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 RESPONDENT IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

The questions presented are:

1. Whether the Oklahoma Court of Criminal Appeals erred in rejecting confessed constitutional errors under *Brady* and *Napue* and giving no weight to the State's considered view that petitioner's trial was infected by serious constitutional error and prosecutorial misconduct.

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.

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INTRODUCTION

Both the State of Oklahoma and the current Attorney General have resisted earlier efforts by Richard Glossip to attack his first-degree murder conviction and capital sentence. Last year, however, the State uncovered evidence—long suppressed in violation of *Brady v. Maryland*, 373 U.S. 83 (1963)—revealing not only that the State's one indispensable witness against Glossip lied on the stand, but that the prosecution knowingly elicited his false testimony and then failed to correct the record, in violation of *Napue v. Illinois*, 360 U.S. 264 (1959). In light of that troubling evidence of grave prosecutorial misconduct, the State initiated an extraordinary independent counsel investigation and, based on the evidence, made the difficult but necessary decision to confess error before the Oklahoma Court of Criminal Appeals and waive any procedural obstacles to adjudication of the *Brady* and *Napue* issues.

Rather than accept the State's confession, the OCCA rejected it in a remarkable and remarkably flawed decision. The OCCA dismissed the *Brady* and *Napue* violations by suggesting that Glossip somehow was aware of the withheld evidence during his trial and that the critical testimony was not actually "false" because the witness was "more than likely in denial of his mental health disorders." JA991. On top of all that, the OCCA gave no weight to the State's confession of prosecutorial misconduct and refused to even honor the State's waiver of procedural obstacles. The net result was a decision ordering the State to move forward with an execution that all parties agree

was the product of serious constitutional violations and prosecutorial misconduct.

That decision cannot stand. The OCCA's analysis of the federal constitutional issues is woefully deficient. It is undisputed that the State not only withheld evidence of its star witness's mental illness and perjury, but knowingly elicited false testimony providing an innocuous explanation for the disclosed facts. The withheld evidence cannot be dismissed as immaterial given the centrality of the witness to the entire prosecution. Nor can the false testimony be deemed truthful based on speculation that the witness was in denial. That is at best a theory of why he lied, not that he told the truth. And the OCCA's refusal to give any weight to the State's confession of error is equally troubling. It not only trivializes the considered views of a sovereign official duty-bound by the Oath Clause to uphold the Constitution, but sends a terrible signal to litigants by suggesting that the courts have a vested interest in preserving their "own" convictions.

These federal constitutional errors are not shielded from correction by any adequate and independent state-law ground. To the contrary, the OCCA's refusal to accept the State's waiver of any procedural bar to reaching the underlying federal constitutional issues was itself unprecedented and improper. The Attorney General does not claim to have the final word on whether there were *Brady* and *Napue* violations here. But by refusing to accept the Attorney General's decision to waive any procedural obstacles, the OCCA reinforced the troubling message that it will cling to its past decisions even in the rare

situation in which a State's chief law officer concludes that a fresh review is needed. That message has no valid place in our system of justice, least of all in a capital case. This Court should reverse and send a very different signal.

STATEMENT OF THE CASE

A. Factual Background and Procedural History

1. On January 7, 1997, nineteen-year-old Justin Sneed murdered Barry Van Treese, the owner of an Oklahoma City Best Budget Inn, by bludgeoning him to death with a baseball bat in one of the motel's guest rooms. JA22. Sneed worked informally in maintenance for the motel in exchange for free lodging; Glossip was the motel's manager. Police investigating the murder quickly turned their attention to these two men.

After police arrived at the scene, Sneed fled the motel and evaded police for a week. JA498. Glossip was thus the first of the two to be interviewed, and he eventually admitted to helping Sneed cover up the murder. JA22. Police also recovered over $1,000 in cash in Glossip's possession, JA983, which appeared consistent with a payout from Sneed, perhaps with funds taken from a cash-flush motel owner. The State accordingly charged Glossip as an accessory after-the-fact to murder. *State v. Glossip*, No. CF-1997-256 (Okla. Cnty. Dist. Ct.).

That changed after the police apprehended and interviewed Sneed. Officers told Sneed that "before [they] talk," and he "make[s] up [his] mind on anything," the officers "want[ed] [him] to hear some of the things that [they had] to say to [him]." JA645.

They then told him that they "kn[e]w that this involve[d] more than just [him]," that "the best thing [he] can do is to just be straightforward … and tell [them] what happened," that they "don't think [he] should take the whole thing," and that while "[e]verybody [they] talked to [was] putting it on [Sneed]," Glossip was "putting it on [him] the worst." JA646, JA655. Sneed—who at first denied even recalling Glossip's last name, JA648—ultimately professed that Glossip was the mastermind of the murder. JA675. The next day, the State dismissed the accessory-after-the-fact charge and charged both Glossip and Sneed with first-degree murder. *See State v. Sneed*, No. CF-1997-244 (Okla. Cnty. Dist. Ct.). Sneed later agreed to testify against Glossip in exchange for avoiding the death penalty. JA22.

Glossip consistently denied involvement in the murder, even while admitting to helping Sneed in the coverup. *Id.* As the OCCA has previously explained, the only "'direct evidence' connecting [Glossip] to the murder was Sneed's trial testimony," and "[n]o forensic evidence linked [Glossip] to murder." JA23. And "no compelling evidence" of any kind "corroborated Sneed's testimony that Appellant was the mastermind behind the murder." *Id.* Without Sneed's statements to the police, there would have been no murder charge; and without his testimony, there would be no murder conviction or capital sentence.

Glossip was found guilty of Van Treese's murder and then sentenced to death on July 31, 1998. JA20-21.

2. On direct appeal, the OCCA unanimously reversed, deeming the trial unconstitutional. *Glossip v. State* ("*Glossip I*"), 29 P.3d 597 (Okla. Crim. App. 2001), JA20-39. The court ordered an evidentiary hearing on Glossip's claim of ineffective assistance of counsel and, without even holding oral argument, held that the conviction could not stand. JA21-22.

The court first noted the relative weakness of the State's theory that Glossip "masterminded the murder by manipulating (asking or telling) Sneed to do it," JA23, and faulted Glossip's counsel for multiple "deficienc[ies]," the "most egregious" and "glaring" of which was the failure to confront Sneed with impeachment material, including Sneed's interview with police and "numerous inconsistencies" between the interview and Sneed's trial testimony, JA24-28 & n.3. The court also observed that "[t]he evidence at trial tending to corroborate Sneed's testimony was extremely weak." JA23. Because Sneed was the State's "star witness"—indeed, its only inculpatory one—the court held that both the performance and prejudice prongs of an ineffective-assistance claim were readily satisfied. JA27-32. The court further held that, on the "specific facts of this case," Glossip was entitled to a jury instruction as to the lesser-related offense of accessory after-the-fact. JA33-34.

3. Before retrial, given the centrality of Sneed's testimony to the prosecution and the flaws in Glossip's prior counsel's examination of him, Glossip requested disclosure of "any and all statements made by Justin Blayne Sneed." JA40. The State was required to provide those statements under Oklahoma law, which compels the disclosure of all "written or recorded

statements and the substance of any oral statements made by the accused or made by a codefendant." 22 Okla. Stat. §2002(A)(1)(c). The State represented in response that it had "complied with [§2002(A)(1)(c)] regarding the statements of Justin Sneed." JA42.

4. The prosecution team in Glossip's second trial was led by assistant district attorney Connie Smothermon. Relevant to Glossip's claims here, Smothermon examined Sneed in the State's case-in-chief as follows:

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

JA312-13. Smothermon continued with the direct examination without revisiting the point or correcting the record.

Throughout the trial and in its closing argument, the State made clear to the jury that Sneed's testimony was effectively dispositive of Glossip's guilt and that Sneed committed this murder only because of Glossip. *See, e.g.*, JA447 ("[I]t's as if Justin Sneed was a Rottweiler puppy, let's say 11 months old, and Richard Glossip was the dog trainer."); JA446 ("What reason above and beyond the reasons of Richard Glossip did Justin Sneed have to kill Barry Van Treese?"); JA448 ("It doesn't make sense to put all this

on Justin Sneed."); JA451 ("But for Richard Glossip, Justin Sneed would never have killed Barry Van Treese.").

The jury found Glossip guilty, and Glossip was again sentenced to death. JA493.

5. This time, on direct appeal, the OCCA affirmed in a fractured opinion, with three votes to affirm and two to reverse. *Glossip v. State* ("*Glossip II*"), 157 P.3d 143 (Okla. Crim. App. 2007), JA492-564.[1] The two-judge plurality acknowledged several potential defects in the trial, including Smothermon's practice of writing notes about witnesses' testimony on demonstratives, which allowed sequestered witnesses to learn the content of preceding testimony. JA511-14 (plurality). The trial court also frustrated the OCCA's review by refusing to preserve the demonstratives as part of the record—something that even the plurality deemed "extremely troubl[ing]." JA512.

