No. 22-7466

IN THE

Supreme Court of the United States

RICHARD EUGENE GLOSSIP,

Petitioner,

vs.

STATE OF OKLAHOMA,

Respondent.

On Writ of Certiorari to the Oklahoma Court of Criminal Appeals

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION SUPPORTING AFFIRMANCE/DISMISSAL

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QUESTIONS PRESENTED

1. Whether the Oklahoma Court of Criminal Appeals correctly rejected on the merits the claims asserted under *Brady* v. *Maryland* and *Napue* v. *Illinois*.

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

This brief *amicus curiae* will address Question 2.

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INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

At the petition stage of this case, CJLF assisted the Van Treese family with their *amicus* brief in opposition to the petition. CJLF's legal director (and counsel on the present brief) wrote Part I of that brief on the jurisdictional question. With the Court's express addition of jurisdiction and the independent state ground to the questions presented, as well as substantial briefing of the point in the "top side" briefs, CJLF has concluded that it needs to file its own brief at the merits stage.

CJLF has long been concerned with repeated attacks on criminal judgments, as this is a major issue impacting surviving victims and families of deceased victims. CJLF has participated in many of this Court's most important cases on successive petitions, including *McCleskey* v. *Zant*, 499 U. S. 467 (1991), *Felker* v. *Turpin*, 518 U. S. 651 (1996), and *Jones* v. *Hendrix*, 599 U. S. 465 (2023). CJLF has also participated in many important cases relating to independent state grounds, including *Coleman* v. *Thompson*, 501 U. S. 722 (1991), and *Walker* v. *Martin*, 562 U. S. 307 (2010). In the absence of a miscarriage of justice (and there is none in

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1. No counsel for a party authored this brief in whole or in part. No counsel, party, or any person or entity other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

this case), such attacks are contrary to the interests CJLF was formed to protect.

SUMMARY OF ARGUMENT

Whether prosecutors' procedural waivers and confessions of error are binding on a state court in proceedings under state law is a state-law question not subject to review by this Court. States are not obligated to follow the lead of the federal courts in these matters. Given that state governments do not generally have a unitary executive and often have multiple separately elected prosecutors, there are good reasons for giving courts the discretion to reject confessions and waivers.

The successive petition rule invoked in this case is independent of federal law. Although the state procedural rule and federal substantive rule have considerable overlap in the facts to be applied, those facts are applied to different rules of law, and neither legal conclusion depends on the other. In particular, the miscarriage of justice requirement for the state rule is a much higher hurdle than the materiality requirement of the federal rule. Evidence could easily be material for *Brady* and yet fall far short of showing the miscarriage of justice required for a successive petition. The state rule is therefore independent.

The state rule is adequate within the meaning of this Court's cases on that point. Waivers by the prosecution and their acceptance or rejection by the state court do not affect whether a rule itself permits the defendant to determine what he needs to do to make his claim, which is the core concern of the adequacy rule. Further, a single case where the state court accepted a waiver under very different circumstances does not render all future rejections of waivers inadequate. Finding inadequacy from a record of application that is

something less than mechanical predictability is the approach that this court rejected in *Walker* v. *Martin*.

No discrimination against federal rights has been shown in this case. The statute on its face applies to all claims. The mere fact that a meritorious *Brady* claim could potentially be barred in a successive petition does not establish discrimination. The parallel federal rules bar meritorious claims as well.

The independent state ground is a jurisdictional bar in this Court. It does not matter whether it was jurisdictional in the state court. The writ of certiorari should be dismissed for lack of jurisdiction.

ARGUMENT

The facts and case are stated in the Brief for Court-Appointed *Amicus Curiae* at pages 5-12 ("Appt. Am. Brief") and in the Brief of Victim Family Members Derek Van Treese, Donna Van Treese, and Alana Mileto as *Amici Curiae* (Van Treese Merits Brief).

I. Whether procedural waivers and confessions of error are binding on the state court is a question of state separation of powers and not a federal question.

The Oklahoma Attorney General (OAG) is particularly incensed that the Oklahoma Court of Criminal Appeals (OCCA) invoked the State's successive petition statute despite his "express waiver." Brief for Respondent 41 ("Resp. Brief"). He denounces the decision as "untenable" and an arrogation of power. *Id*., at 41-42. As the appointed *amicus* has noted, the Attorney General did not waive the statute at all, much less expressly. See Appt. Am. Brief 26-27.

Aside from that problem, however, who is to say that the OAG has the absolute power to waive a statute and that the state court has no power to decline the waiver? That is a question of state law. "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury* v. *Madison*, 1 Cranch. (5 U. S.) 137, 177 (1803). It is just as emphatically the province and duty of the *state* court of last resort to say what the law of the *state* is, and its decision is not reviewable by this Court. See *Murdock* v. *Memphis*, 20 Wall. (87 U. S.) 590, 634-635 (1875). There are "extreme circumstances" involving an " 'obvious subterfuge to evade consideration of a federal issue,' " *Mullaney* v. *Wilbur*, 421 U. S. 684, 691, and n. 11 (1975), which we will discuss in Part III, but in general the waivability issue is within the authority of the state court to decide.

