No. 22-7466

In the Supreme Court of the United States

RICHARD EUGENE GLOSSIP, PETITIONER

v.

OKLAHOMA

(CAPITAL CASE)

ON PETITION FOR A WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

BRIEF FOR THE INNOCENCE PROJECT AS AMICUS CURIAE SUPPORTING PETITIONER

ANDREW C. SHEAR
M. CHRIS FABRICANT
INNOCENCE PROJECT, INC.
40 Worth Street, Suite 701
New York, NY 10013

DONALD BURKE
AMELIA PUTNAM
WILLKIE FARR & GALLAGHER LLP
1875 K Street, NW
Washington, DC 20006

ARGEMIRA FLÓREZ
WILLKIE FARR & GALLAGHER LLP
One Front Street
San Francisco, CA 94111

WILLIAM WEBER
WILLKIE FARR & GALLAGHER LLP
300 North LaSalle Dr.
Chicago, IL 60654

SETH P. WAXMAN
Counsel of Record
JULIA M. MAY
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

NEAL QUENZER
WILMER CUTLER PICKERING HALE AND DORR LLP
60 State Street
Boston, MA 02109

FERDINAND G. SUBA JR.
WILLKIE FARR & GALLAGHER LLP
787 Seventh Avenue
New York, NY 10019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statute:

Miscellaneous: Page

Miscellaneous—Continued: Page

In the Supreme Court of the United States

No. 22-7466

RICHARD EUGENE GLOSSIP, PETITIONER

v.

OKLAHOMA

(CAPITAL CASE)

ON PETITION FOR A WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

BRIEF FOR THE INNOCENCE PROJECT AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF AMICUS CURIAE

Amicus curiae, the Innocence Project, is a nonprofit organization that works to free the innocent, prevent wrongful convictions, and create fair, compassionate, and equitable systems of justice for everyone.[1] Since its founding in 1992, the Innocence Project has used DNA and other scientific advancements to prove innocence. Beginning with the exoneration of Glen Woodall, the first Innocence Project client, it has helped free or exonerate more than 240 people. Collectively, Innocence Project clients have spent more than 3,700 years behind bars.

[1] Pursuant to Rule 37.6, amicus affirms that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, and its counsel made a monetary contribution to fund its preparation or submission. Counsel of record for both parties were provided timely notice of amicus's intent to file this brief.

The Innocence Project is equally dedicated to eliminating the inequities and failings that lead to wrongful convictions by working with policymakers, supporters, and partner organizations to spearhead federal and state-based legislative changes. To date, the Innocence Project's efforts have led to the passage of more than 200 transformative state laws and federal reforms that promote greater police and prosecutor accountability; improve access to justice, including through post-conviction DNA testing; and meaningfully compensate the wrongfully convicted. The Innocence Project also works to strengthen the standards governing the use of science in criminal legal systems.

Together with innocence organizations around the world, the Innocence Project fights to advance the innocence movement. The Innocence Project serves as the headquarters of the Innocence Network, a coalition of 71 organizations that provide investigative support and legal representation to people with claims of innocence throughout the United States and in 12 countries outside of the United States.

The Innocence Project thus has expertise that bears directly on the issues presented by this case, which implicates many of the hallmarks of a wrongful conviction—including an acknowledgement by the State itself that it committed prosecutorial misconduct that renders Richard Glossip's capital conviction fundamentally unreliable.

INTRODUCTION AND SUMMARY OF ARGUMENT

The petition for a writ of certiorari convincingly demonstrates (Pet. 9-11) that the State violated Richard Glossip's right to due process under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and related cases. The State withheld material evidence, see *id.* at 87, that would have undercut

the credibility of its key witness, Justin Sneed, by showing that he suffered from a serious psychiatric condition. And the State failed to correct Sneed's false testimony, see *Napue* v. *Illinois*, 360 U.S. 264, 269 (1959), when he denied that he was under the care of a psychiatrist. Indeed, the State now agrees that Mr. Glossip is entitled to relief for this violation of his due process rights. See Resp. to Stay App. 4-6.

