No. 25-

IN THE

Supreme Court of the United States

TREMANE WOOD,

Petitioner,

vs.

STATE OF OKLAHOMA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

JON M. SANDS
Federal Public Defender
AMANDA BASS CASTRO-ALVES
Counsel of Record
KEITH J. HILZENDEGER
ALISON Y. ROSE
Assistant Federal Public Defenders
250 North 7th Avenue, Suite 600
Phoenix, Arizona 85007
(602) 382-2700 voice
amanda_bass-castroalves@fd.org

Counsel for Petitioner

***** CAPITAL CASE *****
EXECUTION SET FOR NOVEMBER 13, 2025

QUESTIONS PRESENTED

This case is a repeat of *Glossip v. Oklahoma*, 604 U.S. 226 (2025). Like *Glossip*, this case involves a 2004 capital-murder prosecution in Oklahoma County, Oklahoma. Like *Glossip*, this case involves the failure of prosecutors from the same Oklahoma County District Attorney's Office to correct knowingly false testimony by cooperating witnesses about the extent of the benefits that the prosecutors had extended in exchange for their testimony against Mr. Wood. These witnesses identified Mr. Wood as a participant in the robbery during which one of two robbery victims was fatally stabbed in a struggle with two masked assailants. Their testimony also came in during the state's case at the penalty phase.

Like *Glossip*, this case involves a decades-long effort by Oklahoma County prosecutors to keep their rewards to cooperating witnesses hidden from prisoners whom the state seeks to execute. In September 2024, Mr. Wood discovered evidence in the prosecutors' file that led him to suspect that evidence of additional benefits extended to the cooperating witnesses had been hidden from him. Two weeks after this Court decided *Glossip*, the Oklahoma Court of Criminal Appeals (OCCA) ordered an evidentiary hearing on Mr. Wood's alleged violations of *Brady v. Maryland*, 373 U.S. 83 (1963), and *Napue v. Illinois*, 360 U.S. 264 (1959).

Testifying at this hearing, one of the trial prosecutors *admitted* that he knowingly failed to correct testimony from one cooperating witness, Brandy Warden. This agreement required favorable treatment for Ms. Warden

in two counties, so that she would testify free from impeachment with a prior conviction from the other county and so that the full reward for her cooperation against Mr. Wood could be furnished through a sentence reduction in Oklahoma County. The evidence also showed that another cooperating witness, Coleman Givens, was given a substantial reduction in pending charges against him, and that the prosecutors knowingly failed to correct his false testimony against Mr. Wood. Disregarding all of this evidence, the trial court adopted as its own order the state's proposed findings of fact and conclusions of law—right down to the typographical errors.

The OCCA ultimately treated this evidence with the same disregard. While it was considering Mr. Wood's case, the presiding judge of that court received *ex parte* communications alleging that Mr. Wood had recently committed serious misconduct in prison, and how to shield that evidence from him so as to advantage the state's case against clemency and to keep Mr. Wood's execution on schedule. The judge not only refused to recuse himself after learning this information; he wrote the decision rejecting Mr. Wood's *Brady* and *Napue* claims.

This case presents the following questions:

1. Should this Court, after independently reviewing the factual record, grant Mr. Wood a new trial based on the *Napue* violation at his trial, as it did in *Glossip*?

2. Should this Court grant Mr. Wood a new trial based on the *Brady* violations shown at the hearing below?

3. Should this Court instead remand this case for a new hearing without the participation of a judge whose potential for bias was too high to be constitutionally tolerable? *See Williams v. Pennsylvania*, 579 U.S. 1 (2016).

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption of this document. The petitioner is not a corporation.

RELATED PROCEEDINGS

- *Wood v. State*, No. PCD-2024-879 (Okla. Crim. App. filed Nov. 5, 2024)
- *Wood v. Quick*, No. 23-7465 (U.S. filed May 9, 2024)
- *Wood v. Quick*, No. 23-7066 (U.S. filed Mar. 21, 2024)
- *Wood v. Oklahoma*, No. 22-6538 (U.S. filed Jan. 12, 2023)
- *In re Wood*, No. 23-6134 (10th Cir. filed Sept. 15, 2023)
- *In re Wood*, No. 23-6129 (10th Cir. filed Sept. 13, 2023)
- *Wood v. State*, No. PCD-2022-550 (Okla. Crim. App. filed Jun. 17, 2022)
- *Wood v. Carpenter*, No. 18-8666 (U.S. filed Mar. 29, 2019)
- *Wood v. Oklahoma*, No. 17-6891 (U.S. filed Nov. 27, 2017)
- *Wood v. State*, No. PCD-2017-653 (Okla. Crim. App. filed Jun. 23, 2017)
- *Wood v. State*, No. PCD-2011-590 (Okla. Crim. App. filed Jul. 6, 2011)
- *Wood v. Workman*, No. 5:10-cv-829-HE (W.D. Okla. filed Aug. 2, 2010)

- *Wood v. Oklahoma*, No. 07-6250 (U.S. filed Aug. 29, 2007)
- *Wood v. State*, No. D-2005-171 (Okla. Crim. App. filed Feb. 22, 2005)
- *Wood v. State*, No. PCD-2005-143 (Okla. Crim. App. filed Feb. 16, 2005)
- *State v. Wood*, No. CF-2002-46 (Okla. County Dist. Ct. filed Jan. 7, 2002)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution and statutes:

Miscellaneous:

In the Supreme Court of the United States

No. 25-_____

TREMANE WOOD, PETITIONER,

v.

