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 FEDERAL COURTS SCHOLARS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Amici are law professors who teach and write about the federal courts, habeas corpus, and the relationship between federal and state law. A list of amici is attached as Appendix A. Amici sign this brief in their individual capacities and not on behalf of their institutions; institutional affiliations are provided solely for identification purposes.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1997, Justin Sneed murdered Barry Van Treese, owner of a motel in Oklahoma City, in one of the motel's rooms. Sneed confessed to the murder, but after his arrest and in exchange for avoiding a death sentence, Sneed claimed that Richard Glossip—the motel's manager—had paid him to carry it out. In the State's own words, Sneed's testimony was "central to the conviction." State Stay Resp. 10. And, based on that testimony, Mr. Glossip was convicted of murder-for-hire and sentenced to death.

At trial, the State allowed Sneed to tell the jury he had "never seen no psychiatrist or anything." JA313. But in January 2023, the State granted Mr. Glossip access to materials not previously disclosed from the District Attorney's files, including a notation that Sneed told the State he had been under the care

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

of a doctor the prosecution knew to be a psychiatrist, and that he had been prescribed lithium by that doctor to treat a serious psychiatric disorder. JA927, 929.

Also in early 2023, a few months before his scheduled execution date, the Oklahoma Attorney General retained an independent counsel to review the State's prosecution, conviction, sentencing, and post-conviction appeals related to Mr. Glossip. Based in part on the release of those records, the Independent Counsel concluded that "the State must vacate [Mr.] Glossip's conviction due to its decades-long failure to disclose … *Brady* material [and] correct … false trial testimony of its star witness." Cert. App. 62a.

The State agreed and filed a Response to Mr. Glossip's fourth Successive Application for Post-Conviction Relief with the OCCA, confessing error and supporting Mr. Glossip's request for post-conviction relief. JA973-79. But the OCCA denied Mr. Glossip's application, specifically (1) rejecting his *Napue* claim—that is, his claim that the State knowingly allowed false testimony—on the grounds that Sneed's testimony "was not clearly false" and (2) determining that his *Brady* claims "could have been … raised … earlier." JA990-91.

In granting Mr. Glossip's petition for certiorari, the Court directed the parties to address "whether the Oklahoma Court of Criminal Appeals' holding that the Oklahoma Post-Conviction Procedure Act precluded post-conviction relief is an adequate and independent state-law ground for the judgment."

While state courts are the primary forum for enforcement of constitutional rights in state criminal cases, this Court has not unconditionally abdicated its authority over criminal matters. State courts are instead granted full authority over criminal matters so long as they ground that authority in an "adequate and independent state-law ground." In other words, this Court has long prohibited state courts from insulating their decisions from this Court's review by relying on state-law grounds that are either irregular or hostile to the underlying right the state has empowered its courts to enforce, *or* so interwoven with federal law that the state-law basis cannot be distinguished from its federal counterpart.

Here, the state court denied Mr. Glossip's petition for post-conviction relief, ostensibly because his petition was barred by the State of Oklahoma's Post-Conviction Procedure Act, which prohibits subsequent review of issues that could have been raised previously. But that determination is neither (1) adequate, nor (2) independent of federal law. It is not adequate because applying the procedural bar in this way would be both novel and inconsistent with how the OCCA has applied it in the past. More fundamentally, applying the procedural bar here would discriminate against the exercise of federal rights. Moreover, the OCCA's state-law basis depends entirely on resolution of the questions at the very heart of the federal constitutional claims Mr. Glossip raised in his petition. The OCCA's denial of Mr. Glossip's petition was therefore hopelessly intertwined with federal law, and not "independent" as required by this Court's precedent.

