

No. 22-6500
(CAPITAL CASE)

IN THE
Supreme Court of the United States

RICHARD EUGENE GLOSSIP, PETITIONER,

v.

STATE OF OKLAHOMA, RESPONDENT.

UNOPPOSED APPLICATION FOR STAY OF EXECUTION

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

AMY P. KNIGHT
Counsel of Record
JOHN R. MILLS
PHILLIPS BLACK, INC.
1721 Broadway, Suite 201
Oakland, CA 94612
(520) 878-8849
a.knight@phillipsblack.org

DONALD R. KNIGHT
7852 S. Elati St. Suite 205
Littleton, CO 80120

JOSEPH J. PERKOVICH
PHILLIPS BLACK, INC.
P.O. Box 4544
New York, NY 10163

WARREN GOTCHER
GOTCHER & BEAVER
323 E. Carl Albert Ave.
McAlester, OK 74501

Counsel for Richard Eugene Glossip

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

APPLICATION FOR STAY OF EXECUTION 1

STATEMENT OF THE CASE..... 1

 A. The State’s Files 2

 B. The Attorney General’s Independent Investigation 4

 C. The State’s Confession of Error and the OCCA’s Refusal 6

 D. The Pending Litigation and Scheduled Execution 7

REASONS TO STAY THE EXECUTION..... 8

 A. Likely Success on the Merits 9

 B. Diligence..... 11

CONCLUSION 12

TABLE OF AUTHORITIES

Cases

<i>Barefoot v. Estelle</i> , 463 U.S. 880 (1983)	8
<i>Berger v. United States</i> , 295 U.S. 78 (1935)	9
<i>Browning v. Trammell</i> , 717 F.3d 1092 (10th Cir. 2013)	11
<i>Buck v. Davis</i> , 580 U.S. 100 (2017)	10
<i>Escobar v. Texas</i> , 143 S. Ct. 557 (Jan. 9, 2023) (mem.)	10
<i>Hill v. McDonough</i> , 547 U.S. 573 (2006)	8
<i>Nelson v. Campbell</i> , 541 U.S. 637 (2004)	8
<i>Smith v. Cain</i> , 565 U.S. 73 (2012)	11
<i>United States v. Bagley</i> , 473 U.S. 667 (1985)	8
<i>Wainwright v. Booker</i> , 473 U.S. 935 (1985)	8
Other Authorities	
Order, <i>Glossip v. State</i> , No. PCD-2023-267 (Okla. Ct. Crim. App. Apr. 4, 2023).....	4
Resp. Br., <i>Escobar v. Texas</i> , No. 21-1601 (U.S. Sept. 28, 2002)	10
Rex Duncan, <i>Independent Counsel Report in the Matter of Richard Eugene Glossip</i> , <i>Case CF-1997-244</i> 3 (Apr. 3, 2023).....	5
Shelby Banks, <i>Oklahoma Attorney General Orders Independent Review of Glossip’s</i> <i>Case</i> , FOX 23 (Jan. 26, 2023)	4

APPLICATION FOR STAY OF EXECUTION

To Associate Justice Neil Gorsuch and the Justices of the Court, Petitioner Richard Eugene Glossip respectfully requests this Court to issue a stay of his execution, which is currently scheduled for May 18, 2023.

The State of Oklahoma does not oppose this application and has informed undersigned counsel of their intention to respond later this week. Mr. Glossip respectfully requests this Court grant the stay for the reasons that follow:

STATEMENT OF THE CASE¹

The Oklahoma Attorney General, relying on his own independent investigation into Mr. Glossip's case, has recently joined Mr. Glossip's request to set aside his conviction. Grave concerns about the reliability of Mr. Glossip's conviction have plagued his case since his 2004 retrial. Mr. Glossip's conviction hinges on the credibility of the actual perpetrator, Justin Sneed, whom all parties have always agreed is responsible for bludgeoning the victim to death. But Sneed, through a series of conflicting statements elicited through highly suggestive questioning from the state's investigator, claimed he was hired by Mr. Glossip to commit the crime.

