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 THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the United States Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. NACDL has a particular interest in ensuring that a capital defendant is not executed when the State no longer has confidence in the underlying conviction.

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[1] 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 its counsel made any monetary contributions intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

After extensive review of the facts underlying Richard Glossip's conviction and death sentence, the State of Oklahoma concluded that it could no longer stand by the judgment and requested that Mr. Glossip's conviction be vacated. Court records show that these confessions of error are rare: between 1908 and 2022, the State confessed error in 298 cases, including only eight cases involving murder convictions and three cases involving death sentences. In light of how rare these confessions of error are, the Oklahoma Court of Criminal Appeals (OCCA) nearly always accepts them and grants the requested relief. Indeed, in all 298 cases involving confessions of error between 1908 and 2022, the OCCA ultimately granted relief to the defendant.

The OCCA chose a different path here. Rather than accord significant weight to the State's confession, as the OCCA has repeatedly done before, the court dismissed the State's admission that Mr. Glossip's conviction hinged on prosecutorial misconduct in violation of due process. In so doing, the court ignored its precedents involving confessions of error and *Brady* evidence of the key prosecution witness's mental health, and the prosecutor's failure to correct that witness's false testimony on the same topic. The OCCA's anomalous decision to depart from established practice in this way cannot stand.

Not only did the OCCA fail to give adequate weight to the State's confession of error, but the court ignored precedent when it refused to remand the case for a new trial based on newly discovered exculpatory

evidence. The OCCA's rationale for its refusal is that the Oklahoma Post-Conviction Relief Act precluded review. Nothing in that Act, however, suggests that the OCCA abandon its long-standing respect for the State's admissions of prosecutorial misconduct. The Act thus does not support the OCCA's flawed judgment, and its decision must be reversed.

ARGUMENT

I. The Oklahoma Court of Criminal Appeals' (OCCA's) decision departed from its prior practice in cases involving confessions of error.

When prosecuting criminal offenses, the State's interest "is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). So, when the State admits that it can no longer stand by a conviction, courts—including the OCCA—have historically accorded great weight to the State's confession of error. *Sibron v. New York*, 392 U.S. 40, 58 (1968). But the OCCA did not do so here. This decision represents a drastic departure from its century-long practice of respecting the State's admission that a conviction must be reversed.

A. The OCCA historically accorded significant weight to the State's confessions of error.

In cases in which the State can no longer stand behind a conviction, the OCCA has almost always given weight to the State's confessions of error. But here, the court diminished the value of the State's admission in stark contrast from its historical treatment of cases involving confessions of error.

According to court records, between 1908 and 2022, there were 298 cases before the OCCA in which the State confessed error.[2] In all but two of those cases, the OCCA sustained or otherwise approved the State's confession of error and thus reversed or modified the defendant's convictions or sentence. Put differently, in 296 of the 298 (99.3%) cases in which the State has confessed error, the OCCA has agreed with the State's conclusion and granted the defendant relief on that basis. And as described further below, in both remaining cases, the OCCA granted some form of relief, leaving *zero cases* before 2023 where the OCCA did not grant relief after the State confessed error.

These data reveal how, until recently, the OCCA has treated the State's confessions of error as significant and has accorded them great weight. As the OCCA has acknowledged, in cases in which "the Attorney General confesses error," it will "carefully examine the record for fundamental error." *Casey v. State*, 440 P.2d 208, 209 (Okla. Crim. App. 1968). And when the confession "is well founded in law, the conviction will be reversed." *Raymer v. State*, 228 P. 500, 500 (Okla. Crim. App. 1924).

The OCCA's traditional respect for confessions of error makes good sense. After all, the State has invested significant resources into obtaining the underlying conviction and, as this Court has

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[2] To develop this dataset, NACDL and counsel reviewed publicly available court records to determine cases in which the OCCA reviewed the State's confessions of error. This review included both published and unpublished decisions. The list of cases is included as an Appendix.

recognized, the State has a strong interest in maintaining the conviction's finality. *Brown v. Davenport*, 596 U.S. 118, 132 (2022). It does not confess error lightly. *See Watson v. State*, 124 P. 329, 329 (Okla. Crim. App. 1912) (quoting Attorney General's statement that "it is with great reluctance that this office feels constrained to enter a confession of error"); *see also* Brief for Respondent in Support of Petitioner at 31 ("The State did not come to its conclusion to confess error on these constitutional violations lightly."); *id.* at 1, 21, 32 (State explaining that it was "reluctant" to make the "extraordinary" and "difficult" decision to confess error but did so because Mr. Glossip's prosecution has become "indefensible").