STATE OF OKLAHOMA

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

PETITION FOR A WRIT OF CERTIORARI

Tremane Wood respectfully petitions for a writ of certiorari to review the judgment of the Oklahoma Court of Criminal Appeals in this case.

OPINIONS BELOW

The order of the Oklahoma Court of Criminal Appeals denying Mr. Wood's fifth application for postconviction relief is unreported, but included in the appendix at 1a. The findings of fact and conclusions of law issued by the trial court following an evidentiary hearing are likewise unreported, but included in the appendix at 24a.

JURISDICTION

The Oklahoma Court of Criminal Appeals issued its final order denying Mr. Wood's claims for relief on September 2, 2025. This petition is timely. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend. XIV, § 1, as relevant here:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law.

STATEMENT

1. On December 31, 2001, Ronnie Wipf and Arnold Kleinsasser were celebrating the new year at the Bricktown Brewery in downtown Oklahoma City. While at the Bricktown Brewery, the men met and socialized with Brandy Warden and Lanita Bateman. Ms. Warden's ex-boyfriend was Mr. Wood, and Ms. Bateman's boyfriend was his brother Zjaiton (known as Jake).[1] After the bar closed, the women agreed to accompany Messrs. Wipf and Kleinsasser back to a motel. Ms. Warden testified that she only agreed to accompany Mr. Wipf and Mr. Kleinsasser after talking with Mr. Wood and Jake, both of whom she said came up with the idea to rob the men and pressured her to go along.

Once they got to the motel, Mr. Wipf and Mr. Kleinsasser agreed to pay the women $210 for sex. Ms. Bateman pretended to call her mother, but she actually called Jake. Ms. Warden testified that shortly after the phone call, Jake and Mr. Wood arrived at the room. Jake

[1] Mr. Wood's brother is referred to as "Jake" for clarity's sake.

banged on the door until Mr. Wipf opened it. Ms. Bateman and Ms. Warden ran out of the room. Jake and Mr. Wood ran in. Jake was holding a gun; Mr. Wood was holding a knife. Mr. Kleinsasser testified that the larger of the two men took money from him at gunpoint, after which the smaller of the two men also demanded money, hit him on the head with what he believed to be the handle of the knife, and then returned to the struggle with Mr. Wipf. Mr. Kleinsasser fled the room. Mr. Wipf died from a single stab wound to the chest. Mr. Kleinsasser was unable to say who had stabbed Mr. Wipf.

2. On January 7, 2002, Mr. Wood, Jake, Ms. Warden, and Ms. Bateman were each charged with one count of first-degree felony murder, in violation of Okla. Stat. tit. 21, § 701.7(B); one count of robbery, in violation of Okla. Stat. tit. 21, § 801; and one count of conspiracy to commit robbery, in violation of Okla. Stat. tit. 21, § 421. Seven months later, the state filed notice of intent to seek the death penalty against Jake and Mr. Wood. Fern Smith and George Burnett, two assistants with the Oklahoma County District Attorney's Office, were assigned to prosecute the four codefendants. Ms. Smith was the lead prosecutor.

The murder case was not Ms. Warden's first felony charge. On March 15, 2000, Ms. Warden was charged in Payne County, Oklahoma, with one count of larceny from a house, in violation of Okla. Stat. tit. 21, § 1723. She broke into someone's home and stole $1,865 worth of property, including a gun. Three months later, she pleaded guilty pursuant to a plea agreement in which she agreed to a deferred sentence of three years in prison. On October 27, 2000, the Payne County court sentenced Ms. Warden in accordance with the plea agreement and placed her on probation. One of the conditions of the deferred sentence was that she not "violate any city, state, or federal law." If

Ms. Warden successfully completed her probation term, she would be "discharged without a court judgment of guilt, and the court shall order the verdict or plea of guilty or plea of nolo contendere to be expunged from the record." Okla. Stat. tit. 22, § 991c(C) (2000). The probationary period was set to end on October 24, 2003.

But Ms. Warden did not successfully complete probation. On January 17, 2002, Ms. Warden's probation officer in the Payne County case submitted a violation report based on, among other things, the new murder and conspiracy charges in Oklahoma County. The probation officer recommended accelerating Ms. Warden's sentencing in the Payne County case. Such action would have allowed the court to "enter a judgment of guilt" on the larceny charge and proceed to sentencing. Okla. Stat. tit. 22, § 991c(E) (2000). But in Ms. Warden's case, the Payne County District Attorney did not pursue the recommended course of action. The prosecutor, Tom Lee, testified that, on January 18, 2002, he wrote a note that read, "let's hold off for a while on the application" to accelerate Ms. Warden's sentence and affixed the note to his copy of the violation report.

3. On February 19, 2003, in keeping with a publicly-filed plea agreement, Ms. Warden pleaded guilty in Oklahoma County District Court to accessory after the fact to murder, in violation of Okla. Stat. tit. 21, § 175.5, and conspiracy to commit robbery, in violation of Okla. Stat. tit. 21, § 421. In exchange for her plea to these two counts and her testimony against Ms. Bateman, Jake, and Mr. Wood, the written plea agreement provided that Ms. Warden would receive a total sentence of 45 years in prison. The written plea agreement reflected the fact that Ms. Warden had no prior felony convictions. (App. 364a) Her counsel confirmed this fact in open court. (App. 370a)

a. When Ms. Warden pleaded guilty in Oklahoma County, she was still under the deferred-sentencing arrangement in Payne County. Even so, both Ms. Smith and Ms. Warden's lawyer told the judge that the deferred-sentencing arrangement had expired. (App. 379a) Ms. Smith added that it "is not part of our plea agreement to do anything with" the deferred sentence from Payne County. (App. 379a) "Because at this point in time, it is my understanding that it has expired. And we cannot revoke that or do anything with that as a result of her guilty plea in this case." (App. 379a)