Just what that crime allegedly was is just one of Sneed's many conflicting accounts on critical aspects of the case. He has alternatively suggested it was a plot

¹ The case background is more fully set forth in the pending Petition for a Writ of Certiorari. Pet. at 3–31. This statement focuses on the events that have transpired since the filing of that Petition and the facts necessary to address the requested stay.

to rob or to murder Van Treese. Pet. App. 25a–50a. Although this state of affairs would be troubling in any matter of consequence, Sneed’s inconsistencies are particularly problematic because the State’s case for executing Mr. Glossip turns on Sneed’s credibility. Mr. Glossip’s trial judge noted that Mr. Glossip could not have been charged with murder without Sneed’s testimony. Pet. App. 342a. The State no longer disputes that Sneed’s testimony is utterly indispensable to this conviction. Absent a stay of execution, not only will Petitioner meet irreparable harm, the State of Oklahoma, too, will suffer grave harm from its Department of Corrections executing a person whom Oklahoma has concluded should never have been convicted of murder, let alone sentenced to die, in the first place.

A. The State’s Files

Prior to Mr. Glossip’s retrial, he sought all statements of Sneed, written and oral. Pet. App. 356a–57a. He specified his request included those statements made between Mr. Glossip’s first and second trials. Pet. App. 304a.

On August 31, 2022, Mr. Glossip was, for the first time, provided access to the records at issue in the pending petition. The Attorney General had obtained the District Attorney’s files in the case and made seven banker’s boxes of materials available to Mr. Glossip (withholding, it would emerge, an eighth box). These disclosures contained the evidence of, as Sneed himself put it, his desire to “re-cant[],” and a memo demonstrating the State coached Sneed to change his testimony on material aspects of the manner in which he murdered Van Treese, coaching he

accepted and delivered upon in Mr. Glossip's retrial. That evidence—the desire to recant and the memo—formed the basis of Mr. Glossip's post-conviction application, which he filed only three weeks after gaining access to the files. The OCCA's resolution of the related *Brady* claim is the subject of the pending Petition. Pet. i.

On January 27, 2023, the State granted Mr. Glossip access to additional materials from the District Attorney's files, materials that have been referred to as kept in "Box 8." Stay App. at 7a. Box 8 contained a notation that Sneed told the State he had been seen by a "Dr. Trumpet" while in jail before Mr. Glossip's trial. Counsel for Mr. Glossip quickly discovered that a Dr. Larry Trompka had treated Sneed, prescribing him lithium to treat a serious psychiatric disorder. That disorder, according to Dr. Trompka, is "exacerbated by illicit drug use, such as methamphetamine," and a "manic episode [associated with the disorder] may cause an individual to be more paranoid or potentially violent."

This disclosure provided a direct contradiction to Sneed's testimony at trial, where he stated he had "never seen no psychiatrist or nothing." Tr. 6/16/2004 at 63. It also contradicts Sneed's testimony that he "asked for some Sudafed because I had a cold, but shortly after they ended up giving me Lithium for some reason, I don't know why." *Id.* at 64. It also provided crucial information about Sneed's behavior, both at the time he murdered Van Treese and during his interrogation by the State. This disclosure, and the State's failure to correct Sneed's false testimony were

presented in an application for post-conviction relief to the OCCA and are the subject of Mr. Glossip’s forthcoming petition for certiorari.²

B. The Attorney General’s Independent Investigation

Since the filing of the pending petition in this matter, the Oklahoma Attorney General commissioned an independent investigation into the reliability of Mr. Glossip’s conviction. The Attorney General explained the investigation was necessary to “ensure that we are responding to all the evidence that has been presented” and that the “[c]ircumstances surrounding this case necessitate a thorough review.” Shelby Banks, *Oklahoma Attorney General Orders Independent Review of Glossip’s Case*, FOX 23 (Jan. 26, 2023).