ARGUMENT

I. The OCCA Did Not "Clearly And Expressly" Apply A Procedural Bar To Mr. Glossip's *Napue* And *Brady* Claims.

The procedural-default rule, or "procedural bar," is a rule that evolved out of considerations of comity between federal and state sovereigns and concerns for the orderly administration of justice. *Wainwright v. Sykes*, 433 U.S. 72 (1977). The rule prohibits a federal court from reviewing issues on the merits where a state court has already decided that same issue on state-law grounds that are independent of the federal question and adequate to support the judgment. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). The state law applied may be either substantive or procedural. *Id.*

In this case, the purportedly preclusive state law is a procedural one. The Oklahoma Post-Conviction Procedure Act says that the OCCA "may not" grant relief for claims raised in successive post-conviction applications unless: (1) the legal or factual basis therefore was previously unavailable and (2) "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the alleged error, no reasonable fact finder would have found the applicant guilty of the underlying offense or would have rendered the penalty of death." Okla. Stat. tit. 22, § 1089(D)(8).

As this Court has recognized time and again, "a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar." *Harris v. Reed*, 489 U.S. 255, 263 (1989) (quoting *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985) (in turn quoting *Michigan v. Long,* 463 U.S. 1032, 1041 (1983))). The OCCA said that Mr. Glossip's claims regarding the prosecution's disclosure of Sneed's mental-health issues "could have been and should have been raised, with reasonable diligence, much earlier." JA991. But this statement is insufficient to qualify as a "'plain statement' that [its] decision rests upon adequate and independent state grounds." *Long*, 463 U.S. at 1042.

The OCCA knew how to clearly and expressly invoke the procedural bar and did so for certain claims. For example, the OCCA determined that Mr. Glossip's claim based on the prosecution's withholding of videotape evidence "is waived, as [it] could have been raised much earlier." JA993. But as to Mr. Glossip's *Napue* and *Brady* claims, the OCCA amorphously suggested that he should have raised them earlier, without any mention of waiver or other default, the Post-Conviction Procedure Act, or even an explanation of how Mr. Glossip *could* have raised them earlier. JA990-91. That is not enough to "clearly and expressly" invoke the procedural-default rule. For example, this Court in *Harris* determined that the lower court's statement that "most of petitioner's allegations 'could have been raised [on] direct appeal' … falls short of an explicit reliance on a state-law ground." 489 U.S. at 266.

That is especially true where, as here, the court by its decision's plain terms purports to reject the federal claim on the merits. *See id.* at 266 n.13 (finding that state court had not "clearly and expressly" invoked procedural default where it "clearly went on to reject the federal claim on the merits"); *Caldwell*, 472 U.S. at 328 ("[P]rocedural waiver was not the basis of the decision" where state court evaluated the argument "as a matter of both federal and state law before rejecting it as unmeritorious."). Here, the OCCA determined that "the facts are not sufficient to establish by clear and convincing evidence that, but for the alleged error, no reasonable fact finder would have found the applicant guilty of the underlying offense or would have rendered the penalty of death." JA990; *see also* JA991 ("The evidence … does not create a *Napue* error."). That is an assessment of the merits of Mr. Glossip's *Brady* and *Napue* claims, not a determination that those claims are procedurally barred.

II. The State Waived Any Potential Procedural Bar That Exists.

To the extent the OCCA's decision could be construed to have invoked procedural default, the State has waived any such default before the OCCA and this Court. *See* State Br. in Support of Cert. 20-24. In fact, the State's position, from the OCCA proceedings to now, has exceeded mere waiver: It has conceded the *Napue* and *Brady* errors and affirmatively argued that Mr. Glossip's claims are *not* procedurally barred. *See* JA975-79. Giving effect to the State's waiver means that a court need not sua sponte assess the applicability of—and apply—a procedural bar that no one raised. Indeed, the OCCA did not clearly apply

such a bar in its decision below. *See supra* Section I. And this Court need not apply the state's procedural bar where neither the OCCA nor the State has done so. Absent a procedural bar operating to bar Mr. Glossip's *Napue* and *Brady* claims, there is no state-law ground upon which adequacy and independence must be assessed. That alone eliminates any barrier to this Court's review.

