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 FOR COURT-APPOINTED *AMICUS CURIAE* IN SUPPORT OF THE JUDGMENT BELOW

NICHOLAS J. CALUDA
QUINN EMANUEL URQUHART & SULLIVAN, LLP
700 Louisiana Street
Suite 3900
Houston, TX 77002
(713) 221-7000

CHRISTOPHER G. MICHEL
Counsel of Record
RACHEL G. FRANK
ALEX VAN DYKE
QUINN EMANUEL URQUHART & SULLIVAN, LLP
1300 I Street, NW
Washington, DC 20005
(202) 538-8000
christophermichel@quinnemanuel.com

July 8, 2024

QUESTIONS PRESENTED

1. Whether the Oklahoma Court of Criminal Appeals' holding that the Oklahoma Post-Conviction Procedure Act precluded relief here is an adequate and independent state-law ground for the judgment.

2. Whether the Oklahoma Court of Criminal Appeals correctly rejected the claims asserted under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Napue v. Illinois*, 360 U.S. 264 (1959).

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION 1

JURISDICTION 4

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 4

STATEMENT 5

A. The Murder of Barry Van Treese 5

B. Petitioner's First Trial And Appeal 7

C. Petitioner's Second Trial And Appeal 8

D. Prior Post-Conviction Relief Proceedings 9

E. Proceedings Below 10

F. Subsequent Proceedings 12

SUMMARY OF ARGUMENT 12

ARGUMENT 15

I. THIS COURT LACKS JURISDICTION OVER PETITIONER'S *BRADY* AND *NAPUE* CLAIMS 15

A. The OCCA Found That The PCPA Barred Petitioner's *Brady* And *Napue* Claims 16

B. The OCCA's Application Of The PCPA Was Independent Of Federal Law 18

C. The OCCA's Application Of The PCPA Was Adequate To Support The Judgment 22

II. THE OCCA CORRECTLY REJECTED THE *NAPUE* AND *BRADY* CLAIMS 28

A. The Parties Fail To Show A *Napue* Violation . 29

1. The Parties Have Not Shown That Sneed's Disputed Testimony Was False 30

2. The Parties Have Not Shown That Prosecutors Knew Sneed's Disputed Testimony Was False 34

3. The Parties Have Not Shown That Sneed's Disputed Testimony Was Material 34

B. The Parties Fail To Show A *Brady* Violation .. 37

1. Smothermon's Notes Do Not Support A *Brady* Violation..... 38

2. The Parties Identify No Other Valid Basis For A *Brady* Claim..... 41

C. At A Minimum, Remand For Further Fact Development Is Warranted 42

III. THE OCCA PERMISSIBLY DECLINED TO ADOPT THE CONFESSION OF ERROR 43

A. The Constitution Does Not Require State Courts To Give Executive Officials' Confessions Of Error Any Specified Weight ... 43

B. The OCCA Sufficiently Considered The Confession Of Error..... 46

CONCLUSION 48

Appendix A — Constitutional and Statutory Provisions 1a

Appendix B — Petitioner's Motion for Evidentiary Hearing 5a

TABLE OF AUTHORITIES

Page(s)

Cases

Ake v. Oklahoma,
470 U.S. 68 (1985) 21

Andonian v. United States,
2020 WL 6049933 (C.D. Cal. Aug. 10, 2020),
aff'd, 2022 WL 4462695 (9th Cir. Sept. 26,
2022) 44

Banks v. Workman,
692 F.3d 1133 (10th Cir. 2012) 18, 23

Beard v. Kindler,
558 U.S. 53 (2009).....23, 24, 27

Beckles v. United States,
580 U.S. 256 (2017)..... 43

In re Bolin,
811 F.3d 403 (11th Cir. 2016)..... 18

Brady v. Maryland,
373 U.S. 83 (1963).....i, 3, 36

Brecht v. Abrahamson,
507 U.S. 619 (1993)..... 45

In re Cantu,
94 F.4th 462 (5th Cir. 2024) 18

Coleman v. Thompson,
501 U.S. 722 (1991).....15, 20, 22

Commonwealth v. Brown,
196 A.3d 130 (Pa. 2018).....43, 47

Cruz v. Arizona,
598 U.S. 17 (2023).....23, 24

Davis v. Wechsler,
263 U.S. 22 (1923)..... 23

Davison v. State,
531 P.3d 649 (Okla. Crim. App. 2023) 17, 24

Escobar v. Texas,
143 S. Ct. 557 (2023)..... 47

FCC v. Prometheus Radio Project,
592 U.S. 414 (2021)..... 47

Ford v. Georgia,
498 U.S. 411 (1991)..... 23

Foster v. Chatman,
578 U.S. 488 (2016)..... 22

Fox Film Corp. v. Muller,
296 U.S. 207 (1935)..... 19

Giglio v. United States,
405 U.S. 150 (1972).....30, 37

Glossip v. Gross,
576 U.S. 863 (2015)..... 1

Glossip v. Trammell,
530 F. App'x 708 (10th Cir. 2013) 9

Gonzalez v. Crosby,
545 U.S. 524 (2005)..... 17

Grzegorczyk v. United States,
142 S. Ct. 2580 (2022).....15, 44, 48

Harris v. Reed,
489 U.S. 255 (1989)..... 19

Hayes v. Brown,
399 F.3d 972 (9th Cir. 2005).....34, 35

Herb v. Pitcairn,
324 U.S. 117 (1945) 15, 20, 23, 25

James v. Kentucky,
466 U.S. 341 (1984) 23

Johnson v. Lee,
578 U.S. 605 (2016) 20, 21, 23, 25

Johnson v. McCaughtry,
265 F.3d 559 (7th Cir. 2001) 45

Kisela v. Hughes,
584 U.S. 100 (2018) 37

Kyles v. Whitley,
514 U.S. 419 (1995) 38, 40, 41

Lee v. Kemna,
534 U.S. 362 (2002) 23

McCarty v. State,
114 P.3d 1089 (Okla. Crim. App. 2005) 27, 28

Medina v. California,
505 U.S. 437 (1992) 45

Michigan v. Long,
463 U.S. 1032 (1983) 19, 20

Moore v. Illinois,
408 U.S. 786 (1972) 30, 31

Murray v. Giarratano,
492 U.S. 1 (1989) 23

Napue v. Illinois,
360 U.S. 264 (1959) 3, 29, 30, 34

Parlton v. United States,
75 F.2d 772 (D.C. Ct. App. 1935) 45

People v. Alvarado,
133 Cal. App. 3d 1003 (Cal. Ct. App. 1982) 45

Posters 'N' Things, Ltd. v. United States,
511 U.S. 513 (1994)..... 43

Powell v. State,
935 P.2d 378 (Okla. Crim. App. 1997) 24

Rex v. Wilkes,
98 Eng. Rep. 327 (1770)..... 45

Sawyer v. Whitley,
505 U.S. 333 (1992).....17, 19

Sibron v. New York,
392 U.S. 40 (1968).....43, 44

Simpson v. Carpenter,
912 F.3d 542 (10th Cir. 2018)..... 18

Slaughter v. State,
969 P.2d 990 (Okla. Crim. App. 1998) 24

Smallwood v. State,
937 P.2d 111 (Okla. Crim. App. 1997) 16

Smith v. Cain,
565 U.S. 73 (2012)..... 38

Solorio v. Muniz,
896 F.3d 914 (9th Cir. 2018)..... 19

Stewart v. Smith,
536 U.S. 856 (2002)..... 18

Strickler v. Greene,
527 U.S. 263 (1999).....38, 39, 40

Sumner v. Mata,
449 U.S. 539 (1981)..... 46

Terry v. United States,
593 U.S. 486 (2021) 44

Turner v. United States,
582 U.S. 313 (2017) 3, 35, 40, 41

United States v. Agurs,
427 U.S. 97 (1976) 34, 38, 40

United States v. Aichele,
941 F.2d 761 (9th Cir. 1991) 30, 39

United States v. Bagley,
473 U.S. 667 (1985) 29, 37, 40

United States v. Bingham,
653 F.3d 983 (9th Cir. 2011) 33

United States v. Croft,
124 F.3d 1109 (9th Cir. 1997) 33

United States v. Keogh,
391 F.2d 138 (2d Cir. 1968) 36

United States v. Martin,
59 F.3d 767 (8th Cir. 1995) 33

United States v. Shotwell Mfg. Co.,
355 U.S. 233 (1957) 42

United States v. Sutherland,
656 F.2d 1181 (5th Cir. 1981) 33

Walker v. Martin,
562 U.S. 307 (2011) 21, 23, 24, 28

Wearry v. Cain,
577 U.S. 385 (2016) 38

Wharton v. Superintendent,
95 F.4th 140 (3d Cir. 2024) 45

Williams v. Taylor,
529 U.S. 420 (2000).....19, 25

Wood v. Bartholomew,
516 U.S. 1 (1995) 39

Wood v. Milyard,
566 U.S. 463 (2012)..... 28

Wood v. Spencer,
487 F.3d 1 (1st Cir. 2007)..... 19

Wood v. Trammell,
2015 WL 6621397 (W.D. Okla. Oct. 30,
2015), *aff'd*, 907 F.3d 1279 (10th Cir. 2018)..... 18

Young v. United States,
315 U.S. 257 (1942).....43, 44

U.S. Constitution and Federal Statutes

U.S. Const. art. VI, cl. 3 46

28 U.S.C. § 2244(b)(2)(B) 3, 17, 18

28 U.S.C. § 2254(e)(2)(B)..... 19

State Constitution and Statutes

Okla. Const. art. VI, § 10.....4, 12, 47

22 Okla. Stat. § 1089(D)(8)(b) 3, 11, 16, 20, 27

Other Authorities

FDA, *Lithium* [package insert] 1,
https://bit.ly/3zr2uSs..... 35

Pardon and Parole Board, Clemency Hearing
Minutes (Apr. 26, 2023),
https://bit.ly/3xDQpcf 12

Richard M. Re, *Promising the Constitution*,
110 Nw. U. L. Rev. 299 (2016) 46

INTEREST OF *AMICUS CURIAE*

By order dated January 26, 2024, this Court invited Christopher G. Michel to brief and argue this case, as *amicus curiae*, in support of the judgment below.

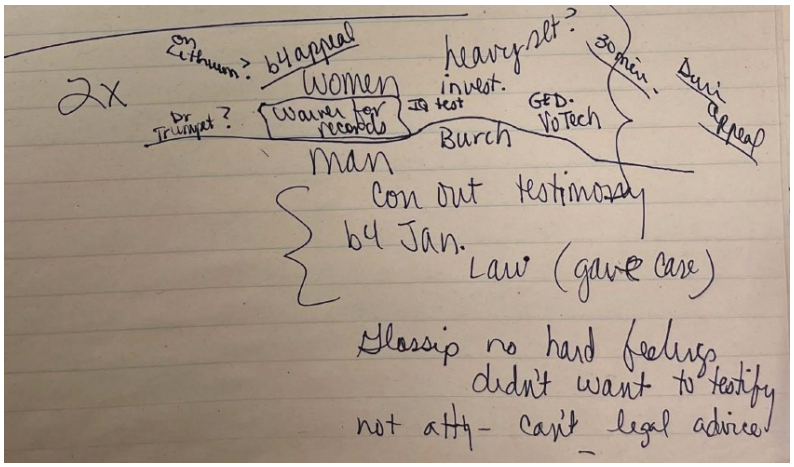
INTRODUCTION

More than 27 years ago, petitioner "hired Justin Sneed to kill ... Barry Van Treese." *Glossip v. Gross*, 576 U.S. 863, 874 (2015). At petitioner's urging and in return for payment, "Sneed entered a room where Van Treese was sleeping and beat him to death with a baseball bat." *Id.* Petitioner has twice been convicted and sentenced to death for that murder. His second conviction has received extensive scrutiny, and every court that has reviewed it has upheld it. JA980-981. In short, there is "compelling" evidence that petitioner had a motive to kill Van Treese, employed Sneed to do it, profited from the murder, and covered it up. JA504.