The Attorney General appointed Rex Duncan, a former District Attorney, to conduct the independent investigation. As part of that investigation, Mr. Duncan reviewed the entirety of the State’s files in the case, the documents related to the trial and conviction, and the materials related to the Reed Smith Report.³ His review was comprehensive and was premised on “full and transparent access” to the

² As part of that application, Mr. Glossip moved to recuse one member of the OCCA, Vice Presiding Judge Robert L. Hudson. Judge Hudson, while serving as a prosecutor, had hired and supervised Connie Smothermon, the subject of the claims of state misconduct, in a three-attorney prosecutor’s office in her first job after law school. The OCCA denied the motion, concluding any claim of judicial bias was speculative. Order, *Glossip v. State*, No. PCD-2023-267 (Okla. Ct. Crim. App. Apr. 4, 2023).

³ The Reed Smith Report is discussed in detail in the petition for certiorari. Pet. at 26–30.

State's file. He also made clear that his conclusions were his own, that the Attorney General "did not influence" the investigation. Rex Duncan, *Independent Counsel Report in the Matter of Richard Eugene Glossip, Case CF-1997-244* 3 (Apr. 3, 2023), https://www.oag.ok.gov/sites/g/files/gmc766/f/documents/2023/glossip_report_4.3.2023_redacted.pdf. (hereinafter "Independent Report").

The Independent Report concluded that the prosecution's withholding evidence, particularly the evidence concerning Sneed's mental health, undermined any hope the "State can have confidence in the process *and* result." *Id.* at 3. Duncan concluded that the "cumulative effect of errors, omissions, lost evidence, and possible misconduct cannot be underestimated." *Id.* at 4. Although the Independent Report recounts many errors warranting a new trial, of particular relevance to the forthcoming petition for certiorari is the State's failure to disclose Sneed's psychiatric condition and to correct Sneed's false testimony about it. The Independent Report recounts how Sneed's reference to "Dr. Trumpet" put it on notice that he was under the care of the county jail's psychiatrist and the significance of Sneed having claimed to have seen "Dr. Trumpet" and being prescribed lithium. *Id.* at 12. It also explained how disclosing the notes and related diagnosis would have empowered Mr. Glossip's trial counsel to clarify that Sneed had a serious mental health disorder. *Id.* As the Independent Report put it, "A release of all Sneed's records would have made a monumental difference . . ." *Id.* at 18.

C. The State's Confession of Error and the OCCA's Refusal

In light of the Independent Report, the Attorney General conceded several points and ultimately requested that the OCCA reverse Mr. Glossip's conviction in light of the State's failure to correct Sneed's false testimony. First, it conceded that Mr. Glossip was "not made aware of Dr. Trompka's treatment of Sneed until he recently received the prosecutor's notes." Stay App. 29a. That is, the Attorney General has conceded the State suppressed Sneed's statement regarding his treatment and that Mr. Glossip and his counsel were only recently made aware of Sneed's diagnosis. This suppressed evidence was the subject of a *Brady* claim before the OCCA and will soon be before this Court.

The State has also conceded that the State failed to correct Sneed's false testimony and that failure materially affected the outcome. On that basis, the Attorney General sought before the OCCA to have Mr. Glossip's conviction reversed. The Attorney General explained that it is "undisputed" that Sneed "was the State's key witness at trial" and the State "may have had reason to know of Sneed's misstatements." In light of what the Attorney General deemed a "concealment," the State conceded "the trier of fact was [not] able to properly evaluate the case against Glossip." Stay App. at 30a.

Despite the State's concessions, the OCCA denied the application, including on the conceded ground. Regarding the State's failure to disclose Sneed's treatment and to correct the false testimony, the OCCA denied relief on both procedural

grounds and the merits. Mr. Glossip does not anticipate that the State will seek to defend the judgment on procedural grounds. On the merits, the OCCA suggested that Sneed's testimony that he had not seen a psychiatrist was "not clearly false." Stay App. at 16a. It posited Sneed "was more than likely in denial of his mental health disorders." *Id.* Without further explanation, the OCCA concluded the falsehood did not "create a reasonable probability that the result of the proceeding would have been different." *Id.*

D. The Pending Litigation and Scheduled Execution

The pending Petition in this matter relates to Sneed's desire to recant and his having been coached by the state in advance of his testimony at Mr. Glossip's retrial. Pet. i. The State's opposition to the pending petition focuses on procedural bar defenses, defenses which the State had waived at the Oklahoma Court of Criminal Appeals. Br. in Op. at 13 n.5; Reply at 5. Mr. Glossip understands that the State will *join* his request for certiorari related to the more recent decision of the OCCA.