Prosecutorial misconduct of the sort the State has acknowledged in this case is a distressingly common factor in wrongful convictions. Careful, systematic reviews of post-conviction exonerations reveal that they are overwhelmingly the product of official misconduct. Violations of the *Brady* right in particular have frequently led to the conviction of innocent people. And the misconduct at issue here is particularly significant because it relates to the credibility of highly dubious informant testimony—itself a frequent contributor to wrongful convictions. And Mr. Glossip's case bears other indicia of wrongful conviction, including a police investigation characterized by "tunnel vision" that focused exclusively on Mr. Glossip in the immediate aftermath of the murder and the State's failure to collect and preserve important evidence that could have allowed Mr. Glossip to demonstrate his innocence at trial. Together, these factors produced an unacceptable risk that Mr. Glossip was convicted, and will be executed, for a crime he did not commit. These circumstances abundantly justify this Court's review, which would underscore the propensity of the factors present in this case to undermine the reliability of criminal convictions, particularly in capital cases.

Review here is especially warranted due to the Oklahoma Court of Criminal Appeals' unexplained—and inexplicable—refusal to defer to the State's confession of

error. The State has now acknowledged (Resp. to Stay App. 3) that Mr. Glossip's "capital conviction is unsustainable and a new trial imperative" because of the State's own misconduct in Mr. Glossip's trial. By giving short shrift to the State's considered judgment that Mr. Glossip's capital conviction cannot be defended, the Court of Criminal Appeals eviscerated a key remedy for wrongful convictions—while improperly discounting the State's balancing of its law-enforcement interests and its important interest in remedying the damage caused by the State's own misconduct. This Court should grant review to prevent the grave miscarriage of justice that would occur if Mr. Glossip were put to death based on a trial the State itself acknowledges was tainted by serious constitutional error.

ARGUMENT

A. Government Misconduct Of The Sort The State Has Acknowledged Committing In This Case Is An Overwhelming Factor In Wrongful Convictions

1. a. Systematic reviews of exonerations have shown that official misconduct is a driving force behind wrongful convictions. A 2020 report prepared by the National Registry of Exonerations, for example, found that misconduct by government officials contributed to the wrongful convictions of a majority of the 2,400 exonerated people included in the study. See National Registry of Exonerations, *Government Misconduct and Convicting the Innocent: The Role of Prosecutors, Police and Other Law Enforcement* iii-iv (2020) (*Government Misconduct and Convicting the Innocent*). The report concluded that 54% of the wrongfully convicted were the victims of some form of official misconduct, with misconduct by police officers contributing to wrongful convictions in 35% of

cases and misconduct by prosecutors playing a role in 30% of cases. See *ibid.*

The pattern is even starker in murder cases, where official misconduct played a role in 72% of the wrongful convictions examined by the National Registry of Exonerations. See *Government Misconduct and Convicting the Innocent* 10. Wrongful convictions are particularly likely in murder cases because the severity of the crime leads "police and prosecutors [to] work harder to secure murder convictions in cases with weak evidence than they do for lesser crimes." *Id.* at 17. The understandable pressure to solve murder cases can create a "strong impulse to secure convictions [that] can also lead to misconduct." *Ibid.* In particular, "the authorities may be tempted to cut corners, jump to conclusions, and—if they believe they have the killer—manufacture evidence to clinch the case, or hide evidence that suggests innocence." *Ibid.* As the statistics compiled by the National Registry of Exonerations bear out, the strong incentives to secure conviction in murder prosecutions have led to wrongful convictions in far too many cases.

b. The form of official misconduct at issue here, a violation of the due process rights recognized in *Brady* and related cases, is a particularly common contributor to wrongful convictions. Indeed, concealment of exculpatory evidence was by far the most common form of official misconduct cataloged in the National Registry of Exonerations' systematic review, which found that the prosecution had concealed exculpatory evidence in 44% of the cases considered. See *Government Misconduct and Convicting the Innocent* 30. For murder cases, the report found that concealment of exculpatory evidence had contributed to 61% of wrongful convictions. See *ibid.*

Although many of the cases considered by the National Registry of Exonerations involved concealment

of substantive evidence of innocence, the more common *Brady* violation involved concealment of impeachment evidence. In more than one-third of the cases considered, "police and prosecutors concealed evidence that would have undercut witnesses who testified to the defendants' guilt." *Government Misconduct and Convicting the Innocent* 32. That distressing statistic underscores the significant risk of a wrongful conviction in a case like this one, where the prosecution suppressed evidence that would have tended to discredit its key trial witness.