Judges Chapel and Johnson dissented, reasoning that allowing Smothermon's notetaking on the demonstratives (and condoning their exclusion from the record) constituted an abuse of discretion. JA537-63 (Chapel, J., dissenting); *see* JA564 (Johnson, J., dissenting). The dissenters further questioned whether the State had met its burden to corroborate Sneed's testimony with independent evidence, as Oklahoma law requires. JA555-59 (Chapel, J., dissenting). Specifically, the dissenters explained that the sufficient-corroboration question was "very close" because after-the-fact assistance and Glossip's

[1] Judge Lumpkin concurred separately in the result. JA536 (Lumpkin, P.J., concurring).

alleged motive were not enough; only the discovery of money in Glossip's possession provided any hint of material corroboration of his participation in the murder. JA559-61.

6. After state post-conviction proceedings, *Glossip v. State*, No. PCD-2004-978 (Okla. Crim. App. filed Sept. 24, 2004), Glossip filed a federal habeas petition in the Western District of Oklahoma, which was denied, Order, *Glossip v. Workman* ("*Glossip III*"), No. 08-cv-326 (W.D. Okla. Sept. 28, 2010), Dkt.64. The Tenth Circuit affirmed. *Glossip v. Trammell* ("*Glossip IV*"), 530 F.App'x 708 (10th Cir. 2013).

7. Glossip brought another state post-conviction challenge in 2015, based on new evidence suggesting that Sneed had recanted his story. An again-closely divided OCCA denied the petition, three votes to two. *See Glossip v. State* ("*Glossip V*"), No. PCD-2015-820 (Okla. Crim. App. Sept. 28, 2015), JA625-41. Judges Smith and Johnson, in dissent, noted the "tenuous evidence in th[e] case" was made even more "questionable" by new allegations that Sneed had "recanted" his story. JA635 (Smith, P.J., dissenting); *see* JA637 (Johnson, J., dissenting) ("Because I believe Glossip did not receive a fair trial, I cannot join in the denial of this successive post-conviction application that further calls into doubt the fairness of the proceeding and the reliability of the result.").

8. Although this Court rejected Eighth Amendment challenges to Oklahoma's execution protocol brought by a group of death-row inmates in Oklahoma, including Glossip, in June 2015, *see Glossip v. Gross*, 576 U.S. 863 (2015), all Oklahoma executions, including Glossip's, were stayed

indefinitely later that year after issues arose with the State's protocol. *See Glossip v. State*, D-2005-310 (Okla. Crim. App. Oct. 2, 2015), JA642-43.

9. After his execution date was reset in 2022, Glossip filed two more post-conviction challenges. *Glossip v. State*, No. PCD-2022-589 (Okla. Crim. App. Nov. 10, 2022); *Glossip v. State* ("*Glossip VI*"), No. PCD-2022-819 (Okla. Crim. App. Nov. 17, 2022), JA771-84. The latter relied on a set of seven bankers boxes that the State first provided to Glossip in the summer of 2022.

Although the State opposed that petition on the merits—just as it had opposed each of Glossip's previous requests for relief—it determined that the public interest would be best served by "address[ing] the merits" of Glossip's claims of "actual innocence" and alleged "egregious misconduct." JA717. The State thus expressly "waive[d] its right to argue the claims within [Glossip's] fourth post-conviction application" were procedurally barred under the Oklahoma Post-Conviction Procedure Act. *Id.* If invoked by the State, that Act would preclude review of a subsequent post-conviction petition in a capital case absent a showing that "the factual basis for the claim was unavailable … through the exercise of reasonable diligence" and that, "but for the alleged error[s], 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). But the State waived §1089(D) and any other procedural bars, and it "respectfully request[ed] that [the OCCA] fully adjudicate [Glossip's] claims" on "the merits." JA718.

The OCCA refused to accept that express waiver, stating that it "alone" would determine whether Glossip's claims were "waived or barred." JA775. The OCCA proceeded to deny Glossip's petition, reasoning that even with the new information contained in those seven boxes, "Sneed could not have been impeached any further than he had already been impeached." JA782.[2]

B. "Box 8" and the Independent Counsel's Report

1. After its 2022 disclosures and Glossip's ensuing post-conviction challenge, the State unearthed disturbing revelations about the contents of the remaining box—consisting of material it previously prevented the defense from obtaining—known as "Box 8." JA984. Buried inside Box 8 was a page of notes handwritten by Smothermon during a pretrial interview with Sneed. Those notes indicated that Sneed had told Smothermon that he was "on lithium" not by mistake, but in connection with a "Dr. Trumpet." JA927.

The parties deduced the import of these notes in short order. The Oklahoma County jail had just one working psychiatrist in 1997 when Sneed was held there: Dr. Larry Trombka. JA930. Sneed's medical records—which the State previously withheld over Glossip's adamant objections—confirm a diagnosis of bipolar disorder with a treatment of lithium at the county jail. JA1005. At that time, Dr. Trombka would have been the only possible treating psychiatrist and

[2] Glossip's certiorari petition with respect to that challenge is pending in this Court as No. 22-6500.

the only medical professional at the jail qualified to prescribe lithium. JA1003. Nonetheless, Smothermon disclosed neither her handwritten notes nor their substantive content—that Sneed was not in fact mis-prescribed lithium, but rather diagnosed with bipolar disorder and treated with lithium under the care of a psychiatrist—to the defense. And despite her knowledge of these facts, Smothermon elicited false testimony from Sneed on the subject. JA312-13.

2. In light of these troubling revelations, the Attorney General disclosed Box-8 materials to Glossip and retained former district attorney and Republican legislator Rex Duncan as Independent Counsel to review the case in its entirety. Rex Duncan, *Independent Counsel Report in the Matter of Richard Eugene Glossip* (Apr. 3, 2023), https://tinyurl.com/2drs5wsf ("*Independent Counsel Report*"). The Independent Counsel's investigation followed on the heels of another comprehensive report compiled by the law firm of Reed Smith, which an ad hoc group of State legislators commissioned to investigate the case. *See* Reed Smith LLP, *Independent Investigation of* State v. Richard E. Glossip (June 7, 2022), https://tinyurl.com/fmnvurvk.[3]

3. After an exhaustive investigation, the Independent Counsel issued a report in April 2023. The report concluded that "[i]f the defense knew [Dr.

[3] Owing specifically to the defects in Glossip's case, State legislators have begun considering steps to stay *all* executions in Oklahoma. *See* Okla. H.B. 3138 (2024), https://tinyurl.com/5yt5anz3; Keaton Ross, *House Committee Advances Death Penalty Moratorium Bill*, Oklahoma Watch (Mar. 4, 2024), https://tinyurl.com/4bvj6edr.

Trombka] had diagnosed Sneed as [bipolar] and prescribed lithium, Glossip's attorneys could have impeached Sneed's credibility, memory[,] and truthfulness." *Independent Counsel Report*, *supra*, at 11. The report dismissed the possibility that "seasoned capital homicide prosecutors" would be unable to connect "Dr. Trumpet" and "lithium" with treatment for bipolar disorder by Dr. Trombka, "the only psychiatrist on staff" at the Oklahoma County jail where Sneed was held. *Id.* at 12. And it noted that the previously available evidence "disclosed Sneed was given lithium, but not why, or by whom," wrongly "leaving the impression that it was for dental work or a cold, and merely administered by a jail nurse." *Id.* at 13.[4]

The report concluded that, "tenuous as it was," the trial evidence appeared sufficient at the time to support Glossip's prosecution. *Id.* at 3. But the case "was not particularly strong and would have been … weaker if full discovery had been provided." *Id.* The report concluded that "Glossip was deprived of a fair trial in which the State can have confidence in the process *and* result" due to violations of "discovery mandates under *Brady* and disclosure requirements of *Napue*." *Id.* at 3-4 (footnote omitted). In sum, the report urged that "[t]he cumulative effect of errors, omissions, lost evidence, and possible misconduct cannot be underestimated," and judged that a "release of all of Sneed's records would have made a

[4] Smothermon, now retired, told the Independent Counsel that "she is not convinced Dr. Trombka and 'Dr. Trumpet' are the same person, and that she and [her co-counsel] tried a 'clean' case." *Independent Counsel Report*, *supra*, at 13.

monumental difference in his cross-examination, and possibly, the jury's verdict." *Id.* at 4, 18.