This case involves petitioner's fifth application for state post-conviction relief. In it, he claims that he was deprived of due process by the prosecution's failure to disclose notes that he contends would have allowed him to impeach Sneed's trial testimony against him. JA902-904. Although the State had defended petitioner's conviction and sentence for decades, the newly elected Attorney General of Oklahoma decided to support petitioner's application for relief "without suggesting that [petitioner] is innocent of any charge made against him." JA974. Like petitioner, the Attorney General relies principally on the notes taken by former Assistant District Attorney (ADA) Connie Smothermon during an October 2003 meeting with Sneed. JA975.

Throughout their briefing, the parties describe those notes as if they provide a definitive statement that

"prosecutors knew, yet failed to disclose, that Sneed was seen after his arrest by a psychiatrist who prescribed him lithium." Pet. Br. 1-2; *see, e.g.*, Pet. Br. 8-10, 12, 21-26, 30-31, 38, 48; Resp. Br. 10-11, 17-18, 23-27. In fact, here is what the notes say:



JA927.

The parties base their position that petitioner's 20-year-old capital conviction should be vacated on the barely decipherable notations "on Lithium?" and "Dr. Trumpet?" *Id.* They concede that petitioner has known since 1997 that Sneed had been prescribed lithium and that he testified accurately to that fact. Pet. Br. 29; JA700-702. Their case thus comes down to the following series of inferences: "Dr. Trumpet?" refers to former Oklahoma County jail psychiatrist Lawrence Trombka; Trombka treated Sneed, even though he has produced no record of doing so; and the jury, which knew that Sneed had been prescribed lithium, may not have found petitioner guilty of Van Treese's murder if it had known that Sneed purportedly received the lithium from a psychiatrist—as opposed to another medical provider.

The five judges of the Oklahoma Court of Criminal Appeals (OCCA)—Oklahoma's court of last resort for criminal cases—unanimously rejected petitioner's speculative claims for two alternative reasons, either of which suffices to resolve this case.

First, the OCCA held that the claims were barred by the Oklahoma Post-Conviction Procedure Act (PCPA), 22 Okla. Stat. § 1089(D)(8)(b). JA990 ¶26. Specifically, the court found that petitioner had neither shown "reasonable diligence" in pursuing his claims nor established "by clear and convincing evidence" that the jury would have not have found him guilty or chosen the death penalty if the notes had been disclosed. *Id.* The court's application of that bar, borrowed almost verbatim from the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2244(b)(2)(B), constitutes a paradigmatic independent and adequate state-law ground precluding this Court's jurisdiction.

Second, the OCCA in an alternative holding correctly rejected the asserted violations of *Napue v. Illinois*, 360 U.S. 264 (1959), and *Brady v. Maryland*, 373 U.S. 83 (1963). JA991 ¶¶24, 28. Smothermon's cryptic notes do not contradict Sneed's testimony or otherwise help petitioner, which means they cannot be the subject of a *Napue* or *Brady* claim. And even crediting the parties' strained interpretation of the notes, the difference between what the jury knew (Sneed was prescribed lithium) and what it would have known if the notes had been disclosed (Sneed was prescribed lithium *by a psychiatrist*) is immaterial. In all likelihood, "it would not have surprised the jury to learn that" Sneed received lithium—a medication for mood disorders—from a psychiatrist. *Turner v. United States*, 582 U.S. 313, 327 (2017). And the medical specialty of the lithium

prescriber does not undermine the core evidence against petitioner, such as his motive to kill Van Treese, possession of unexplained cash, and coverup efforts.

This Court should accordingly dismiss the case for lack of jurisdiction or affirm the judgment below. At the certiorari stage, petitioner asked this Court to decide whether "due process of law requires reversal" when "the State no longer seeks to defend" a capital conviction. Pet. i. Petitioner expressly abandons that question, Pet. Br. i n.*, so this Court should not reach it. If the Court does so, it should reject the Attorney General's position. Nothing in the Constitution compels a state court to provide a particular measure of deference to a state official's confession of error. And in any event, the OCCA here considered the substance of the confession but reached a different conclusion based on its reading of the "law" and "fact[s]." JA990 ¶25. That was entirely proper. To the extent the Attorney General expresses concern that he cannot singlehandedly vacate petitioner's conviction or stop his execution, that results from Oklahoma's decision to vest the power to recommend clemency with a pardon and parole board rather than the Attorney General, Okla. Const. art. VI, § 10—not any question before this Court.

JURISDICTION

This Court lacks jurisdiction over petitioner's *Brady* and *Napue* claims because the OCCA rejected those claims on adequate and independent state-law grounds.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are reproduced in an appendix to this brief.

STATEMENT

A. The Murder of Barry Van Treese

Barry Van Treese owned the Best Budget Inn in Oklahoma City; petitioner was its manager. JA493. Van Treese could not visit the property much in late 1996 as a result of family tragedies, and the motel fell into physical and financial disarray during his absence. JA493-JA494. Van Treese blamed petitioner for the mismanagement and suspected he was stealing money. JA494, JA505. On January 6, 1997, Van Treese inspected the motel and told petitioner that he had to produce certain missing receipts or be fired. JA494-496. Van Treese then traveled to a motel that he owned in Tulsa and returned to the Best Budget around 2 o'clock the next morning. JA495.

Shortly after that, petitioner knocked on the door of Justin Sneed, an 18-year-old high-school dropout who was "totally dependent" on petitioner for work, a room, and food. JA504; *see* JA294-298, JA494-495. Sneed had little "mental presence" and "didn't make a lot of decisions." JA85, JA178. He often had to be told "what to do and how to do it," JA180, and usually the person who told him was petitioner. JA178-180.

In Sneed's motel room around 3 o'clock, petitioner told him that he would pay him $10,000 to kill Van Treese; otherwise, petitioner said, they would both lose their jobs. JA495-496, JA504. Sneed agreed. JA496. He went to Van Treese's room, entered with a key petitioner had given him, and beat Van Treese to death with a baseball bat. JA318-320, JA496.

Sneed told petitioner that he had killed Van Treese, and petitioner went to Van Treese's room to confirm he was dead. JA496-497. Petitioner then instructed Sneed

to drive Van Treese's car to a nearby parking lot and said his payment would be in an envelope under the seat, where petitioner knew that Van Treese kept cash proceeds from the motels. JA328-329, JA497, JA505. Sneed complied and found $4,000, which he split with petitioner. JA329-334, JA497. Petitioner then told Sneed to buy acid, a hacksaw, and trash bags to dispose of Van Treese's remains. JA497.

At work early the next morning, petitioner told a motel worker that Van Treese had left to get supplies for remodeling rooms. JA73-74. He also told a housekeeper to clean the upstairs rooms but that he and Sneed would take care of the downstairs, where Van Treese's body lay. JA194-195, JA498. Eventually, Van Treese's empty car was found, and a manhunt ensued. JA133-134, JA202-203. When he returned from shopping for an engagement ring with his girlfriend, JA425-426, petitioner gave the police three different accounts of his last interaction with Van Treese, while indicating that he had searched the motel, JA202-204, JA217, JA498, JA506, JA590.

Suspicious of petitioner's shifting stories, an officer searched on his own and found Van Treese's body. JA227-229, JA276-282, JA498. Petitioner was arrested the following day and found with a largely unexplained $1,757 on him. JA291, JA499. After initially denying involvement, petitioner admitted that he knew Sneed had killed Van Treese and that he had helped Sneed clean up the murder scene. JA497-498, JA506. A week later, police apprehended Sneed, who also had around $1,200 of unexplained cash. JA498. Sneed admitted his role in the murder and also revealed petitioner's. JA302-303, JA499. They were both charged with first-degree murder. JA492, JA805.

B. Petitioner's First Trial And Appeal

After his arrest, Sneed underwent a competency evaluation administered by Dr. Edith King. JA698-703. In response to the question whether Sneed was "a mentally ill person or a person requiring treatment as defined by" Oklahoma law, Dr. King answered "Yes." JA700 (emphasis omitted). Dr. King described Sneed's mental-health problems—including atypical "mood instability" and "depress[ion] to a moderate degree"—as well as his "history of polysubstance abuse" ("including marijuana, crank, cocaine, and acid") and "anger outburst[s]." JA700-702.

Dr. King further reported that Sneed was "taking lithium at the jail," which was "probably helping him control his moods." JA700, JA702; *see* JA701 ("It sounds as if he may well have had [ADHD] and mood instability which lithium may help."). The report states that Sneed "denied any psychiatric treatment" and told Dr. King the lithium "was administered after his tooth was pulled." JA700. The report was published on the docket and made available to all counsel on July 7, 1997. Pet. Br. 10, 12, 29; *see* JA991.

Sneed ultimately pled guilty and agreed to testify against petitioner in exchange for the State not pursuing the death penalty against him. JA982. Petitioner was tried, convicted, and sentenced to death for capital murder in 1998. JA20. On direct appeal, the OCCA reversed the conviction and granted petitioner a new trial, in part because of his counsel's "failure to impeach Sneed with statements he made to Dr. King during his competency examination." JA17-18.

C. Petitioner's Second Trial And Appeal

1. Petitioner stood trial again in 2004. The jury heard testimony from Van Treese's wife and motel employees about petitioner's motive to kill Van Treese, as well as testimony from Sneed and others about how petitioner instructed him to kill Van Treese and attempted to cover up the crime. JA493-499, JA502-508.

Of relevance to the issues now before the Court, ADA Smothermon and Sneed had a brief exchange about Sneed's medical history during his lengthy direct examination recounting petitioner's role in the murder. Smothermon asked Sneed if he had been "placed on any type of prescription medication" after his arrest. JA312. Sneed responded that he had "asked for some Sudafed because [he] had a cold, but then shortly after that somehow they ended up giving [him] Lithium for some reason." JA312-313. He added, "I never seen no psychiatrist or anything." JA313.

After hearing the extensive evidence against petitioner, the jury returned a guilty verdict and found as an aggravating circumstance that he had employed another to commit murder for remuneration. JA493. The jury recommended a sentence of death, which the trial court imposed. *Id.*

2. On appeal, the OCCA affirmed the conviction and sentence, citing not only Sneed's direct testimony that petitioner had hired him to murder Van Treese but also significant corroborating evidence that, as required by Oklahoma law, "tend[ed] to connect [petitioner] with the commission of the offense." JA503 & n.3. In particular, the OCCA highlighted the prosecution's "compelling case" that Sneed "was totally dependent on" petitioner; both petitioner and Sneed were arrested in possession

of large amounts of cash; Sneed had "no independent knowledge" that Van Treese kept hotel proceeds under the front seat of his car; and petitioner had a clear motive after he learned that Van Treese had discovered that he had been stealing from the motel. JA504-505. The OCCA further found that petitioner's "actions after the murder also shed light on his guilt." JA504-505. Specifically, there was "an enormous amount of evidence that [petitioner] concealed Van Treese's body from investigators all day long" and "never told anyone that he thought Sneed was involved in the murder" until "after he was taken into custody." JA506.