On April 18, 2003, Ms. Warden was sentenced in Oklahoma County court to a total of 45 years in prison. The judge acknowledged that he was following the terms of the plea agreement that had been submitted in open court two months earlier.

b. Wayna Tyner, a lawyer who was representing Jake at his trial in Oklahoma County,[2] testified that she knew that Ms. Warden had a deferred-sentencing arrangement from Payne County at the time of the murder. Ms. Tyner tried to find out whether and how the Payne County deferred sentence had been resolved—whether there had been filed any motions to accelerate, whether the sentence had been completed, and whether she was still on probation. She suspected that Ms. Warden and Oklahoma County prosecutors may have coordinated with Payne County to avoid converting the deferred sentence into a conviction. She also suspected that Ms. Warden may also have been given further incentives to continue to testify against her three codefendants. She believed that these

[2] Mr. Wood's trial counsel, Johnny Albert, died in 2016. Ms. Tyner's testimony at the reference hearing pertained to pretrial investigative efforts that applied to both Jake's and Mr. Wood's cases.

benefits could strengthen Ms. Warden's "motivation to testify falsely." (App. 532a)

But Ms. Tyner's independent investigative efforts did not pan out. As reflected on a second note attached to the Payne County probation violation report, Ms. Tyner contacted the Payne County District Attorney to inquire why Ms. Warden's deferred-sentencing arrangement had not been accelerated in the wake of her guilty plea in Oklahoma County. No one from the Payne County District Attorney's Office returned her call. All the while, Ms. Smith and Mr. Burnett refused to confirm or deny that there was any arrangement between the two county prosecutor's offices.

c. So Ms. Tyner turned to the Oklahoma County court for help. On August 6, 2003, Ms. Tyner filed a "motion… requesting that the Court order the Government to reveal all deals" with Ms. Warden to the codefendants and their counsel. (App. 390a) The state responded that Ms. Tyner's motion was "moot" because "the State has fully complied with 22 O.S. 2201, et seq., and will continue to disclose any new evidence." (App. 392a)

On September 3, 2003, the trial judge held a hearing on Ms. Tyner's motion. Mr. Wood's counsel was present for the hearing, as was Mr. Burnett. The judge sustained the motion. He directed the state, "If you've already previously complied, sobeit [*sic*]. If not, do it." Ms. Tyner added, "I am concerned about Miss Brandy Warden does have an accelerated—she is still on a deferred judgment and sentence out of Payne County…. I have been in the process of trying to contact one of the prosecutors that is on that case to determine whether or not she is going to be accelerated. I also know right after this offense allegedly occurred her probation officer… requested that

to be accelerated. However, nothing has been done on behalf of the prosecution. I am trying to find out what it is and if there was any deal." (App. 403a–404a)

The judge repeated his directive to Mr. Burnett. "Any and all deals and/or agreements that the DA's office of Oklahoma County has with any witness must be disclosed. I am sustaining that…. [A]ny and all deals that this DA's office has made with any other and all other DA's offices anywhere in the world in reference to any witness must be disclosed." (App. 404a–405a)

The state disclosed nothing in response to the trial judge's order.

d. On October 24, 2003, the Payne County District Attorney moved to dismiss the larceny charge against Ms. Warden. He explained that Ms. Warden had successfully completed probation. He gave this explanation even though, by then, she had pleaded guilty to accessory after the fact to first-degree murder in Oklahoma County, admitting an apparent violation of her probation.

4. At Mr. Wood's death penalty trial, Ms. Smith elicited Ms. Warden's testimony that her deal was for a prison term of 45 years and 10 years on the accessory and conspiracy counts, respectively, to run concurrently. Ms. Smith also elicited Ms. Warden's testimony that she received no other benefits for her cooperation and that she was "here to tell the jury what [her] part and what Mr. Termane [*sic*] Wood's part in the murder was." (App. 431a)

Neither of the prosecutors intervened to correct Ms. Warden's understanding of the terms of her plea agreement in any way. In fact, on redirect examination, Ms. Smith doubled down. "And for that you got 45 years in prison[?]" Ms. Warden said, "Yes."

On direct examination by Ms. Smith, Ms. Warden minimized her role in the robbery and murder, while maximizing her codefendants' culpability, including Mr. Wood's. Ms. Warden testified that although she was the one who had purchased the gloves and ski masks from Wal-Mart earlier in the evening on December 31, 2001, she did so only because "[Mr. Wood]… asked me for money…. And he asked me if I would buy him something. He didn't tell me what at the time." She told the jury that she only agreed to go along with the robbery under pressure from Mr. Wood, telling the jury, "I had tears in my eyes… [b]ecause I was scared" (App. 449a), "[Mr. Wood]… told me to quit crying like a big ass baby and suck it up" (App. 451a), and he "grabbed my face" and "squeezed [my] cheeks together" while "calling [me] that name" (App. 453a).