The Oklahoma District Attorneys Association's amicus brief has nonetheless suggested that the State's affirmative waiver makes no difference because procedural default operates as a strict jurisdictional bar and is nonwaivable. DA Ass'n Br. 7-8. That is incorrect. The equitable exceptions grafted onto the state procedural rule at issue here demonstrate that it is not a jurisdictional bar. Section 1089(D) of the Oklahoma statute expressly contemplates an exception to procedural default where the legal or factual basis was previously unavailable and where the petitioner has been prejudiced by the claimed error. The OCCA, too, has recognized an equitable exception to procedural default under § 1089(D) "when an error complained of has resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right." *Valdez v. State*, 46 P.3d 703, 710-11 (Okla. Crim. App. 2002) (citing Okla. Stat. tit. 20, § 3001.1); JA994 (citing *Valdez v. State*).

These equitable exceptions suggest that the state's procedural bar is neither a truly "jurisdictional" rule nor a mandatory, nonjurisdictional one. In its recent attempts to bring "discipline" to the "jurisdictional label," *Boechler P.C. v. Comm'r*, 596 U.S. 199, 203 (2022), this Court has clarified that courts

"cannot grant equitable exceptions to jurisdictional rules" and "must enforce jurisdictional rules *sua sponte*, even in the face of a litigant's forfeiture or waiver," *Santos-Zacaria v. Garland*, 598 U.S. 411, 416 (2023). By contrast, "threshold barriers" such as "exhaustion of state remedies, procedural default, [and] nonretroactivity" are nonjurisdictional. *Day v. McDonough*, 547 U.S. 198, 205-06 (2006). They speak not to a court's adjudicative authority but rather to the orderly processing of claims. *Wilkins v. United States*, 598 U.S. 152, 157 (2023). Nonjurisdictional rules that are mandatory likewise do not encompass the procedural rule here. As this Court noted in *Nutraceutical Corp. v. Lambert*, mandatory, nonjurisdictional rules can be waived or forfeited but are "not susceptible of the equitable approach" like the one the lower court applied there. 139 S. Ct. 710, 714 (2019).

That Oklahoma's procedural bar constitutes a nonjurisdictional rule tracks how the procedural-default doctrine operates in the federal habeas context. For one, procedural default is an affirmative defense that can be (and is) waived when the state fails to raise it on time. *See Welch v. United States*, 578 U.S. 120, 138 (2016); *Gray v. Netherland*, 518 U.S. 152, 165-66 (1996); 28 U.S.C. § 2254 Rule 5. As in the Oklahoma post-conviction context, federal habeas doctrine also carves out exceptions to procedural default. For example, a court may reach the merits of a defaulted post-conviction claim when a petitioner can demonstrate cause and prejudice. *See Reed v. Ross*, 468 U.S. 1, 11 (1984) (citing *Engle v. Isaac*, 456 U.S. 107, 129 (1982); *Sykes*, 433 U.S. 72). And, should that standard unfairly bar otherwise meritorious claims, a court may also excuse procedural default when failing

to adjudicate the accused's constitutional claim would result in a miscarriage of justice. *See Sykes*, 433 U.S. at 91. That miscarriage-of-justice exception extends to the circumstance in which a petitioner shows ineligibility for the death penalty under applicable state law, such as when evidence kept from the jury due to a *Brady* violation relates to the aggravating circumstances used to justify punishment by death. *Sawyer v. Whitley*, 505 U.S. 333, 347-48 (1992).

Other federal habeas restrictions are likewise nonjurisdictional. For example, 28 U.S.C. § 2254(b)(1)(B) provides exceptions to the exhaustion requirement, including when there is an absence of available state corrective process or when circumstances render such process ineffective to protect the petitioner's rights. Or take 28 U.S.C. § 2244(d)(2), which tolls the one-year limitations period for section 2254 cases while a "properly filed" petition is "pending" on "state post-conviction or other collateral review." *See also Carey v. Saffold*, 536 U.S. 214, 217, 221 (2002). Indeed, this Court has recognized that "should a State intelligently choose to waive a [§ 2244(d)] statute of limitations defense, a district court would not be at liberty to disregard that choice," *Day*, 547 U.S. at 210 n.11, because it would be "an abuse of discretion to override a State's deliberate waiver of a limitations defense," *id.* at 202.