Respondent at page 45 quotes *Wood* v. *Milyard*, 566 U. S. 463, 466 (2012), for the proposition that " 'A court is not at liberty … to bypass, override, or excuse a State's deliberate waiver' of a procedural safeguard it is entrusted to assert or excuse when justice so demands." This quote is taken out of context. "This case concerns the authority of a *federal court* to raise, on its own motion, a statute of limitations defense to a habeas corpus petition." *Id.*, at 465 (emphasis added). *Wood* does not say anything about the authority of a state court to raise a state-law procedural bar on its own motion.

Petitioner relies on a federal case, *Gray* v. *Netherland*, 518 U. S. 152, 166 (1996), for the proposition that, generally, a procedural defense is lost if not raised by the state. Brief for Petitioner 46 ("Pet. Brief"). However, federal law illustrates that default and waiver of non-jurisdictional procedural defenses is a policy question. It can be decided by the courts or by statute.

In *Granberry* v. *Greer*, 481 U. S. 129 (1987), this Court decided that in exceptional cases a federal court of appeals could raise the exhaustion issue *sua sponte* when "the State fails, whether inadvertently *or otherwise*," to raise it. *Id.*, at 134 (emphasis added). The implication was that even an intentional waiver was not necessarily binding on the court. Congress later settled the question by specifying that only express waivers would serve to waive the requirement, 28 U. S. C. § 2254(b)(3), but states may decide their own policy issues differently.

There are reasons why states may choose to limit the ability of a prosecutor's office to "take a dive" in a collateral attack on a final criminal judgment. Unlike the federal government, most states do not have a unitary executive. The pardon power is typically vested in the governor, or sometimes in a board either exclusively or in conjunction with the governor. See, e.g., Okla. Const., Art. VI, § 10 (governor on recommendation of the board). If the separately elected attorney general of a state or the district attorney of a county or other subdivision could simply walk into court, confess error, and waive all procedural bars with no discretion in the court to reject the confession and waiver, that would effectively vest pardon power in these other officials.

This is not speculation. In Los Angeles, George Gascón was elected district attorney with a massive infusion of outside campaign money. See Zack Smith & Charles D. Stimson, Rogue Prosecutors: How Radical Soros Lawyers Are Destroying America's Communities, ch. 3, n. 245 and accompanying text (2023). He then set about undoing all capital judgments from the county by systematically conceding error regardless of the facts, law, or justice of the case. See Cady, *Gascón's Secret Scheme to Release a Convicted Cop Killer and Mexican*

Mafia Shot Caller (Nov. 28, 2023), https://www.laadda.com/2023/11/28/gascons-secret-scheme-to-release-a-convicted-cop-killer-and-mexican-mafia-shot-caller/.

Even the Governor of California cannot unilaterally commute the sentence of a repeat felon. The people have added a requirement of consent of a majority of the California Supreme Court as a check on the miscarriage of justice that can follow from the misuse of the clemency power. See Cal. Const., Art. V, § 8(a). Yet a county district attorney would be able to do it if his concessions were binding on a court.

Prosecutors are generally authorized to represent the state or its people in court. Yet a state may legitimately decide that authorizing a separately elected official to confess error where there is none or waive a protection for the finality of judgments that the legislature has seen fit to enact vests too much power in one official. The Attorney General protests that the OCCA is using the statute "to force the State to carry out an execution against its will." Resp. Brief 41. Even though he is authorized to represent the State in this court case, the Attorney General is not the entire government of the State of Oklahoma, and his will is not the State's will. The State's separation of powers gives the Oklahoma Court of Criminal Appeals the last word on whether he can "take a dive" to vacate a judgment that is actually valid in fact and in law, as found by the State's court of last resort on these matters. Further, the courts cannot force an execution if the Governor grants a reprieve. Okla. Const., Art. VI, § 10.

"This Court has held that the separation-of-powers principles that the Constitution imposes upon the Federal Government do not apply against the States. See *Dreyer* v. *Illinois*, 187 U. S. 71, 83-84 (1902)." *Stop the Beach Renourishment, Inc.* v. *Florida Dep't of Envtl. Prot.*, 560 U. S. 702, 719 (2010) (plurality opinion). If

the state court of last resort says that the Attorney General's waiver of the successive petition statute is not binding on that court, then it is not, at least until the Legislature says otherwise. This is not a federal question.[2]

II. The successive petition ground of decision was clearly stated and independent of federal law.

An adequate and independent state ground bars review of a state court decision in this Court, it has long been established. See, e.g., *Florida* v. *Powell*, 559 U. S. 50, 56 (2010). Although the independence and adequacy requirements are usually stated together, they have different origins and purposes. We will address independence in this part and adequacy in the next part.

A. Oklahoma's Successive Petition Statute.

The OCCA held that its "review is limited by the Oklahoma Post-Conviction Procedure Act[,] Title 22 O.S.Supp.2022, § 1089(D)(8),[3] which provides for the filing of subsequent applications for post-conviction relief," J. A. 985, and it quoted that provision in footnote 4.