D. Prior Post-Conviction Relief Proceedings

Between 2006 and July 2022, petitioner filed three applications for state post-conviction relief and a federal habeas petition, raising a total of 27 claims. Each was denied. JA487, JA572, JA891, JA895-896; *Glossip v. Trammell*, 530 F. App'x 708 (10th Cir. 2013).

In September 2022, petitioner filed a fourth application for state post-conviction relief. JA785, JA802. In response to what he described as "a media campaign … to place pressure on" the State, then-Oklahoma Attorney General John O'Connor filed a response to the petition stating that he would, "with reluctance, … waive" the "right to argue the claims within [petitioner's] fourth post-conviction application" were barred under Oklahoma law on the ground that "they could have been raised previously." JA717-718. He opposed the application on the merits, adding that the State "strenuously object[ed]" to "yet another post-conviction application in the future" and would "raise all procedural defenses going forward." JA719.

The OCCA rejected the purported waiver of the procedural bar, holding that the "[c]ourt alone will determine whether" that requirement "should be abandoned." JA775. The OCCA determined that petitioner's claims were procedurally barred and denied his application in November 2022. *Id.* Petitioner sought this Court's review in January 2023. No. 22-6500. The State, represented by the current Attorney General, opposed the certiorari petition and explained that the OCCA's application of Oklahoma's procedural bar on post-conviction relief constituted an independent and adequate state-law ground that precluded this Court from exercising jurisdiction. No. 22-6500 Cert. Opp. 10-21. That petition remains pending.

E. Proceedings Below

1. In March 2023, petitioner filed his fifth post-conviction relief application—the one at issue in this case. JA900-923. As centrally relevant here, he argued that a recently disclosed page of notes taken by ADA Smothermon while visiting Sneed in jail in October 2003—reproduced above, *see* p. 2, *supra*—had been withheld in violation of the State's *Brady* obligations. JA927. Petitioner identified two phrases in the notes—"on Lithium?" and "Dr. Trumpet?"—as the basis for the claim. He contends that "Dr. Trumpet" is Dr. Lawrence Trombka, a psychiatrist at the Oklahoma County jail whom petitioner asserts treated Sneed while Sneed was held there after his arrest. JA930.

In response to the application, the Attorney General told the OCCA that he "believe[d he] must concede error under" *Napue*—a case petitioner had not raised—based on Sneed's trial testimony that he had never seen a psychiatrist. JA976-978. The Attorney General did "not suggest[] that Glossip is innocent of any charge

made against him" and stated that he "continues to believe that [petitioner] has culpability in the murder of Barry Van Treese." JA974.

2. The OCCA unanimously denied petitioner's application. It began its decision by recognizing the Attorney General's position but explaining that its review of a successive application like petitioner's "is limited by the" PCPA, which requires an applicant to show that the "factual basis for the claim … was not ascertainable through the exercise of reasonable diligence" and that the asserted error would establish "by clear and convincing evidence" that "no reasonable fact finder would have found the applicant guilty" or imposed the death penalty. JA982 ¶3, JA985-986 ¶16 & n.4 (citing 22 Okla. Stat. § 1089(D)(8)(b)).

The OCCA found that petitioner's claims met neither PCPA requirement. JA990-991 ¶¶25-27. The court explained that the factual basis for the *Brady* and *Napue* claims "was ascertainable through the exercise of reasonable diligence" because the 1997 competency report provided to petitioner's counsel "noted Sneed's lithium prescription" and "Sneed testified at trial that he was given lithium." JA990-991 ¶¶26-27. In addition, the court explained, the asserted errors would not "establish by clear and convincing evidence that, but for the alleged error, no reasonable fact finder would have found [petitioner] guilty of the offense or would have rendered the penalty of death." JA990 ¶26.

In the alternative, the OCCA explained that, "[e]ven if" petitioner could "overcome[the] procedural bar," his claims would fail on the merits. JA989 ¶24; *see* JA991 ¶28. The court held that "the facts do not rise to the level of a *Brady* violation," noting that the allegedly withheld evidence was not material. JA989 ¶24, JA991

¶28. The court also held that "[t]he evidence … does not create a *Napue* error" because Sneed's "testimony was not clearly false" and was "not material under the law." JA991 ¶28. Specifically, Sneed's "known mental health treatment evidence d[id] not create a reasonable probability that the result of the proceeding would have been different had Sneed's testimony regarding his use of lithium been further developed at trial." *Id.*

F. Subsequent Proceedings

Following the OCCA's decision, petitioner sought clemency from the Oklahoma Pardon and Parole Board, the body that Oklahoma's constitution vests with the authority to recommend clemency. Okla. Const. art. VI, § 10; Pardon and Parole Board, Clemency Hearing Minutes 1-2 (Apr. 26, 2023), https://bit.ly/3xDQpcf. After hearing from the Attorney General, petitioner, petitioner's lawyers, the Van Treese family, and others, the board declined to recommend clemency. *Id.* at 3.

Petitioner sought a stay of execution and certiorari from this Court. The Attorney General supported both requests. The Court granted them and directed the parties to address the additional question whether the OCCA's decision was supported by adequate and independent state-law grounds. 144 S. Ct. 691.

SUMMARY OF ARGUMENT

The Court should dismiss this case for lack of jurisdiction or affirm the judgment below.

I. The Court lacks jurisdiction to consider petitioner's *Brady* and *Napue* claims because the OCCA resolved those claims on grounds independent of federal law and adequate to support the judgment. Oklahoma's PCPA contains a familiar procedural bar,

modeled on AEDPA, that precludes consideration of post-conviction relief claims if the applicant *either* (1) could have discovered the factual basis for the claim "through the exercise of reasonable diligence," *or* (2) cannot show "by clear and convincing evidence" that "no reasonable fact finder" would have found the applicant guilty or recommended the death penalty. 22 Okla. Stat. § 1089(D)(8)(b). The OCCA applied both prongs of that statute essentially verbatim in paragraph 26 of its opinion, holding that petitioner's claims are procedurally barred. JA990. That is a paradigmatic independent and adequate state-law ground.

While framed as challenges to the independence and adequacy of the OCCA's state-law holding, the parties ultimately argue that the OCCA should have explained its holding more thoroughly or that its holding is wrong. But neither of those positions is a valid basis for this Court to review a state-court decision grounded in state law. The fact that federal habeas courts commonly bar *Brady* and *Napue* claims under AEDPA's parallel provisions further confirms the independence and adequacy of the OCCA's holding. And the parties' new contention that the OCCA was compelled to accept a purported waiver of the state-law procedural bar is doubly flawed: the Attorney General did not attempt such a waiver in response to the application at issue, and in any event the OCCA permissibly applied the bar.

II. If the Court reaches the merits, it should affirm. At their core, the *Brady* and *Napue* claims both turn on a significant overreading of the "on Lithium?" and "Dr. Trumpet?" references in Smothermon's notes of her meeting with Sneed. The lithium notation cannot support either claim because petitioner was concededly aware of Sneed's lithium prescription and Sneed

testified accurately to having received it. And the parties' reliance on the Dr. Trumpet notation to suggest that Sneed received lithium from a psychiatrist involves multiple layers of unsupported speculation, including that Dr. Trumpet refers to Trombka and that Trombka treated Sneed.

Even if the notes could establish that Sneed received lithium from a psychiatrist, that would not satisfy the materiality requirement for a *Brady* or *Napue* claim. Lithium is prescribed only for mood disorders. Learning that Sneed received a lithium prescription from a psychiatrist would not likely have surprised the jury or affected its decision about petitioner's guilt, particularly because it does nothing to negate petitioner's motive or explain why he covered up the crime for Sneed. Nor would any false testimony from Sneed have been material. The jury knew that Sneed committed murder, was testifying to avoid the death penalty, and contradicted himself on other issues. It is not plausible that the jury found petitioner guilty notwithstanding those flaws in Sneed's testimony but might have changed its mind because it learned that Sneed lied about obtaining lithium from a psychiatrist as opposed to some other medical professional.

III. The Court should not address the question whether due process requires a state court to accept or defer to a confession of error. Petitioner had every incentive to press that question but elected to abandon it, and there is no good reason to resolve it on respondent's urging. In any event, the answer is straightforward. Nothing in the Constitution requires a state court to provide any particular level of deference to a state official's confession of error. And even if there were some requirement of respectful consideration, the

OCCA met it here by acknowledging the Attorney General's position but disagreeing with it on the law and facts—precisely the kind of decision that courts exist to make.

The suggestion that courts must vacate final criminal judgments at the behest of executive officials creates serious separation-of-powers concerns. That is especially true where, as here, the judgment in question is a capital sentence for a haunting murder decades ago. And this Court's intervention is especially unnecessary in this case because the Oklahoma constitution specifies a separate administrative mechanism for pursuing clemency. That petitioner and the Attorney General were unable to obtain relief through that process is not a valid basis for them "to enlist the Judiciary" in obtaining relief through this one. *Grzegorczyk v. United States*, 142 S. Ct. 2580, 2580 (2022) (statement of Kavanaugh, J., respecting denial of certiorari, joined by Roberts, C.J., and Thomas, Alito, and Barrett, JJ.).

ARGUMENT

I. THIS COURT LACKS JURISDICTION OVER PETITIONER'S *BRADY* AND *NAPUE* CLAIMS

"This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds." *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945). Because this Court has "no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). Thus, on "direct review of a state court judgment," the presence of an

"independent and adequate state ground" imposes a "jurisdictional" limitation. *Id.*[1]

That limitation precludes this Court's review of petitioner's *Brady* and *Napue* claims. The OCCA found those claims procedurally barred under two separate PCPA provisions. Each holding is independent of federal law and adequate to support the judgment.

A. The OCCA Found That The PCPA Barred Petitioner's *Brady* And *Napue* Claims

1. The PCPA "honor[s] and preserve[s] the legal principle of finality of judgment" in capital cases. *Smallwood v. State*, 937 P.2d 111, 114 (Okla. Crim. App. 1997). As relevant here, the statute provides that the OCCA "may not consider the merits" of a successive post-conviction relief application in a capital case unless an applicant makes two showings: (1) the "current claims and issues" could not have been previously presented because "the factual basis for the claim … was not ascertainable through the exercise of reasonable diligence," 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." 22 Okla. Stat. § 1089(D)(8)(b).

---

[1] The Court has also "applied the independent and adequate state ground doctrine … in deciding whether federal district courts should address the claims of state prisoners in habeas corpus actions." *Coleman*, 501 U.S. at 729. In that context, the doctrine is not jurisdictional but "is grounded in concerns of comity and federalism." *Id.* at 730.