2. The *Brady* violation at issue here is all the more significant because it relates to the testimony of a highly incentivized informant who provided the key evidence used to convict Mr. Glossip of murder. The prosecution's use of this kind of inherently unreliable evidence, offered by an informant who was heavily induced by the prosecution to inculpate Mr. Glossip, is itself a key contributor to wrongful convictions.

a. Statistics gathered from the cases of exonerated people demonstrate the dangers of unreliable informant testimony. False informant testimony was a factor in nearly 20% of the 375 DNA-based exonerations in the United States from 1989 to 2020.[2] False or unreliable informant testimony played a role in 233 of the 3,325 known wrongful convictions that have been compiled by the National Registry of Exonerations.[3] And in capital cases, a study concluded that 45.9% of wrongful

---

[2] See Innocence Project, *Informing Injustice: The Disturbing Use of Jailhouse Informants* (Mar. 6, 2019), https://innocenceproject.org/informing-injustice/.

[3] See National Registry of Exonerations, *Exoneration Detail List*, https://tinyurl.com/y7tr9hzt.

convictions were based at least in part on unreliable informant testimony—by far, the leading cause.[4]

In exchange for informants' cooperation, prosecutors routinely offer substantial benefits that incentivize false testimony. Of particular relevance here, "[b]ecause an offer of leniency allows [an informant] to avoid the full penal consequences of his own misconduct, such a reward may provide not only a powerful incentive to cooperate, but also a powerful incentive to lie." R. Michael Cassidy, *Soft Words of Hope:* Giglio, *Accomplice Witnesses, and the Problem of Implied Inducements*, 98 Nw. U. L. Rev. 1129, 1140 (2004). And because the value of the testimony offered by the informant may influence the leniency that the prosecution is willing to offer, informants face "overwhelming incentives to lie" to "please" the prosecutor. Michael S. Ross, *Thinking Outside the Box: How the Enforcement of Ethical Rules Can Minimize the Dangers of Prosecutorial Leniency and Immunity Deals*, 23 Cardozo L. Rev. 875, 880 (2002). Meanwhile, the "prosecutor has a powerful incentive to accept a cooperator's account uncritically," Bennett L. Gershman, *Witness Coaching by Prosecutors*, 23 Cardozo L. Rev. 829, 848 (2002), especially in weaker cases, where the informant's testimony "may be all the government has," Alexandra Natapoff, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 Golden Gate U. L. Rev. 107, 108 (2006).

Notwithstanding those obvious sources of bias and incentives to lie, experience has shown that juries are all too willing to accept incentivized informant testimony

---

[4] See Northwestern U. Sch. of Law, Ctr. on Wrongful Convictions, *The Snitch System: How Snitch Testimony Sent Randy Steidl and Other Innocent Americans to Death Row* 3 (2005), https://tinyurl.com/2p8j5w9u (*The Snitch System*).

uncritically. Just a few examples illustrate the pervasive problem:

- In 1977, Randall Dale Adams was sentenced to death for the murder of a police officer during a traffic stop. His conviction rested on informant testimony from the actual killer, who received immunity in exchange for his testimony. The killer eventually recanted, and Adams was exonerated after 13 years on death row.
- In 1996, Dan L. Bright was convicted of murder and sentenced to death. His conviction was based in part on the false testimony of an informant who was promised leniency in exchange for testifying. Bright was exonerated after the disclosure of a suppressed FBI report indicating that someone else had committed the crime. He had been incarcerated for eight years.
- In 1983, Anthony Siliah Brown was convicted of murder and sentenced to death. The informant was the actual killer, who testified against Brown in exchange for leniency. After three years in prison, Brown was exonerated by the killer's recantation at retrial.
- In 1985, Verneal Jimerson was convicted of double murder in Chicago. His conviction rested on the testimony of a purported accomplice who, in exchange for her testimony, was released from prison, where she was serving 50 years for her supposed role in the crime. The same informant also falsely testified against two other alleged participants in the crime. All convicted defendants were eventually exonerated after DNA testing of the biological evidence excluded Jimerson, and the

real killers confessed. Jimerson had been incarcerated for eleven years.

- In 1993, Steven Manning was convicted of murder and sentenced to death. His conviction rested primarily on the testimony of a jailhouse informant who, in exchange for his testimony, was released after having served only six years of a fourteen-year sentence. Manning was granted a new trial in 1997 based on trial errors, and the charges against him were dropped in 2000. Manning was incarcerated for ten years.