Although the State does not oppose Mr. Glossip's request for a stay of execution, the Oklahoma Department of Corrections has begun preparing to execute Mr. Glossip. For his ninth execution date, Mr. Glossip recently completed the State's required paperwork in anticipation of his own execution. Today, April 26, 2023, the Board of Pardon and Parole denied Mr. Glossip clemency.

Mr. Glossip anticipates filing a petition for writ of certiorari by early next week addressing the most recent decision from the OCCA. Stay App. 1a.

REASONS TO STAY THE EXECUTION

A stay of execution is warranted where there is a “presence of substantial grounds upon which relief might be granted.” *See Barefoot v. Estelle*, 463 U.S. 880, 895 (1983). To decide whether a stay is warranted, the federal courts consider the petitioner’s likelihood of success on the merits, the relative harm to the parties, and the extent to which the prisoner has delayed his or her claims. *See Hill v. McDonough*, 547 U.S. 573, 584 (2006); *Nelson v. Campbell*, 541 U.S. 637, 649–50 (2004). In certiorari proceedings, a petitioner must show a reasonable probability that four members of this Court would consider the underlying case worthy of the grant of certiorari, that there is a significant likelihood of reversal of the lower court’s decision, and a likelihood of irreparable harm absent a grant of certiorari. *See Barefoot*, 463 U.S. at 895.

There is no question that Mr. Glossip will suffer irreparable harm absent this Court entering a stay of execution. *See Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (1985) (Powell, J., concurring) (irreparable harm is “necessarily present in capital cases”). But in this case, the *State* will also suffer harm from its Department of Corrections executing a person whom the State has concluded should never have been convicted of murder, let alone sentenced to die, in the first place. *See United States v. Bagley*, 473 U.S. 667, 675 n.6 (1985) (explaining the State’s interest “in a

criminal prosecution is not that it shall win a case but that justice shall be done” quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

The remaining stay considerations also weigh heavily in favor of a stay, and they are each addressed in turn.

A. Likely Success on the Merits

Since filing the Petition, Mr. Glossip’s case for certiorari and relief has only strengthened. The Brief in Opposition relies almost exclusively on procedural defenses, declining to defend at all the OCCA’s merits treatment of the suppressed memo, i.e., the OCCA’s reasoning that because Sneed, the State’s critical witness, was so unreliable, suppressed impeachment could never be material. Pet. App. 17a; Br. in Opp. at 19; Pet. Reply at 2. The merits of the other pending *Brady* claim are also strong. The OCCA only denied it after mischaracterizing Sneed’s desire to recant as “reluctance” to testify. In a prior decision in this case, one member of the OCCA had noted the significance that a recantation in this case would present: it would require reversal. Stay App. at 45a, *Glossip v. State*, No. PCD-2015-820 (Sept. 28, 2015).⁴ The merits of Mr. Glossip’s claims are strong.

As explained elsewhere, the State’s asserted procedural defenses do not stand on their own terms, and the Court should not allow the State to stand behind defenses it expressly waived at the OCCA. Pet. at 37–40; Pet. Reply at 5. The basis for reaching the merits is now even stronger because the State no longer seeks to

⁴ It was this member of the OCCA whom Mr. Glossip sought to recuse.

defend the conviction. *See Buck v. Davis*, 580 U.S. 100, 126 (2017) (recognizing weakened State interest in finality where, in other similar cases, the State declined to defend the judgment). The merits of Mr. Glossip’s pending claims are strong and no substantial procedural bar should prevent this Court from granting relief on them.