This statute looks remarkably like 28 U. S. C. § 2244(b)(2), the statute for federal habeas corpus petitions by state prisoners who present new claims in a second or successive petition. This is not a coincidence. Both statutes were enacted in the wake of the bombing of the federal courthouse in Oklahoma City.

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2. Adequacy of the state rule is a federal question, but a different one. See Part III, *infra*.

3. Cited below as § 1089(D)(8).

Although the Oklahoma Legislature moved faster, it largely copied its 1995 statute from a bill that eventually became the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). See *Davison* v. *State*, 2023 OK CR 11, ¶9, n. 1, 531 P. 3d 649, 651 (Okla. Crim. App. 2023).

Paragraph (D)(8) governs successive and untimely petitions. Subparagraph (D)(8)(a), for new law, is not at issue in this case. Subparagraph (D)(8)(b), like 28 U. S. C. § 2244(b)(2)(B), is for newly discovered facts and has two requirements, both of which must be met. The first requires not only that the defense did not know the facts but also could not have discovered them with reasonable diligence. In the second, the Oklahoma Legislature (and Congress) created a rule more strict than the prior case law requirement of *McCleskey* v. *Zant*, 499 U. S. 467 (1991). *McCleskey* adopted the standard that applied (and still does) to procedurally defaulted claims: either (1) cause and prejudice *or* (2) a fundamental miscarriage of justice. See *id*., at 493-494.[4] The new standard requires a particular kind of cause *and* a miscarriage of justice.

In one respect, the Oklahoma standard is more lenient than the federal one. While 28 U. S. C. § 2244(b)(2)(B)(ii) requires innocence of the underlying offense to qualify for the miscarriage of justice prong, § 1089(D)(8)(b)(2) includes cases where "no reasonable fact finder ... would have rendered the penalty of death."

4. *Amicus* CJLF suggested this standard. See *id*., at 523, n. 10 (Marshall, J., dissenting).

B. Fair Appearance and Plain Statement.

With an out-of-context quote from *Michigan* v. *Long*, 463 U. S. 1032, 1044 (1983), Petitioner contends that there is a presumption against the independence of the state ground unless there is a "plain statement" to the contrary in the opinion. Pet. Brief 39. The group of academic *amici* who call themselves "federal court scholars" make a similar claim. Brief for Federal Court Scholars as *Amici Curiae* 5, citing *Harris* v. *Reed*, 501 U. S. 722 (1989) ("FCS Brief").

This Court explained the error of similar arguments in *Coleman* v. *Thompson*, 501 U. S. 722 (1991). The petitioner in that case, as in this one, "has read the rule out of context." *Id*., at 736. "The [*Long*] presumption, like all conclusive presumptions, is designed to avoid the costs of excessive inquiry where a *per se* rule will achieve the correct result in almost all cases." *Id*., at 737. "A predicate to the application of the [*Long*/]*Harris* presumption is that the decision of the last state court to which the petitioner presented his federal claims must fairly appear to rest primarily on federal law or to be interwoven with federal law." *Id*., at 735. If not, the presumption will not reach the correct result most of the time, and it does not apply. *Id*., at 737.[5]

In this Court, the case is entirely about Proposition One of Glossip's petition. Compare Petition for Certiorari i (question presented) with J. A. 902, 907, 908, 911, 913 (other propositions not in the QP). The OCCA discussed the procedural requirements in Part III, J. A. 985-985, even quoting section 1089(D)(8) nearly in full, and it returned to Propositions One and Two in Part V. The OCCA begins the discussion by

5. Justice O'Connor wrote the opinions of the Court in both *Long* and *Coleman*.

noting, "*Even if* this claim overcomes procedural bar, the facts do not rise to the level of a *Brady* violation.[6]" J. A. 989, ¶ 24 (emphasis added). This is a holding on the merits, explained in the remainder of this paragraph, but "even if" indicates that the merits and the procedural bar are different issues. An alternative holding on the merits does not impair the independence of the state procedural ground. See *Harris* v. *Reed*, 489 U. S. 255, 264, n. 10 (1989). In paragraph 25, the OCCA notes the State's concession on the merits but holds that it "cannot overcome the limitations on successive post-conviction review. See 22 O.S.Supp.2022, § 1089(D)(8)." J. A. 990. If a plain statement were required, that is it.

But a plain statement is not required because the next paragraph is unambiguously a holding purely on state procedural grounds, not dependent on the *Brady* rule nor intertwined with it. The OCCA states its holding in the words of the statute, not the words of the *Brady* line of cases:

> "¶26 This issue is one that 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 the applicant guilty of the underlying offense or would have rendered the penalty of death." J. A. 990.

Whether diligence has any part at all in the *Brady* line is debatable, as discussed *infra*, at 14, but the requirement is explicitly in the statute. Even more clearly, "the facts are not sufficient to establish by clear

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6. [Opinion note 7]: "*Brady* v. *Maryland*, 373 U. S. 83 (1963). Oklahoma clearly follows the dictates of *Brady* ...."