Indeed, the State's interest in preserving convictions is at its apex when the defendant stands convicted of murder—and especially so in cases like this, in which the defendant has been sentenced to death. That explains why, before this case, the State had only confessed error in eight murder cases since 1908. And of those eight cases, only three involved defendants who had been sentenced to death. In other words, it is exceedingly rare that the State would take the drastic step of admitting an error in a case in which the State at one point fiercely advocated that the defendant's culpability was significant enough to warrant capital punishment.

It is unsurprising, then, that in each of those cases involving murder convictions, the OCCA granted relief following the State's confession of error. These cases, dating back to 1911, are: *Ridge v. State*, 220 P. 965 (Okla. Crim. App. 1923) (capital sentence); *Davis v. State*, 1 P.2d 824 (Okla. Crim. App. 1931) (capital

sentence); *McCarty v. State*, 114 P.3d 1089 (Okla. Crim. App. 2005) (capital sentence); *Thompson v. State*, 118 P. 614 (Okla. Crim. App. 1911); *McClatchey v. State*, 152 P. 1136 (Okla. Crim. App. 1915); *Smith v. State*, 226 P. 390 (Okla. Crim. App. 1924); *Morrison v. State*, 294 P. 825 (Okla. Crim. App. 1931); and *Pettit v. State*, No. F-2005-468 (Okla. Crim. App. 2006).

The OCCA has sustained confessions of error across several different contexts. For example, in cases involving legal error in the proceedings below, the OCCA has reviewed confessions of error and held they are "well founded and should be sustained." *McClatchey*, 152 P. at 1136; *see also Ridge*, 220 P. at 967 (sustaining confession of error because "neither the spirit nor the letter of the law ha[d] been followed"). And in cases involving factual aberrations in which the Attorney General has conducted a significant factual investigation, the OCCA has acknowledged that the State's confession "is well taken," *Smith*, 226 P. at 391, and has even adopted the Attorney General's confession of error as its own opinion, *Thompson*, 118 P. at 616. These cases demonstrate that the OCCA's historical function has not been to preserve convictions over the State's objection, but rather to assess the State's confession of error with due deference to the State's difficult decision to admit error and seek to remedy a wrongful conviction. The OCCA abandoned this time-honored principle in Mr. Glossip's case.

B. The OCCA departed from its century-long practice of crediting the State's confessions of error.

The historical data are replete with examples in which the OCCA has overturned a conviction based on the State's confessions of error—especially in cases involving the most serious crimes. When taken together, these data confirm that the OCCA's treatment of cases involving confessions of error constitutes a "firmly established and regularly followed" practice on which defendants and the State alike have come to rely. *See Cruz v. Arizona*, 598 U.S. 17, 26 (2023) (quoting *Lee v. Kemna*, 534 U.S. 362, 376 (2002)).

But here, the OCCA departed from over a century of practice when it determined—with merely a cursory explanation and no evidentiary hearing—that the State's confession of error did not pass muster. Given the court's established history of accepting confessions of error, and the rarity of the State making these confessions in a capital case, the OCCA's divergence here represents the precise type of "unforeseeable and unsupported state-court decision" that cannot preclude this Court's review. *See id.*

As noted, before 2023, there were only two cases since 1908 in which the OCCA relied on grounds other than the State's confession of error to grant the defendant relief. In the first case, the State's confession stemmed from a larceny conviction, and the ensuing legal dispute centered on how to treat cases transferred to state court after Oklahoma was admitted into the Union. *Harris v. United States*, 111 P. 982, 983 (Okla. Crim. App. 1910). The OCCA

discussed the confession in dicta before relying on its own interpretation of the governing law to grant a new trial. *Id.* In the second, which involved a robbery conviction, the OCCA did not address the confession of error because it conducted its own independent review of the record and found "the evidence insufficient to sustain the judgment in any view of the case." *Gunter v. State*, 252 P. 449, 450 (Okla. Crim. App. 1927).

