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 CURRENT AND FORMER STATE AND FEDERAL PROSECUTORS AS AMICI CURIAE IN SUPPORT OF PETITIONER RICHARD GLOSSIP

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BRIEF OF AMICI CURIAE

INTEREST OF THE AMICI[1]

Amici are current and former federal and state prosecutors. As trial lawyers, they have grappled with evidence and have substantial experience with its materiality before juries. *Amici* are leaders in the community and deeply familiar with the criminal justice system. They include stakeholders—U.S. Congressmen, former trial and appellate judges, state Attorneys General, United States Attorneys, Assistant United States Attorneys, elected prosecutors and their deputies, and former police officers—from every stage of the criminal justice process. A full list of *amici* is attached as an Appendix to this Brief. Notwithstanding their diverse backgrounds, *amici* share a strong interest in maintaining the fairness and public legitimacy of the criminal justice system. Their collective centuries of criminal justice experience reflect that prosecutions must be premised upon an honest and completely transparent record to protect societal confidence in the verdict and the death sentence. As detailed in the Reed Smith independent review and report on Richard Glossip's conviction and death sentence, absent the State's destruction of evidence, knowing presentation of false impressions, and failure to disclose exculpatory and impeachment evidence to the accused, there is a reasonable likelihood the outcome of Mr. Glossip's trial could have been different.

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[1] Pursuant to Rule 37.6, *Amici* certify that no person or entity other than amici or amici's counsel authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of this brief.

As current and former prosecutors, *amici* have personally considered, practiced the obligations, and shouldered any burdens to protect the integrity and custody of evidence, present nothing but the whole truth to the court and to the jury, and to fully disclose all material exculpatory and impeachment information to the accused. *Amici* submit that these prosecutorial obligations have not been met here and there can be no confidence in the verdict. The Court should grant relief and reverse the decision of the Oklahoma Court of Criminal Appeals.

SUMMARY OF ARGUMENT

We submit this amicus brief on behalf of current and former prosecutors because we are troubled by the actions of law enforcement officers in Oklahoma that appear to have destroyed evidence, knowingly presented false impressions, and failed to disclose exculpatory and impeachment evidence undermining confidence in the conviction and placing Mr. Glossip at imminent risk of wrongful execution.

An ad hoc group of 61 Oklahoma legislators (44 Republicans and 17 Democrats) commissioned an independent audit from Reed Smith LLP (a global law firm) on the integrity of the Oklahoma murder conviction of Mr. Glossip, and his death sentence. The conservatively tilted ad hoc committee consists of persons with a variety of backgrounds, including Army, Navy, Air Force, and Marine combat veterans; a firefighter, Deputy Sheriff, and career Oklahoma Department of Corrections Officer; a certified public accountant, psychologist, and clergyman; ranchers, registered nurses, educators, lawyers, pharmacists, construction business owners, and children's advocates; and a

letterman from the Oklahoma State University wrestling team.

The initial yet thorough investigation spanned over four months and involved 30 attorneys, three investigators, two paralegals, and a local Oklahoma law firm. The examination involved the review of over 146,000 pages of documents (many which had never been disclosed to Mr. Glossip, the court, or the jury, but only was discovered by Reed Smith during its investigations in 2022), 36 witness interviews, a 3.5-hour interview of Richard Glossip, juror interviews, and expert witness analysis.

The audit concluded that, *inter alia*, neither the conviction nor the death sentence is reliable.[2]

Of course, the American justice system does not operate upon independent audits of jury verdicts, nor should it. That said, criminal jury verdicts should rarely be predicated – and certainly not here – on the testimony of a single witness/murderer receiving a deal to avoid the death penalty after the State's: 1) loss or destruction of a multitude of material evidence (including 10 items from the murder scene and the victim's vehicle and surveillance videotape of the murder area); 2) failure to disclose material impeachment or exculpatory evidence (e.g., Justin Sneed's desire to recant his statements against Mr. Glossip and/or leverage his testimony to bargain for a better deal, his

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[2] We incorporate by reference the full report and the several subsequent reports that have continued to follow from Reed Smith LLC which can be found at https://www.reedsmith.com/en/news/2022/08/reed-smith-updates-richard-glossip-report-with-new-findings (last visited Mar. 7, 2024).