On cross-examination, Mr. Wood's counsel attempted to impeach Ms. Warden by emphasizing her motivation to lie by minimizing her role in the murders. Mr. Wood's counsel asked her, "And without you setting this up, nothing could have happened, right? Without you playing your part, none of the bad things could have happened, right?" Ms. Warden agreed. (App. 487a) Mr. Wood's counsel then attempted to elicit from Ms. Warden testimony that she would serve less time in prison than the fact that a 45-year sentence was imposed would imply. He asked, "You talk about this 45-year sentence you got. That is actually a non-violent sentence, isn't it?" Ms. Warden agreed. (App. 488a) Mr. Wood's counsel then asked, "You will get out faster than had you been convicted of a violent crime, correct?" (App. 488a) Ms. Smith objected, though she did not specify the grounds for her objection. (App. 488a) The judge sustained the

objection, adding, "We have no idea when she will get out."[3] (App. 488a)

Coleman Givens also testified on behalf of the prosecution. He explained that on the night of the crime he was staying across from the motel and heard the voices of two "black men" outside the motel room door where the crime occurred. He testified that he saw four people leaving the motel room in a little white car. He testified further that after becoming a witness for the prosecution, he just so happened to be handcuffed twice to Mr. Wood and Jake in the county jail where they threatened him. And he told the jury that he "got a feeling about the voices" of Mr. Wood and Jake as the voices he'd heard on the night of the crime. Ms. Smith elicited from Mr. Givens testimony that he had received no help from the prosecution in his pending felony case in exchange for testifying against Mr. Wood. (App. 217a)

In closing argument, Mr. Burnett told the jury that Ms. Warden "kn[ew] one rule, you do what Termane [*sic*] told you to do." He urged the jury to see Ms. Warden more as Mr. Wood's victim than a co-conspirator, arguing, "Now is she the big conspirator or is she the fall guy?" Mr.

---

[3] At the time Ms. Warden was sentenced, Oklahoma law allowed prisoners to accrue credits toward their sentences at a rate of up to 60 days of credits per month of sentence served. *See* Okla. Stat. tit. 57, § 138(D)(2)(c) (2001). A conviction for first-degree murder or for solicitation of first-degree murder disqualified a prisoner from earning credits at this rate. *See id.* § 138(E)(9), (10). No accessory crime disqualified a prisoner from earning credits at this rate. Thus the judge erred in sustaining Ms. Smith's objection to the question, "You will get out faster than had you been convicted of a violent crime, correct?" Put at that level of generality, the question reflected an accurate understanding of how Ms. Warden's sentence might be implemented. Ms. Warden was released from state prison on April 30, 2014, having served only 12 years in prison.

Burnett also urged the jury to believe Ms. Warden because she "gave up 45 years of her life because of the terrible thing that she did in this case. She at least tried to come and do one right thing, that is come and tell the truth in this courtroom about the things that transpired." Ms. Smith similarly urged the jury in her closing argument to credit Ms. Warden's testimony because she had "no other felony convictions" before Mr. Wood forced her into participating in the robbery and murder. (App. 127a–128a)

On April 2, 2004, the jury convicted Mr. Wood of first-degree felony murder, robbery, and conspiracy. His case then moved into the penalty phase. Ms. Smith told the jury that the prosecution was incorporating the guilt-phase evidence into the penalty phase, including Ms. Warden's and Mr. Givens's testimony. She told the jury that Ms. Warden would incriminate Mr. Wood in a pizza restaurant robbery that had taken place earlier in the evening of December 31, 2001. Ms. Warden ultimately testified about this topic.

In closing argument, Ms. Smith told the jury that Mr. Wood deserved the death penalty because he is "different from people like you and me. He manipulates women. He manipulated, I submit to you, Brandy [Warden] into doing the things that she did and now is serving 45 years in prison." Mr. Burnett similarly urged the jury to sentence Mr. Wood to death to save his children from his influence. "Keep him alive so maybe some day he can be an influence? Those kids need to stay away from this guy…. Brandy messed up her life. She gave up 45 years of her life and gave up the opportunity to raise these kids because of what she did and participated in this event." (App. 236a–237a)

On April 5, 2004, the jury sentenced Mr. Wood to death. None of the other codefendants received a death sentence.

On April 15, 2004, two weeks after testifying against Mr. Wood at his trial, the judge held a hearing on Ms. Warden's application for modification of sentence. The hearing took place off the record.[4] That same day, a form order was issued, explaining, "After receiving testimony and other evidence, and being otherwise fully advised, the Court concludes that the requested modification should be granted." (App. 515a) Ms. Warden's total sentence was reduced to 35 years. The form order did not mention any opposition from the state.

Four days later, another written order issued, adding that the "requested modification should be granted over the strenuous objections of the State. In spite of the State's objections, the Court found the defendant cooperative and her testimony truthful and further found that the defendant had done the 'right thing' by testifying." (App. 516a)

5. The Oklahoma Court of Criminal Appeals affirmed Mr. Wood's convictions and death sentence on direct appeal. *Wood v. State*, 158 P.3d 467 (Okla. Crim. App.), *cert. denied*, 552 U.S. 999 (2007). In 2010, the United States District Court for the Western District of Oklahoma appointed the Federal Public Defender for the District of Arizona to assist him in filing a federal habeas

[4] Although Oklahoma law required this hearing to be held in open court, Okla. Stat. tit. 22, §982a(C) (2003), that did not occur. *Cf. Sellers v. State*, 809 P.2d 676, 681 (Okla. Crim. App. 1991) (requiring stipulations either be reduced to writing and made part of the record or "recited in open court and recorded by the court reporter"). The publicly available minute entry for this hearing notes that the use of a court reporter had been "waived."

petition, which he did on June 30, 2011. The district court denied the petition on October 30, 2015. The Tenth Circuit affirmed the denial of the petition. *Wood v. Carpenter*, 907 F.3d 1279 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 2748 (2019).

6. In 2024, a new district attorney in Oklahoma County instituted a policy of making prosecution files, including work product, available to defense counsel in capital cases. This review enabled Mr. Wood's counsel to investigate Ms. Warden's deal free from the prosecutors' gatekeeping.