For a nearly 100-year period after *Gunter*, there does not appear to be a single case in which the OCCA declined to accept the State's confession of error. During this period, defendants and the State came to rely on the principle that, when the State takes the rare and significant step of admitting error, a defendant is entitled to relief, and the OCCA will give substantial weight to the State's judgment. But in 2023, the OCCA revisited this principle in two outlier decisions—this case and *Lara v. State*, No. F-2021-249 (Okla. Crim. App. May 18, 2023) (unpublished summary opinion).[3] In both these cases, unlike in nearly all its prior precedents, the court did not give

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[3] *Lara*, an unpublished, non-precedential opinion that postdates *Glossip*, addressed domestic-violence charges rather than a murder conviction. *Lara* was also decided on direct review and therefore did not address post-conviction relief generally or Section 1089 specifically. And although there was a *Brady* violation, the defendant's trial counsel knew about the suppressed evidence, which did not bear on the relevant witness's ability to recall events. *See Lara*, No. F-2021-249, at 24. Still, the OCCA failed to adequately consider the State's confession about the withheld *Brady* evidence and disregarded the State's assessment as "without merit and, quite frankly, inexplicable." *Id.* at 24 n.9.

any weight—much less substantial weight—to the State's confession of error on prosecutorial misconduct claims. In neither case did the OCCA note, let alone explain, its departure from precedent.

Here, the OCCA paid little attention to the State's confession of error. After acknowledging that the State conceded that Justin Sneed's false testimony along with the other errors—such as the prosecution's failure to inform Mr. Glossip about Sneed's treatment—warranted relief, the OCCA simply noted its view that the confession "is not based in law or fact" and thus "cannot overcome the limitations" of Section 1089(D)(8). *Glossip v. State*, 529 P.3d 218, 226 (Okla. Crim. App. 2023).

Apart from this brief statement, the court did not include any discussion of the details of the State's confession of error or the investigation that led to it, the significance of such a confession in a case like this, or the impact of the confession of error on the State's case at trial. Rather, the court diminished the State's confession by referring to it as a vague set of "unspecified cumulative errors," *id.*, when, in reality, the State specifically noted the additional errors in Mr. Glossip's trial, including "violation of the rule of sequestration and the destruction of various pieces of evidence," Appendix to Petition for Writ of Certiorari at 153a (Pet. App.). The OCCA also did not discuss its own century-long practice of providing significant weight to confessions of error. Nor did it discuss any of this Court's caselaw holding that "[c]onfessions of error" by an enforcing officer are "entitled to and given great weight." *Sibron*, 392 U.S. at 58; *see also Young v. United States*, 315 U.S. 257, 259 (1942).

The court seemingly justified discounting the confession of error by pointing to the state post-conviction procedural rule, Section 1089(D)(8). Okla. Stat. tit. 22, § 1089(D)(8). But nothing in the text of Section 1089(D)(8) changes how the OCCA should consider the State's confessions of error. Instead, Section 1089(D)(8) merely says, in relevant part, that the new facts in a petitioner's application for relief must establish "by clear and convincing evidence that, but for the alleged error, no reasonable fact finder would have found the applicant guilty . . . or would have rendered the penalty of death." *Id.* Accepting the State's confessions of error and giving them substantial weight is fully consistent with that standard because, as noted above, it is exceedingly rare that the State will confess error in cases involving a murder conviction and death sentence. As a result, any confession of error in such a case indicates that the "clear and convincing evidence" standard is satisfied. *Id.*

Additionally, the OCCA has already considered cases involving confessions of error since Oklahoma enacted Section 1089 in 1995, and it has never before construed that provision to change the treatment of confessions of error. For example, in *McCarty*—a case in which Section 1089 applied—a capital petitioner filed a "second application for post-conviction relief and request for evidentiary hearing, seeking reversal of his murder conviction and death sentence." 114 P.3d at 1090. The State "waived procedural bars and consented to an evidentiary hearing on several of Petitioner's claims 'due to the serious allegations raised,'" so the OCCA "remanded the case for an evidentiary hearing." *Id.* After the petitioner raised

concerns about flaws in the underlying evidence and the State consented to an evidentiary hearing, the OCCA followed the State's suggestion and ordered a hearing. *Id.* After the evidentiary hearing revealed that a state agent withheld evidence, the OCCA reversed the petitioner's murder conviction, vacated his death sentence, and remanded for a new trial. *Id.* at 1095.