history and propensity for violence including threatening to murder his junior high school principal, his methamphetamine drug addiction and his thirst to finance it); and/or 3) knowing creation of false impressions to the jury (e.g., the State presented a murder for hire theory against Mr. Glossip when it believed it was a robbery gone bad homicide by Sneed; the State violated the Court's Rule of Sequestration during Mr. Glossip's retrial by providing Sneed, through his attorney, information regarding testimony given by other witnesses to allow Sneed to conform his testimony to match that of the other witnesses. Sneed received this information right before he testified on May 26, 2004). All the forgoing was detailed by Reed Smith's reporting at various times in 2022. Those forms of State misconduct undermine due process and the confrontation clause and the reliability of the conviction and death sentence.

ARGUMENT

I. THE CONVICTION AND DEATH SENTENCE ARE IMPROPERLY PREMISED UPON THE UNRELIABLE TESTIMONY OF JUSTIN SNEED, THE ADMITTED MURDERER OF THE VICTIM, IN EXCHANGE FOR HIS AVOIDANCE OF A DEATH SENTENCE.

Justin Sneed was coached by a Detective Bob Bemo to implicate Richard Glossip when Bemo repeatedly advised Sneed that law enforcement did not believe Sneed acted alone in the homicide and offered Glossip's name to Sneed *six times* in the first 20 minutes of the interview as the possible accomplice. Mr. Glossip's name repeatedly was proffered after

Sneed was advised that Glossip had been arrested, and Glossip had implicated Sneed, including that Sneed had confessed the murder to Glossip. Sneed complied with Detective Bemo's clear guidance. Thereafter, the State locked Sneed into his story implicating Mr. Glossip by contracting with Sneed that he would receive a sentence less than *death* for his admission that he in fact murdered the victim by bludgeoning the victim to death with a baseball bat, but did so only at the solicitation of Mr. Glossip in order to split the robbery proceeds.

After this deal was secured, videotape surveillance from the murder scene – which likely could be used to either corroborate or debunk Sneed's statements inculpating Mr. Glossip in the events – was obtained by the State and improperly "lost" by the Homicide Supervisor. *See Arizona v. Youngblood*, 488 U.S. 51, 58 (1988) (due process requires law enforcement not just to preserve evidence already in hand, but to gather and to collect evidence in those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant). *Cf. Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (an individual prosecutor has "a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.").

The destruction of material evidence presents a highly prejudicial cloud over a case. Destruction caused by bad judgment does not equate to good faith. The absence of good faith is bad faith. *See, e.g.,*

Clemency Petition Grant for Robin Lovitt (Virginia, Nov. 29, 2005).[3]

Our system of justice sanctions "deals" between prosecutors and codefendants, giving the latter benefits in return for their hopefully truthful testimony. Such arrangements are permitted because they unfortunately are necessary to prosecute serious criminal activity. Thereafter, the system relies upon jurors to keep the system honest. Jurors have the duty to determine the credibility of the witnesses. Any plots to keep jurors ignorant of witness weakness via unscrupulous interrogation techniques, the failure to conduct full and complete investigations, or the destruction of evidence including videotaped surveillance are wrong. Courts should not countenance such actions.

II. THE STATE FAILED TO DISCLOSE MATERIAL IMPEACHMENT EVIDENCE INCLUDING THE DESIRE OF SNEED TO RECANT HIS TESTIMONY.

The legitimacy of a prosecution lies in the presentation of the complete truth with full transparency of all material evidence. This necessarily includes material evidence addressing the credibility or impeachment of the State's evidence, and potentially exculpatory evidence of the accused. Complete State disclosure of this material is a must. "[T]he prudent

[3] Former Virginia Attorney General Mark L. Earley (R) presented the Lovitt clemency petition, stating "it's morally unfair to this guy when the evidence was by all accounts clearly destroyed contrary to [state law], and it has clearly prejudiced him." https://deathpenaltyinfo.org/news/conservatives-urge-virginia-governor-to-grant-clemency-request-as-1-000th-execution-nears (last visited Mar. 7, 2024).

prosecutor will resolve doubtful questions in favor of disclosure." *United States v. Agurs*, 427 U.S. 97, 108 (1976). A "prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence." *Kyles v. Whitley*, 514 U.S. 419, 439 (1995).