C. Oklahoma's Confession of Error and Post-Confession Proceedings

1. Although the State did not embrace all of the Independent Counsel's conclusions, it agreed that the *Brady* and *Napue* errors were grave violations of its prosecutorial standards that rendered Glossip's conviction and capital sentence untenable, such that basic principles of justice demanded a new trial. The State thus confessed error in connection with Glossip's latest application for post-conviction relief. *See* JA973-79. The State explained that it had "reviewed the Independent Counsel's report" and "reached the difficult conclusion that justice requires setting aside Glossip's conviction and remanding the case to the district court." JA974. The State further explained that while it did not believe that Glossip made a showing of actual innocence—and fully reserved the right to evaluate all evidence and retry him—it was clear that Sneed "made material misstatements to the jury regarding his psychiatric treatment and the reasons for his lithium prescription." *Id.*

While continuing to dispute that any of Glossip's prior grounds for appeal warranted reversal on their own, the State conceded that "multiple and cumulative errors, such as violation of the rule of sequestration and destruction of evidence," warranted vacatur "taken together with Sneed's misstatements." *Id.* The "concealment" of evidence that the State's "key witness" suffered from a severe mental health disorder, combined with "Sneed's history of drug addiction," was a but-for factor in "obtain[ing]" "the

conviction." JA977-78. And although the OCCA had already deviated from past practice and (without explanation) rejected the State's waiver of procedural bars with respect to Glossip's immediately preceding petition, the State again incorporated its earlier waiver by reference, this time not only waiving obstacles to merits review, but conceding that such review must result in vacatur. JA975.

2. In an extraordinary opinion that it reached after declining either to hold an evidentiary hearing or request that the district court complete one, the OCCA rejected Glossip's application, the State's substantive confession of error, and the State's waiver of the state-law post-conviction procedural bar. *Glossip v. State* ("*Glossip VII*"), 529 P.3d 218 (Okla. Crim. App. 2023), JA980-98.

The OCCA rejected Glossip's *Brady* claim on the ground that the State did not suppress evidence of Sneed's mental health treatment. JA989-91. The OCCA asserted that Glossip's counsel "knew or should have known about Sneed's mental health issues" because a pretrial competency report and Sneed's trial testimony indicated that Sneed had taken lithium, JA991, even though neither suggested that it was prescribed by a psychiatrist for bipolar disorder, and both in fact affirmatively stated otherwise. This, the court reasoned, both doomed a *Brady* claim and triggered §1089(D)(8)(b) because "this issue could have been and should have been raised" in earlier proceedings. *Id.* The court speculated that the defense "did not question Sneed further on his mental health condition" to avoid implying that Sneed was

"vulnerable to Glossip's manipulation and control." *Id.*

As for the *Napue* issue, the OCCA said nothing about the procedural bar and instead similarly just rejected it on the merits, on the theory that "[d]efense counsel was aware or should have been aware that Sneed was taking lithium." *Id.* It found that Sneed's testimony "was not clearly false" under *Napue*, supposedly because Sneed "was more than likely in denial of his mental health disorders" when he testified that he had never seen a psychiatrist and was given lithium for a common cold. *Id.* And the court concluded that the suppressed evidence and false testimony were not "material," i.e., they did "not create a reasonable probability that the result of the proceeding would have been different." *Id.*

In reaching these conclusions, the OCCA refused to give any weight to the State's confession of prosecutorial misconduct, baldly asserting that it was "not based in law or fact." JA990. In a footnote, the court attempted to distinguish *Escobar v. Texas*, 143 S.Ct. 557 (2023), on the counterfactual ground that Texas did not "confess[] error before its own state courts." JA990 n.8. And the OCCA invoked §1089(D)(8), JA990, again refusing to honor the State's waiver of the procedural bar.

The OCCA thus denied relief, rejected the joint application for a stay of execution, and ordered the State to execute Glossip over its own objection. JA996.

3. Glossip sought clemency from the Oklahoma Pardon and Parole Board, a quasi-executive panel charged with authorizing or denying commutation recommendations. The Board held a special meeting

at which Glossip's counsel and the Attorney General both appeared in support of Glossip's application. *See* Pardon and Parole Board, *Clemency Hearing Minutes* 1-2 (Apr. 26, 2023), https://tinyurl.com/378wjv77. But the five-member Board deadlocked 2-2 after the recusal of the Board's chairman, Richard Smothermon—the husband of Glossip's prosecutor, Connie Smothermon—and accordingly failed to reach the majority required to grant clemency. *Id.* at 3.

The Board convened at 9:30am, and by noon, Richard Glossip's fate was sealed—with his prosecutor's husband's vote effectively counted against him. *See id.* at 1, 3. Just over three weeks after the Independent Counsel's report and the State's confession of error, the Board's recusal-driven deadlock left all state "officer[s]" powerless to stop the execution. 22 Okla. Stat. §1004; *see id.* §§1001-1001.1. And while the Governor retains the constitutional power to grant "reprieves … not to exceed sixty (60) days," he cannot commute a sentence without the assent of the Board. Okla. Const. art. VI, §10.

4. The same day that the Board denied clemency, Glossip filed an application for stay of execution in this Court, again with the State's support. No. 22A941 (Apr. 26, 2023). The Court granted a stay of execution with no noted dissents.[5] It then granted Glossip's

[5] The Court's stay order is effective pending the resolution of both this case and the still-pending petition in No. 22-6500. Oklahoma law provides that "a new execution date shall be set by operation of law thirty (30) days after the dissolution of the stay of execution" entered "by any state or federal court." 22 Okla. Stat. §1001.1(E).

petition for writ of certiorari, which the State supported, while adding a question presented.

SUMMARY OF ARGUMENT

As the State reluctantly concluded after an exhaustive study and the appointment of an independent counsel, its prosecutors did not live up to the standards demanded by Oklahoma and the Due Process Clause. By suppressing important evidence about the State's indispensable witness and then knowingly eliciting false testimony on the same subject, the prosecutors violated both *Brady* and *Napue*. Those serious instances of prosecutorial misconduct prompted the State's confession of error and demand redress. And there is no obstacle to this Court's reaching those federal constitutional questions and providing relief. To the contrary, the OCCA's refusal to accept the State's waiver of a procedural bar was unprecedented and the OCCA's reliance on that bar was neither adequate nor independent of its deeply flawed whitewashing of federal constitutional violations.

First, in contravention of *Brady*, the prosecution suppressed evidence that its star witness—whose testimony was the linchpin for converting Glossip from after-the-fact accessory to ex-ante mastermind—had received treatment for bipolar disorder and lied about it on the stand. The centrality of Sneed's testimony to the murder charged cannot be overstated. As reviewing courts have repeatedly acknowledged, the prosecution would not have been viable without Sneed's testimony. The OCCA engaged with none of this, resting on the *ipse dixit* that the evidence would not have affected the outcome of the

trial. How exposing the State's key witness as a perjurer with serious mental-health issues could not affect the outcome of a capital trial is left unexplained. And the OCCA's suggestion that Glossip somehow had contemporary knowledge about the bipolar diagnosis, treatment, and fabrications is even more baffling, especially given that the prosecution blocked his efforts to secure the relevant information.

The prosecution then reinforced that *Brady* violation by knowingly eliciting false testimony in contravention of *Napue*. Despite having taken handwritten notes confirming her knowledge of Sneed's diagnosis and treatment *and* despite Sneed's previous lies on the subject in a competency evaluation, Smothermon asked Sneed on the stand whether he was taking any medication. When Sneed falsely responded that he was mistakenly dispensed lithium and had never seen a psychiatrist, Smothermon did not correct the record, but doubled down to obtain a reaffirmation before moving on. The OCCA disposed of this problem by deeming Sneed's statement "not clearly false" on the theory that he was "in denial" of his mental-health problems. JA991. And it faulted Glossip for not interjecting, even though, thanks to the *Brady* violation, Glossip (unlike the State) had no way of knowing Sneed's testimony was false.

In blithely dismissing these serious instances of prosecutorial misconduct, the OCCA went out of its way to explain that it was giving zero weight to the State's considered confession of federal constitutional error and ignoring the State's waiver of procedural obstacles to reaching the underlying constitutional

questions. That refusal to give respectful consideration to an oath-bound sovereign actor's confession of error was contrary to this Court's settled caselaw. That is doubly true of a prosecutor's confession of prosecutorial misconduct, given the prosecutor's unique responsibilities to ensure that its point is won by securing justice for its citizens (rather than via misconduct) and acute understanding of what testimony was material to its own prosecution. And it is triply true in a capital case, where the net effect of the OCCA's refusal was to effectively order the State to carry out an execution that its chief law officer believes was unconstitutionally procured. The OCCA then reinforced that error by failing to give credence to this Court's decision in *Escobar*.

The OCCA's invocation of a state post-conviction procedural bar despite the State's waiver was plainly not an adequate or independent ground for its judgment or a basis to ignore the *Brady* and *Napue* violations that infected this capital conviction. It is established in Oklahoma that the Attorney General may disclaim reliance on procedural restrictions such as §1089(D)(8)(b), especially in capital cases where the consequences of not waiving such defenses can be immeasurably grave. The Attorney General did so here, yet the OCCA took the unprecedented step of overriding the Attorney General's considered choice to waive that procedural hurdle. That was precisely the sort of "unforeseeable and unsupported state-court decision" that "does not constitute an adequate ground to preclude this Court's review of a federal question." *Cruz v. Arizona*, 598 U.S. 17, 26 (2023) (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964)).