Even after the passage of Section 1089, not until this case and *Lara* did the OCCA reject a confession of error. Indeed, there have been at least 19 cases since Oklahoma enacted Section 1089 in 1995 in which the OCCA sustained the State's confession and granted relief. *See* Appendix.

The OCCA's recent dismissive treatment of the State's confessions of error cannot be affirmed based on a state-law ground such as Section 1089. The OCCA's decisions in cases like *McCarty* establish that, before 2023, even when Section 1089 applied, the OCCA would not discard the State's confession of error without ordering the State's requested relief. The novel approach taken by the court in this case—in which it speculated about evidence and gave minimal weight to the State's confession of error—was unprecedented and departed from a century of practice.

II. The OCCA ignored prior precedents involving wrongfully withheld impeachment evidence of an inculpatory witness's mental-health issues.

The OCCA's decision in this case not only departed from its rules and practice involving confessions of error, but also departed from its treatment of cases in

which defendants raise colorable *Brady*[4] claims and seek remand. And when the OCCA has declined to do so, federal courts collaterally reviewing those decisions have determined that the petitioner was entitled to further proceedings. The OCCA failed to adhere to this practice here. This Court should recognize that the *Brady* and *Napue*[5] violations compel remand to the district court for a new trial.

A. The OCCA's rules and state and federal precedents establish that a post-conviction petitioner who raises a colorable prosecutorial-misconduct claim and seeks remand should receive it.

OCCA Rule 9.7(D) provides that if the "requirements of Section 1089(D) . . . have been met and issues of fact must be resolved by the District Court," the OCCA "shall issue an order remanding to the District Court . . . ." OCCA Rule 9.7(D)(1) and (6). This provision is triggered when an application for post-conviction relief and affidavits attached thereto show by "clear and convincing evidence the materials sought to be introduced . . . are likely to have support in law and fact to be relevant to an allegation raised in the application." *Id.* at 9.7(D)(5).

To be sure, the applicant still must satisfy Section 1089(D)'s standard to prove he is entitled to further proceedings. But when he does so, remand must follow. *See* Rule 9.7(D)(6). And here, as explained above, the State's acknowledgment of prosecutorial misconduct strongly supports the conclusion that this

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[4] *Brady v. Maryland*, 373 U.S. 83 (1963).

[5] *Napue v. Illinois*, 360 U.S. 264 (1959).

standard is satisfied. The State rarely confesses error in cases involving murder convictions; here, the State has gone so far as to say that Mr. Glossip's trial "was unfair and unreliable," and that it "is not comfortable advocating that the result of the trial would have been the same but for these errors." Pet. App. at 153a–154a. These admissions confirm that Mr. Glossip's application satisfies Section 1089(D) and the OCCA was therefore required to consider Rule 9.7(D).

As explained above, the relief jointly sought by the State and Mr. Glossip—a new, fair trial—is necessary here. In prior cases, after the State has confessed prosecutorial misconduct, the OCCA has ordered the relief sought by the State. *See, e.g.*, *McCarty*, 114 P.3d at 1090 (granting State's request for evidentiary hearing). In this case, the State sought vacatur of the conviction with remand for a new trial, Pet. App. at 154a, but the OCCA diverged from its prior practice in summarily rejecting the State's request for relief.

The OCCA also injected speculative theories and disregarded the evidence in the record to reach its conclusions without the benefit of an evidentiary hearing. In prior cases, the OCCA has explained that "[t]he affidavits and evidentiary materials filed in support of the post-conviction application and request for evidentiary hearing are *not reviewed on their merits*, but are reviewed to determine if a threshold showing is met to require a review on the merits," necessitating further proceedings in the district court. *See* Order Remanding for Evidentiary Hearing at 2–3, *Frederick v. State*, No. PCD-2015-47 (Okla. Crim. App. Aug. 1, 2017) (emphasis added) (citing *Slaughter*

v. State, 105 P.3d 832, 835 (Okla. Crim. App. 2005)).[6] In other words, the OCCA's task was not to determine whether the "clear and convincing" standard was met, but rather, to determine whether Mr. Glossip's evidence of *Brady* and *Napue* violations was sufficient for the mere "threshold showing" to warrant further proceedings.

In every other instance—apart from those in 2023—in which the State has supported the defendant's application, the OCCA agreed with the State's confession and ordered the requested relief.