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" is verbatim from the statute and is far removed from the *Brady* materiality standard. On its face, this holding is pure state law, and, as explained *infra*, at 19, it is certainly correct. It does not fairly appear to be dependent on federal law. The *Long*/*Harris* presumption does not apply. Even if it did, the explicit citation of the statutory bar in paragraph 25 and the holding in the words of the statute in paragraph 26 amount to a plain statement.

C. Independence.

1. Generally.

The reason why a state ground that is dependent on the answer to a federal question does not preclude this Court's review follows from the reason why state grounds generally do have such a preclusive effect. "It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions." *Herb* v. *Pitcairn*, 324 U. S. 117, 125-126 (1945). If the state ground is independent, then a reversal on the federal question would not change the judgment. *Id*., at 126. If a reversal on the federal question would require reconsideration of the state ground, then it is dependent.

In criminal cases, the dependent (or ambiguous) state ground most typically occurs when the state constitution contains substantially the same provision as the federal, and the state courts generally follow this Court's pronouncements as to the federal provision's meaning when applying the state provision. That was

the situation in *Long*. The Michigan Supreme Court reversed a decision of that state's intermediate appellate court, holding that it had misapplied *Terry* v. *Ohio*, 392 U. S. 1 (1968). See *People* v. *Long*, 413 Mich. 461, 471 (1982). The opinion concluded that the search violated both the Fourth Amendment and the analogous provision of the Michigan Constitution. *Id*., at 473. No Michigan precedents giving that provision a different meaning are mentioned. This is the kind of decision that fairly appears to be based on federal law. See *Michigan* v. *Long*, 463 U. S., at 1043-1044.

Ake v. *Oklahoma*, 470 U. S. 68 (1985), presented a situation where a state procedural default rule depended on the merits of a federal constitutional claim. The state's default rule did not apply to "fundamental" errors, and under the state's case law at the time all federal constitutional errors were deemed fundamental. *Id*., at 74-75. The present statutory rule has no such exception. See § 1089(D)(8), last para.

Foster v. *Chatman*, 578 U. S. 488, 498 (2016), involved a state rule against reasserting on habeas corpus a claim previously rejected on appeal with an exception for a "change in the facts sufficient to overcome the res judicata bar." The state court's analysis of whether the newly discovered evidence was sufficient for this purpose required a decision of the merits of the federal claim. *Ibid*. No such dependence is present in this case. The OCCA's holding in paragraph 26 that Glossip had not met the requirements of the statute does not refer to and is not dependent on its holding in paragraph 24 that Glossip's *Brady* claim is without merit. Nor does it refer to or depend on the statement in paragraph 28 that the *Napue* issue (not in the petition but raised by the Attorney General) was also without merit. The claim that the holding is dependent appears to be based on the circumstance that the merits

and the procedural bar involve some of the same facts and the court's assessment of those facts. This does not create dependency, but it does require some exploration.

2. Parallel requirements.

The arguments of the parties that OCCA's procedural decision is not independent of federal law of *Brady* v. *Maryland* relate to the fact that the procedural bar has parallels with some of the elements of *Brady* and involve many of the same facts. See Pet. Brief 39-43; Resp. Brief 50; see also FCS Brief 20-21. In *Strickler* v. *Greene*, 527 U. S. 263 (1999), this Court noted the parallels between some of the elements of *Brady* and a very different procedural default standard, the cause-and-prejudice rule for considering a claim on an initial federal habeas corpus petition despite a default in state court. See *id*., at 282; see *Engle* v. *Issac*, 456 U. S. 107, 128-129 (1982). This was not an independence question, as both rules are federal, but it is illuminating.

A *Brady* claim requires (1) favorable evidence (exculpatory or impeaching), (2) suppressed by the State, and (3) resulting prejudice, which is the same as the evidence being "material." *Strickler*, 527 U. S., at 281-282. Suppression constitutes cause, and materiality equals prejudice. Given the congruence of the standards, a single discussion of the facts answers the application of both rules, but they are still separate rules. The same evidence that established suppression also established cause. The same evidence that failed to establish materiality also failed to establish prejudice. See *id*., at 296.

3. The diligence prong.

The present case is not an initial habeas corpus petition, for which the relatively low hurdle of cause and prejudice for a defaulted claim is appropriate. This is the *fifth* state collateral review, see J. A. 981, ¶ 2, for a prisoner who has also had a full round of federal habeas corpus review. See J. A. 891, 894-895. Both the Oklahoma Legislature and Congress have decided to raise the bar for repeated petitions, reserving them for exceptional situations.

The first prong requires more than simply facts that were not known to the defense previously. It requires that "the factual basis for the claim was unavailable as it was *not ascertainable through the exercise of reasonable diligence* on or before" the date of the previous applications. § 1089(D)(8)(b)(1) (emphasis added). This might or might not be a higher hurdle than the suppression prong of *Brady*. Authority is divided as to whether a fact not known to the defense but ascertainable through reasonable diligence can be *Brady* material. See 6 W. LaFave et al., Criminal Procedure § 24.3(b), pp. 438-443, and n. 87 (4th ed. 2015) and pp. 139-140 (2023-2024 Supp.). In addition, successive petition diligence requirements have a different time frame. See *In re Davila*, 888 F. 3d 179, 184 (CA5 2018).