This is as it should be. Such disclosure will serve to justify trust in the prosecutor as "'the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Id.* (quoting *Berger v. United States,* 295 U.S. 78, 88 (1935)). This "will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations." *Id.* at 440. Defendants must be "'acquitted or convicted on the basis of all the evidence which exposes the truth.'" *United States v. Leon,* 468 U.S. 897, 900–01 (1984) (quoting *Alderman v. United States,* 394 U.S. 165, 175 (1969)).

"'[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.'" *Wearry v. Cain*, 577 U.S. 385, 392 (2016) (quoting *Brady v. Maryland*, 373 U.S. 83, 87 (1963)). The "rule stated in *Brady* applies to evidence undermining witness credibility." *Id.* (citing *Giglio v. United States,* 405 U.S. 150, 153–54 (1972)). Favorable undisclosed evidence includes that which is "exculpatory or impeaching." *Milke v. Ryan*, 711 F.3d 998, 1012 (9th Cir. 2013) (citations omitted). "Evidence qualifies as material when there is "'any reasonable likelihood'" it could have "'affected the judgment of the jury.'"" *Wearry,* 577 U.S. at 392 (quoting *Giglio*,

405 U.S. at 154 (quoting *Napue v. Illinois,* 360 U.S. 264, 271 (1959)). Trial error does not require that the undisclosed evidence actually affected the verdict. *Id.* & n.6.

The State of Oklahoma has failed to apply this materiality standard, instead creating a far more burdensome standard to protect state misconduct. *Amici* agree that the standard for prejudice under *Brady* in this case is that set forth by this Court in *Agurs* and *Wearry*, and that a rigorous application of that standard is vital for prosecutorial ethics and overall sense of fairness, especially in a capital case.

The State's loss or destruction of material evidence including 10 items from the murder scene and the victim's vehicle and surveillance videotape of the murder area undermined its duty to disclose and undertake a transparent prosecution. Moreover, recently released letters by the State show that both before and after Mr. Glossip's 2004 trial, Sneed talked to several people, including prosecutors, about recanting his testimony, and sought to leverage his testimony to secure a new, better deal. His lawyer forcefully advised him not to, telling him he would likely be killed if he did. This material impeachment evidence also was withheld from Mr. Glossip and the jury. The desired recantation reflects more than Sneed's reluctance – it raises questions about whether Sneed believed he had ever told the truth. At a minimum, this undisclosed new evidence is sufficient to "undermine confidence" in the verdict. *See Smith v. Cain*, 565 U.S. 73 (2012).

III. DEATH PENALTY CASES DEMAND THE HIGHEST STANDARDS OF CONDUCT BY STATE ACTORS.

The State must not do indirectly what the law absolutely forbids it to do directly, i.e., dress up a witness with false indicia of credibility. *See Dickey v. Davis*, 69 F.4th 624, 632-33 (9th Cir. 2023) (prosecutor claimed witness would face death penalty for providing false testimony despite knowing testimony was in fact false). This is inconsistent with a system of justice that expects integrity from prosecutors, not cheap tricks designed to skirt clear responsibilities. Winning at any cost is not synonymous with pursuing justice. *Strickler v. Greene*, 527 U.S. 263, 281 (1999) (there is a "*special role* played by the American prosecutor in the search for truth in criminal trials.").

"Few things are more repugnant to the constitutional expectations of our criminal justice system than . . . perjury that flows from a concerted effort by rewarded criminals to frame a defendant. The ultimate mission of the system upon which we rely to protect the liberty of the accused as well as the welfare of society is to ascertain the factual truth, and to do so in a manner that comports with due process of law as defined by our Constitution. This important mission is utterly derailed by unchecked lying witnesses, and by any law enforcement officer or prosecutor who finds it tactically advantageous to turn a blind eye to the manifest potential for malevolent disinformation." *N.*

Mariana Islands v. Bowie, 243 F.3d 1109, 1114 (9th Cir. 2001) (Trott, J.).[4]