See *The Snitch System*, *supra* note 4, at 3-4, 8, 10.

b. The facts of this case underscore the substantial risk that Sneed offered false testimony that led the jury to wrongly convict Mr. Glossip and sentence him to death.

There is no dispute that Sneed, a methamphetamine addict, brutally murdered Barry Van Treese. He confessed to the crime only a week after the murder and faced a significant risk of a death sentence. Sneed avoided that risk only by agreeing to endorse the prosecution's theory that Mr. Glossip had masterminded a murder-for-hire scheme.

Sneed's overwhelming incentive to lie to save his own life itself provides a powerful reason to question his reliability. But other significant factors further undermined the reliability of Sneed's trial testimony. For starters, when Sneed was arrested, he did not implicate Mr. Glossip in the murder until *after* police investigators had repeatedly mentioned Mr. Glossip's name, told Sneed that Mr. Glossip had implicated him, and stressed that Sneed faced a capital charge if he did not shift responsibility to Mr. Glossip. As an independent report commissioned by a bipartisan group of Oklahoma legislators concluded, the investigators employed several "high risk" investigative techniques that are "contrary to

eliciting truthful and reliable evidence." See Reed Smith LLP, *Independent Investigation of State v. Richard E. Glossip* 69 (June 7, 2022), https://tinyurl.com/3hc5wvp8 (*Reed Smith Report*). The investigators' suggestive questioning thus contaminated Sneed's trial testimony by feeding him the prosecution's narrative of the case and signaling that he could obtain leniency only by endorsing it.

Information that has come to light following Mr. Glossip's trial provides still further reason to doubt Sneed's testimony. Multiple witnesses have now acknowledged that Sneed had a history of violence, exacerbated by his serious methamphetamine addiction, and that he frequently stole to support that drug habit. See *Reed Smith Report* 220-224. Stephanie Garcia, a dancer at the strip club neighboring the motel where the murder was committed, reported that Sneed would use other dancers to lure men to motel rooms to rob them. *Id.* at 222. The modus operandi Garcia described corresponds to the testimony of trial witnesses who reported hearing "male and female voices" or "a couple" in the room where the murder was committed, 5/14/2004 Tr. 158; 5/18/2004 Tr. 26, and it is a far cry from the prosecution's depiction of Sneed as a pitiful figure who was easily manipulated by Mr. Glossip into committing murder, see *Reed Smith Report* 208.

In addition, multiple witnesses who were incarcerated with Sneed both before and after he testified at trial have reported that Sneed told them accounts of the murder that did not involve Mr. Glossip. One witness, who was housed with Sneed in the county jail after the murder, reported that Sneed said he was afraid of a death sentence and asked for the witness's help to "lay it all on Rich." *Reed Smith Report* 253. Another witness, also housed with Sneed in the jail, reported that Sneed had recounted

a robbery gone wrong; that Sneed had never mentioned Mr. Glossip as hiring him to commit a murder; and that Sneed had said he was blaming Mr. Glossip because he was mad at him. *Id.* at 254. Another witness, who had been Sneed's jail cellmate, reported that Sneed never gave any indication that someone else was involved in the murder and never mentioned Mr. Glossip. *Id.* at 253. A fourth witness reported that Sneed never mentioned Mr. Glossip; that he never claimed to have been hired to rob or kill Van Treese; and that he recounted only a robbery involving his girlfriend that went wrong. *Ibid.* And two witnesses who were later imprisoned with Sneed offered similar accounts, specifically reporting that Sneed acknowledged acting alone and falsely blaming Mr. Glossip for the murder. *Id.* at 254-255.