Moreover, the OCCA's cursory §1089(D)(8)(b) analysis was wholly inadequate even on its own terms. The court's finding that Glossip's counsel should have known about Sneed's mental illness, even though the prosecution covered up the crucial evidence and Sneed falsely denied it, is baseless. *Brady* and *Napue* impose obligations to disclose exculpatory evidence and to correct lies. Dismissing violations of those constitutional bedrocks on the ground that suitably skeptical and intrepid defense counsel should have assumed the government was concealing and prevaricating and gotten to the truth anyways eviscerates those bedrock precedents. And the notion that a reasonable factfinder would have ignored evidence that the prosecution's star witness was suffering from a serious mental illness and committed perjury is equally unfathomable.

Finally, the OCCA's reliance on the procedural bar was wholly intertwined with its resolution of federal questions. The court found that there was no *Brady* violation based on its misguided views of materiality and the nature of the State's disclosures, and it found §1089(D)(8)(b) was unsatisfied, *a fortiori*, for that reason. And the court did not even purport to apply the state-law bar as to *Napue*, resting its holding on federal law alone. That is about as dependent as it gets.

ARGUMENT

I. Prosecutorial Misconduct Committed And Confessed By This State Precluded Any Possibility Of A Fair Trial Or A Valid Capital Sentence.

When the State of Oklahoma confessed that its prosecutors had violated bedrock constitutional guarantees in securing a capital conviction, the OCCA looked the other way. That was reversible error several times over.

A. Glossip's Due Process Rights Under *Brady* and *Napue* Were Violated in Conjunction with the State's One Indispensable Witness.

The Fourteenth Amendment's Due Process Clause requires the State to provide defendants with all exculpatory evidence in its possession that "is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. It further precludes the State from obtaining "a conviction … through use of false evidence, known to be such by representatives of the State." *Napue*, 360 U.S. at 269. Even when not intentionally "solicit[ed]," the State may not "allow[] it to go uncorrected when it appears." *Id.* In short, prosecutors can neither conceal exculpatory evidence nor knowingly allow false testimony to go uncorrected. Here, the State has reluctantly concluded that its prosecutors did both, and did so in conjunction with the State's one indispensable witness. The Box-8 notes were plainly *Brady* material, and failing to correct Sneed's false testimony just as plainly violated the State's obligations under *Napue*. Either of these

errors would independently require reversal. Together, they make clear beyond cavil that Glossip's capital conviction cannot stand.

1. The failure to disclose evidence of Sneed's psychiatric treatment violated *Brady*.

a. The centrality of Sneed's testimony to Glossip's trial, conviction, and capital sentence can hardly be overstated. Sneed committed the murder and was the key to transforming Glossip from after-the-fact accessory to criminal mastermind and motivating force behind a murder-for-hire agreement. Judges at virtually every stage of review of Glossip's conviction have underscored that the State's murder case would have been exceedingly difficult (if not impossible) to prove without its "star witness." JA28; *see, e.g.*, JA23 ("No forensic evidence linked [Glossip] to murder and no compelling evidence corroborated Sneed's testimony that [Glossip] was the mastermind behind the murder."); Order at 1, *Glossip III*, No. 08-cv-326 (W.D. Okla. Sept. 29, 2010), Dkt.66 (case "hinged on the testimony of one witness, Justin Sneed"). Indeed, the centrality of Sneed to the prosecution explains why the OCCA readily and unanimously found prejudice from the errors in Glossip's first trial, in large part based on defense counsel's failure to cross-examine Sneed. JA20-39.

Before Sneed pointed the finger at Glossip, the evidence substantiated Glossip's involvement only *after* the murder, aiding Sneed in covering it up. Anything beyond that, Glossip consistently denied. JA22. And the State had no evidence outside of Sneed's say-so tying Glossip to the murder's

commission, as opposed to its coverup. That is why, until Sneed was located and flipped, the State charged Glossip only as an accessory after-the-fact. *See Independent Counsel Report*, *supra*, at 1.

The centrality of Sneed to the prosecution's murder case against Glossip makes the prosecution's failure to turn over evidence undermining Sneed's testimony a particularly troubling *Brady* violation. Had the prosecution turned over the evidence in Box 8 indicating that Sneed had been prescribed lithium by a jail psychiatrist for bipolar affective disorder, the defense would have been able to present a far stronger case. That previously undisclosed evidence not only provided a basis for attacking Sneed's overall reliability as a witness, but would have allowed defense counsel to directly impeach Sneed's sworn testimony falsely providing an innocuous explanation for being prescribed lithium. That surely renders the suppressed evidence material under *Brady*. *See generally Giglio v. United States*, 405 U.S. 150, 154 (1972) (*Brady* material includes "evidence affecting credibility"). Had the defense obtained that evidence, there is a "'reasonable probability' of a different result," or, equivalently, its suppression "undermines confidence in the outcome of the trial." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (quoting *United States v. Bagley*, 473 U.S. 667, 678 (1985)).

And had the prosecution turned over Smothermon's Box-8 notes, it would have been immediately obvious to the defense that the State's indispensable witness was lying on the stand. The notes, and specifically the reference to "Dr. Trumpet," would have pointed the defense to the fact that,

contrary to Sneed's sworn testimony, he was under the care of a psychiatrist who prescribed him lithium. *See* JA1003. In turn, cross-examination based on this evidence would have seriously undermined Sneed's credibility and exposed his perjury.[6] That is surely enough to create "a reasonable *possibility* that either a total, or just a substantial, discount of [Sneed's] testimony might have produced a different result." *Strickler v. Greene*, 527 U.S. 263, 291 (1999). Even Smothermon's co-counsel, Gary Ackley, concedes as much, conveying in a sworn affidavit in 2023 that Sneed's "treatment for bipolar disorder" qualified as "*Brady* impeachment material." JA940.

The materiality of the withheld information goes well beyond undermining Sneed by exposing his innocuous explanation for the lithium prescription as a lie. The information would have allowed Glossip's counsel to set forth a viable alternative story of the murder—that Sneed, addicted to methamphetamine as well as on marijuana, cocaine, and acid, JA700, had a "manic," "paranoid," "potentially violent" episode triggered by the combination, JA932 (Trombka Affidavit). *Accord* JA964-65 (report by Sneed's co-inmate of confession consistent with that possibility). That theory would be consistent with the unabashedly brutal nature of the murder, which included "beat[ing] Van Treese to death by hitting him ten or fifteen times with a baseball bat," JA22, and multiple stab wounds

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[6] That makes this evidence far different from the issues in Glossip's separate post-conviction petition from 2022, as it would have enabled a categorically different impeachment opportunity than what Glossip had at trial. *See* JA782; *see also Turner v. United States*, 582 U.S. 313, 327 (2017).

from a blunt tip knife, *see Independent Counsel Report*, *supra*, at 9.

Sneed's bipolar disorder also might help explain his frequently (and sometimes inexplicably) shifting accounts about what transpired in the predawn hours of January 7, 1997. All that, together with the undisclosed evidence's value in impeaching the singular witness on which the prosecution critically depended, is more than sufficient to "undermine[] confidence in the outcome of the trial." *Bagley*, 473 U.S. at 678; *see id.* at 676 (no distinction between "impeachment evidence and exculpatory evidence," which must be considered together under *Brady*).

b. The OCCA seriously erred in concluding that the Box-8 evidence was not *Brady* material. Other than a conclusory assertion that the evidence would not have changed the outcome, *see* JA991-92, the OCCA provided zero support for its conclusion that the prosecutor's notes undermining the prosecution's "star witness" somehow were immaterial under *Brady*. It did not discuss the weight of the other evidence, the absolute centrality of Sneed's testimony, the clear contradiction between the notes and Sneed's actual testimony, or the degree to which the suppressed evidence of bipolar disorder (coupled with Sneed's dishonesty on the stand) would have called his account into question. Instead, the OCCA deemed nondisclosure of the notes immaterial because, in its view, the relevant facts were *not concealed at all*, but had already been disclosed through a prior competency evaluation and the trial testimony itself. JA991. Thus, reasoned the OCCA, defense counsel

"knew or should have known about Sneed's mental health issues." *Id.*

That is flatly wrong factually and legally. The 1997 competency evaluation affirmatively pointed Glossip's defense counsel away from the truth, reporting that Sneed "denied any psychiatric treatment" and that he was given lithium after a visit to the dentist; the report went on to speculate that Sneed may have had ADHD (a far cry from bipolar disorder), which was incidentally helped by the drug. JA700-01. Indeed, as late as 2015, the State was arguing, on the basis of the competency report, that Sneed "was not prescribed lithium until March, 1997[,] after having a tooth pulled." JA609. The trial testimony was similarly misleading. In the course of Smothermon's direct examination at trial, Sneed flatly denied "see[ing] no psychiatrist or anything" and suggested that he mistakenly received lithium after "ask[ing] for some Sudafed because [he] had a cold." JA312-13.

Both the competency examination and Sneed's sworn testimony are worlds apart from the truth revealed in the Box-8 notes—that the lithium was prescribed by a psychiatrist for diagnosed bipolar disorder. Worse still, Glossip affirmatively requested Sneed's medical records after doubts emerged about his credibility, but the State refused and successfully blocked access by calling the request "nothing more than a fishing expedition." JA620; *see also* JA621-22. Thus, the OCCA's inappropriate speculation that defense counsel did not "want to inquire about Sneed's mental health" for fear of "showing that he was mentally vulnerable to Glossip's manipulation,"

JA991, blinks reality. Defense counsel did not know the truth because the truth lay undisclosed in Box 8.