These two requirements match "almost verbatim" AEDPA's bar on successive federal habeas petitions. *Davison v. State*, 531 P.3d 649, 651 n.1 (Okla. Crim. App. 2023). The first—the diligence prong—tracks 28 U.S.C. § 2244(b)(2)(B)(i). The second—the innocence prong—tracks 28 U.S.C. § 2244(b)(2)(B)(ii), which requires "showing a high probability of actual innocence," *Gonzalez v. Crosby*, 545 U.S. 524, 530 (2005).[2]

2. The OCCA found that both PCPA prongs barred petitioner's claims. JA990-991 ¶¶25-27. The OCCA explained at the outset that its review of petitioner's "fifth application for post-conviction relief … is limited by the" PCPA. JA981-982 ¶¶2-3. The court quoted and described the diligence and innocence prongs. JA985-986 ¶16 & n.4. The court acknowledged the Attorney General's position that post-conviction relief is warranted, but explained that "the concession alone cannot overcome the [PCPA's] limitations on successive post-conviction review." JA990 ¶25.

In paragraph 26 of its opinion, the OCCA directly applied the PCPA's diligence and innocence prongs, stating that the "issue" underlying the *Brady* and *Napue* claims "could have been presented previously, because the factual basis for the claim was ascertainable through the exercise of reasonable diligence, and 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 [petitioner]

---

[2] The OCCA has alternatively described the second PCPA requirement as a "miscarriage of justice standard," which derives from this Court's use of the terms "miscarriage of justice" and "actual innocence" interchangeably in describing the bar on review of successive federal habeas petitions. *Davison*, 531 P.3d at 651 n.1; *see Sawyer v. Whitley*, 505 U.S. 333, 336, 349-50 (1992).

guilty of the underlying offense or would have rendered the penalty of death." JA990 ¶26.

Elaborating on the diligence prong, the OCCA explained that petitioner's "counsel knew or should have known about Sneed's mental health issues" given the 1997 competency report, which was "available to" him and "noted Sneed's lithium prescription." JA991 ¶27. The OCCA found it "controlling" that "this issue could have been and should have been raised, with reasonable diligence, much earlier than this fifth application for post-conviction relief." *Id.*

B. The OCCA's Application Of The PCPA Was Independent Of Federal Law

1. A state-law ground is "independent of federal law" if its resolution does not "depend upon a federal constitutional ruling on the merits." *Stewart v. Smith*, 536 U.S. 856, 860 (2002). The OCCA's application of the PCPA readily satisfies that definition.

Neither the diligence nor innocence prong depends on a federal merits ruling. *See Banks v. Workman*, 692 F.3d 1133, 1145 (10th Cir. 2012) (Gorsuch, J.). Applicants can fail to show sufficient diligence or clear and convincing evidence of innocence regardless of whether their *Brady* or *Napue* claim would succeed (or fail) on the merits. Federal courts thus treat the OCCA's application of the PCPA to *Brady* and *Napue* claims as "independent" of federal law. *Simpson v. Carpenter*, 912 F.3d 542, 570-71 (10th Cir. 2018); *accord, e.g.*, *Wood v. Trammell*, 2015 WL 6621397, at *34 (W.D. Okla. Oct. 30, 2015), *aff'd*, 907 F.3d 1279 (10th Cir. 2018).

Similarly, federal courts reviewing habeas claims regularly apply the parallel language of Section 2244(b)(2)(B) to *Brady* and *Napue* claims without

reviewing their merits. *See, e.g.*, *In re Cantu*, 94 F.4th 462, 471-73 (5th Cir. 2024); *Solorio v. Muniz*, 896 F.3d 914, 920-23 (9th Cir. 2018); *In re Bolin*, 811 F.3d 403, 409-11 (11th Cir. 2016); *Wood v. Spencer*, 487 F.3d 1, 3-5 (1st Cir. 2007). This Court has also applied 28 U.S.C. § 2254(e)(2), which imposes similar diligence and innocence requirements, to a *Brady* claim without resolving its merits. *Williams v. Taylor*, 529 U.S. 420, 429-30, 440 (2000); *see also Sawyer v. Whitley*, 505 U.S. 333, 349-50 (1992) (applying pre-AEDPA innocence standard to bar a *Brady* claim).

The OCCA's application of the PCPA here likewise did not depend on federal law. In paragraphs 25-27 of its opinion, the OCCA explained and applied the PCPA's diligence and innocence prongs without referencing federal law. JA990 ¶¶25-27. To be sure, the court separately rejected the *Brady* and *Napue* claims on the merits. JA989 ¶24; JA991-992 ¶28. But such "an *alternative* holding" does not render the application of a state procedural bar any less independent. *Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989); *accord, e.g.*, *Fox Film Corp. v. Muller*, 296 U.S. 207, 209-10 (1935).

2. The parties offer several arguments that the OCCA's application of the PCPA is dependent on federal law. None is persuasive.

First, the parties contend that the OCCA's decision "is presumptively subject to this Court's review" under *Michigan v. Long*, 463 U.S. 1032 (1983). Pet. Br. 39; *see* Resp. Br. 51. But the *Long* presumption applies only when "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law." 463 U.S. at 1040. In *Long* itself, for example, the state court only "referred twice to the

state constitution in" passing, both times in connection with federal law. *Id.* at 1037 & n.3.

The OCCA's decision here is nothing like that. Although petitioner asserts that the OCCA merely "recit[ed]" the PCPA's requirements, Pet. Br. 41, the OCCA in fact expressly *held* in paragraph 26 of its opinion that "the factual basis for [petitioner's] claim was ascertainable through the exercise of reasonable diligence," and 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 [petitioner] guilty of the underlying offense or would have rendered the penalty of death," JA990 ¶26. That passage applied the PCPA's diligence and innocence prongs almost word-for-word. *Compare id.*, *with* 22 Okla. Stat. § 1089(D)(8)(b).

The "predicate" for applying the *Long* presumption is accordingly absent because the OCCA's application of the PCPA's procedural bar does not "fairly appear to rest primarily on federal law." *Coleman*, 501 U.S. at 735. Alternatively, the OCCA's "plain statement" that the bar applies overcomes the presumption. *Long*, 463 U.S. at 1041. Either way, "it is simply not true that the 'most reasonable explanation' is that the state judgment rested on federal grounds." *Coleman*, 501 U.S. at 737.

Second, the parties contend that the OCCA did not provide enough "support," Pet. Br. 41, or "separate analysis" for its "state-law holding," Resp. Br. 50-51. But this Court's "power is to correct wrong judgments, not to revise opinions." *Herb*, 324 U.S. at 126. Thus, the Court has expressly declined to "impose mandatory opinion-writing standards on state courts as the price of federal respect for their procedural rules." *Johnson v. Lee*, 578 U.S. 605, 611 (2016) (internal quotation marks

and citation omitted). Indeed, even unexplained summary orders can provide independent and adequate state grounds barring federal review. *See id.*; *Walker v. Martin*, 562 U.S. 307, 319 (2011). The OCCA's express reliance on the PCPA's procedural bar makes this case straightforward under those precedents.

In any event, the OCCA did explain its reasoning. Paragraph 27 elaborates why petitioner failed to show "reasonable diligence," which the OCCA deemed "controlling." JA991 ¶27. And the court explained that petitioner had not provided "sufficient information that would convince [it] to overturn the jury's determination that he is guilty of first-degree murder and should be sentenced to death," JA984 ¶12, which addressed the substance of the innocence prong, *see also* JA982-984 ¶¶5-11; JA995 ¶41. Even if the court needed to explain its application of the PCPA bar, that analysis—drawing on the court's extensive familiarity with the case—sufficed. *See Johnson*, 578 U.S. at 611.[3]

Third, the parties try to blur the PCPA's diligence and innocence prongs with the *Brady* and *Napue* standards. Pet. Br. 42-43; Resp. Br. 50. But the PCPA's requirements are distinct. Petitioner acknowledges that the PCPA "has a separate materiality standard," Pet. Br. 42, and the Attorney General recently told this Court that the OCCA's holding that "the factual basis

[3] The Attorney General suggests that the "OCCA never stated that [petitioner's] *Napue* claim was procedurally barred." Resp. Br. 51. But the OCCA unmistakably referred to the *Napue* claim, *see* JA990 ¶25 (describing the "claim[ ] … that Sneed lied about his mental health treatment to the jury" and referring to "alleged false testimony"), and then applied the procedural bar in terms equally applicable to both the *Napue* and *Brady* claims, JA990 ¶26.

for [a *Brady*] claim was previously available" does not make that state-law conclusion "intertwined with federal law," No. 22-6500 Cert. Opp. 17. As those admissions suggest, merging the standards would have broad implications: if applying the diligence or innocence prong is inseparable from resolving the merits of a *Brady* or *Napue* claim, then a state court's rejection of a *Brady* or *Napue* claim on procedural-default grounds could never be independent.

Petitioner's invocation of *Ake v. Oklahoma*, 470 U.S. 68 (1985), and *Foster v. Chatman*, 578 U.S. 488 (2016), illustrates what actual overlap of state and federal law looks like. Pet. Br. 39-41. In *Ake*, a case on direct appeal, the OCCA found a defendant's claim waived because it did not involve "fundamental trial error," which state law defined to include federal constitutional error. 470 U.S. at 74-75. That application, the Court held, was not independent because it involved "an antecedent ruling on federal law." *Id.* at 75. Similarly, in *Foster*, the state court's res judicata holding expressly turned on a determination that the defendant's federal constitutional claim was "'without merit.'" 578 U.S. at 498 (citation omitted). Those precedents underscore why no similar overlap is present here: the OCCA's rejection of petitioner's *Brady* and *Napue* claims involved two antecedent *state*-law holdings—that he had not satisfied the PCPA's diligence and innocence prongs.

C. The OCCA's Application Of The PCPA Was Adequate To Support The Judgment

1. The OCCA's application of the PCPA's procedural bar was also "adequate to support the judgment." *Coleman*, 501 U.S. at 729. Adequacy in this context has a specialized meaning. Because "[s]tate

collateral proceedings are not constitutionally required" at all, *Murray v. Giarratano*, 492 U.S. 1, 10 (1989) (plurality opinion), adequacy does not demand that a state provide any particular degree of review. Nor does adequacy involve inquiring into the correctness of a state court's application of state law; that is precisely what the doctrine *prevents* this Court from doing. *Herb*, 324 U.S. at 126.

The adequacy requirement instead serves as a check against state courts using state law as a pretext to deny federal rights. *See, e.g.*, *Davis v. Wechsler*, 263 U.S. 22, 24 (1923). This Court has accordingly found state-court holdings inadequate where, for example, they applied a procedural rule against a defendant who had no notice that it existed, *Ford v. Georgia*, 498 U.S. 411, 424-25 (1991); required a written motion, even though oral motions were commonly accepted, *Lee v. Kemna*, 534 U.S. 362, 380-88 (2002); or denied a substantive argument because it was miscaptioned, *James v. Kentucky*, 466 U.S. 341, 348-49 (1984).

The Court recently applied those principles to find inadequate a state court's application of a procedural rule that was "entirely new and in conflict with" its precedent—an "exceptional" result "reserved for the rarest of situations." *Cruz v. Arizona*, 598 U.S. 17, 26-27 (2023); *see id.* at 33-34 (Barrett, J., dissenting). By contrast, a state-law ground is almost always adequate when it is "firmly established and regularly followed." *Id.* at 26 (quoting *Kemna*, 534 U.S. at 376); *see, e.g.*, *Johnson*, 578 U.S. at 608; *Walker*, 562 U.S. at 316; *Beard v. Kindler*, 558 U.S. 53, 60-61 (2009).