Finally, additional evidence that the State suppressed at trial, which is the subject of the *Brady* claim at issue in the pending petition for a writ of certiorari in No. 22-6500, provides still further reason to doubt Sneed's testimony. Records from the trial prosecutor that were not made available to the defense until August 2022 suggest that prosecutors met with Sneed shortly before he testified at Mr. Glossip's 2003 retrial, in order to address the "big problem" caused by a discrepancy between Sneed's testimony at Mr. Glossip's initial trial and the forensic evidence relating to knife wounds that had emerged only recently during the retrial. See Pet. App. 56a-57a (Independent Counsel's investigative report). Immediately thereafter, Sneed changed his testimony and claimed that he had stabbed Van Treese with a knife during the murder. *Ibid.* Other recently disclosed records show that Sneed expressed a desire to recant his testimony before Mr. Glossip's retrial, and shortly thereafter met with prosecutors to discuss his testimony and the possibility of getting a better deal from the

prosecution. See 22-6500 Pet. 7-10; Reed Smith LLP, *Independent Investigation of State v. Richard E. Glossip, Second Supplemental Report* 1-14 (Aug. 23, 2022), https://tinyurl.com/36hm247b. Although this evidence would have provided powerful grounds for impeachment, *none of it was disclosed to the defense.*

3. Although the *Brady* claims at issue here and in No. 22-6500 are perhaps the most troubling aspects of Mr. Glossip's case, they are not the only indicia of a wrongful conviction. Particularly because wrongful convictions are often the result of overlapping factors, rather than a single problem, these additional issues provide further reason to doubt the reliability of Mr. Glossip's conviction and capital sentence.

a. In many cases, wrongful convictions result from an inadequate police investigation characterized by "tunnel vision"—*i.e.*, reaching a premature conclusion about a suspect's guilt, followed by a failure to examine evidence that might discredit that theory. This sort of investigative failure can "be most damaging" in the initial stages of a criminal case, "because all later stages of the process feed off the information generated in the police investigation." Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 Wis. L. Rev. 291, 295 (2006).

Independent investigators have made a convincing showing that Mr. Glossip was the victim of this very sort of tunnel vision. See *Reed Smith Report* 12. When police detectives interviewed Sneed for the first time only a week after the murder, they had settled on Mr. Glossip as their suspect and used suggestive interview techniques that risked generating false statements by Sneed. See pp. 9-10, *supra*. The police thereafter failed to investigate potential leads that might have discredited the narrative they had adopted in the first days after the murder. See

Reed Smith Report 88. For example, the police failed to identify relevant witnesses from the multiple other guests who stayed at the motel the night of the murder, *id.* at 89; they failed to investigate witnesses' inconsistent statements about how much money Van Treese had picked up from the motel the day before he was murdered, *id.* at 95-96; and they failed to review relevant financial records, *ibid.*

b. This case also involves multiple failures by the State to collect and preserve forensic evidence, another factor that demonstrably contributes to wrongful convictions.

Independent investigators have cataloged a plethora of examples of the police's failure to properly collect physical evidence following Van Treese's murder. For example, the police lost a surveillance videotape showing the night of the murder from the gas station next to the motel. See *Reed Smith Report* 75. They failed to collect the motel's financial records and daily reports. *Id.* at 76. They did not process fingerprints from the van parked next to Van Treese's vehicle, *ibid*, or from the interior of Van Treese's vehicle, *id.* at 76. They did collect fingerprints from a drinking glass in the vehicle but never processed them. *Ibid.* They did not fully photograph the money or envelopes found in the vehicle, *ibid*, or investigate the source of the money, *id.* at 93. And the police failed to identify or process for fingerprinting and DNA analysis an envelope that Sneed claimed contained money he and Mr. Glossip had taken from the vehicle. *Id.* at 76.

In November 1999—after Mr. Glossip's initial trial but before his retrial—police destroyed ten items of key physical evidence and potentially exculpatory financial records at the direction of the Oklahoma County District Attorney's Office. See *Reed Smith Report* 7. That unexplained departure from the District Attorney's "long-

standing agreement" to indefinitely preserve evidence in capital cases, *ibid.*, deprived Mr. Glossip of evidence that he might have used to demonstrate his innocence at his retrial, and it adds yet another troubling red flag undermining the reliability of his capital conviction.

4. As in this case, wrongful convictions are almost never the result of a single factor. In looking at 3,325 exonerations, the National Registry of Exonerations found the following factors contributed to wrongful convictions:[5]

Factor	Percentage of Wrongful Convictions Affected
Official Misconduct	59%
Perjury or False Accusation	63%
False Confession	12%
False or Misleading Forensic Evidence	24%
Mistaken Witness ID	27%

These numbers add up to more than 100% because virtually all wrongful convictions are the result of multiple factors. This is even more striking in homicide cases. In those cases, 72% involved perjury or a false accusation and 73% involved official misconduct, both factors present in this case.[6]

Given this stark reality, the failure of the Oklahoma Court of Criminal Appeals to consider the errors in this case cumulatively is a virtually guaranteed path to incarcerating, and ultimately executing, innocent people.