Diligence is unambiguously required by the Oklahoma statute. If it is not required for *Brady*, then a holding that the claim is barred because the facts could have been found with reasonable diligence is necessarily a holding independent of *Brady*. The OCCA did hold that the facts could have been found with reasonable diligence. J. A. 990, ¶ 26. The court noted that the defense had Dr. King's report and therefore knew that Sneed had been given lithium, as he also testified at trial. J. A. 991, ¶ 27. Further, Dr. King had reported that Sneed was mentally ill, J. A. 700, and that he has

a "mood swing disorder ... characterized by 'ups and downs,' " J. A. 702, and that lithium is helpful for this "mood instability." J. A. 701. The category of mood disorders that Dr. King described is detailed in a chapter titled Bipolar Disorder and Related Disorders in the standard psychiatric disorder manual. See American Psychiatric Assn., Diagnostic and Statistical Manual of Mental Disorders 123-154 (5th ed. 2013) (DSM-5).

It is was quite easy at the time of trial to determine that lithium is a prescription medication, and its only "on-label" use is for treatment of bipolar disorder. See Physician's Desk Reference 2230 (50th ed. 1996). A diligent attorney would not have believed that Sneed was given this drug for a cold or a toothache or by mistake. Cf. Pet. Brief 30; Resp. Brief 47. The most likely scenario, by far, was that Sneed had been prescribed this medication by a psychiatrist for a disorder in the bipolar-and-related group.

Petitioner claims that his counsel did not know of the "Dr. Trumpet" indicated in the note by the prosecutor. Even if that were true, the note is not a Rosetta Stone that unlocks an otherwise unsolvable puzzle. Merely by inquiring at the jail, "Glossip's counsel easily confirmed" that Dr. Lawrence Trombka was the psychiatrist at the jail at the time, Pet. Brief 9-10, and obtained the affidavit now submitted as the primary factual basis of *Brady* materiality. A diligent attorney who thought the prescription and diagnosis were important could have made that inquiry at any time. The "Dr. Trumpet" note was not needed to ask who the psychiatrists at the jail were and get the answer that there was only one, Dr. Trombka.

The likely reason why trial counsel did not pursue this line of inquiry, the OCCA notes, is that Sneed's mental state was a double-edged sword, with the wrong edge likely sharper. J. A. 991, ¶ 27. After trial, though,

this information could have been obtained for the first postconviction review. Or the second. Or the third. Or the fourth. See *ibid*.

To hold that the diligence prong of the state successive petition bar is not independent would require two steps. The Court would first have to hold that undisclosed material that the defense could have obtained with reasonable diligence is not *Brady* material, resolving the circuit split noted above, so that a holding of lack of diligence is also a ruling on the merits of *Brady*. The Court would then have to hold that when a state procedural bar is congruent to the merits of the federal claim and based on the same facts, even a holding in the exact words of the state statute is not clearly enough a holding of state law to be considered independent. No convincing argument has been made for such a massive shift. But there is a simpler way to resolve this case. The second prong is clearly independent and sufficient to sustain the judgment by itself.

4. The miscarriage of justice prong.

The Attorney General's brief seeks to play down the difference between the second prong of the successive petition statute and the materiality element of *Brady*. The brief correctly notes the "reasonable probability" standard of *Brady* but misdescribes the state standard as "he either would not have been convicted or would not have been sentenced to death." Resp. Brief 50. The hurdle is much higher than that. Before AEDPA, for a miscarriage of justice resulting from a death sentence for one guilty of murder but ineligible for that sentence, this Court adopted a standard of "clear and convincing evidence that but for constitutional error, no reasonable juror would find him eligible for the death penalty" under the relevant law. *Sawyer* v. *Whitley*, 505 U. S. 333, 348 (1992). The Oklahoma Legislature, like Con-

gress, adopted this standard for successive petitions, although extending it to the guilt and penalty decisions as well.

The FCS *amici* go even further, misstating the law and the holding backwards. "The OCCA determined that ... 'no reasonable fact finder' would have found Mr. Glossip not guilty. J. A. 990-91." FCS Brief 20. The OCCA did *not* hold that, and neither *Brady* nor § 1089(D)(8) has such a standard. The court held correctly that Glossip had failed to show that no reasonable fact finder would have found him guilty. J. A. 990, ¶ 26. That is a huge difference in standards, on opposite sides of the range of reasonable disagreement.

It is not enough for a court to conclude that the defendant would not or should not have been convicted or sentenced to death, considering the new evidence. That new evidence, when combined with the other evidence, must be so compelling that *no reasonable fact finder* would have reached that verdict. The *Brady* standard requires considerably *less* than a finding that the defendant would have been acquitted more likely than not. See *Kyles* v. *Whitley*, 514 U. S. 419, 434 (1995). The *Sawyer* standard adopted in this statute requires considerably *more*. It is close to a certainty that the defendant would have been acquitted (or received a sentence less than death) if the evidence had been available at trial. This requires blockbuster evidence that leaves no room for reasonable disagreement, a standard that is rarely met.