On September 4, 2024, pursuant to the new policy, Mr. Wood's counsel reviewed the Oklahoma County District Attorney's Office's file for the first time. (App. 115a) In the file was a copy of the state's response to Ms. Tyner's "Motion to Reveal All Deals." This copy of the document bore a handwritten notation: "Brandy Warden D/S in Payne County." The response itself was filed on August 18, 2003, six months after Ms. Smith and Ms. Warden's counsel both told the judge in open court that Ms. Warden's Payne County deferred sentence had expired. This notation led Mr. Wood's counsel to suspect that Ms. Warden's deal also included ensuring that her Payne County deferred sentence would not be accelerated to a felony conviction before she testified against Mr. Wood. *See* Okla. Stat. tit. 22, § 991c(E) (2000). This assurance, in turn, prevented Mr. Wood's counsel from using the Payne County case to impeach Ms. Warden's credibility. *See* Okla. Stat. tit. 12, § 2609(A)(1).

Based on this new evidence, on November 5, 2024, Mr. Wood filed a fifth application for postconviction relief with the Oklahoma Court of Criminal Appeals (OCCA). *See* Okla. Stat. tit. 22, § 1089(D). Mr. Wood contended that the prosecutors' failure to disclose the suspected trilateral

agreement violated *Brady v. Maryland*, 373 U.S. 83 (1963), and that the prosecutor's knowing failure to correct Ms. Warden's false trial testimony about the existence of that agreement violated *Napue v. Illinois*, 360 U.S. 264 (1959). (App. 116a–143a)

The OCCA reviewed Mr. Wood's postconviction filing in order to determine whether his *Brady* and *Napue* claims, based on the newly discovered evidence in the Oklahoma County District Attorney's file, met the statutory requirements for convening an evidentiary hearing. *See Slaughter v. State*, 105 P.3d 832, 835 (Okla. Crim. App. 2005) (citing Okla. Stat. tit. 22, § 1089(D)). In the wake of this Court's decision in *Glossip v. Oklahoma*, 604 U.S. 226 (2025), the OCCA, with two judges recused, unanimously agreed that it did. (App. 151a) It referred the case to the Oklahoma County District Court for a hearing on eight enumerated questions based on what Mr. Wood had uncovered in the prosecution's file. (App. 151a–153a)

7. The reference hearing took place April 7–9, 2025. Tracking the OCCA's eight questions, the hearing primarily focused on the existence of an undisclosed arrangement between prosecutors in Oklahoma County and Payne County to work together to ensure that Ms. Warden's Payne County case would not be converted into a felony conviction by the time she testified against her Oklahoma County codefendants. But the hearing covered other topics as well.

a. Evidence of a different agreement with Ms. Warden came to light during the hearing. Even though Mr. Wood's counsel had repeatedly reviewed the prosecutors' file, they had not uncovered any evidence of this different agreement before the hearing began.

Testifying at the reference hearing, Mr. Burnett explained that the prosecution's deal with Ms. Warden

was reflected in a "cooperation memorandum," rather than in the plea agreement that had been filed in open court. Mr. Wood's counsel asked Mr. Burnett to review the official written plea agreement from the court record. She asked him, "Is that what you're referring to as the cooperation memorandum, or was it something else?" Mr. Burnett said that the document in the court record was *not* the cooperation memorandum reflecting the prosecution's true deal with Ms. Warden. The referee judge asked both parties whether they had ever seen the cooperation memorandum. Both Mr. Wood's counsel and the state's counsel said that they had not seen it. The judge asked Mr. Burnett whether Ms. Warden's counsel, from the Oklahoma County Public Defender's Office, would have a copy. "Yeah, [there] should be [a] copy in her file," he testified. (App. 613a–614a)

The judge recessed the hearing. Off the record, the judge contacted the Oklahoma County Public Defender and asked for a copy of the cooperation memorandum from Ms. Warden's file. She also obtained a copy of the April 19, 2004, order that noted the state's "strenuous objection" to reducing her sentence. Once the hearing resumed, these documents were admitted into the record.

b. For the first time, Mr. Wood learned the full extent of the benefits Ms. Warden received for testifying against him. The cooperation memorandum was dated February 4, 2003, two weeks *before* Ms. Warden pleaded guilty in open court. The title "AGREEMENT" appeared at the top of the document. The document was signed by Ms. Smith, Mr. Burnett, Ms. Warden, and her counsel. The memo promised Ms. Warden a *35-year* sentence, and placement in protective custody outside of the Oklahoma County Jail, in exchange for her testimony against Mr. Wood and her other codefendants. (App. 360a)

When shown the cooperation memorandum, Mr. Burnett testified that it reflected the prosecution's true deal with Ms. Warden. When Mr. Wood's counsel asked Mr. Burnett to explain why he told Mr. Wood's jury that Ms. Warden's deal was for 45 years' imprisonment when the cooperation memorandum indicated that she was promised 35 years' imprisonment all along, Mr. Burnett testified, "Never underestimate my—my ability to say something stupid to a jury. I mean, I—I've made a mistake probably, best I can tell." (App. 681a)

Mr. Burnett and Ms. Smith kept their promise to Ms. Warden. They did so in a two-step maneuver. First, a 45-year sentence was imposed in open court, consistent with the publicly available plea agreement. Then later, after Ms. Warden testified against Mr. Wood, her sentence was modified to 35 years, as reflected in the secret cooperation memorandum. In order for this two-step maneuver to comply with state law, Mr. Burnett and Ms. Smith *had* to ensure that Ms. Warden's Payne County deferred sentence was never converted to a felony conviction. *See* Okla. Stat. tit. 22, § 982a(A) (2004).