In sum, Oklahoma's procedural-default statute itself provides an exception akin to the federal cause-and-prejudice exception. Separately, the OCCA, including in its opinion below, JA994, recognizes the equitable miscarriage-of-justice exception to procedural default. At a minimum, those two exceptions indicate

the procedural rule here is nonjurisdictional. The State can therefore waive procedural default, as it has unquestionably done here. And that waiver alone forecloses reliance on the state procedural bar as a basis for shielding this case from the Court's review.

III. There Is No Adequate Or Independent State-Law Ground.

Apart from the failure of both the OCCA and the State to invoke procedural default, any contention that there is an adequate and independent state-law ground in this case cannot withstand scrutiny. It is well-established that "[t]his Court will not take up a question of federal law in a case 'if the decision of [the state] court rests on a state law ground that is independent of the federal question and adequate to support the judgment.'" *Cruz v. Arizona*, 598 U.S. 17, 25 (2023) (quoting *Lee v. Kemna*, 534 U.S. 362, 375 (2002)). But here, any state-law ground for the OCCA's decision is neither adequate nor independent. It is inadequate because, to the extent OCCA applied its procedural bar, it was a novel application of that bar (or, at a minimum, an inconsistent one) and also discriminated against federal rights—any of which renders a state-law ground inadequate to avoid federal judicial scrutiny. The state-law ground is also not independent because the OCCA's decision collapsed its application of the procedural bar into its assessment of the merits of Mr. Glossip's federal claims. For both reasons, the Court faces no barrier to reviewing the merits of Mr. Glossip's constitutional claims.

Two fundamental legal principles animate the independent and adequate state ground doctrine in this

context. First, the presence of an adequate and independent state ground ensures the Court does not render advisory opinions that "would not alter the final result." Edward A. Purcell, Jr., *The Story of* Michigan v. Long*: Supreme Court Review and the Workings of American Federalism*, *in* Federal Courts Stories 118 (Vicki Jackson & Judith Resnik eds., 2010). And second, "[g]iving effect to adequate and independent state court judgments show[s] respect for the proper authority of state law." *Id.* at 118-19. Generally, state courts have an interest in "following procedure that is familiar, uniform, and good." Wright & Miller, Federal Practice & Procedure § 4021. This Court, in turn, "has an interest in leaving state courts free to follow their own procedure," even when deciding federal questions. *Id.* But that deference to state procedures is bounded by the "manifest federal interest in preventing destruction of federal rights in the name of local procedure," *id.*, balancing the "functional needs of the state courts and the countervailing need to ensure federal supremacy," *id.* § 4027. As this Court stated in *Davis v. Wechsler*, "[w]hatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." 263 U.S. 22, 24 (1923). The question of adequacy thus ultimately "sounds in equitable concerns about fairness and due process." Eve Brensike Primus, *Federal Review of State Criminal Convictions: A Structural Approach to Adequacy Doctrine*, 116 Mich. L. Rev. 75, 98, 102 (2017).

Those fairness and due-process concerns lie at the heart of this case. The OCCA noted that Mr. Glossip

should have brought his *Brady* claim earlier. JA990-91. To the extent the OCCA relied on that reasoning to procedurally bar both the *Napue* and *Brady* claims, that turns the purposes of *Napue* and *Brady* on their head. *Napue* and *Brady* protect the accused's right to a fair trial. But interpreting the OCCA's decision as procedurally barring Mr. Glossip's claims faults Mr. Glossip for delay caused by *the State itself*, which has impaired his right to a fair trial by failing to discharge its obligations to correct false testimony and reveal exculpatory evidence.