It is entirely possible for evidence to have enough probative value to meet the "reasonable probability" threshold yet fall far short of the daunting "no reasonable fact finder" standard. The OCCA found that the evidence met neither standard, J. A. 990, ¶¶ 24, 26, but that does not make one holding dependent on the other. Petitioner claims that "the OCCA's opinion makes clear

that its ruling depended entirely on its analysis of Glossip's federal *Napue* and *Brady* claims," Pet. Brief 41, but he does not cite *any* language in the opinion indicating such a dependency at all, much less a clear one. Similarly, the Attorney General claims that "[t]he OCCA simply held, *based on these federal-law determinations*, that the *Brady* issue was barred by § 1089(D)(8)(b)," Resp. Brief 51 (emphasis added), without citing anything to support the "based."

The truth is that the OCCA's holdings on both the materiality/prejudice prong of the merits and the miscarriage of justice prong of the procedural bar are terse. It would be preferable if the court had discussed the evidence and explained in more detail why it found it so lacking in probative value as to satisfy neither standard. However, in a world of limited resources we must regularly deal with less than perfection. In capital cases particularly, defendants return to courts again and again, throwing every conceivable argument against the wall to see if any of it sticks. See J. A. 890-898 (claims made in prior petitions). A court already very familiar with the case and under an execution deadline may not need or be able to explain in detail. Dispositions will sometimes be less thorough than we would like, but they are still the judgments of courts and entitled to respect. See *Harrington* v. *Richter*, 562 U. S. 86, 97-99 (2011) (28 U. S. C. § 2254(d) applies to summary decisions).

Even without an explanation, it is not difficult to see why the OCCA found this evidence far less probative than the petitioner claims. From the likely fact that Sneed was prescribed lithium by a psychiatrist, petitioner extrapolates that he necessarily had bipolar disorder, and in such a severe form that this plus his known methamphetamine use "thus *had* mutually reinforcing, deleterious effects on his impulse control at

the time of the crime and, later, his reliability as a witness." Pet. Brief 11 (emphasis added). "Had," petitioner says, not "possibly might have had." He knows that for a fact, it would seem from the brief. But he doesn't. This is wild extrapolation.

Dr. Trombka says that "lithium was a first line drug used to treat patients diagnosed with [REDACTED]." J. A. 930. We will assume for the sake of argument that the redacted term is bipolar disorder. Significantly, he does not say it is never prescribed for anything else. There is support in the medical literature that lithium is helpful for cyclothymia and depression. See, e.g., Malhi et al., Current Status of Lithium in the Treatment of Mood Disorders, 1 Current Treatment Options in Psychiatry 294, 298 (2014). Cyclothymia is a related but less severe disorder, and it would be consistent with Dr. King's description. See DSM-5, at 139-141.

Further, even if Sneed was diagnosed with bipolar disorder, that does not say anything about the severity. In its mild form, bipolar disorder causes only "minor impairment in social or occupational functioning." DSM-5, at 154. Prescription of lithium by a psychiatrist is thus consistent with mental conditions that have no substantial impact on the case beyond what was known at the time of the trial. See Appt. Am. Brief 35. Petitioner has shown nothing.[7]

The OCCA was correct that this evidence does not rise to the materiality standard of *Brady*. It is less than the evidence found insufficient in *Strickler*, 527 U. S., at 289-296. But the Court need not and indeed *cannot* even reach that question. The OCCA found that the same evidence failed to clear the much higher hurdle of

7. This is in addition to his failure to show that anything was withheld from the defense at all. See Van Treese Merits Brief, Part I.

the state successive petition statute. That holding was also correct, but more fundamentally it was the OCCA's to make and not in this Court's jurisdiction to review. There is not a word in the opinion to suggest that the application of facts to state law depends on the application of the same facts to federal law.

If, hypothetically, the weight of the evidence were somewhere higher than the *Brady* materiality threshold yet lower than the § 1089(D)(8)(b)(2) "no reasonable fact finder" threshold (a very wide gap), the state-law decision would still be correct even if the federal-law decision were wrong. Therefore, the state-law decision is *not* dependent on the federal-law decision. Both decisions stand on the same factual base, but neither stands on the other as a legal base. This is the opposite of *Foster* v. *Chatman*, 578 U. S., at 498-499, and n. 4.

Little more needs to be said about the *Napue* issue, as petitioner made no such claim. Part V of the OCCA opinion is addressed to Propositions One and Two of the petition. J. A. 989, ¶ 24. Proposition One is purely a *Brady* claim. It does not cite *Napue* v. *Illinois*, 360 U. S. 264 (1959). J. A. 902-904. It mentions Sneed's denial that he had seen a psychiatrist but makes no complaint about the prosecutor not correcting that statement. J. A. 902. The court's statement that the facts show no *Napue* error, J. A. 991, ¶ 28, responds to a statement in the Attorney General's brief, J. A. 974-978, but the statute requires that facts qualifying for a successive petition be in the application. See § 1089(D)(8)(b). The court unambiguously rejected petitioner's Proposition One on state procedural grounds in paragraphs 26 and 27 in terms that would cover a *Napue* claim also. Rejecting the Attorney General's assertion on the merits in paragraph 28 is helpful to reassure the public, but it was not required to hold the petition barred as successive.