---

[5] See National Registry of Exonerations, *% Exonerations By Contributing Factor*, https://tinyurl.com/2s3utjcb.

[6] *Ibid.*

As set forth in the petition (at 18-19), this failure violated Mr. Glossip's long-recognized constitutional rights.

B. By Discounting The State's Confession Of Error, The Court Of Criminal Appeals Undermined A Key Remedy For Wrongful Convictions

In this case, the Oklahoma Court of Criminal Appeals concluded, remarkably, that Mr. Glossip must be put to death despite the State's own determination—acting through its "chief law officer," Okla. Stat. tit. 74, § 18—that Mr. Glossip's "capital conviction is unsustainable and a new trial imperative." Resp. to Stay App. 3. As the State explained in responding to Mr. Glossip's application to this Court for a stay of execution, the State reached that "difficult but essential conclusion * * * through extensive diligence," which "establish[ed] that Glossip's trial was unfair and unreliable." *Id.* at 3, 5. The Court of Criminal Appeals nonetheless rejected the State's considered determination based on nothing more than an unexplained statement that "[t]he State's concession is not based in law or fact." Pet. App. 15a. That refusal to defer to the State's confession of error was manifestly incorrect and has deeply pernicious consequences.

To state the obvious, a confession of error by the prosecution in a criminal case is an extraordinary event that warrants significant deference from the courts. As this Court has long understood, "[t]he considered judgment of the law enforcement officers that reversible error has been committed is entitled to great weight." *Young* v. *United States*, 315 U.S. 257, 258 (1942); see also *Sibron* v. *New York*, 392 U.S. 40, 58 (1968). Although the prosecution's confession of error "does not relieve [the courts] of the performance of the judicial function," *Young*, 315 U.S. at 258, due regard for the State's interest in the integrity of its own criminal convictions requires

that the prosecution's views be given careful consideration.

That is particularly true in the context of a capital prosecution, where the "severity" of the sanction "mandates careful scrutiny in the review of any colorable claim of error." *Zant* v. *Stephens*, 462 U.S. 862, 885 (1983). And it makes abundant sense in the context of post-conviction proceedings, where a variety of doctrines will often circumscribe the courts' review of claimed constitutional errors in deference to the State's interest in the finality of its criminal judgments. Whatever force that interest may have in ordinary cases, it is obviously diminished when the State itself determines that finality must yield to its countervailing interest in a fair and reliable determination of guilt. Cf. *Wood* v. *Milyard*, 566 U.S. 463, 472-473 (2012) (explaining that procedural defenses to the consideration of habeas claims may be waived).

As a practical matter, moreover, careful consideration of a confession of error is warranted due to the exceptional nature of that development. It is a cherished premise of our system of criminal justice that the state's "interest * * * in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger* v. *United States*, 295 U.S. 78, 88 (1935). Consistent with the state's "special role * * * in the search for truth in criminal trials," *Strickler* v. *Greene*, 527 U.S. 263, 281 (1999), this Court has cautioned that "[t]he public trust reposed in the law enforcement officers of the Government requires that they be quick to confess error when, in their opinion, a miscarriage of justice may result from their remaining silent." *Young*, 315 U.S. at 258.

In recent years, a number of jurisdictions have taken that guidance to heart and formed Conviction Integrity Units (or Conviction Review Units) within their

prosecutors' offices.[7] Those units serve to discharge the prosecutor's obligation to ensure that justice is done by working to prevent, identify, and remedy wrongful convictions, and their important work has played an important role in the exoneration of innocent people.[8] The Innocence Project commends this development.

Nonetheless, confessions of error by the prosecution remain rare: Criminal prosecutions are inherently adversarial, and in the mine-run case the prosecution can be expected to vigorously challenge claims of constitutional error at trial or of actual innocence. Indeed, a study of cases involving post-conviction exonerations based on a showing of factual innocence concluded that "[p]olice and prosecutors * * * serv[ed] as the largest combined source of opposition to exoneration." Jon B. Gould & Richard A. Leo, *The Path to Exoneration*, 79 Alb. L. Rev. 325, 361 (2016). Prosecutors have a natural incentive to defend the validity of their own work, while attitudes tend to harden (and openness to evidence of innocence diminishes) after "the declaration of guilt at trial." *Id.* at 360. And prosecutors may be particularly unsympathetic to assertions of error that accuse the prosecution itself of misconduct, such as the *Brady* claims at issue in this case.