The difference between how the adequate and independent state ground doctrine applies on direct appeal and how it applies on federal habeas review illustrates the appropriate balance of these background legal principles. As this Court explained in *Coleman v. Thompson*, "[i]n the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional." 501 U.S. at 729. After all, when there is a substantive state-law ground that independently supports the state-court judgment, any decision by the federal courts on direct review with respect to a federal ground would be advisory only. But this Court was careful to note in *Coleman* that "[t]he basis for application of the independent and adequate state ground doctrine in federal habeas is somewhat different." *Id.* at 730. On federal habeas review, the federal courts do not issue an advisory opinion when they look past a state procedural rule, because there is no substantive state-law ground upon which the judgment is predicated. Thus, there is no jurisdictional bar. The reason this Court applies the adequate and independent state ground doctrine to state procedural rules in

federal habeas proceedings is grounded in the federal courts' respect for a state's interest in enforcing its own procedural rules. But in a case like this one—where the State itself is conceding error and affirmatively wants to look past any procedural defects—those prudential comity and federalism concerns reach their nadir.

A. The OCCA's decision did not rest on an adequate state-law ground.

In addition to the reasons Petitioner states, Pet'r Br. 44-49, applying Oklahoma's procedural bar in these circumstances would render the state-law ground inadequate for at least three well-recognized reasons. First, it would constitute a novel application of that procedural bar. Second, even if not novel, it would constitute an inconsistent application. And third, it would discriminate against the exercise of federal rights. Accordingly, any state procedural ruling barring Mr. Glossip's *Napue* and *Brady* claims here constitutes an inadequate state-law ground and thus fails to preclude this Court's review.

1. To begin with, the procedural bar—to the extent it applies at all here—is inadequate because its application is novel. For over a century, this Court has adhered to the principle that such novel applications cannot thwart this Court's review of state-court judgments. *See Cruz*, 598 U.S. at 26. According to this principle, a state procedural rule is inadequate unless it is "firmly established and regularly followed." *James v. Kentucky*, 466 U.S. 341, 348-49 (1984). It follows that "an unforeseeable and unsupported state-court decision on a question of state procedure does

not constitute an adequate ground." *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964).

The OCCA has never before applied the state procedural bar to an intertwined *Napue* and *Brady* claim that was not discoverable earlier because the government withheld evidence. As in *James*, the OCCA's ostensible application of a procedural bar in this case is thus not the kind of rule "strictly adhered to" to establish adequacy. *James*, 466 U.S. at 346-47 (finding no adequate ground). Indeed, the OCCA's approach in this case is "so unfounded as to be essentially arbitrary," which is also to say it is unforeseeable. *See Enter. Irrigation Dist. v. Farmers Mut. Canal Co.*, 243 U.S. 157, 165 (1917). Arbitrariness is a feature of the state ground here because applying the procedural bar to Mr. Glossip's claims simply defies common sense. *Bernard v. United States*, 141 S. Ct. 504, 506 (2020) (Sotomayor, J., dissenting from denial of certiorari) (questioning "[h]ow exactly [petitioner was] supposed to have raised a *Brady* claim … given that he was unaware of the evidence the Government concealed"). The contradictory idea that Mr. Glossip needed to have brought his *Napue* and *Brady* claims before actually knowing the basis for those claims is far from a foreseeable application of state law. Litigants cannot reasonably anticipate such an unreasonable application, much less when there is no support in prior state law for applying the procedural bar in this way. *See Walker v. Martin*, 562 U.S. 307, 320 (2011) (state ground is inadequate when "discretion has been exercised to impose novel and unforeseeable

requirements without fair or substantial support in prior state law" (citation omitted)).