The State should not base its prosecution on "the manifestly unreliable, poisonous testimony of a self-interested jailhouse informant" to secure a capital conviction. "This should not occur in a rational, humane justice system that prides itself on integrity. Jailhouse informant testimony [is] by its nature suspect . . . No enlightened society should impose its ultimate sanction based on perjurious testimony . . . Death should not be carried out based upon on a felon's calculated lie. That would be a terrible wrong. Our people are too great, and this State is too enlightened, to allow that awful, ultimate offense to be carried out . . ." Pet. for Exec. Clemency (California), Michael A. Morales, Jan. 27, 2006 (Counsel Kenneth W. Starr, Esq.).[5]

A study conducted by the Actual Innocence Project revealed that out of sixty-two cases in which DNA has exonerated an innocent defendant, twenty-one percent relied to some extent on the testimony of informers. Barry Scheck, Peter Neufeld, & Jim Dwyer,

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[4] The Hon. Stephen S. Trott sits on the United States Court of Appeals. Before being appointed to the bench by President Ronald Reagan, he was a lifelong prosecutor: a deputy district attorney for Los Angeles County, California for fifteen years (the Chief Deputy District Attorney for four years); the United States Attorney in Los Angeles; the Assistant Attorney General for the United States Department of Justice Criminal Division; and the Associate Attorney General.

[5] The clemency petition was presented by the Hon. Kenneth W. Starr, appointed to the United States Court of Appeals by President Reagan, and thereafter appointed Independent Counsel by the Attorney General to investigate criminal conduct in the Whitewater Investigation.

Actual Innocence (2000). Mr. Glossip's case falls within the twenty-one percent, as the Reed Smith reports make abundantly clear.

A criminal charged with a serious crime understands that a fast and easy way out of trouble is to cut a deal at someone else's expense and to purchase leniency from the State by offering testimony in return for immunity or reduced incarceration. The State's failure to do so would insulate many dangerous criminals from the reach of the law. Without accomplice cooperation and testimony, many violent and non-violent criminals would escape justice.

On the other hand, because of the perverse and mercurial nature of the criminals with whom the State often must deal, each contract for testimony is fraught with the real peril that the proffered testimony will not be truthful, but simply factually contrived to "nail" a target and induce concessions from the State. Defendants or suspects with nothing to sell may simply manufacture evidence to create something of value while betraying others. Such false testimony corrupts the criminal justice system and makes a mockery out of its constitutional goals and objectives.

Thus, rewarded criminals represent a great threat to the mission of criminal justice. Even more so in this case where the State's case against Mr. Glossip relies entirely upon Justin Sneed's accusations – there is no physical evidence that links Mr. Glossip to the crime scene or the murder and the only witness identifying Mr. Glossip as a participant in the murder is the actual killer himself, Justin Sneed, and only after he was led there six times during the first 20 minutes of

law enforcement's interrogation. *See Milke v. Ryan*, 711 F.3d 998, 1023-25 (9th Cir. 2013) (Kozinski, C.J., concurring) (regarding law enforcement's unconstitutional abuse of proper police interrogation practices).

It is just as constitutionally unacceptable for the government to put a guilty person in prison based on false evidence as it is to have an innocent person suffer the same fate. Nowhere in the Constitution or in the Declaration of Independence, nor for that matter in the Federalist or in any other writing of the Founding Fathers, can one find a single utterance that could justify a decision by any oath-beholden civil servant to look the other way when confronted by the real possibility of being complicit in the wrongful use of false evidence to secure a conviction. It is for these reasons that the prosecution is not the representative of an ordinary party to a lawsuit, but of a sovereign with a responsibility not just to win, but to see that justice is done. Hard blows, yes, foul blows no. *Berger v. United States*, 295 U.S. 78, 88 (1935).

The ends in our system do not justify the means. Our Constitution does not promise every criminal will go to jail, it promises due process of law. As Justice Oliver Wendell Holmes said, it is "a less evil that some criminals should escape than that the Government should play an ignoble part." *Olmstead v. United States*, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting).

The duty to manage this difficult business must be undertaken with the utmost care by those in the best position and with the power to ensure that it does not go awry. Although the public has an interest in effective law enforcement, and although *Amici* expect law

enforcement officers and prosecutors to be tough on crime and criminals, they are not to be tough on the Constitution. "Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." *Mapp v. Ohio*, 367 U.S. 643, 659 (1961) (Clark, J.). These duties imposed on police and prosecutors by the requirements of due process are hardly novel or burdensome. Investigating and verifying the credibility of witnesses and the believability of testimony and evidence is a task undertaken every day. No fair-minded prosecutor could chafe under these mandates.