Mr. Burnett also testified (when Mr. Wood's counsel confronted him with the evidence) that prior to Mr. Wood's trial, he intervened in Mr. Givens' pending Oklahoma county felony cases and arranged to have the preliminary hearing conferences postponed until after Mr. Givens testified against Mr. Wood. Then, just months after Mr. Wood was sentenced to death, Mr. Burnett dismissed one of Mr. Givens' felonies entirely, and then downgraded Mr. Givens' second felony to a misdemeanor —all in exchange for his cooperation.

Mr. Burnett also explained why the agreement had been hidden from Mr. Wood for so long, only to emerge at the behest of a judge conducting a postconviction hearing

22 years after the fact. The reason he gave for the "strenuous objection" mentioned in the *post hoc* order modifying Ms. Warden's sentence was "because of what we're doing here today. I mean, we wanted to—you know, you present your case and you try to set this thing out and then all of a sudden, you know, you're—you know, somebody thinks there's some wink-wink deal, and then all of a sudden you're in a mess, just like we're in here today." (App. 684a) Because Ms. Warden's sentence-modification hearing was not held in open court, this testimony is the only evidence in the record that explains *why* Mr. Burnett lodged a "strenuous objection" to reducing her sentence.

8. After the hearing, the judge received proposed findings of fact and conclusions of law from both parties. (App. 156a) The judge summarily adopted the state's proposed findings of fact and conclusions of law, including the typographical and other obvious errors in that document. (App. 268a) She recommended denying relief on both of Mr. Wood's claims.

The referee judge found Mr. Burnett's testimony to be "credible in all material respects." (App. 51a) Yet despite Mr. Burnett's testimony to the contrary, the judge concluded that the true sentence that Ms. Warden bargained for was 45 years, and the cooperation memorandum reflected a 35-year sentence for "unknown reasons." (App. 50a n.21) "Given: 1) that the written plea agreement with Ms. Warden delineated forty-five (45) years; 2) no other document or testimony in this case referred to a thirty-five (35) year term; and 3) Mr. Burnett's strenuous objection to the sentence modification, the Court finds that the reference to thirty-five (35) years in the memorandum does not reflect the true agreement between the State and Ms. Warden." (App. 50a n.21) She also credited Mr. Burnett's testimony

that any benefits Mr. Givens may have received were not in exchange for his testimony against Mr. Wood. (App. 54a)

9. On May 20, 2025, Mr. Wood filed a supplemental brief with the OCCA. Based on Mr. Burnett's candid admission that he suppressed the true nature of the benefits Ms. Warden received in order to avoid being exposed at a later postconviction hearing, Mr. Wood expressly argued that Ms. Smith's and Mr. Burnett's "suppression of their actual deal with Warden violates *Brady*; and their solicitation of Warden's false testimony about her deal and the benefits she received and was promised in exchange for her testimony against Mr. Wood violates *Napue*." (App. 272a) He bolstered this contention by citing evidence that Mr. Burnett had intervened in Mr. Givens's cases, dismissing both felony charges and reducing one to a misdemeanor, in order to reward Mr. Givens for his testimony against Mr. Wood. (App. 273a)

a. By statute, the OCCA consists of five judge, "any three of whom shall constitute a quorum." Okla. Stat. tit. 20, § 31. Although three judges had acted on Mr. Wood's petition when the court remanded his case for a hearing, two Justices of the Oklahoma Supreme Court were designated to sit on the OCCA so that a full complement of judges could decide Mr. Wood's case.

In July 2025, the Attorney General of Oklahoma, Gentner Drummond, and the Chief Judge of the OCCA, Gary Lumpkin, engaged in a series of *ex parte* email communications regarding scheduling Mr. Wood's execution. In public, General Drummond had previously noted that the OCCA could schedule the execution for September 11, 2025, based on a timetable previously set by the court and the execution of John Hanson on June 12, 2025. In his private email to Judge Lumpkin, General

Drummond was asking to have the execution set 30 days later than September 11.

On July 15, 2025, General Drummond wrote to Judge Lumpkin to flag an "active investigation issue that I wish to address with you so as to protect the integrity of the investigation while balancing our duty to fully brief the Pardon & Parole [Board]" as part of the clemency process. (App. 295a) General Drummond explained that "DOC has recovered three cell phones from [Mr.] Wood while on H-Unit [death row at the Oklahoma State Penitentiary], from which he has ordered one 'hit' on a prisoner, engaged in illegal texting with his public defender and a county judge's clerk, contains videos of drug use while in DOC, contains photographs of Wood holding numerous $100 bills, and records drug transactions outside the prison system." (App. 295a) General Drummond accused Mr. Wood of "working in collusion with prison personnel." (App. 295a) He asked the court not to schedule Mr. Wood's execution for September 11, and offered to "drop by to discuss this request in person tomorrow or to discuss telephonically." (App. 295a)

Judge Lumpkin responded later that evening. "We are scheduled to discuss setting execution dates at our conference on 23 July…. I will need to share this email with other judges to have a discussion on 23 July. Is that timing OK or is this something that will need attention prior to that time? Please let me know." (App. 294a) General Drummond responded the next afternoon. "We do not need the Court to consider setting the date before your July 23 conference. Regarding the execution date, my team believes a date one month beyond our original September 11 request would be sufficient to permit sensitive parts of the investigation to be completed before we submit the information to the Board. Finally, because

three members of the Arizona Federal Public Defender's Office represent Mr. Wood in this Court, I want to clarify that the public defender with whom Mr. Wood is communicating via the cell phones is not one of these three individuals." (App. 294a)