2. Even if applying Oklahoma's procedural bar here does not constitute a novel application, it is, at the very least, an inconsistent one. Inconsistently applied state procedural rules should not be used "to the particular disadvantage of petitioners asserting federal rights." *Walker*, 562 U.S. at 316, 321. Inconsistent applications exist when, as here, state courts adjudicate a similar type of challenge in other cases but hold that procedural default does not preclude review there. *See, e.g.*, *Barr v. City of Columbia*, 378 U.S. 146 (1964). For example, applying a procedural bar here is inconsistent with the OCCA's treatment of state waiver. In *McCarty v. State*, as here, the petitioner pressed *Brady* and *Kyles* claims, and the State "waived procedural bars." 114 P.3d 1089, 1090, 1091 & n.7, 1092 n.13, 1094 n.24 (Okla. Crim. App. 2005). But unlike here, the OCCA honored the State's waiver and reached the merits of the petitioner's claims in *McCarty*. *Id.* at 1095. Applying a procedural bar here would also be inconsistent with Oklahoma's miscarriage-of-justice exception. The OCCA has bypassed procedural default and reached the merits of a post-conviction claim on that basis in other cases. *Cf. Malicoat v. State*, 137 P.3d 1234 (Okla. Crim. App. 2006). Yet the OCCA concluded here that none of Mr. Glossip's claims "have resulted in a miscarriage of justice." JA994.

3. As part of the adequacy inquiry, federal courts also "must carefully examine state procedural requirements to ensure that they do not operate to discriminate against claims of federal rights." *Walker*,

562 U.S. at 321. The OCCA's supposed invocation of a procedural bar—and its cramped interpretation of that bar—unduly burdens the exercise of federal constitutional rights and discriminates against federal law.

It does so by effectively eliminating the ability to bring, on collateral attack, *Napue* claims that are compounded by a *Brady* error. Here, the State erred twice over: first, by failing to correct Sneed's false testimony (*Napue*), and second, by withholding evidence showing both the falsity of that testimony and the State's knowledge of that falsity (*Brady*). That withheld evidence included a notation that Sneed had informed the State he'd been under the care of a "Dr. Trumpet" (Dr. Trombka, the only psychiatrist at the Oklahoma County jail at the time). JA927, 929-30. Ironically, that the State doubly erred now serves as the hypothetical basis to deem Mr. Glossip's claims procedurally defaulted, because he somehow should have known of information the State had withheld and brought these claims earlier. As a result, the OCCA's decision forecloses review of an entire set of federal claims brought by petitioners who cannot challenge false testimony precisely because the prosecution withheld that information from them. And that creates the kind of "troublesome" scenario previously identified by some members of this Court. *Bernard*, 141 S. Ct. at 506 (Sotomayor, J., dissenting from denial of certiorari) ("[A]pplying the bar on second-or-successive habeas petitions to *Brady* claims 'would produce troublesome results, create procedural anomalies, and close [the courthouse] doors to a class of habeas petitioners seeking review without any clear

indication that such was Congress' intent,'" particularly where the defendant is "unaware of the evidence the Government concealed from him") (quotations omitted); *see also Storey v. Lumpkin*, 142 S. Ct. 2576, 2577-78 (2022) (Sotomayor, J., statement respecting denial from certiorari but reiterating *Bernard* dissent).

The adequacy requirement is aimed at preventing exactly these consequences. Such an application of Oklahoma's procedural bar would form "an insuperable barrier to one making claim to federal rights" and, in practice, deny any "reasonable opportunity to have the issue as to the claimed right heard and determined by the State court." *Michel v. Louisiana*, 350 U.S. 91, 93 (1955). As explained above (at 14), requiring Mr. Glossip to have brought his *Napue* and *Brady* claims—before he had any way of knowing that they existed—in order to overcome state procedural default defies reason. The first reasonable opportunity for his claims to be heard was in these proceedings below, and the OCCA denied him that opportunity.