The OCCA's application of the PCPA here is a paradigmatic example of relying on such a "firmly established and regularly followed" procedural rule.

Beard, 558 U.S. at 60. The OCCA routinely applies the PCPA to belatedly asserted *Brady* claims. *See, e.g.*, *Slaughter v. State*, 969 P.2d 990, 994 (Okla. Crim. App. 1998); *Powell v. State*, 935 P.2d 378, 385 (Okla. Crim. App. 1997). And federal courts have "repeatedly held" that the PCPA "meets the adequacy requirement." *Banks*, 692 F.3d at 1145.

2. The parties offer objections fitting into three categories; none has merit.

First, the parties challenge the adequacy of the OCCA's application of the diligence prong. Pet. Br. 47-49; Resp. Br. 46-47. They argue that the OCCA "defied any reasonable application of state law," Pet. Br. 47, by holding that petitioner should have discovered the factual basis for his *Brady* and *Napue* claims before the state disclosed the prosecutor's notes. But the parties identify no OCCA case, let alone an established body of law, from which the decision below would be an "exceptional" departure. *Cruz*, 598 U.S. at 26. The Attorney General does not even attempt to point to such a case. And petitioner proposes just one: *Davison*. Pet. Br. 48. But *Davison* illustrates how ordinary the OCCA's decision is. There, the OCCA barred five of six claims for lack of diligence. 531 P.3d at 651-54. The only claim to survive was based on counsel's allegedly deficient performance during post-conviction proceedings. *Id.* at 653-54. The fact that the OCCA finds a lack of diligence in some cases but not others hardly suggests that its holding here is inadequate. *See Walker*, 562 U.S. at 318-20.

As noted above, moreover, federal courts regularly find that AEDPA's parallel diligence prong bars *Brady* and *Napue* claims like petitioner's. *See* pp. 18-19, *supra*. This Court did the same under the AEDPA

diligence requirement at issue in *Williams*. 529 U.S. at 440. Those holdings are highly instructive, because this Court will "not lightly 'disregard state procedural rules that are substantially similar to those which [federal courts] give full force.'" *Johnson*, 578 U.S. at 609 (quoting *Beard*, 558 U.S. at 62); *accord Beard*, 558 U.S. at 65 (Kennedy, J., concurring).

In the end, the parties' position reduces largely to the contention that the OCCA wrongly applied the diligence prong. But the adequacy inquiry is not a vehicle for backdoor merits review of state-law rulings. *Herb*, 324 U.S. at 126; *see, e.g.*, *Cruz*, 598 U.S. at 38 (Barrett, J., dissenting).

Second, the Attorney General (but not petitioner) contests the adequacy of the OCCA's application of the innocence prong. Resp. Br. 48-49. That position is even less compelling. The Attorney General asserts that it "beggars belief that a 'reasonable fact finder' would" find petitioner guilty and impose a capital sentence if petitioner could have introduced evidence showing that Sneed had been treated by a psychiatrist for bipolar disorder. Resp. Br. 48 (citation omitted). But the Attorney General cites no cases suggesting that the OCCA's contrary holding departed from settled precedent; he simply disagrees with how the OCCA applied the innocence prong. And he maintains that petitioner has *not* "made a showing of actual innocence—and fully reserve[s] the right to evaluate all evidence and retry him." Resp. Br. 13; *see* JA974.

Third, the parties contend that the OCCA's application of the PCPA is inadequate because the court was compelled to accept the Attorney General's purported waiver of the statute's procedural bar. Pet. Br. 46-47; Resp. Br. 41-46. Neither party advanced that

claim in its certiorari-stage filings. This Court accordingly need not consider the argument, but in any event it is unpersuasive.

As a threshold matter, the Attorney General did not "waive[the PCPA's] procedural hurdles" in his response to the post-conviction relief application at issue here. Resp. Br. 43 (citing JA717-718). The Attorney General instead cites his predecessor's response to petitioner's *fourth* application for post-conviction relief. JA708-770. That submission provided that "the State waives its right to argue the claims *within this fourth post-conviction application* are waived because they could have been raised previously." JA717-718 (emphasis added). The submission added, however, that the "State *will raise all procedural defenses going forward*," including in response to petitioner's then-forthcoming fifth application. JA718-719 (emphasis added).

When the current Attorney General filed his response to petitioner's present application, he did not include an express waiver like the one in the response to the fourth application. JA717-718. He instead told the OCCA: "To the extent that they are consistent with this confession of error, the State adopts and incorporates by reference all prior State briefings to this Court related to [petitioner's] appeals and multiple applications for post-conviction relief." JA975. The Attorney General now asserts that he "incorporated [his] earlier waiver" of the PCPA's procedural bar "by reference" in that sentence. Resp. Br. 14. But the "earlier waiver" the Attorney General claims to have incorporated, *id.*, was limited to the "fourth post-conviction application," and was accompanied by a

commitment to "raise"—not waive—"all procedural defenses going forward," JA717-719.[4]

In any event, the OCCA's application of the PCPA did not "contravene[ ] its own precedent." Pet. Br. 46. That is clear from the OCCA's decision on petitioner's fourth post-conviction relief application. JA717-718. The OCCA there rejected the prior Attorney General's attempted PCPA waiver. JA775. When petitioner sought review of that decision in this Court, the current Attorney General opposed review, contending that the OCCA "*adhered to state law*" in rejecting the waiver, No. 22-6500 Cert. Opp. 13 (emphasis added), and that this Court lacks jurisdiction, *id.* at 10-21. The Attorney General has thus told this Court that the OCCA properly exercised precisely the authority that he now calls "unprecedented." Resp. Br. 43. And the OCCA's rejection of the Attorney General's supposed waiver could not have been "unforeseeable" to petitioner, Pet. Br. 44, when petitioner had seen the OCCA do just that in denying his earlier-filed fourth application, JA775.

Even setting that aside, the parties' waiver argument fails. They contend that the OCCA adopted a different approach to waiver in one case: *McCarty v. State*, 114 P.3d 1089 (Okla. Crim. App. 2005). Pet. Br. 46-47; Resp. Br. 42-44. But while *McCarty* considered

---

[4] Petitioner contends that "the State waived reliance on the [PCPA], instead arguing that its limitations were satisfied." Pet. Br. 46 (citing JA976). But to "waive[ ] reliance" on a defense is different from "arguing that its limitations were satisfied." *Id.* Moreover, the passage of the Attorney General's response that petitioner cites argued only that the limitations of PCPA Section 1089(C) were satisfied. JA976. The applicable provision, however, is Section 1089(D)(8)(b), which imposes a different and higher standard. *See* JA985 ¶16 & n.4.

the merits of a defendant's claims after observing that the State had waived the relevant procedural bar, *see* 114 P.3d at 1091 & n.7, 1092 n.13, 1094 n.24, it did not announce a categorical rule that an express waiver of a procedural bar must always be accepted. *McCarty* thus shows at most that the OCCA has *discretion* to accept a waiver of a procedural bar. And application of discretionary exceptions to a procedural bar does not make that bar inadequate. *See Walker*, 562 U.S. at 320; *Beard*, 558 U.S. at 60-61.

Finally, the Attorney General suggests that the OCCA's decision was inadequate because it did not follow a rule that federal habeas courts apply when presented with a state's waiver of certain procedural defenses. Resp. Br. 45-46 (citing *Wood v. Milyard*, 566 U.S. 463 (2012)). But the Attorney General concededly relies on a rule of federal law, not state law, and he provides no reason to conclude that the OCCA has ever adopted it. In addition, the federal rule applies only to "deliberate" waivers and preserves federal courts' prerogative "to raise a forfeited timeliness defense on their own initiative." *Wood*, 566 U.S. at 466, 473. As noted above, the Attorney General did not deliberately waive the PCPA's bar in response to petitioner's present application. *See* pp. 26-27, *supra*.[5]

II. THE OCCA CORRECTLY REJECTED THE *NAPUE* AND *BRADY* CLAIMS

If the Court reaches the merits, it should affirm. The *Napue* and *Brady* claims turn almost entirely on one page of notes taken by Smothermon during a 2003

[5] Petitioner remains free to assert his *Brady* and *Napue* claims in a subsequent federal habeas petition, subject to applicable limitations.

meeting with Sneed. The parties portray those notes as evidence that "Sneed was seen … by a psychiatrist who prescribed him lithium," Pet. Br. 1-2; *see* Pet. Br. 8-10, 12, 21-26, 30-31, 38, 48; Resp. Br. 10-11, 17-18, 23-27. But the parties' position contains two central defects: The notes do not say what the parties claim they say. And even if they did, the limited additional information they provide—*i.e.*, Sneed was prescribed lithium by a psychiatrist, as opposed to another medical specialist—would not likely have changed the jury's verdict.

A. The Parties Fail To Show A *Napue* Violation

Under *Napue*, "a State may not knowingly use false evidence, including false testimony" from a witness, "to obtain a" conviction. 360 U.S. at 269. A *Napue* violation requires a defendant to establish three elements: (1) the witness's testimony was false, (2) the prosecution knew the testimony was false and failed to correct it, and (3) the false testimony was material—*i.e.*, there is a "reasonable likelihood" it could "have affected the judgment of the jury." *Id.* at 270-71; *see United States v. Bagley*, 473 U.S. 667, 679 n.9 (1985) (plurality op.).

The *Napue* claim pressed by the parties relies on the following testimony from Sneed's direct examination:

> Q. After you were arrested, were you placed on any type of prescription medication?
>
> A. [1] When I was arrested I asked for some Sudafed because I had a cold, but [2] then shortly after that somehow they ended up giving me Lithium for some reason, [3] I don't know why. [4] I never seen no psychiatrist or anything.

> Q. So you don't know why they gave you that?
>
> A. [3] No.

JA312-313. The parties do not dispute statements [1], [2], or [3]. They base the asserted violation on statement [4]—specifically, Sneed's testimony that he had "never seen [a] psychiatrist." *Id.*; *see* Pet. Br. 24-28; Resp. Br. 27-31. That testimony does not support any elements of a *Napue* violation, much less all three.

1. The Parties Have Not Shown That Sneed's Disputed Testimony Was False

a. To prove that testimony is "false" under *Napue*, a defendant must identify some information that "necessarily contradicts" the testimony. *Moore v. Illinois*, 408 U.S. 786, 797 (1972). In *Napue*, that information was a prosecutor's letter stating that he had "promised" a witness a benefit in exchange for testifying, which directly contradicted the witness's testimony that the prosecutor had *not* "promised" such a benefit. 360 U.S. at 266-67, 271; *see Giglio v. United States*, 405 U.S. 150, 150-54 (1972) (similar).

The facts here are markedly different. The parties claim Sneed's testimony that he had not "seen [a] psychiatrist," JA313, is false in light of the "Dr. Trumpet?" notation in Smothermon's notes, JA927. But the "Dr. Trumpet?" notation does not "necessarily contradict[]" Sneed's testimony that he had not seen a psychiatrist. *Moore*, 408 U.S. at 797. At best, it resembles the ambiguous handwritten diagram that this Court in *Moore* found did *not* support a conclusion that the relevant witness "testimony was false." *Id.* at 797-98; *see, e.g.*, *United States v. Aichele*, 941 F.2d 761,

766 (9th Cir. 1991) (rejecting a *Napue* claim that was based on "mere speculation").