Judge Lumpkin responded later that evening. "The only matters the Court can consider are those matters properly filed before the Court. My previous reply was merely to determine if something was going to formally be presented to the Court that would require its action prior to 23 July. If there is a formal, properly filed request presented, even a request to file a matter under seal, the Court will consider and take appropriate action based on what is filed in the case. At this time this ex parte notification is not pending before the Court." (App. 291a)

The next morning, General Drummond declined to formally file a request supporting his *ex parte* inquiry about postponing Mr. Wood's execution date. "Unfortunately, my office making any filing—even under seal—on this matter will likely tip off Mr. Wood as to the nature of the investigation. We would rather have a September 11 execution date than compromise the investigation through providing Mr. Wood notice of the investigation." (App. 310a)

b. On July 29, 2025, the OCCA ordered the Attorney General to show cause why these *ex parte* communications should not be disclosed to Mr. Wood and his counsel. (App. 280a) Nine days later, the OCCA found the state's response to the show-cause order insufficient and ordered the communications released to Mr. Wood's counsel on August 8, 2025. (App. 285a) The court also entered the communications into the record in Mr. Wood's case. (App. 285a)

Now that Mr. Wood's counsel was fully aware of what had been going on between General Drummond and Judge Lumpkin, Mr. Wood asked Judge Lumpkin to recuse himself from further participation in his case. (App. 317a) He based his recusal request on the due-process requirement that a judge's participation in a case on a multi-member court be free from both actual bias and the appearance of bias, citing *Williams v. Pennsylvania*, 579 U.S. 1 (2016), and *Rippo v. Baker*, 580 U.S. 285, 287 (2017) (per curiam). (App. 322a, 324a) On August 28, 2025, the OCCA denied Mr. Wood's request that Judge Lumpkin recuse himself. "Appellant has failed to objectively demonstrate 'the likelihood of bias on the part of [the Presiding Judge] is too high to be constitutionally tolerable.'" (App. 335a (quoting *Williams*, 579 U.S. at 4))

c. Five days later, the OCCA denied Mr. Wood's *Brady* and *Napue* claims on the merits. Chief Judge Lumpkin wrote the court's decision. The court expressly found that these claims were not procedurally barred. (App. 7a) It did not enforce against Mr. Wood the statutory requirement of obtaining its express approval for "any amendments or supplements to the issues" to be resolved at the reference hearing. *See* Okla. Stat. tit. 22, § 1089(D)(5). The court addressed the claims regarding the cooperation memorandum and Coleman Givens in a footnote.

The OCCA agreed with the referee judge that there were "unexplained reasons" why the cooperation memorandum reflected a 35-year sentence. (App. 15a n.7) It added that the "discrepancy" between the 45-year sentence contained in the written plea agreement and the 35-year sentence in the memorandum "is not indicative of any secret promise by the State" because "no other document or testimony references a 35-year sentence." (App. 16a n.7) "Further, while Ms. Warden's sentence was

ultimately modified to thirty-five (35) years, the modification occurred over the State's strenuous objections. We agree with the District Court's conclusion that the 'cooperation memorandum' does not reflect the actual agreement between Ms. Warden and the State, and that the full extent of the plea agreement is set forth in the plea agreement form." (App. 16a n.7) The court also agreed that the record "contains no evidence supporting a conclusion that prosecutors 'sanitized' Mr. Givens' record and suppressed and concealed the extent of his agreement to testify for the State." (App. 16a n.7)

The court later scheduled Mr. Wood's execution for November 13, 2025. This timely petition and motion to stay the execution follow.

REASONS FOR GRANTING THE WRIT

Over 50 years ago, in *Giglio v. United States*, 405 U.S. 150 (1972), this Court unanimously laid down the rule on which the courts below should have relied to decide this case. In *Giglio*, a prosecutor promised an unindicted coconspirator that he would not be prosecuted if he testified against the defendant. *Id.* at 153. On cross-examination at trial, the coconspirator testified that he had *not* been told he would not be prosecuted, and the prosecutor stressed that testimony in his closing argument. *Id.* at 151–52.

This Court reversed the conviction and remanded for a new trial. "When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility" falls within the general rule that "suppression of material evidence justifies a new trial irrespective of the good faith or bad faith of the prosecution." *Id.* at 153–54 (cleaned up) (quoting first *Napue v. Illinois*, 360 U.S. 264, 269 (1959), and then

Brady v. Maryland, 373 U.S. 83, 87 (1963)). "A new trial is required if the false testimony could in any reasonable likelihood have affected the judgment of the jury." *Id.* at 154 (quoting *Napue*, 360 U.S. at 271) (cleaned up). Because the case against the defendant relied on the coconspirator's testimony, "evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it." *Id.* at 155 (cleaned up).

This Court reaffirmed these "rudimentary demands of justice," *id.* at 153 (quoting *Mooney v. Holohan*, 294 U.S. 103, 112 (1935)), as recently as eight months ago. In *Glossip v. Oklahoma*, 604 U.S. 266 (2025), involving a trial that was roughly contemporaneous with Mr. Wood's, a six-Justice majority of this Court ruled that Oklahoma County prosecutors violated their "constitutional obligation to correct false testimony" when they allowed an alleged coconspirator in a murder case to testify that he suffered from no mental illnesses and that he had been given the psychotropic medication lithium in jail when he had asked for Sudafed. *Id.* at 246, 247. Oklahoma County prosecutors knew that this testimony was false, because they quite likely had access to the coconspirator's "medical file, which would have listed both the lithium prescription and the bipolar diagnosis." *Id.* at 247. And if the prosecutors had corrected this false testimony while the coconspirator was on the stand, "his credibility plainly would have suffered." *Id.* at 248. "A lie is a lie, no matter what its subject." *Id.* at 249 (quoting *Napue*, 360 U.S. at 249). Just as it did over 50 years ago in *Giglio*, this Court vacated the conviction and remanded for a new trial. 604 U.S. at 258 (citing *Ake v. Oklahoma*, 470 U.S. 68, 86–87 (1985)).