Moreover, foreclosing collateral review of federal *Brady* claims unless "no reasonable fact finder" could find the defendant guilty, per § 1089(D)(8), undermines the standard established by this Court in *Brady*. *Brady* requires only a "reasonable probability" of a different result. *Strickler v. Greene*, 527 U.S. 263, 280 (1999). Oklahoma's procedural standard, therefore, "is far more stringent than the 'reasonable probability of a different result' standard that typically applies to *Brady* claims." *Bernard*, 141 S. Ct. at 506 (Sotomayor, J., dissenting from the denial of certio-

rari). To the extent the OCCA applied the state procedural rule requiring a petitioner to establish more than what *Brady* materiality requires, that discriminates against the exercise of federal *Brady* rights. More fundamentally, such an approach "conflicts with this Court's precedent, and it rewards prosecutors who successfully conceal their *Brady* and *Napue* violations" in all but the most extreme circumstances. *Id.*

4. Nor does applying Oklahoma's procedural bar to Mr. Glossip's *Napue* and *Brady* claims advance a legitimate state interest. *See Osborne v. Ohio*, 495 U.S. 103, 124 (1990) (citing *James*, 466 U.S. at 349) (internal quotation marks omitted). Even the State itself does not defend such an approach. The OCCA invokes the principle of finality in support of its decision. JA987. But finality does not always have the last word. *Brady* and *Napue*—and even Oklahoma law—create carveouts from the principle of finality in these narrow, exceptional circumstances to preserve the time-honored right to a fair trial. By invoking finality, the OCCA also disregards that principle's core underpinnings. The interest in finality in criminal judgments is for the benefit of the state. But here, the State itself has disclaimed that interest in the face of egregious due-process violations. Balancing state and federal interests, and recognizing the manifest unfairness of applying a procedural bar to Mr. Glossip's claims, no adequate state-law ground exists to preclude this Court's review.

B. The OCCA's decision did not rest on an independent state-law ground.

It is not enough for the state court to rely on an adequate state-law ground; it must also be "independent" of any question of federal law in order to be insulated from federal review. *Coleman*, 501 U.S. at 729 (This Court will not take up a question of federal law presented in a case "if the decision of [the state] court rests on a state law ground that is independent of the federal question *and* adequate to support the judgment.") (emphasis added). The question of "independence" is also one for this Court to determine. *Long*, 463 U.S. at 1038. In *Long*, this Court adopted the following standards for determining independence:

> When … a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, [the state law ground is independent so long the court] make[s] clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached.

Id. at 1040-41.

Thus, a state ground is not independent when "it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision primarily on federal law." *Id*. at 1042; *see also Ake v. Oklahoma,* 470 U.S. 68, 75 (1985) ("[W]hen resolution of the state procedural law question depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and our jurisdiction is not precluded."); *Enter. Irrigation Dist.,* 243 U.S. at 164 ("[W]here the non-Federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain.").

The OCCA's holding applying the state procedural bar depends on its federal-law ruling and does not present an independent state-law ground. The OCCA determined that Mr. Glossip's *Brady* claim failed to satisfy the standard for post-conviction review because, even if the prosecution had not suppressed the evidence of Sneed's lithium use, "no reasonable fact finder" would have found Mr. Glossip not guilty. JA990-91. But the OCCA was only able to reach that conclusion by resolving the very same materiality question that goes to the heart of the due-process issue presented by *Brady*. As the OCCA observed, "[t]o establish a *Brady* violation, a defendant must show that the prosecution failed to disclose evidence that was favorable to him or exculpatory, and that the evidence was material." JA989-90. But, the

OCCA determined, the prosecution had *not* hidden exculpatory information because Sneed's competency examination already "noted Sneed's lithium prescription" and thus defense counsel already "knew or should have known about Sneed's mental health issues." JA991. That is a determination on the merits of the *Brady* claim. Likewise, the OCCA's determination that timely production of the evidence would not "have affected the outcome of the trial" is the "implicit … requirement of [*Brady*] materiality." *United States v. Agurs*, 427 U.S. 97, 104 (1976).