---

[7] As of June 2023, at least eight States have established Conviction Integrity Units. See National Registry of Exonerations, *Conviction Integrity Units*, https://tinyurl.com/4rru8676. In addition to those statewide units, at least 89 such units have independently been established in prosecutor's offices throughout the country. See *ibid.*

[8] The National Registry of Exonerations, for example, concluded that Conviction Integrity Units played a role in 132 of the 233 known exonerations it recorded in 2022 (56.7% of the total). See National Registry of Exonerations, *2022 Annual Report* 4 (May 8, 2023), https://tinyurl.com/2nfyfpf3.

Given the State's institutional incentives to defend its criminal judgments, the State's considered judgment that a conviction is "unsustainable," Resp. to Stay App. 3, due to prosecutorial misconduct is a profound indicator of injustice. Over more than 30 years of experience, the Innocence Project has found that prosecutorial doubt about guilt or the reliability of a conviction is a substantial indicator of a wrongful conviction. And when, as here, the State expresses not merely doubt, but a firm conviction that a capital conviction was "obtained with the benefit of material misstatements to the jury by the State's key witness," *id.* at 11, it is virtually unthinkable that the conviction could be allowed to stand.

At an absolute minimum, a court must undertake a careful review of the State's confession of error, giving due regard to the State's own balancing of its law-enforcement interests and the State's independent interest in remedying the damage caused by its own prosecutorial misconduct. The Court of Criminal Appeals' terse statement that "[t]he State's concession is not based in law or fact," Pet. App. 15a, is impossible to square with that standard.

* * * * *

Wrongful convictions strike at the core of our system of criminal justice, allowing the guilty to escape while inflicting severe punishment—potentially death—on the innocent. See *United States* v. *Agurs*, 427 U.S. 97, 111 (1976). Given the stakes inherent in any criminal prosecution, "[i]t is as much [the State's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger*, 295 U.S. at 88. Here, to its credit, the State has acknowledged that it breached its due process obligations by obtaining a capital conviction

"with the benefit of material misstatements to the jury by the State's key witness." Resp. to Stay App. 11.

Under these circumstances, the State is correct that Mr. Glossip's conviction is "unsustainable." Resp. to Stay App. 11. This Court should grant review, reverse the Court of Criminal Appeals' erroneous judgment, and prevent the grave miscarriage of justice that would occur if Mr. Glossip were to be executed based on the result of a flawed trial that the State does not—and cannot—defend. See *Moore* v. *Texas*, 139 S. Ct. 666, 670 (2019) (summarily reversing state court's determination that the petitioner was not intellectually disabled, where prosecutor agreed with his submission that he was intellectually disabled and thus ineligible for the death penalty); *Escobar* v. *Texas*, 143 S. Ct. 557 (2023) (granting certiorari, vacating judgment, and remanding for further consideration in light of Texas's confession of error on *Brady* claim); cf. *Calcutt* v. *FDIC*, No. 22-714, 2023 U.S. LEXIS 2063, at *9 (May 22, 2023) (summarily reversing Sixth Circuit's decision in response to Solicitor General's confession of error).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ANDREW C. SHEAR
M. CHRIS FABRICANT
INNOCENCE PROJECT, INC.
40 Worth Street, Suite 701
New York, NY 10013

DONALD BURKE
AMELIA PUTNAM
WILLKIE FARR & GALLAGHER LLP
1875 K Street, NW
Washington, DC 20006

ARGEMIRA FLÓREZ
WILLKIE FARR & GALLAGHER LLP
One Front Street
San Francisco, CA 94111

WILLIAM WEBER
WILLKIE FARR & GALLAGHER LLP
300 North LaSalle Dr.
Chicago, IL 60654

SETH P. WAXMAN
Counsel of Record
JULIA M. MAY
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

NEAL QUENZER
WILMER CUTLER PICKERING HALE AND DORR LLP
60 State Street
Boston, MA 02109

FERDINAND G. SUBA JR.
WILLKIE FARR & GALLAGHER LLP
787 Seventh Avenue
New York, NY 10019

JUNE 2023