The OCCA's factually flawed assertion that the defense knew enough because the competency report and trial testimony mentioned a "lithium prescription," *id.*, is legally baseless as well. The basic premise of *Brady* is that the State will disclose everything that is material and exculpatory. Disclosing materially inaccurate breadcrumbs that might lead the most skeptical defense counsel to divine the truth is plainly not enough. *Brady* obligations (and the *Napue* doctrine, and the Due Process Clause) serve to ensure that a criminal defendant can take the representations of the prosecutors at face value. The contents of Box 8 indicate that the prosecutors did not live up to those standards here. To dismiss that constitutional omission on the ground that suitably skeptical defense counsel should have assumed the worst and ferreted out the truth is profoundly misguided.

2. The *Brady* violation was exacerbated by a *Napue* violation.

While the *Brady* violation independently justifies vacating the conviction, the State's affirmative elicitation of false evidence on the same subject exacerbated the violation and was *a fortiori* reversible error under *Napue*. *See United States v. Agurs*, 427 U.S. 97, 103-04 (1976); *Bagley*, 473 U.S. at 679 n.9.

As the Box-8 notes confirm, Smothermon, the State's prosecutor, knew that Sneed had been prescribed lithium by a psychiatrist. Her handwritten notes indicated that Sneed mentioned "lithium" in connection with a "Dr. Trumpet." JA927. At the same

time, Sneed had stated during a competency evaluation that he was given lithium in error and had never received any psychiatric treatment.[7] Yet rather than disclose the truth about Sneed's psychiatric treatment to defense counsel, Smothermon specifically elicited testimony in the State's case-in-chief designed to provide an innocuous (and false) explanation for Sneed's disclosed lithium use, presumably to head off cross-examination on the subject. JA312-13. Sneed again denied that he had "seen [a] psychiatrist," asserting that he had requested Sudafed and was given lithium in an apparent mix-up. *Id.* And rather than take steps to correct what she knew to be false testimony, Smothermon followed up, asking *again* to confirm that Sneed did not "know why they gave" him lithium, and Sneed testified that he did not. JA313.

In short, the prosecution plainly presented evidence it knew to be false, thus "corrupt[ing] the truth-seeking function of the trial process." *Agurs*, 427 U.S. at 104. All the same prejudice arguments for *Brady* error, *see* pp.22-25, *supra*, apply with even greater force under these circumstances. Indeed, the prosecution's felt need to inoculate Sneed's disclosed lithium use by eliciting a false narrative on direct examination underscores the materiality of the notes sitting undisclosed in Smothermon's files.

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[7] In a competency hearing in his own case, Sneed again denied either taking psychotropic medication or failing to take any medication he had been prescribed. JA14. He further denied ever being examined by anyone other than the competency evaluator for his mental health, despite the diagnosis by and prescription from Dr. Trombka. *Id.*

The OCCA resisted this straightforward conclusion through gold-medal doctrinal gymnastics, culminating in the remarkable proposition that Sneed's testimony was "not clearly false," supposedly because he "was more than likely in denial of his mental health disorders." JA991. But "denial" is at best an explanation for why Sneed was lying, not a basis for claiming that the lie becomes the truth. In common parlance, being in denial is failing to come to terms with the truth. In the law, being in denial is hardly an excuse for lying on the stand after swearing to tell the truth. In all events, *Napue* obligations are directed at the prosecutor, not the witness—and they depend on the prosecutor's knowledge alone. *See, e.g.*, *Napue*, 360 U.S. at 269 ("[A] State may not knowingly use false evidence, including false testimony."); *Giglio*, 405 U.S. at 153 (similar). A prosecutor may not elicit knowingly false testimony from a witness regardless of whether the perjury is a product of denial, senility, or habit. Simply put, a prosecutor may not knowingly elicit or leave uncorrected false testimony from a witness, period.[8]

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[8] Unlike the OCCA, the circuits have had no trouble reading *Napue*'s clear command. *See, e.g.*, *United States v. Kattar*, 840 F.2d 118, 128 (1st Cir. 1988) ("Even" if not "perjury," "the government is precluded [under *Napue*] from using evidence that is known *to the government* to be false"); *accord United States v. Harris*, 498 F.2d 1164, 1169 (3d Cir. 1974); *Kutzner v. Cockrell*, 303 F.3d 333, 337 (5th Cir. 2002); *United States v. Lochmondy*, 890 F.2d 817, 822 (6th Cir. 1989); *United States v. Boyd*, 55 F.3d 239, 243 (7th Cir. 1995); *United States v. McClintic*, 570 F.2d 685, 692 & n.13 (8th Cir. 1978); *Hayes v. Brown*, 399 F.3d 972, 981 (9th Cir. 2005) (en banc); *id.* at 989 (Tallman, J., concurring in part and dissenting in part); *Graham v. Wilson*, 828 F.2d 656, 659

The OCCA backed up its remarkable no-lie theory with an entirely unexplained no-materiality proclamation. The OCCA declared Sneed's testimony "not material under the law" because it did "not create a reasonable probability that the result of the proceeding would have been different." JA991; *see Giglio*, 405 U.S. at 154. That *ipse dixit* is wrong for all the same reasons as the OCCA's (equally conclusory) *Brady* determination. *See* pp.22-25, *supra*. Indeed, the *Napue* violation was even more prejudicial. Whether Sneed was deluding himself (as the OCCA hazarded to guess) or just lying, either one would be immensely important to the defense's cross-examination, showing that Sneed was either incapable or unwilling of telling the truth under oath. *See Hayes v. Brown*, 399 F.3d 972, 981 (9th Cir. 2005) (en banc) ("That the witness is unaware of the falsehood of his testimony makes it more dangerous, not less so."). The prosecution's knowing solicitation of false testimony deprived Glossip of a basis to cross-examine Sneed both on his mental illness and his lies (or delusions) on the stand.

Finally, in faulting defense counsel for "not inquir[ing] further" after Sneed's false testimony, the OCCA ignored the *Brady* violation that prevented defense counsel from identifying the lie as a lie and exploiting it through a devastating cross-examination. That underscores that while the *Brady* and *Napue* violations are each sufficient grounds for reversal, the two violations reinforced one another and that both instances of prosecutorial misconduct were highly

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(10th Cir. 1987); *United States v. Dickerson*, 248 F.3d 1036, 1043 n.6 (11th Cir. 2001).

material. Both involved a key fact about the key witness. And the one-two punch of concealment and eliciting a false cover story deprived the defense of critical opportunities for impeachment and developing an alternative explanation for the brutal nature of the murder. The OCCA's decision to whitewash those serious and reinforcing constitutional violations cannot be the final word.[9]

B. Allowing This Capital Conviction to Stand Over the State's Misconduct Confession Was Reversible Error.

The State did not come to its conclusion to confess error on these constitutional violations lightly. The State successfully resisted countless previous efforts by Glossip and his attorneys to attack his conviction and sentence, and the State continues to defend dozens of capital convictions. Moreover, the Attorney General confessed error only after authorizing an exhaustive independent review of the withheld materials and how they impacted the fairness of the trial. Even then, the Attorney General did not accept all the Independent Counsel's conclusions. But the serious and reinforcing *Brady* and *Napue* errors implicating the State's indispensable witness stood out and demanded correction. Thus, after extensive deliberation and following the best of our traditions, the State confessed error as to those two instances of prosecutorial misconduct.

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[9] The State has repeatedly opposed relief on the basis of other trial errors. But it concedes that these other errors reinforce the need to remedy the confessed *Brady* and *Napue* violations.

The OCCA gave the State's confession of error precisely zero weight, blithely dismissing it as "not based in law or fact." JA990. As the foregoing makes clear, that is just plain wrong. This is not a case in which a progressive prosecutor has abandoned capital prosecutions and ceased defending capital convictions secured by his predecessor. This is a case in which an Attorney General actively defending other capital prosecutions commissioned an independent review and reluctantly concluded that a capital prosecution had become indefensible due to constitutional violations by the prosecutors. As a result, the Attorney General waived any procedural bars to assessing the merits of the constitutional issues, including §1089(D)(8)(b), and agreed with Glossip that the *Brady* and *Napue* errors demand a retrial. While that confession of error did not decide the constitutional issues for the OCCA, that candid confession of prosecutorial misconduct demanded respectful consideration, rather than a brush-back pitch. This Court has never treated such an extraordinary confession of error so dismissively, let alone a prosecutor's confession of prosecutorial misconduct, and in a capital case at that. There is no reason to ratify the OCCA's decision to do so now, and every reason not to.

1. Confessions of error demand especially respectful consideration when they relate to the State's own prosecutors' admitted misconduct.