The absence of any contradiction on the face of the notes is only the beginning of the problem. Of the four people present when the notes were written—Smothermon, fellow prosecutor Gary Ackley, Sneed's counsel Gina Walker, and Sneed himself—none has ever endorsed the parties' position that the notes show that Sneed saw a psychiatrist. JA939. The Attorney General admits that Smothermon, the notetaker, rejects his reading. Resp. Br. 12 n.4; *see Moore*, 408 U.S. at 797 (relying on the views of the diagram's drawer). Although the parties rely on an affidavit from Ackley, it does not suggest that Sneed said he saw a psychiatrist. JA940. The parties do not suggest that Walker endorsed their reading. And Sneed has consistently stated at least three separate times—in his competency evaluation, at a subsequent competency hearing, and at petitioner's trial—that he did not see a psychiatrist. JA14, JA312-313, JA700.

In short, no one with any relevant knowledge of what Sneed told prosecutors has ever endorsed the parties' interpretation. Even petitioner admitted in his motion for an evidentiary hearing before the OCCA that "any finding about what [the Smothermon notes] meant or what the attorneys did or did not know when they wrote them would be speculation" without additional testimony. App. 6a. Given that record, the OCCA correctly found that the testimony underlying the *Napue* claim "was not clearly false." JA991 ¶28.[6]

[6] The OCCA declined to order an evidentiary hearing. JA995 ¶41. Petitioner has not challenged that decision.

b. The parties assert that Smothermon's notes show that "Sneed was seen … by a psychiatrist who prescribed him lithium." Pet. Br. 1-2; *see* p. 29, *supra*. But if Smothermon's notes matched the parties' description, they would say something like "Sneed said that he saw a psychiatrist, who prescribed him lithium." The notes do not say that, or anything like that. They say "on Lithium?" and "Dr. Trumpet?" JA927.

What the parties appear to mean is that a series of inferences from the notes leads to the conclusion that Sneed's testimony was false. But this Court has never recognized a *Napue* claim requiring multiple inferential steps, and it is not clear that such a theory would satisfy *Napue* even if every step had clear support. In any event, no such support exists here; to the contrary, the parties' chain of inferences breaks down in at least three separate places.

First, the parties do not explain the basis for their asserted link between "Dr. Trumpet?" and Trombka, a psychiatrist who worked at the Oklahoma County Jail in 1997 and 1998. JA930. Although the names may sound similar, petitioner is not correct that "[t]here is no dispute that 'Dr. Trumpet' meant Dr. Trombka." Pet. Br. 31. Smothermon, the author of the notes, "is not convinced Dr. Trombka and 'Dr. Trumpet' are the same person." Resp. Br. 12 n.4. And none of the other participants in the meeting where the notes were taken has endorsed the parties' position that "Dr. Trumpet" is Trombka.

Second, even if Dr. Trumpet and Trombka are the same, the parties identify no evidence that Trombka treated Sneed. Trombka's affidavit is phrased conditionally, stating that he "was the only medical health professional" at the jail "who would have ordered

Mr. Sneed to be prescribed lithium." JA931. But Trombka does not actually say that he treated Sneed. And he states that other, non-psychiatrist physicians "could have ordered … lithium as a prescription," although he "recall[s]" that "another medical doctor also working at the" jail would refer patients to him for psychiatric care. *Id.*

Third, even if the notes could be understood as recording a statement by Sneed that Trombka prescribed him lithium, that would not itself "establish that the testimony offered at trial was false." *United States v. Croft*, 124 F.3d 1109, 1119 (9th Cir. 1997). Courts regularly find that "prior inconsistent statements are insufficient to establish prosecutorial use of false testimony," *United States v. Martin*, 59 F.3d 767, 770 (8th Cir. 1995) (citation and quotation omitted), because it is not possible to know whether the earlier or later statement was false, *see, e.g.*, *United States v. Bingham*, 653 F.3d 983, 995 (9th Cir. 2011); *United States v. Sutherland*, 656 F.2d 1181, 1203 (5th Cir. 1981). As noted, Sneed has stated at least three times, including under oath in court, that he did not see a psychiatrist. *See* p. 31, *supra*. The parties offer no basis to conclude that all of those statements were lies while his purported statement to Smothermon in his jail cell was true.[7]

---

[7] The parties suggest in several places that Sneed testified that he was given lithium by mistake, *see* Pet. Br. 22, 26, 30; Resp. Br. 10, 18, 47, or for a cold, Pet. Br. 25. In fact, Sneed testified that he was given Sudafed for the cold and that he did not know why he was prescribed lithium. JA312-313.

2. The Parties Have Not Shown That Prosecutors Knew Sneed's Disputed Testimony Was False

Even if Sneed's testimony were shown (or assumed) to be false, a witness's false testimony alone does not establish a *Napue* violation; *Napue* applies only to "*knowing*[] use [of] … false testimony" by the prosecution. *Napue*, 360 U.S. at 269 (emphasis added); *see United States v. Agurs*, 427 U.S. 97, 103 (1976); Pet. Br. 24-25. The parties assert that the prosecutors here knew Sneed's testimony was false, *see* Pet Br. 1-2, 9-10, 21-22, 25-26; Resp. Br. 27-28, based entirely on Smothermon's notes. But for many of the reasons outlined above, the notes do not provide evidence that the prosecutors knew Sneed's testimony was false. Smothermon disagrees with the parties' reading of the notes, Resp. Br. 12 n.4; Ackley's affidavit does not suggest that he knew (or thinks today) Sneed's testimony was false; and petitioner told the OCCA that what prosecutors "*did or did not know*" could not be determined on the existing record without resort to speculation, App. 6a (emphasis added). There is accordingly no basis to find the knowledge element satisfied.

3. The Parties Have Not Shown That Sneed's Disputed Testimony Was Material

a. Even if Sneed's testimony that he had not seen a psychiatrist were false and prosecutors knowingly did not correct it, *Napue* permits reversal only where there is a "reasonable likelihood" that the "false testimony could … have affected the judgment of the jury." 360 U.S. at 271. Materiality must be assessed in light "of the entire record." *Agurs*, 427 U.S. at 112; *see, e.g.*, *Hayes v. Brown*, 399 F.3d 972, 992 (9th Cir. 2005)

(Tallman, J., concurring in part and dissenting in part) (explaining that the materiality inquiry requires considering "the marginal effect" of the false testimony). Thus, the critical question here is whether the jury, knowing Sneed had been prescribed lithium by some medical provider, might reasonably have reached a different result on petitioner's guilt if it knew that Sneed had been prescribed lithium by a psychiatrist.

The record, along with common sense, dictates that the answer is no. Lithium has just one medical purpose: treating mood disorders. *See, e.g.*, FDA, *Lithium* [package insert] 1, https://bit.ly/3zr2uSs (listing a single indication: "a mood-stabilizing agent … for the treatment of bipolar I disorder"); JA930-931 (Trombka). It is "general knowledge" that lithium is not used as pain medication or for colds. JA940 (Ackley); JA807 (Sneed's former cellmate). Thus, when Sneed accurately testified that he had been prescribed lithium, a reasonable jury would have understood that it was to treat a mental-health condition. Learning that Sneed received the lithium from a psychiatrist, rather than some other medical provider, would not likely have "surprised the jury" or changed its assessment of Sneed's testimony in any meaningful way. *Turner*, 582 U.S. at 327.

The identity of Sneed's lithium prescriber, moreover, would not have undermined the critical evidence against petitioner. The prosecution showed that petitioner had a motive to murder Van Treese—he was likely to be fired by Van Treese for mismanagement and embezzlement. JA494-496. The evidence also showed that petitioner took elaborate steps to cover up Van Treese's murder and was arrested with an unexplained large sum of cash. JA497-499; Pet. Br. 15-16, 35-36.

None of that evidence is affected by whether Sneed had ever seen a psychiatrist. Likewise, Sneed's medical history does nothing to ameliorate one of the central defects in petitioner's defense—the absence of any plausible reason that petitioner would have risked his liberty and life to help conceal a murder purportedly arranged alone by Sneed. The OCCA thus correctly concluded that any false testimony about whether Sneed saw a psychiatrist would be harmless—and therefore "not material" under *Napue*. JA991 ¶28.

b. The parties dispute that reasoning "in two ways," Pet. Br. 26, but neither has merit.

First, the parties argue that, if the jury had known that Sneed had seen a psychiatrist, it would have been more likely to conclude that the murder was a result of Sneed's "extreme impulsivity," especially given the potential mix of his mental condition and illegal-drug use. Pet. Br. 23, 27; *see* Resp. Br. 25. But the jury already knew that Sneed had been prescribed lithium, used illegal drugs, and behaved impulsively; he admitted that he beat a man to death with a baseball bat in the middle of the night with no advanced planning. JA18, JA312-313, JA318-320, JA348-349. The critical question was whether Sneed did so on his own initiative or at petitioner's direction. The asserted fact that "Sneed's lithium had been prescribed by a psychiatrist," Pet. Br. 26—as opposed to a different practitioner treating his mental-health issues—has little bearing on that question. And to the extent it might, there is no basis to conclude that it would have helped rather than hurt petitioner. *See* JA991 ¶27 ("It is likely counsel did not want to inquire about Sneed's mental health due to the danger of showing that he was mentally vulnerable to [petitioner's] manipulation and control.").

Second, the parties suggest that, if the jury had known that Sneed had been prescribed lithium by a psychiatrist, it would have been materially more likely to doubt his memory and credibility. Pet. Br. 26-28; Resp. Br. 25, 30-31. That is unlikely. Sneed was nobody's idea of a strong witness. He admitted to committing murder. JA348-349. He acknowledged he was testifying to avoid the death penalty. JA357-359. Numerous aspects of his testimony were inconsistent or worse; as the OCCA observed in a prior opinion, "Sneed could not have been impeached any further than he had already been impeached." JA782. The suggestion that the jury would have believed Sneed enough to convict petitioner despite all of those flaws—but would have changed its mind if it had known that he had testified falsely about whether he had seen a psychiatrist—"does not pass the straight-face test." *Kisela v. Hughes*, 584 U.S. 100, 108 (2018) (citation omitted).

B. The Parties Fail To Show A *Brady* Violation

Under *Brady*, "suppression by the prosecution of evidence favorable to an accused ... violates due process where the evidence is material either to guilt or to punishment." 373 U.S. at 87. A prosecutor, however, is not required to deliver his entire file to defense counsel," *Bagley*, 473 U.S. at 675, and courts will not "require a new trial whenever 'a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense," *Giglio*, 405 U.S. at 154 (quoting *United States v. Keogh*, 391 F.2d 138, 148 (2d Cir. 1968) (Friendly, J.)).

Instead, a *Brady* violation occurs only where the (1) evidence at issue is "favorable to the accused, either because it is exculpatory, or because it is impeaching," (2) the evidence was "suppressed by the State, either

willfully or inadvertently," and (3) "prejudice ... ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). The principal basis for petitioner's claim—nondisclosure of Smothermon's notes—does not satisfy those requirements. And to the extent petitioner asserts *Brady* violations based on other information, his claims are also foreclosed.