In paragraph 26, the OCCA squarely and correctly held that petitioner's Proposition One is barred by the state successive petition statute because it did not meet the very high threshold of the (b)(2) prong. That is an independent state ground. As we will show in the next part, it is also adequate.

III. Oklahoma's successive petition rule is easily "adequate" as applied in this case.

The essence of the adequacy requirement is captured in an early opinion by Justice Holmes, that procedural "springes" set by the State may not block review of a federal claim "plainly and reasonably made." *Davis* v. *Wechsler*, 263 U. S. 22, 24 (1923). Typical cases of inadequate state grounds are those where the state law is applied in a way that failed to give the defendant notice of what he needed to do to properly make his claim. See *Rogers* v. *Alabama*, 192 U. S. 226, 229-230 (1904) (two-page motion stricken as "prolix"); *James* v. *Kentucky*, 466 U. S. 341, 346-348 (1984) (obscure distinction between "instruction" and "admonition" with forfeiture if the wrong one requested).

In the present case, the statute plainly advises petitioners that they must use diligence to find evidence supporting their first petition or be precluded from raising it on a later one. The protests that the OCCA applied the rule in a way that precludes a claim before petitioner could possibly have known the facts, Pet. Brief 44; FCS Brief 14, are simply disagreements with the decision, not demonstrations of inadequacy. As described *supra*, at 14-16, the OCCA found that the important facts could have been discovered with diligence, a reasonable interpretation of the evidence.

The other argument is that the state ground is inadequate because of claimed inconsistencies in its

application compared with other cases. See Pet. Brief 46-47. At an earlier time, in some federal courts, the consistency of state procedural rules was subject to this kind of severe scrutiny, with anything less than rigid, mechanical uniformity resulting in a declaration of inadequacy. This Court rejected that approach in *Walker* v. *Martin*, 562 U. S. 307 (2011), and *Johnson* v. *Lee*, 578 U. S. 605 (2016) (per curiam). *Walker* held that a rule is not inadequate simply because the court has some discretion to deal with unusual circumstances. See *Walker*, at 320-321.

The parties claim that the rule as applied in this case is inadequate because the OCCA has permitted the Attorney General to waive the statutory successive petition rule before, but they can only cite one case, *McCarty* v. *State*, 2005 OK CR 10, 114 P. 3d 1089 (Okla. Crim. App. 2005). Pet. Brief 46-47; Resp. Brief 42-43. There are two problems with this argument. First, *McCarty* alone is inadequate to establish a precedent that the Oklahoma courts *must* accept waivers of § 1089(D)(8) by the Attorney General in all cases. That case involved the extraordinary circumstances of a state crime laboratory chemist engaging in widespread misconduct affecting many cases, probably including intentional destruction and alteration of evidence. See *McCarty*, ¶ 11, 114 P. 3d, at 1091. The court accepted blanket waivers of all procedural bars without comment. *Id*., nn. 7, 13, 24. An action taken in one case in extraordinary circumstances does not necessarily require the same action in more routine cases. See *Buck* v. *Davis*, 580 U. S. 100, 124 (2017).

Section 1089 is limited to capital cases. Waivers by the Attorney General are not common. None of the briefs in this case have cited any cases but *McCarty* and the present case for a waiver of the bar of this statute. This creates a sample size problem, with one unex-

plained acceptance and one unexplained rejection. Differences in the cases justifying different treatment are apparent, though. *McCarty* involved intentional suppression of evidence and false testimony by the state's police chemist regarding evidence directly identifying the defendant. *McCarty*, ¶¶ 8-12, 114 P. 3d, at 1091-1093. The present case involves a note of a name with no immediately apparent exculpatory value which later led to evidence of minimal probative value which defense counsel could have obtained before trial without much difficulty. See *supra*, at 14-16, 19. The OCCA noted that the Attorney General's confession of error had no basis in law or fact. J. A. 990, ¶ 25. It did not expressly state a reason for not accepting a waiver of procedural bars by the Attorney General, probably because none was plainly made.

The second problem is that a waiver of a procedural bar by the prosecution is distinct from the terms of the procedural requirement itself, and this issue does not come within the scope of the purpose of the adequacy requirement. Whether a future prosecutor will waive a bar does not alter the defendant's ability to know what he needs to do to comply with it. A firmly established and regularly followed rule does not become a "springe" because the circumstances under which a prosecution waiver will or will not be accepted have not yet been clarified due to the rarity of such waivers.

The calls to return to the pre-*Walker* games of "gotcha," searching state precedents for any hint of inconsistency, should be rejected. Section 1089(D)(8) is an adequate and independent state ground.

Finally, it is well established that a state procedural bar cannot be applied in a discriminatory manner against federal rights. *Walker* v. *Martin*, 562 U. S., at 321, noted the rule but dismissed it in a single sentence. "On the record before us, however, there is no basis for

concluding that [the state procedural] rule operates to the particular disadvantage of petitioners asserting federal rights." *Ibid*. The same summary disposition is appropriate here. Although assertions of discrimination have been made, Pet. Brief 49; FCS Brief 10, 15, no showing has been made that Oklahoma's rule is applied to block assertions of federal rights while allowing state-law claims through the gateway.