In *Foster v. Chatman*, this Court reviewed a Georgia habeas court's determination that the petitioner's constitutional claim was "not reviewable based on the doctrine of res judicata." 578 U.S. 488, 497-98 (2016). But in so holding, the state court "engaged in four pages of" analysis of the constitutional claim to determine whether the petitioner had alleged a "sufficient 'change in the facts'" to overcome the res judicata bar. *Id.* at 498. Based on that analysis, the state court concluded that the "'renewed [constitutional] claim [wa]s without merit.'" *Id.* This Court held that, "[i]n light of the foregoing, it is apparent that the state habeas court's application of res judicata … was not independent of the merits of his federal constitutional challenge." *Id.* That is precisely what the OCCA has done here. In determining whether Mr. Glossip's *Brady* claim is procedurally barred, it necessarily decided the materiality question that is at the heart of *Brady*. *See Strickler*, 527 U.S. at 280 ("[E]vidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'") (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)).

So too with the OCCA's conclusion that Mr. Glossip should have known about the facts supporting his *Brady* claim earlier; that conclusion requires a substantive determination on the suppression issue. In order to conclude that Mr. Glossip should have known about Sneed's mental-health treatment earlier, the OCCA assumes that Mr. Glossip had that information available to him. But Mr. Glossip argues that he could not have known until the January 2023 disclosure. That is the same question asked by *Brady*, and in purporting to resolve that question, the OCCA necessarily delved into the merits of the federal issue.

The same is true of the OCCA's conclusions regarding Mr. Glossip's *Napue* claim. Assuming the OCCA determined that Mr. Glossip's *Napue* claim was procedurally barred (which it did not, *supra* Section I), that conclusion was also so intertwined with the questions at the very heart of the *Napue* inquiry that it cannot possibly be considered "independent" of federal law. For example, OCCA concluded that, because Sneed's statement "was not clearly false," it was "not material under the law" and "d[id] not create a reasonable probability that the result of the proceeding would have been different." JA991-92. But whether Sneed's testimony "was … clearly false" is exactly the question to be resolved under *Napue*. *Napue v. Illinois*, 360 U.S. 264, 269-70 (1959) (When false testimony "appears" in a criminal trial, and the government is aware of the falsity, the prosecutor cannot remain "silen[t]," but instead "has the responsibility and duty to correct what [it] knows to be false and elicit the truth."). Whatever state procedural ruling the OCCA may have relied on, that state-law holding

depends on the OCCA's federal-law ruling on the falsity of Sneed's testimony. JA991-92. Accordingly, the OCCA's entangled § 1089 ruling cannot be a barrier to this Court's review. *See Foster,* 578 U.S. at 497; *Ake,* 470 U.S. at 74-75.

The OCCA's *Napue* and *Brady* determinations are also intertwined with federal law because any "procedural default" was a direct result of the state's violation of the federal rights protected by this Court's rulings in those cases. As discussed above (at 1-2), the State failed to disclose the relevant information relating to Sneed's bipolar disorder and treatment by a psychiatrist until 2023. To be sure, "[d]efense counsel was aware or should have been aware that Sneed was taking lithium at the time of trial." JA991. But that knowledge could not be dispositive of the prosecution's *Brady* and *Napue* violations once the prosecution elicited testimony from Sneed regarding his lithium use that it *knew* to be false. Moreover, the defense had no reason to know—indeed, could not have known, given the State's *Brady* and *Napue* violations—about Sneed's bipolar diagnosis. The defense sought to obtain Sneed's medical records in 2015, but the State opposed and OCCA denied the defense's motion. Cert. App. 495a-496a, 164a. The defense therefore had no basis until January 2023 to explore potential avenues of impeachment stemming from that revelation about the critical witness against Mr. Glossip—and, more to the point, it had no reasonable basis for disbelieving the testimony that the State elicited from Sneed on the subject, and thus no reasonable basis to assert a *Napue* claim.

Because of the prosecution's *Brady* and *Napue* violations, Mr. Glossip could not have brought either his *Brady* or his *Napue* claim any earlier than he did. The OCCA's holding otherwise required a determination that no violation occurred. Its determination is therefore "so interwoven" with the federal questions asked by *Napue* and *Brady* that this Court's review cannot be foreclosed.

CONCLUSION

The Court should decline to find that the OCCA's decision rested on an adequate and independent state-law ground.

Respectfully submitted,

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APPENDIX TABLE OF CONTENTS

APPENDIX A

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