1. Smothermon's Notes Do Not Support A *Brady* Violation

The parties contend that *Brady* required the prosecution to disclose the "on Lithium?" and "Dr. Trumpet?" references in Smothermon's notes. Pet. Br. 31-38; Resp. Br. 22-27. Petitioner undisputedly knew about Sneed's lithium usage decades ago, Pet. Br. 29, so that notation did not reveal anything "unknown to the defense," *Agurs*, 427 U.S. at 103. The parties accordingly focus their *Brady* arguments "specifically" on the "Dr. Trumpet?" reference. Resp. Br. 23. But that reference, considered in the context of the record, does not satisfy any of the *Brady* elements.

a. First, Smothermon's notes—particularly the "Dr. Trumpet?" reference—do not contain evidence "favorable to the accused." *Strickler*, 527 U.S. at 281-82. No one suggests that the notes are exculpatory of petitioner, and—as detailed above—they could not be used to impeach Sneed because they do not contradict Sneed's testimony. *See* Section II.A.1, *supra*. That sharply distinguishes petitioner's claim from *Brady* violations based on "undisclosed statements" that "directly contradict" a witness's testimony. *Smith v. Cain*, 565 U.S. 73, 76 (2012); *see, e.g.*, *Wearry v. Cain*, 577 U.S. 385, 393 (2016); *Kyles v. Whitley*, 514 U.S. 419, 441-43 (1995). The parties' theory that Smothermon's notes would have undermined Sneed's testimony is

instead "based on mere speculation." *Wood v. Bartholomew*, 516 U.S. 1, 6 (1995).

b. The notes also contain no evidence "suppressed by the State." *Strickler*, 527 U.S. at 282. Indeed, the parties' claim of suppression is undermined by their own arguments. If the parties could really "deduce[ ] ... in short order" that Trombka must have treated Sneed because "[t]he Oklahoma County jail had just one working psychiatrist in 1997 when Sneed was held there," Resp. Br. 10; *see* Pet. Br. 9-10, petitioner could have long ago reached the conclusion that Sneed was likely treated by a psychiatrist.

More fundamentally, petitioner's longstanding knowledge that Sneed was prescribed lithium—and that Dr. King said the "medication is probably helping him control his moods," JA702—gave petitioner all he needed to pursue his theory that Sneed had seen a psychiatrist for mental-health problems. The Ackley affidavit that the parties rely on states that Sneed's mental-health "condition *was disclosed to the parties to the litigation* by filing of a written report in the case by Dr. King." JA940 (emphasis added); *see* JA991 ¶27. There is no mystery about the purposes of a lithium prescription, *see* p. 35, *supra*, and investigating whether a witness who was prescribed lithium saw a psychiatrist is about as self-evident a step as investigating whether a witness who was prescribed eyeglasses saw an optometrist. That petitioner did not do so reflects a "strategic decision," not a constitutional violation. *Bartholomew*, 516 U.S. at 7; *see, e.g.*, *Aichele*, 941 F.2d at 764 ("When, as here, a defendant has enough information to be able to ascertain the supposed *Brady* material on his own, there is no suppression by the government.").

c. Finally, the notes are not "'material' within the meaning of *Brady*." *Turner*, 582 U.S. at 324 (citation omitted). The "mere *possibility* that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense," *Agurs*, 427 U.S. at 109-10 (emphasis added); "petitioner's burden is to establish a reasonable *probability* of a different result," *Strickler*, 527 U.S. at 291.

The parties fall short of that standard. As explained, the "Dr. Trumpet?" notation itself does not undermine any of Sneed's testimony. And even if the parties could connect the "Dr. Trumpet?" reference in the notes to Dr. Trombka, they still fail to provide any evidence that Dr. Trombka treated Sneed. *See* pp. 32-33, *supra*. The notes are thus immaterial. They would not have "put the whole case in such a different light as to undermine confidence in the verdict," *Kyles*, 514 U.S. at 435; they would not have put the case in any different light at all, *see, e.g.*, *Turner*, 528 U.S. at 326-28 (rejecting *Brady* claim based on lack of materiality); *Strickler*, 527 U.S. at 292-96 (same); *Agurs*, 420 U.S. at 113-14 (same).

The parties echo many of their *Napue* materiality claims, suggesting that the notes undermine Sneed's credibility or reinforce his impulsivity. Pet. Br. 32-33; Resp. Br. 24-25. Those theories are unpersuasive for the reasons explained above, *see* pp. 36-37, *supra*, and they fail a fortiori here because *Brady*'s materiality standard is higher than *Napue*'s, *see Bagley*, 473 U.S. at 679 n.9 (plurality op.). Even viewing all the evidence most favorably for the parties, the notes would have at most altered the jury's perception of Sneed from a troubled murderer who took lithium to a troubled

murderer who took lithium from a psychiatrist. That incremental change would have been "too little, too weak, [and] too distant from the main evidentiary points" to create a probability of a different result. *Turner*, 582 U.S. at 326. At best, the identity of the prescriber would have been "largely cumulative" of the lithium evidence itself. *Id.* at 327.

2. The Parties Identify No Other Valid Basis For A *Brady* Claim

The parties briefly suggest a *Brady* claim that extends beyond Smothermon's notes, but no such claim could succeed. Pet. Br. 33-38; Resp. Br. 17-18. To the extent the parties contend that Sneed's asserted diagnosis with bipolar disorder is *Brady* material, they identify nothing in the prosecution files that confirms that diagnosis or could have been disclosed. Smothermon's notes say nothing about bipolar disorder. And while the parties cite a "medical information sheet" appended to Trombka's affidavit, JA933, JA1005, they do not explain where that document came from or how it could support a *Brady* claim. The parties also do not present any evidence the prosecution knew whether Sneed had bipolar disorder, and the affidavit they submit from Ackley says the opposite. *See* JA940 ("I do not recall knowing or discussing with anyone that Justin Sneed was on lithium at any time as treatment for bipolar disorder.").

Petitioner also alludes generally to cumulative materiality review, but he alleges only—and only in passing—that two other categories of information were "suppressed." *Kyles*, 515 U.S. at 436; *see* Pet. Br. 34-35. One is another Smothermon note that petitioner says indicates that he obtained $900 while liquidating his property shortly after the murder. JA949. But these

Smothermon notes are no clearer or more helpful to petitioner than the others, as the OCCA recognized in finding that they "do not clearly have an amount of money" and that petitioner "has not shown that this information is material." JA993 ¶34.

Petitioner also points to certain documents related to testimony about Sneed's use of a knife, but he admitted to the OCCA that a "similar claim was presented" and rejected in an earlier post-conviction relief application. JA908. The OCCA found the claim barred, JA994 ¶¶37-8, and this Court accordingly lacks jurisdiction to review it, *see* Part I, *supra*.

For his part, the Attorney General states generally that "other errors reinforce the need to remedy the confessed *Brady* and *Napue* violations," Resp. Br. 31 n.9, but he does not identify any other errors. Because no errors have been established, no relief on cumulative-error grounds is possible.

C. At A Minimum, Remand For Further Fact Development Is Warranted

At a minimum, the Court should remand for further fact development rather than vacating the conviction. *See, e.g.*, *United States v. Shotwell Mfg. Co*., 355 U.S. 233, 245-46 (1957). As noted, petitioner has conceded the lack of factual basis for his claims on the current record, App. 6a, so an outright reversal would be unwarranted. The lack of information about the meaning of the Smothermon notes and Sneed's medical history, in particular, suggests that further evidentiary development would be appropriate if the Court determines that petitioner's claims can be considered and that the OCCA's decision should not be affirmed.

The OCCA could then determine on an updated record whether relief is warranted under the PCPA.

III. THE OCCA PERMISSIBLY DECLINED TO ADOPT THE CONFESSION OF ERROR

Petitioner sought this Court's review to consider "[w]hether due process of law requires reversal" when "the State no longer seeks to defend" a capital conviction. Pet. i. Having secured certiorari, petitioner expressly abandons that question. Pet. Br. i n.*. This Court should accordingly not decide it. *See Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 527 (1994) (declining to consider question that the "petition presented … but petitioners' brief … abandons").

If the Court considers the question at the Attorney General's request, *see* Resp. Br. 31-40, it should affirm the OCCA's judgment. Nothing in the Constitution compels a state court to afford a particular degree of weight to an executive official's confession of error. And even if there were some minimum requirement, the OCCA met it by exercising its "judicial obligation[] … to examine independently the errors confessed." *Young v. United States*, 315 U.S. 257, 258-59 (1942); *see Sibron v. New York*, 392 U.S. 40, 58 (1968).

A. The Constitution Does Not Require State Courts To Give Executive Officials' Confessions Of Error Any Specified Weight

1. This Court has long held that an executive official's confession of error "does not relieve this Court of the performance of the judicial function." *Young*, 315 U.S. at 258. "The public interest that a result be reached which promotes a well-ordered society is foremost in every criminal proceeding." *Id.* at 259. Once a criminal conviction is final, that "interest is

entrusted to [the judiciary's] consideration and protection as well as that of the enforcing officers." *Id.* It has therefore been "the uniform practice of this Court to conduct its own examination of the record in all cases where the Federal Government or a State confesses that a conviction has been erroneously obtained." *Sibron*, 392 U.S. at 58.

In conducting that examination, a confession of error is "entitled to great weight." *Young*, 315 U.S. at 258. But this Court has never suggested that the Constitution compels any particular deference to the prosecution or relieves courts of their "obligation" to decide cases "upon proper [legal] grounds." *Sibron*, 392 U.S. at 59. Indeed, the Court has also stressed the "special weight" and "respectful treatment" owed to a criminal judgment that "is the final product of a sovereign judicial system." *Id.* at 58. That is presumably why this Court often appoints *amici curiae* to defend criminal judgments that executive officials submit are erroneous —and then adjudicates the merits without any apparent deference to the government. *See, e.g.*, *Terry v. United States*, 593 U.S. 486, 492-95 (2021) (disagreeing with government confession); *Beckles v. United States*, 580 U.S. 256, 269 (2017) (same); *cf. Grzegorczyk*, 142 S. Ct. at 2580 (Kavanaugh, J.,) (explaining that "this Court has no appropriate legal basis to vacate the" judgment below despite the government's confession of error).

The Pennsylvania Supreme Court recently applied similar independent review to a district attorney's confession of error in a capital case, explaining thoroughly why it could not provide post-conviction relief without finding legal error. *Commonwealth v. Brown*, 196 A.3d 130, 143-62 (Pa. 2018). Other courts

have followed the same approach. *See, e.g.*, *Wharton v. Superintendent*, 95 F.4th 140, 144-46 (3d Cir. 2024) (approving rejection of confession of error in capital case); *Andonian v. United States*, 2020 WL 6049933, at *7-14 (C.D. Cal. Aug. 10, 2020) (rejecting confession of error under *Brady*), *aff'd*, 2022 WL 4462695 (9th Cir. Sept. 26, 2022); *see also, e.g.*, *Johnson v. McCaughtry*, 265 F.3d 559, 564 (7th Cir. 2001); *People v. Alvarado*, 133 Cal. App. 3d 1003, 1021 (Cal. Ct. App. 1982); *Parlton v. United States*, 75 F.2d 772, 773 (D.C. Ct. App. 1935).[8]

2. The Attorney General contends that the Due Process and Oath Clauses require reversal of the OCCA's decision because it did not provide sufficiently "respectful consideration" to his "legal opinion." Resp. Br. 36. As suggested by petitioner's decision to abandon that argument despite facing execution and having secured this Court's review, it lacks merit.