It is axiomatic that "[c]onfessions of error are … entitled to and given great weight." *Sibron v. New York*, 392 U.S. 40, 58 (1968); *see also Young v. United*

States, 315 U.S. 257, 258-59 (1942). That has been this Court's practice at least since Solicitor General Taft's confession of error in *Cook v. United States*, 138 U.S. 157 (1891), when "representatives of the government, in this court, frankly concede[d], as it was their duty to do, that this action of the court below was so erroneous as to entitle the defendants to a reversal." *Id.* at 185.

To be sure, confessions by the Executive Branch "do not 'relieve this Court of the performance of the judicial function.'" *Sibron*, 392 U.S. at 58 (quoting *Young*, 315 U.S. at 258). But giving weight to such confessions of error is rooted not just in ordinary adversarial principles—no party lightly concedes that it should lose on appeal—but also in the due respect owed to the executive's "considered judgment" as a sovereign power with sovereign duties. *Young*, 315 U.S. at 258. As a government actor that has taken its own oath to uphold the Constitution, the United States Attorney General "transcends" the role of "an adversary." *Bagley*, 473 U.S. at 675 n.6. Far from "an ordinary party to a controversy," it represents "a sovereignty whose obligation to govern impartially" renders its "interest … not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935).

That is no less true of a State Attorney General. He is bound by the same Oath Clause as his federal counterpart. *See* U.S. Const. art. VI, cl.3. And that federally mandated oath is backed by solemn duties imposed by state law. Upon entering office, the Oklahoma Attorney General takes an oath to "support, obey, and defend the Constitution of the

United States" and to "faithfully discharge" the "duties" of his office "to the best of [his] ability." Okla. Const. art. XV, §1; 74 Okla. Stat. §18a. That promise is a weighty one. As the "chief law officer" of the State, 74 Okla. Stat. §18, the Attorney General is "charged as much with the duty of seeing that no innocent man suffers as of seeing that no guilty man escapes," *Brower v. State*, 221 P. 1050, 1051 (Okla. Crim. App. 1924). "It is his duty," on behalf of himself and all those acting in the State's name, "to see that nothing but competent evidence is submitted to the jury" in securing and sustaining all criminal convictions. *Id.* Due respect for the constitutional views of those who seek to honor their constitutionally mandated oath demands that courts take sovereign confessions seriously. *See Sibron*, 392 U.S. at 58 (differentiating "a state official" such as the Attorney General from an officer of "one political subdivision within the State").

These principles have particular force where the confession concerns prosecutorial misconduct given the special duties of prosecutors and their acute awareness of which prosecutorial missteps are material. As a "peculiar … servant of the law," a prosecutor's duty "is as much … 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. As officers of the court, all attorneys have a "special duty … to prevent and disclose frauds upon the court." *Nix v. Whiteside*, 475 U.S. 157, 168-69 (1986). But the "public trust" in *government* attorneys in particular "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; *see*

also Connick v. Thompson, 563 U.S. 51, 65-66 (2011) ("Prosecutors have a special duty to seek justice, not merely to convict."); Okla. R. Prof. Cond. 3.8(h)(2)(iii) (requirement to "request an appropriate authority to investigate whether the defendant was convicted of an offense that the defendant did not commit"). Moreover, giving no weight to prosecutorial confessions of prosecutorial misconduct ignores not only prosecutors' special responsibilities, but their special competence to identify prosecutorial conduct that crosses the line and assess the materiality of particular evidence in the broader scheme of their own prosecutions.

Refusing to give respectful consideration to the reasons behind such confessions, as the OCCA did here, sends all the wrong signals to prosecutors and the accused alike. After all, prosecutors are expected to pursue the State's interests within the bounds of zealous advocacy. The courts, by contrast, are expected to be wholly impartial. Thus, when the courts refuse to give respectful consideration to confessions of error, it sends the signal to litigants that the courts are asserting a vested interest in prosecutions and are clinging more tightly to convictions than the prosecutors themselves. None of that means that courts do not have the final word on whether a prosecution comported with due process. But it does mean that giving no weight to confessions of error cannot be squared with the basic guarantee of impartial courts on which our justice system depends.

The OCCA's cavalier disregard for the State's considered judgment was thus wrong in and of itself (and an error not even arguably shielded by any

adequate and independent state ground). In Oklahoma, the "public trust reposed in … law enforcement," *Young*, 315 U.S. at 258, rests with the State's "chief law officer," namely the Attorney General, 74 Okla. Stat. §18. *See id.* §18b(A), (A)(2) ("The duties of the Attorney General as the chief law officer of the state shall be … [t]o appear for the state and prosecute and defend all actions and proceedings in any of the federal courts[.]"). The Attorney General treats his solemn obligation to confess misconduct as an unyielding, immensely important responsibility. "It serves no good purpose for an officer of the law to fail or neglect to comply with the law in making an effort to secure evidence against one whom he believes is violating the law, and unless the officer, whose duty it is to administer the law, obey and respect the law, we cannot hope for faithful obedience of the same by our citizens." *Graves v. State*, 283 P. 795, 796 (Okla. Crim. App. 1929); *see also Abbott v. Territory*, 94 P. 179, 179 (Okla. 1908) ("For h[e] … who executes the laws, the moving course should be: Neither shall an innocent person be punished nor shall a guilty one go free."); *Guiaccimo v. State*, 115 P. 129, 129 (Okla. Crim. App. 1911) (per curiam) (similar).

To be sure, the State's confession of error reflects a legal opinion that Glossip's due process rights were violated, and on that question, this Court has the final say. But the judgment of the State's oath-bound chief legal officer that a conviction *its officers procured* was the unconstitutional product of prosecutorial misconduct surely deserves respectful consideration. The combined effect of the Due Process and Oath Clauses demands nothing less. Our system of justice places awesome powers and responsibilities in the

hands of prosecutors. When those prosecutors themselves recognize that they have overstepped, that judgment cannot be dismissed as just another litigation position.

2. The OCCA further erred in dismissing this Court's decision in *Escobar* and ignoring the practical effect of its decision.

That this is a capital case makes the OCCA's refusal to give any weight to the State's confession of error even more inexcusable. The "severity" of a capital conviction itself "mandates careful scrutiny"—not casual disregard—"in the review of any colorable claim of error." *Zant v. Stephens*, 462 U.S. 862, 885 (1983). Review in capital cases, in other words, is "qualitatively different." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). Here, however, the OCCA paid no mind to that difference and placed the Attorney General in an impossible position.

a. This Court has never countenanced a death sentence issued over a State's confession of error. Just last year, in *Escobar*, this Court considered a case in which the prosecution confessed a *Napue* error and supported vacating a capital conviction. *See* Brief of Respondent State of Texas in Support of Petitioner ("*Escobar* Br."), *Escobar v. Texas*, No. 21-1601, 2022 WL 4781414 (U.S. Sept. 28, 2022). Before the Texas Court of Criminal Appeals, the prosecution filed a "confession of error" to support vacatur; when the court denied relief, the prosecution filed a motion for reconsideration, thinking that the court must have inadvertently overlooked the confession. *Id.* at *2-3, *19-20. When that motion too was denied, the

prosecution filed a brief in support of certiorari. This Court then granted the petition, vacated the judgment, and remanded "for further consideration in light of the confession of error." 143 S.Ct. 557, 557 (2023).

The OCCA dismissed *Escobar* in a footnote, stating only that "Texas confessed error in a brief before the United States Supreme Court," not "before its own state courts as the Attorney General has done in its brief presented to this Court." JA990 n.8. That is not even remotely correct; as just explained, Texas confessed error in *Escobar* in exactly the same posture that the State confessed error here. The OCCA's denial of that incontestable procedural reality betrays the OCCA's desperation to avoid giving the State's confession here the weight it was due.

Indeed, the OCCA ignored not only this Court's decision in *Escobar*, but the impossible position it was putting the Attorney General in by ignoring his confession of error and related waiver of procedural impediments to square consideration of the confessed constitutional defects in the prosecution. It is doubtful that this situation could even arise at the federal level with its unitary executive. If the Justice Department determined that a federal capital conviction was constitutionally infirm, the President could and presumably would put the execution on hold or commute the sentence. But the situation in Oklahoma is more complex. Oklahoma has a plural, not unitary, executive. *Wentz v. Thomas*, 15 P.2d 65, 84 (Okla. 1932); *see* Okla. Const. art. VI, §1. That is a fully permissible choice for a sovereign State in our federal system, but it complicates matters here: Neither the

State Executive vested with the power to confess error in a way that binds other executive-branch officials (i.e., the Attorney General) nor the State's Chief Executive (i.e., the Governor) can stop Glossip's execution, notwithstanding the State's view that it is constitutionally unsupportable. Okla. Const. art. VI, §10; 22 Okla. Stat. §§1001-1001.1, 1004. The only body with the power to do so was the Pardon and Parole Board, but it deadlocked based on a recusal. Under these circumstances, the OCCA's refusal to give respectful consideration to the Attorney General's confession of error or honor his waiver of procedural obstacles to adjudicating the underlying constitutional issues effectively ordered executive officials to carry out an execution that they believe is constitutionally infirm.

b. Members of the Van Treese family suggest that the Attorney General is complicit in a nationwide scheme of "abolitionist supporters" to "further their campaign against the death penalty." Brief of *Amicus Curiae* Victim Family Members in Opp. at 9; *see id.* at 3-4. The family's desire to see this process come to an end is eminently understandable, and the circumstances in which it, the State, and Glossip all find themselves are truly regrettable. But with all due respect, the suggestion that the State has joined forces with death-penalty "abolitionists" is divorced from reality. The Attorney General's Office has repeatedly defended enforcement of its death penalty, including in this Court, *see, e.g.*, *Cooper v. Oklahoma*, 517 U.S. 348 (1996), and even *in Glossip's case* in this Court, *see* 576 U.S. 863 (2015). The State carried out four executions *last year alone*, all with the support of the current Attorney General, including one witnessed by

him and in which the Pardon Board recommended clemency.[10] And just this month, the State successfully opposed emergency relief for a capital defendant and carried out his execution. *See* Response to Application, *Smith v. Oklahoma*, No. 23-7136 (U.S. Apr. 3, 2024).