The forthcoming petition for writ of certiorari also has a substantial likelihood of success. The State having joined Mr. Glossip’s request to reverse the judgment on its own, merits a stay of execution. *See Escobar v. Texas*, 143 S. Ct. 557, 557 (Jan. 9, 2023) (mem.).⁵ The State has good reasons to do so. The OCCA found that Sneed’s false testimony and the prosecution’s failure to correct it were immaterial. Stay App. at 16a. That holding is indefensible. Sneed’s falsehood further impeached a witness who all now agree should not have been believed. And the substance of the lie was important: Sneed had in fact been diagnosed with a serious mental illness that could have explained his violent outburst.

But not only is the OCCA’s holding indefensible, it creates a conflict with this Court’s precedent and with the Tenth Circuit Court of Appeals. The Tenth Circuit has held that materiality is established by clearly established federal law “at least when the eyewitness is ‘the *only* evidence linking [the defendant] to the crime,’ and

⁵ In its most recent decision, the OCCA stated Texas had not confessed error before the Texas Court of Criminal Appeals prior to joining Escobar’s request for certiorari. Stay App. at 14a n.8. That is incorrect; the State had confessed error before the Texas Court of Criminal Appeals. Resp. Br. at 29–30, *Escobar v. Texas*, No. 21-1601 (U.S. Sept. 28, 2002).

the impeachment evidence casts substantial doubt upon its reliability.” *Browning v. Trammell*, 717 F.3d 1092, 1107 (10th Cir. 2013) (quoting *Smith v. Cain*, 565 U.S. 73, 76 (2012) (emphasis in *Smith*). In that case, the impeachment in question was very similar to those here, a psychiatric report that the witness in question had psychiatric issues that rendered him potentially violent. *Id.* at 1095–96. The conflict between the OCCA and the Tenth Circuit on the primary issue in the OCCA’s recent opinion makes it suitable for certiorari and warrants a stay.

B. Diligence

There is no serious argument that Mr. Glossip has been dilatory in bringing the claims at issue. In both the pending and forthcoming petitions, Mr. Glossip filed his application for post-conviction relief shortly after obtaining the information that formed the basis of them. Although it is true that Mr. Glossip filed these applications while facing an execution date, that state of affairs is not attributable to him or his counsel. He has long sought the records at issue.

For the records related to the pending Petition, he filed his application three weeks after gaining access to the seven banker’s boxes containing the information at issue in that application. For the forthcoming petition, Mr. Glossip filed his state petition within the allotted timeline, sixty days. He would have filed sooner, but he was successfully seeking an agreed upon resolution with the State of Oklahoma, an effort that would lessen the burden on the courts and one that bore fruit.

Both the requests for any statements of Sneed date back to before Mr. Glossip's retrial. He requested all of Sneed's statements, written and oral, Pet. App. 356a–57a, even clarifying that he sought any statements Sneed made after the first trial and before the second. Pet. App. 304a. Any suggestion that Mr. Glossip has been dilatory on these matters cannot be credited.

As recounted more fully in the pending petition, Mr. Glossip should not have been convicted of murder, a point the State now concedes. His case has generated conflict and controversy, including at this Court. But he comes to this Court as an individual who, whatever his shortcomings and mistakes, has done nothing to justify his execution.

CONCLUSION

The application for stay of execution should be granted.

Respectfully submitted,

AMY P. KNIGHT
Counsel of Record
JOHN R. MILLS
PHILLIPS BLACK, INC.
1712 Broadway, Suite 201
Oakland, CA 94612
(520) 878-8849
a.knight@phillipsblack.org

DONALD R. KNIGHT
7852 S. Elati St., Suite 205
Littleton, CO 80120

WARREN GOTCHER
GOTCHER & BEAVER
323 E. Carl Albert Ave.
McAlester, OK 74501

JOSEPH J. PERKOVICH
PHILLIPS BLACK, INC.
P.O. Box 4544
New York, NY 10163

COUNSEL FOR PETITIONER

April 26, 2023