But rather than remand this matter, in an apparent rush to reach the merits, the OCCA summarily denied the request for a new trial or for any other proceedings in the district court. *See Glossip*, 529 P.3d at 228. It did so even though the merits standard—whether clear and convincing evidence shows that, without the *Brady* and *Napue* violations, *only* an unreasonable jury could have found Mr. Glossip guilty or sentenced him to death—is far more exacting than the standard for a remand. *Id.* at 226.

B. The OCCA relied on speculation to misconstrue the record and failed to appreciate the materiality of the multiple *Brady* violations.

The OCCA's merits analysis reveals that, although Mr. Glossip raised factual questions that went unanswered in the record, the court simply waved them away, answering them in a cursory fashion. *Id.*

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[6] https://www.oscn.net/dockets/GetCaseInformation.aspx?db=appellate&number=PCD-2015-47.

With no basis in the record, the OCCA theorized, for example, that Sneed's testimony was "not clearly false" because he was "more than likely in denial of his mental health disorders." *Id.* at 227. The court also surmised that Mr. Glossip's counsel actually knew (or should have known) about Sneed's mental health disorder and that it was "likely [defense] counsel did not want to inquire about Sneed's mental health due to the danger of showing that he was mentally vulnerable to Glossip's manipulation and control." *Id.* at 226. The court supplied these reasons for defense counsel's supposed lack of inquiry even after the State admitted that Mr. Glossip "was not made aware of Dr. Trombka's treatment of Sneed until he recently received the prosecutor's notes."[7] Pet. App. at 152a. And the OCCA did so despite defense counsel's affidavits demonstrating that they did not know that Sneed had "been treated by Dr. Trombka for a diagnosed psychiatric illness." *See* Appendix to Petitioner's Reply in Support of Petition for Writ of Certiorari at 37a–38a, 40a–41a, 44a.

The OCCA's pre-2023 decisions do not rely on this type of speculation to deny remand for further proceedings in a case in which the State has admitted that they should occur. The OCCA's decision in *McCarty* is instructive. There, a petitioner sentenced to death filed a successive application for post-

[7] The OCCA's groundless assertion that the suppressed *Brady* evidence "could have been presented previously . . . through the exercise of reasonable diligence," *Glossip*, 529 P.3d at 226–27, is thus risible at best. It is axiomatic that "[i]t is not a petitioner's responsibility to uncover suppressed evidence." *Scott v. Mullin*, 303 F.3d 1222, 1229 (10th Cir. 2002).

conviction relief, centered in part on a *Brady* claim alleging the "suppression of exculpatory evidence and bad faith by the State of Oklahoma, [and] due process denial." 114 P.3d at 1089–90. Among the petitioner's allegations were claims that the State failed to disclose information that could have been used to impeach a key witness. *See id.* at 1091. After the Attorney General consented to an evidentiary hearing on several claims "due to the serious allegations raised," the OCCA agreed and remanded. *Id.* at 1090. That hearing ultimately confirmed that crucial evidence had, in fact, been withheld, and that the petitioner therefore did not receive a fair trial. *Id.* at 1092.

McCarty was not an outlier. In two other cases in which the petitioner raised a colorable *Brady* claim, neither of which involved confessions of error, the OCCA remanded the case to the district court for additional proceedings. *See Brown v. Mullin*, 62 F. App'x 221, 222 (10th Cir. 2003) ("Brown's application asserted that the prosecution failed to disclose material impeachment evidence in violation of *Brady*, and knowingly argued a theory of guilt it knew to be false, in violation of *Napue*. After initially reviewing Brown's application, the OCCA stayed his scheduled execution and remanded the case to state district court for an evidentiary hearing on his claims." (cleaned up)). *See also* Order Granting Motion for Evidentiary Hearing, *Brown v. State*, No. PCD-2003-312 (Okla. Crim. App. Mar. 26, 2003);[8] Order Remanding for Evidentiary Hearing at 19, *Frederick*,

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[8] https://www.oscn.net/dockets/GetCaseInformation.aspx?db=appellate&number=PCD-2003-312.

No. PCD-2015-47. These precedents show that the OCCA would typically remand to the district court (rather than deny the request) when the petitioner presents a colorable *Brady* claim. But the court refused to do so here. Nor did it explain why Mr. Glossip (and the State) failed to meet the standard for a remand or otherwise distinguish its long line of precedents granting requests for remand, with or without confessions of error.