"In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example . . . If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself." *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

CONCLUSION

For all of the foregoing reasons, *Amici* respectfully submit that the Court should grant relief to Petitioner on his conviction and death sentence.

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TABLE OF APPENDICES

APPENDIX: FULL LIST OF *AMICI CURIAE*..1a

APPENDIX: FULL LIST OF *AMICI CURIAE*

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Parisa Dehghani-Tafti, Commonwealth's Attorney, Arlington County and the City of Falls Church, Virginia (2016-present)

John J. Farmer, Jr., Senior Counsel to the 9/11 Commission (2003-2004); Attorney General of New Jersey (1999-2002); Assistant United States Attorney, District of New Jersey (1990-1994)

Gil Garcetti, Los Angeles County District Attorney (1992-2000); Los Angeles County Chief Deputy District Attorney (1984-1988); Los Angeles County District Attorney's Office (1978-2000)

H.S. (Bert) Garcia, United States Attorney, District of Puerto Rico (2002-2006); Executive Assistant United States Attorney, Eastern District of Texas (1983-2002)

George Gascón, Los Angeles County District Attorney (2022- present); San Francisco County District Attorney (2011-2019); Los Angeles Police Department, Assistant Chief of Police (2003-2006); Mesa, Arizona Police Department, Chief of Police (2006-2008); San Francisco Police Department, Chief of Police (2009-2010)

Steve Gaskins, Fellow, American College of Trial Lawyers, Assistant District Attorney, New York County (1978-1982)

Sarah F. George, Chittenden County State's Attorney, State of Vermont (2017-present); Deputy State's Attorney, Chittenden County (2011-2017)

Hon. Rudolph J. Gerber, Associate Director, Arizona Criminal Code Commission (1976-77); Deputy Attorney, Maricopa County Attorney's Office (1976-1979); Judge, Maricopa County Superior Court (1979-1985); Associate Presiding Judge, (1985-1988); Judge, Arizona Court of Appeals, Division One (1988-2001)

Deborah Gonzalez, District Attorney, Western Judicial Circuit (Athens), Georgia (2021-present)

John Hummel, District Attorney, Deschutes County, Oregon (2015-2022)

Natasha Irving, District Attorney, 6th Prosecutorial District (Lincoln, Waldo, Sagadahoc and Knox counties), Maine (2018-present)

Hon. Glenn F. Ivey, U.S. Representative for Maryland's 4th Congressional District, State's Attorney, Prince George's County, Maryland (2002-2011)

Norman D. James, Assistant United States Attorney, Central District of California (1973-1978)

Justin F. Kollar, Prosecuting Attorney, County of Kaua'i, Hawaii (2012-2021)

Miriam Aroni Krinsky, Assistant United States Attorney, Central District of California; Chief, Criminal Appellate Section; Chief, General Crimes Section;

Chair, Solicitor General's Advisory Group on Appellate Issues; Member, Attorney General's Advisory Committee on Sentencing] and District of Maryland (1987-2002)

Corinna Barrett Lain, S.D. Roberts and Sandra Moore Professor of Law, University of Richmond School of Law, Assistant Commonwealth Attorney (1997-2000)

J. Alex Little, Assistant United States Attorney, Middle District of Tennessee and the District of Columbia (2007-2013)

Rory Little, Associate Deputy United States Attorney General (1996-97); Special Assistant United States Attorney, Northern District of California (1994-1996); Assistant United States Attorney, Northern District of California (1987-1994)

Randy Luskey, Assistant United States Attorney, Northern District of California (2011–2014)

Beth McCann, Denver District Attorney (2017-current)

Alan B. Morrison, Assistant United States Attorney, Southern District of New York (1968-1972)

Bill Nettles, United States Attorney, District of South Carolina (2010-2016)

Jerry L. Newton, Assistant Chief United States Attorney (Criminal Division), Central District of California (1974-1976); Assistant United States Attorney, Central District of California (Criminal Division) (1971-1974)

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Stacy K. Parker, Assistant Prosecuting Attorney, Franklin County, Ohio (2004-2006); Kanawha and Jackson Counties, West Virginia (1998-2003)

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