There was a time in history when discrimination against federal rights was a major problem. In 1904, a state court decision quashing an objection to jury discrimination on the ground that a two-page motion was "prolix" was an obvious evasion to defeat the federal right. *Rogers* v. *Alabama*, 192 U. S. 226, 229-231 (1904).

Nothing like that is happening in this case. Oklahoma fully accepts and enforces the *Brady* rule when the claim is properly raised, as the OCCA noted. J. A. 989, n. 7. The discrimination arguments of the petitioner, Pet. Brief 49, and supporting *amici*, FCS Brief 16, seem to be based on a combination of a disagreement with (1) the OCCA's finding that the claim could have been brought earlier with reasonable diligence, and (2) the Legislature's decision that claims in successive petitions will not be heard in any case unless there has been a miscarriage of justice. Both briefs imply that a successive petition rule that cuts off potentially meritorious claims amounts to discrimination. It does not.

Just two terms ago, this Court upheld and enforced as written a parallel federal statute that cut off an otherwise meritorious claim. In *Jones* v. *Hendrix*, 599 U. S. 465, 470-471 (2023), the petitioner would likely have succeeded in overturning his conviction if the claim had been available in his initial motion under 28 U. S. C. § 2255. However, Congress decided not to make an exception to the successive motion bar of subdivision

(h) of that section for new statutory interpretations as distinguished from new rules of constitutional law. See *Jones*, at 470-471. It is not up to the judiciary to do an "end-run" around the statute, *id*., at 477, and that result raised no constitutional doubt. See *id*., at 482-488.

The Oklahoma statute does not target federal claims generally or *Brady* claims particularly for exclusion. On its face, it expressly applies to all claims. See § 1089(D)(8), last para. Its exceptions are broader than the federal statute enforced in *Jones*, as the new law provision includes all forms of "legal basis," see § 1089(D)(8)(a), and the miscarriage of justice provision includes sentence as well as guilt. See § 1089(D)(8)(b)(2); cf. 28 U. S. C. § 2255(h)(1).

Procedural bars, by their nature, exclude meritorious claims at times.[8] The proper balance between finality and error correction is for the legislative branch to determine, if it chooses to do so. *Jones*, 599 U. S., at 480. The Oklahoma Legislature has made that choice in an even-handed statute. There is no discrimination against federal rights. The state statute is valid and was validly applied.

IV. An adequate, independent state ground is a jurisdictional bar in this Court, regardless of whether it was jurisdictional in the state court.

At the certiorari stage, the *amicus* brief for the Van Treese family, joined by the Oklahoma District Attorneys Association, noted at pages 7 to 8 that an adequate and independent state ground of decision is a jurisdic-

8. But not in this case. See Appt. Am. Brief 28-42; Van Treese Merits Brief.

tional bar in this Court. At the merits stage, the FCS Brief falsely states that this brief claimed that the bar was jurisdictional in the state court, FCS Brief 7, and then proceeds to knock down the straw man of their own creation.[9]

Not only is the statement of jurisdictional status not "incorrect," cf. FCS Brief 7, it is correct beyond doubt. "In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional." *Coleman* v. *Thompson*, 501 U. S. 722, 729 (1991). There is no requirement that a state ground be jurisdictional in the state court before it can serve as a jurisdictional bar in this Court. In *Cruz* v. *Arizona*, 598 U. S. 17 (2023), the state ground was a rule of court that gave no indication of being jurisdictional. The dissent asserted that it would deprive this Court of jurisdiction if found adequate and independent. See *id*., at 32-33 (Barrett, J., dissenting). The opinion of the Court did not dispute this but found the bar to be inadequate in that case. *Id*., at 25-27.

The FCS Brief then goes off on an irrelevant discussion of jurisdictional rules and waivability in *federal* courts without a single citation to support the proposition that only jurisdictional rules are not waivable under *Oklahoma* law. FCS Brief 7-10. They conclude, "the procedural rule here is nonjurisdictional. The State can *therefore* waive procedural default ...." *Id*., at 10 (emphasis added). That is a *non sequitur*. The Van Treese Certiorari-Stage Brief said at page 8, "the state has no obligation to follow a similar rule" of waivability

9. They also engage in the odd and confusing practice of referring to the brief as that of the second-named *amicus* who joined it, rather than the first-named *amicus* whose attorneys actually wrote it. See *supra*, at 1. They give no reason for doing this, and none is apparent.

of nonjuridictional procedural limitations, and nothing in the FCS Brief supports a contrary conclusion.

The OCCA's rejection of the Attorney General's waiver is a decision of state law, as discussed in Part I. If it is adequate and independent of federal law, as discussed in Parts II and III, then it is a jurisdictional bar in this Court, and the case should be dismissed for lack of jurisdiction.

CONCLUSION

The writ of certiorari should be dismissed for lack of jurisdiction. If the Court does reach the merits, the judgment should be affirmed for the reasons stated in the Appointed *Amicus* Brief and the Van Treese Merits Brief.

July, 2024

Respectfully submitted,

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