Indeed, the State continued to defend the integrity of the Glossip's conviction and death sentence as recently as last year, in opposition to a separate petition filed by Glossip that remains pending (and that the State continues to oppose). It was only after the emergence of the evidence of serious prosecutorial misconduct that the State was compelled to support vacatur. The Independent Counsel, too, as former "Chairman of the Oklahoma House of Representatives Judiciary Committee … supported pro-death penalty legislation, guided pro-death penalty bills through committee and co-authored such a bill signed into law." *Independent Counsel Report*, *supra*, at 18-19. The State's position here simply reflects its firm belief (as should be common ground) that the death penalty should be reserved for defendants found guilty beyond reasonable doubt after a fair trial free from prosecutorial misconduct.

II. There Is No Impediment To Reversal.

The OCCA's invocation of the Oklahoma Post-Conviction Procedure Act, 22 Okla. Stat. §1080 *et seq.*, despite the State's waiver, was neither an adequate

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[10] *See* Caroline Sellers, *State of Oklahoma Executes Fourth Death-Row Inmate of 2023*, KFOR (Nov. 30, 2023), http://tinyurl.com/mw5a6r5x.

nor an independent basis for ordering Glossip's execution to proceed over the State's objection that his conviction was secured through prosecutorial misconduct.

A. The Court's Reliance on §1089(D)(8)(b) Despite the State's Intentional Waiver Renders it an Inadequate Ground for Forcing the State to Execute Glossip Over Its Own Objection.

"The question whether a state procedural ruling is adequate is itself a question of federal law," and this Court has long recognized that "exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question." *Beard v. Kindler*, 558 U.S. 53, 60 (2009); *Lee v. Kemma*, 534 U.S. 362, 376 (2002); *see also, e.g.*, *Ward v. Bd. of Cnty. Comm'rs*, 253 U.S. 17, 22 (1920) (state-law ground is inadequate if it lacks "fair or substantial support"). While §1089(D)(8)(b) is generally a valid rule of Oklahoma procedure that the State itself routinely invokes, the OCCA's decision to invoke it despite the Attorney General's express waiver, and to use it to force the State to carry out an execution against its will, is simply untenable.

Section 1089 of the Oklahoma Post-Conviction Procedure Act applies only in capital cases. As relevant here, it limits "subsequent application[s] for post-conviction relief" in capital cases to those that not only "contain[] sufficient specific facts establishing that the current claims and issues have not and could not have been presented previously … through the exercise of reasonable diligence," but also "would be sufficient," "if proven and viewed in light of the

evidence as a whole," "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).

Like other post-conviction procedural hurdles in Oklahoma, that provision is waivable by the State when the Attorney General determines that such waiver is required to ensure that justice is done. Despite having accepted the State's waiver of §1089 in previous cases, the OCCA here flatly rejected the State's waiver without any explanation, arrogating to itself the sole power to determine whether to "abandon[]" procedural bars. JA775. That is the exact opposite of what binding OCCA precedent commanded—and thus the very definition of an "unforeseeable and unsupported state-court decision" that "does not constitute an adequate ground to preclude this Court's review." *Cruz*, 598 U.S. at 26.

The OCCA has previously accepted waivers by the State in identical circumstances. In *McCarty v. State*, 114 P.3d 1089 (Okla. Crim. App. 2005), a capital defendant filed a "second application for post-conviction relief and request for evidentiary hearing, seeking reversal of his murder conviction and death sentence." *Id.* at 1090. The State "waived procedural bars and consented to an evidentiary hearing on several of Petitioner's claims 'due to the serious allegations raised,'" so the OCCA "remanded the case for an evidentiary hearing." *Id.* When the case returned to the OCCA, the State again "waived any procedural bars that may arguably apply" to several

claims—including for "suppression of exculpatory evidence and introduction of false testimony by the prosecution"—in McCarty's second application. *Id.* at 1091 & n.7, 1092 n.13, 1094 n.24. Each time, the OCCA accepted the State's waiver, disregarded whether the defendant would have satisfied the strictures of the Post-Conviction Procedure Act, and proceeded to the merits—where it ultimately reversed the conviction without regard to §1089(D). *Id.* at 1095.

Just as in *McCarty*, the State here waived §1089's procedural hurdles due to serious concerns about the integrity of Glossip's conviction. JA717-18. But here—unlike in *McCarty*, and to the State's knowledge, for the first time *ever*—the OCCA wholly disregarded the State's waiver, just as it brushed aside the State's confession. The OCCA provided no explanation for its departure from settled law, simply rejecting the waiver and declaring that whether to set aside procedural thresholds was the province of the OCCA "alone." JA775. Erecting that unprecedented and unexplained barrier to relief is precisely the kind of "novel and unfounded" rule that is inadequate to preclude this Court's review. *Cruz*, 598 U.S. at 29; *see also NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457-58 (1958) ("Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights."). And the "consequences of the interpretation below compound its novelty." *Cruz*, 598 U.S. at 28. By rejecting both the State's confession and its waiver, the court arrived at a decision to order the State carry out an execution

that its chief law officer believes to be constitutionally unsupportable.

It would have been bad enough—and inadequate under this Court's caselaw—if the OCCA had rejected waiver on the (unexplained) theory that State post-conviction procedural restrictions would now, for the first time, be unwaivable. *See Walker v. Martin*, 562 U.S. 307, 320 (2011) ("A state ground, no doubt, may be found inadequate when discretion has been exercised to impose novel and unforeseeable requirements without fair or substantial support in prior state law."). But the OCCA's decision is wholly unsupportable even on its own terms. The OCCA did not suggest that the procedural rules had, contrary to established precedent, suddenly become unwaivable or unyielding. To the contrary, the OCCA repeatedly embraced the longstanding rule in Oklahoma that all post-conviction procedural bars, including §1089(D)(8)(b), not only may but must yield when enforcement would result in a "miscarriage of justice." JA630; *see* JA775 ("This Court's rules and our case law, however, do not bar the raising of a claim of factual innocence at any stage." (citing *Slaughter v. State*, 108 P.3d 1052, 1054 (Okla. Crim. App. 2005))); *accord* JA994 (citing *Valdez v. State*, 46 P.3d 703, 710-11 (Okla. Crim. App. 2002)); *see also, e.g.*, *Malicoat v. State*, 137 P.3d 1234, 1235 (Okla. Crim. App. 2006) ("reach[ing] the merits" of "subsequently filed application for capital post-conviction review" because the "[c]ourt has the authority to consider the merits of an issue which may so gravely offend a defendant's constitutional rights and constitute a miscarriage of justice"). Instead, the OCCA simply stated that *it*, not the People through their elected law officer, could

decide whether to dispense with waivable statutory procedural requirements meant to protect the State against repeat challenges to convictions it secured.

That unprecedented judicial overreach is not just wrong, but dangerous. In "our adversarial system of adjudication, we follow the principle of party presentation," in which courts are "neutral arbiter[s] of matters the parties present." *United States v. Sineneng-Smith*, 590 U.S. 371, 375 (2020). To be sure, the party-presentation rule is not ironclad; courts may excuse a failure to timely invoke a procedural bar "when extraordinary circumstances so warrant." *Wood v. Milyard*, 566 U.S. 463, 471 (2012); *see id.* at 472-73. But such actions are limited to forfeiture—i.e., situations where a State fails to raise a defense by "inadvertent error." *Id.* at 474. "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. *Id.* at 466; *cf. Day v. McDonough*, 547 U.S. 198, 202, 210 n.11 (2006) ("[S]hould a State intelligently choose to waive a statute of limitations defense, a district court would not be at liberty to disregard that choice."). Indeed, a court's refusal to accept such an express waiver would blur the lines between impartial courts and zealous prosecutors in ways that would raise serious due process issues. The OCCA "does not have *carte blanche* to depart from the principle of party presentation basic to our adversary system," least of all in capital cases. *Wood*, 566 U.S. at 472. And with good reason, as the OCCA's decision creates

an appearance of partiality and amounts to judicial usurpation of a quintessentially executive function.[11]

B. The OCCA's §1089(D)(8)(b) Reasoning Was Neither Adequate Nor Independent From Its *Brady* and *Napue* Errors.

Even setting aside the problems with applying §1089(D)(8)(b) despite the Attorney General's waiver, the OCCA's reliance on that provision was both inadequate and thoroughly intertwined with its resolution of the federal constitutional issues.