As to due process, this Court has explained that the "Bill of Rights speaks in explicit terms to many aspects of criminal procedure, and the expansion of those constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order." *Medina v. California*, 505 U.S. 437, 443 (1992). The Attorney General cites no case applying the Due Process Clause to require a specified level of

[8] *Parlton*, which this Court cited in *Young*, 315 U.S. at 259, traced the requirement of independent judicial review despite a confession of error to English practice, where the Attorney General was told that "his confessing an error in law would not do: the [court] must judge it to be an error," "for their judgment would be a precedent." 75 F.2d at 772 (quoting *Rex v. Wilkes*, 98 Eng. Rep. 327, 341 (1770)).

deference to confessions of error, and no basis for such a reading exists.

The Oath Clause is an even less likely source for the Attorney General's proposed rule. While he is bound by oath to support the Constitution, Resp. Br. 33-34, so are "judicial Officers" of the OCCA, U.S. Const. art. VI, cl. 3; *see Sumner v. Mata*, 449 U.S. 539, 549 (1981). If oathtaking has any bearing here, it provides "a reason to defer to" the OCCA judges who have sworn to apply the Constitution in reviewing criminal convictions. Richard M. Re, *Promising the Constitution*, 110 Nw. U. L. Rev. 299, 342 (2016) (citing *Brecht v. Abrahamson*, 507 U.S. 619, 636, 638 (1993)).

The Attorney General suggests that his confession is different from others because it comes in a capital case, it involves a claim of prosecutorial misconduct, and he is a statewide official. Resp. Br. 35-37. In fact, some of those features have been present in prior confessions of error rejected by courts, and this Court has rejected confessions by nationwide officials when warranted. *See* pp. 44-45, *supra*. But the deeper problem is that none of those asserted distinctions supports the Attorney General's claim that the Constitution (or other federal law) compels the rule he advances. On direct review from the OCCA's judgment, this Court has no other basis to grant relief.

B. The OCCA Sufficiently Considered The Confession Of Error

Even if the Constitution did impose a "respectful consideration" standard for state courts' treatment of executive officials' confessions of error, Resp. Br. 36, the OCCA's decision would meet it. The OCCA expressly acknowledged the Attorney General's position, JA981-

982 ¶3, and explained why it had decided to deny relief—"the concession alone cannot overcome the limitations on successive post-conviction review," and the "concession is not based in law or fact," JA990 ¶25. That makes this case different from *Escobar v. Texas*, 143 S. Ct. 557 (2023), in which this Court remanded for the Texas Court of Criminal Appeals to address a confession of error that it had not considered.

While demanding greater respect from the OCCA, the Attorney General shows little in return. He asserts that "[t]he OCCA gave the State's confession of error precisely zero weight," exhibited "cavalier disregard for the State's considered judgment," and showed "desperation to avoid giving the State's confession here the weight it was due." Resp. Br. 32, 35, 38. Those allegations are unfounded. That the OCCA rejected the Attorney General's legal arguments does not mean that the court disregarded his position any more than he disregarded the court's position when he called it "flatly wrong factually and legally." Resp. Br. 26; *cf. FCC v. Prometheus Radio Project*, 592 U.S. 414, 426 (2021) ("The FCC did not ignore the [contested] studies. The FCC simply interpreted them differently.").

The Attorney General's ultimate concern appears to be that he faces an "impossible position" because he cannot singlehandedly stop petitioner's execution. Resp. Br. 38. But as he implicitly acknowledges, that position is not the result of any interpretation of federal law by the OCCA. *Id.* It exists because the Oklahoma constitution does not authorize the Attorney General to grant clemency. Okla. Const. art. VI, § 10. Instead, the Pardon and Parole Board makes clemency recommendations to the Governor. *See id.* The Attorney General presented his views on clemency to

the Board, but the Board—after hearing from others, including the son of Barry Van Treese—declined to adopt them. Resp. Br. 15-16.

The Attorney General has no valid basis "to enlist the Judiciary" to accomplish what he could not through the process prescribed by the state constitution. *Grzegorczyk*, 142 S. Ct. at 2580 (Kavanaugh, J.). And allowing him to do so would create separation-of-powers concerns. If they could effectively compel judges to vacate criminal convictions, executive officials "would have the powers of courts, while courts would be reduced to mere rubber stamps." *Brown*, 196 A.3d at 149. "Every conviction and sentence would remain constantly in flux, subject to reconsideration based upon the changing tides of the election cycles." *Id.* And accountability would be blurred, with courts facing the blame for the decisions of officials in other branches. By considering the Attorney General's position but deciding this case based on "law" and "fact," JA990 ¶25—as it has in meticulously reviewing petitioner's case for the past two decades—the OCCA properly discharged its judicial duty and complied with any applicable constitutional requirement.

CONCLUSION

This Court should dismiss the case for lack of jurisdiction. If it reaches the merits, the Court should affirm the judgment below.

Respectfully submitted,

NICHOLAS J. CALUDA
QUINN EMANUEL
URQUHART
& SULLIVAN, LLP
700 Louisiana Street
Suite 3900
Houston, TX 77002
(713) 221-7000

CHRISTOPHER G. MICHEL
Counsel of Record
RACHEL G. FRANK
ALEX VAN DYKE
QUINN EMANUEL
URQUHART
& SULLIVAN, LLP
1300 I Street NW, Suite 900
Washington, DC 20005
(202) 538-8000
christophermichel@
quinnemanuel.com

Court-Appointed *Amicus Curiae*

July 8, 2024

APPENDICES

APPENDIX A

TABLE OF CONTENTS

Constitutional and Statutory Provisions

U.S. Const. amend. XIV § 1 (Due Process Clause) 1a

U.S. Const. art. VI cl. 3 (Oath Clause) 1a

Okla. Const. art. VI § 10 (Reprieves, commutations, paroles and pardons) 1a

22 Okla. Stat. § 1089(D)(8) (Post-Conviction Procedure Act) 3a

28 U.S.C. § 2244(b)(2) 4a

28 U.S.C. § 2254(e)(2) 4a

U.S. Const. amend. XIV, § 1 (Due Process Clause)

No state shall … deprive any person of life, liberty, or property, without due process of law ….

U.S. Const. art. VI, cl. 3 (Oath Clause)

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution ….

Okla. Const. art. VI § 10
(Reprieves, commutations, paroles and pardons)

There is hereby created a Pardon and Parole Board to be composed of five members; three to be appointed by the Governor; one by the Chief Justice of the Supreme Court; one by the Presiding Judge of the Criminal Court of Appeals or its successor. … The appointed members shall hold their offices coterminous with that of the Governor and shall be removable for cause only in the manner provided by law for elective officers not liable to impeachment. It shall be the duty of the Board to make an impartial investigation and study of applicants for commutations, pardons or paroles, and by a majority vote make its recommendations to the Governor of all persons deemed worthy of clemency. Provided, the Pardon and Parole Board shall have no authority to make recommendations regarding parole for persons sentenced to death or sentenced to life imprisonment without parole.

The Pardon and Parole Board by majority vote shall have the power and authority to grant parole for

nonviolent offenses after conviction, upon such conditions and with such restrictions and limitations as the majority of the Pardon and Parole Board may deem proper or as may be required by law. …

The Governor shall have the power to grant, after conviction and after favorable recommendation by a majority vote of the Pardon and Parole Board, commutations, pardons and paroles for all offenses, except cases of impeachment, upon such conditions and with such restrictions and limitations as the Governor may deem proper, subject to such regulations as may be prescribed by law. Provided, the Governor shall not have the power to grant paroles if a person has been sentenced to death or sentenced to life imprisonment without parole. The Legislature shall have the authority to prescribe a minimum mandatory period of confinement which must be served by a person prior to being eligible to be considered for parole. The Governor shall have power to grant after conviction, reprieves or leaves of absence not to exceed sixty (60) days, without the action of the Pardon and Parole Board.

The Governor shall communicate to the Legislature, at each regular session, each case of reprieve, commutation, parole or pardon granted, stating the name of the person receiving clemency, the crime of which the person was convicted, the date and place of conviction, and the date of commutation, pardon, parole or reprieve.

The Pardon and Parole Board shall communicate to the Legislature, at each regular session, all paroles granted, stating the names of the persons paroled, the crimes of which the persons were convicted, the dates and places of conviction, and the dates of paroles.

22 Okla. Stat. § 1089(D)(8)
(Post-Conviction Procedure Act)

[I]f a subsequent application for post-conviction relief is filed after filing an original application, the Court of Criminal Appeals may not consider the merits of or grant relief based on … a subsequent application, unless: …

b. (1) the application contains sufficient specific facts establishing that the current claims and issues have not and could not have been presented previously in a timely original application or in a previously considered application filed under this section, because the factual basis for the claim was unavailable as it was not ascertainable through the exercise of reasonable diligence on or before that date, 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.

28 U.S.C. § 2244(b)(2)

A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless— …

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) 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 constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2)

If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on— …

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

APPENDIX B

TABLE OF CONTENTS

Petitioner's Motion for Evidentiary Hearing
(Okla. Crim. App. Mar. 27, 2023).....5a

APPENDIX B

IN THE COURT OF CRIMINAL APPEALS
THE STATE OF OKLAHOMA

[Filed March 27, 2023]

Oklahoma County Case No. CF-97-256

RICHARD GLOSSIP,

Petitioner,

v.

STATE OF OKLAHOMA,

Respondent.

Court of Criminal Appeals
Direct Appeal Case No. D-2005-310

Post-conviction Case No. PCD-2004-978
Post-conviction Case No. PCD-2015-820
Post-conviction Case No. PCD-2022-589
Post-conviction Case No. PCD-2022-819

No. _____

MOTION FOR EVIDENTIARY HEARING

Pursuant 22 O.S. § 1089(D)(5) and Rule 9.7, Rules of the Court of Criminal Appeals, Mr. Glossip requests an evidentiary hearing be held on his successive post-conviction application. In support of this request, he incorporates by reference the facts plead in the application, the arguments contained in the respective

propositions for relief and the supporting evidence presented with the application. The materials submitted show, by clear and convincing evidence, that the evidence sought to be presented at a hearing is likely to have support in law and fact and be relevant to the allegations raised in the successive application for post-conviction relief (the "Application"). If the factual allegations are true, Mr. Glossip is entitled to relief. An evidentiary hearing should be held as to all propositions in the Application.

In particular, the resolution of these claims turns in part on interpretation of prosecutors' notes, and actions taken in court based on those notes. Without their testimony, any finding about what they meant or what the attorneys did or did not know when they wrote them would be speculation. If the notes could reasonably reflect material exculpatory evidence being withheld, then a hearing is necessary, even if another explanation is possible, because the resolution of the claim depends on the determination of a disputed fact.

At the hearing on this proposition, Mr. Glossip would expect to call some or all of the following witnesses:

Justin Sneed

Connie Smothermon

Gary Ackley

Dr. Chai Choi

Paul Melton

Dr. Peter Speth

Dr. Larry Trombka

Chuck Loughlin

The anticipated testimony of these witnesses is consistent with the contents of the declarations and affidavits submitted with the Application and the factual allegations in the Application.

Respectfully submitted,

/s/ Warren Gotcher
Warren Gotcher, OBA # 3495