For their part, federal courts have also held that failure to disclose impeachment evidence that goes to the mental health of a key witness constitutes a *Brady* violation. For example, in *Browning v. Trammel*, a case akin to this one, the Tenth Circuit held that the OCCA unreasonably applied *Brady*. *See* 717 F.3d 1092, 1094 (10th Cir. 2013). In *Browning*, the petitioner had been tried and convicted of murder and sentenced to death. *Id.* But in the post-conviction proceedings, the petitioner learned that the State failed to disclose that "the most important witness at trial[] had been diagnosed with a severe mental disorder." *Id.* Even though the witness's psychiatric records had been in the State's possession, the OCCA reviewed the records and concluded there had been no *Brady* violation. *Id.* at 1105–06.

After the federal habeas courts reviewed and released the materials, the *Browning* petitioner discovered that the witness "blurred reality and fantasy, suffered from memory deficits, tended to project blame onto others, and had an assaultive, combative, and even potentially homicidal disposition." *Id.* at 1094. The Tenth Circuit therefore found it "beyond question that th[e] records contain[ed]" favorable and material evidence and held

that the OCCA "could not have reasonably concluded otherwise." *Id.* at 1105, 1108.

In the years following *Browning*, the OCCA interpreted that decision to hold that *Brady* had been satisfied because the witness "was diagnosed as having a severe mental illness which affected [the witness's] ability to recount events accurately," "was prone to homicidal acts," and "had memory deficits and blurred reality and fantasy," all leading to the conclusion that that person's "ability to observe and remember events was impaired." *Brown v. State*, 422 P.3d 155, 175 (Okla. Crim. App. 2018) (discussing *Browning*, 717 F.3d at 1094–1101, but holding that a personality disorder did not qualify as the type of severe mental illnesses that impacted a witness's memory).

The OCCA's decision here cannot be squared with the standard articulated in *Browning*. Under that standard, the withheld evidence about Sneed's bipolar disorder and prescription medications constitutes the type of "severe mental illness" that diminishes Sneed's ability to credibly testify against Mr. Glossip. But the OCCA did not conduct any such detailed analysis. Beyond citing *Brown* for the *Brady* standard, the court did not otherwise engage with *Brown* or *Browning*.

As a result, the OCCA turned a blind eye to this case's myriad parallels to *Browning*. Here, as in *Browning*, the credibility of the "prosecution's indispensable witness," *Browning*, 717 F.3d at 1106, was the cornerstone of its case, *Glossip*, 529 P.3d at 226. Sneed was diagnosed with a severe mental illness that affected his recall of events and

potentially made him violent, Pet. App. at 103a; and the State knew and did not disclose to Mr. Glossip the medical records that would have impacted Sneed's credibility before the jury.

The OCCA's conclusion was also inconsistent with its own reasoning in *Brown*. The type of evidence withheld here shows how Sneed's bipolar disorder, combined with his methamphetamine usage, could likely cause not only issues with memory recall and perception of reality, but also increase his potential for violence. *See, e.g.*, Affidavit of Dr. Trombka, Pet. App. at 104a, ¶¶ 10–11. The evidence therefore resembles the withheld evidence that constituted a *Brady* violation in *Browning* and is distinct from the evidence that did not meet that standard in *Brown*. *See Browning*, 717 F.3d at 1094–1101 (evidence that witness's mental health affected his ability to recount events and blurred his perception of reality); *Brown*, 422 P.3d at 175 (evidence did not show that witness's mental health condition impacted her ability to recall). The OCCA therefore did not even follow its own reasoning from *Brown* when it determined that the withheld evidence here was not *Brady* material.

Each of these defects alone would suffice to warrant reversal. These faults compound the existing errors in the case, considering that the State confesses the *Napue–Brady* error, refuses to stand by Mr. Glossip's conviction, and joins him in his request for a new, fair trial. Viewed as a whole, these circumstances render the state court's decision to deny relief unreasonable. This Court should reverse and remand for a new trial.

CONCLUSION

For the reasons set forth above, this Court should reverse the judgment of the Oklahoma Court of Criminal Appeals and remand for a new trial.

Respectfully submitted,

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