1. The OCCA's assertion that the *Brady* and *Napue* violations could have been raised earlier and did not affect the outcome is not an adequate basis for its decision.

a. The record contains no support for the OCCA's conclusion that the *Brady* and *Napue* issues "could

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[11] Waiver of §1089 excuses procedural default even under the deferential standards of federal habeas review. "[P]rocedural default is normally a 'defense' that the State is 'obligated to raise' and 'preserv[e]' if it is not to 'lose the right to assert the defense thereafter.'" *Trest v. Cain*, 522 U.S. 87, 89 (1997); *see Fairchild v. Workman*, 579 F.3d 1134, 1141 n.2 (10th Cir. 2009) (describing procedural restriction under §1089 as "an affirmative defense that must be raised by the state"). Applying these principles, federal courts have repeatedly recognized that states have discretion to "waiv[e] all available procedural defenses" that the state could otherwise invoke in opposition to an application for postconviction relief. *Buck v. Davis*, 580 U.S. 100, 124-25 (2017) (praising state's decision to waive procedural defenses in light of conceded constitutional violations); *see, e.g.*, *James v. Gibson*, 211 F.3d 543, 557 (10th Cir. 2000) (reaching the merits, "even though the Oklahoma Court of Criminal Appeals held the claim barred" under §1089, because "[t]he State d[id] not argue procedural bar").

have been presented previously." JA990. The OCCA asserted that Glossip's trial counsel knew or should have known, based on Sneed's competency evaluation and trial testimony, that Sneed was "under the care of [a] doctor who prescribed lithium" as a "mental health treatment." JA991. That is not accurate. The competency evaluation affirmatively pointed in a different direction, stating that "Sneed denied any psychiatric treatment" and was given lithium "after his tooth was pulled." JA700. Sneed's (perjured) testimony was to the same effect: He had "never seen no psychiatrist or anything" and that someone else at the jail gave him lithium by mistake. JA312-13. Moreover, when defense counsel tried to verify Sneed's claims, the prosecution blocked them from accessing Sneed's medical records or any related prosecution notes, including those in Box 8. *See Independent Counsel Report*, *supra*, at 14-15; JA621-22. In short, there was no way for Glossip's counsel to bring the *Brady* claim earlier because the prosecution withheld the relevant impeachment evidence until 2023. *See* pp.25-27, *supra*.

The OCCA's determination that the *Napue* issue could have been raised earlier is weaker still. As explained, there is no universe in which Sneed's "testimony was not clearly false," JA991; delusions do not make lies true. But Glossip's counsel had no way of knowing that the testimony was false—much less that *the prosecution* knew so, and yet did nothing to correct it—until they received the evidence in Box 8 last year. Glossip was thus unable to raise the *Napue* issue until his counsel received that evidence and learned the truth. *Contra* JA991.

b. The OCCA's determination that this conceded prosecutorial misconduct did not affect the outcome of Glossip's trial, *see id.*, similarly lacks "fair or substantial support." *Ward*, 253 U.S. at 22. As numerous judges and the Independent Counsel have concluded, Sneed's testimony was absolutely indispensable to the State's effort to convert Glossip from an accessory-after-the-fact (itself an undoubtedly serious charge) into the mastermind of a murder-for-hire scheme. The case indisputably turned on the credibility of the State's sole inculpatory witness.

The newly revealed evidence demonstrates that the prosecution's indispensable witness was suffering from a serious mental illness, had been prescribed psychotropic medication (which he routinely failed to take, *see* JA313), and perjured himself on the stand. *See* pp.10-11, *supra*. It beggars belief that a "reasonable fact finder" would ignore all of that and not only find Glossip "guilty of the underlying offense" but also "render[] the penalty of death." 22 Okla. Stat. §1089(D)(8)(b). As the Independent Counsel observed, "[t]he State's case primarily relied on Sneed's credibility, his perception of reality and memory recall." *Independent Counsel Report*, *supra*, at 12 n.14. The newly revealed evidence shows the State presented Sneed "in a light far more favorable than he was entitled, and his false testimony went unchallenged." *Id.* A reasonable factfinder who learned that Sneed was suffering from a serious mental illness and committed at least one count of perjury would not have credited his other testimony to impose the death sentence.

The OCCA offered no reasoning to support its contrary conclusion. It did not even meaningfully engage with the relevant inquiry. The question under Oklahoma law is whether, "*viewed in light of the evidence as a whole*," the withheld evidence regarding Sneed's mental illness and false testimony would have changed the verdict or the death sentence. 22 Okla. Stat. §1089(D)(8)(b) (emphasis added). The OCCA did not engage with that question, let alone view the evidence as a whole. Instead, it fought the hypothetical, insisting that the defense "knew" that Sneed had been receiving "mental health treatment" and that his testimony somehow was not "clearly false." JA991. The OCCA never even mentioned the prosecutor's handwritten notes referencing Dr. Trombka, much less considered how the *Brady* and *Napue* violations—"if proven"—would have reinforced each other and affected a prosecution that depended entirely on Sneed's testimony. *See* 22 Okla. Stat. §1089(D)(8)(b). Absent any meaningful analysis on this point, the OCCA's *ipse dixit* that the manifest due process violations here did not affect the outcome is not an adequate ground for declining to engage with the federal constitutional questions on the merits.

2. The OCCA's §1089(D)(8)(b) holding in this case was entirely dependent on its erroneous analysis of federal issues.

"The mere existence of a basis for a state procedural bar does not deprive this Court of jurisdiction; the state court must actually have relied on the procedural bar as an *independent* basis for its disposition of the case." *Caldwell v. Mississippi*, 472

U.S. 320, 327 (1985); *see, e.g.*, *Enter. Irrigation Dist. v. Farmers' Mutual Canal Co.*, 243 U.S. 157, 164 (1917) ("[W]here the non-Federal ground is so interwoven with the other as not to be an independent matter … [this Court's] jurisdiction is plain."). Although the OCCA often relies on §1089 as an *independent* ground for denying post-conviction relief, it did not do so here. The OCCA's state-law holding was entirely dependent on its analysis of the federal merits.

This is obvious with respect to *Brady*. To establish a constitutional violation, Glossip needed to show that exculpatory evidence "ha[d] been suppressed by the State," *Strickler*, 527 U.S. at 282, and a "reasonable probability" that the outcome would have been different absent the deprivation, *Kyles v. Whitley*, 514 U.S. 419, 434 (1995); *see Bagley*, 473 U.S. at 678-79. To satisfy the Post-Conviction Procedure Act, he similarly needed to show that the factual basis for the claim was "not ascertainable through the exercise of reasonable diligence" and, "but for the alleged error[s]," he either would not have been convicted or would not have been sentenced to death. 22 Okla. Stat. §1089(D)(8)(b).

The OCCA resolved these issues together in one fell swoop—by applying federal law. It assumed *arguendo* that Glossip's claims "overcome[] the procedural bar" of §1089(D)(8)(b), JA989, and purported to address the federal questions on their merits. It held that the newly revealed evidence regarding Sneed's "mental health treatment" was not "material" on the (erroneous) theory that the evidence "does not create a reasonable probability that the result of the proceeding would have been different."

JA991. And it denied that there *was* any nondisclosure, bizarrely denying "that the State failed to disclose evidence of Justin Sneed's mental health treatment." JA990.

The opinion contains no separate analysis of the state-law bar. The OCCA simply held, based on these federal-law determinations, that the *Brady* issue was barred by §1089(D)(8)(b). But "whether a state law determination is characterized as 'entirely dependent on,' 'resting primarily on,' or 'influenced by' a question of federal law, the result is the same: the state law determination is not independent of federal law and thus poses no bar to [this Court's] jurisdiction." *Foster v. Chatman*, 578 U.S. 488, 499 n.4 (2016) (citations omitted).

As for *Napue*, the analysis is even more straightforward. The OCCA never stated that Glossip's *Napue* claim was procedurally barred; it held only that there was no *Napue* error—or that if there were one, it was not material under the federal standard. JA991-92. But this Court requires a "plain statement" that the state court independently relied on state law, *Michigan v. Long*, 463 U.S. 1032, 1041 (1983); without one, there is a "conclusive presumption of jurisdiction," *Coleman v. Thompson*, 501 U.S. 722, 733 (1991); *see also Harris v. Reed*, 489 U.S. 255, 261 (1989). There is thus no state-law obstacle to this Court intervening here to prevent the State from being forced to carry out an execution that its own prosecutors secured via unconstitutional misconduct.

CONCLUSION

For the foregoing reasons, this Court should reverse and remand with instructions to vacate the judgment of conviction and order a new trial.

Respectfully submitted,

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