These principles have been crystal clear for over half a century. The OCCA's failure to abide by them once

again cries out for this Court's intervention. That cry is particularly urgent where, as here, the appearance of partiality tainted that court's decisional process. *See Williams v. Pennsylvania*, 579 U.S. 1 (2016).

1. The lower courts failed to properly grapple with the legal implications of the prosecutor's admitted due-process violation, and so this Court must independently verify whether Mr. Wood's claims have merit.

Mr. Wood's case presents egregious violations of the Oklahoma County District Attorney's obligations under *Brady* and *Napue*. The lower courts' denial of Mr. Wood's claims rests entirely on their finding that the cooperation memorandum reflected no part of the deal between Ms. Warden and Oklahoma County. But that finding overlooks the testimony of George Burnett, which both lower courts found to be credible, explaining that the cooperation memorandum reflected the true extent of the deal with Ms. Warden, and that it was kept hidden from Mr. Wood for 22 years because he wanted to avoid being exposed at a postconviction hearing.

Under these circumstances, this Court has a "constitutional duty to conduct an independent examination of the record as a whole, without deference to" the lower courts. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 567 (1995) (citing *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984)). "In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will re-examine the evidentiary basis on which those conclusions are founded." *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951) (citation omitted). In short, because the lower courts' resolution of Mr. Wood's

due-process claims is inseparable from their conclusion that the cooperation memorandum reflects no part of the agreement between Ms. Warden and Oklahoma County, this Court must "make a fresh examination of crucial facts" on which Mr. Wood's claims rest. *Hurley*, 515 U.S. at 567; *see also Napue*, 360 U.S. at 272 (reiterating that "the duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest") (quoting *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, 121 (1954)). Faithful adherence to this principle will lead this Court to conclude that the lower courts' resolution of Mr. Wood's *Napue* and *Brady* claims cannot stand.

On February 4, 2003, Ms. Warden and the prosecutors agreed that, in exchange for providing an interview to a government investigator and testifying against her codefendants at their trials, she would receive a 35-year sentence and favorable treatment while in jail. Seven months later, when the trial judge ordered Oklahoma County prosecutors to turn over "all deals" to Mr. Wood and Jake, they did not disclose this agreement with Ms. Warden. They thus allowed Mr. Wood's and Jake's counsel to believe that the only deal with Ms. Warden was for a 45-year sentence. And when Ms. Warden testified at Mr. Wood's trial in April 2004 that she had agreed to testify against him in exchange for a 45-year sentence, the prosecutors did nothing to correct her testimony, which they knew was false and elicited anyway. Prosecutors also elicited testimony from Coleman Givens that they had extended him no benefits in exchange for his testimony against Mr. Wood, despite their later actions to reduce his two pending felony cases to a single misdemeanor. These are textbook violations of *Brady* and *Napue*.

Both the referee judge and the OCCA rejected Mr. Wood's *Brady* and *Napue* claims based on the cooperation

memorandum by rejecting the idea that the cooperation memorandum reflects *any* aspect of the true agreement with Ms. Warden. The referee judge noted that plea negotiations with Ms. Warden "culminated in the execution of a 'cooperation memorandum' that was signed by all parties and outlined Ms. Warden's anticipated plea agreement and the State's expectations of her as a cooperating witness." (App. 49a) She found Mr. Burnett's testimony to be "credible in all material respects." (App. 51a) She thus must have credited Mr. Burnett's explanation that the reason for his "strenuous objection" to reducing Ms. Warden's sentence to 35 years was to "avoid allegations of the existence of any 'wink-wink' deals after the fact." (App. 50a n.21) And yet the referee judge chalked up the 35-year sentence in the cooperation memorandum as an unexplained discrepancy. (App. 50a n.21) The judge's recommendation to deny Mr. Wood's claims does not square with Mr. Burnett's credible testimony that the true deal with Ms. Warden was hidden from Mr. Wood in order to avoid the truth coming out at a postconviction hearing.

The record also shows that the OCCA did not, as its own precedent requires, review the referee's factual determinations on this score for abuse of discretion. *See State v. Fuller*, 547 P.3d 149, 152 (Okla. Crim. App. 2024) (citing *State v. Brester*, 531 P.3d 125, 129 (Okla. Crim. App. 2023)). An "abuse of discretion" is a "clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented." *Golden v. State*, 552 P.3d 74, 76 (Okla. Crim. App. 2024) (quoting *Vanderpool v. State*, 434 P.3d 318, 325 (Okla. Crim. App. 2018)). If Mr. Burnett's explanation for why he and Ms. Smith hid the true nature of their deal with Ms. Warden was credible—that they did so in order to avoid the truth emerging at a postconviction evidentiary hearing—then it "stretches credulity" to argue that the cooperation

memorandum reflected a mere "discrepancy" rather than the true extent of the benefits Ms. Warden received. *See Buck v. Davis*, 580 U.S. 100, 123 (2017) (holding that minimizing the crux of petitioner's claim to a "*de minimis* role in the proceeding" correctly describes an abuse of discretion).

2. The prosecution's failure to disclose the full extent of its agreement with Ms. Warden affected the outcome of Mr. Wood's trial.

The record shows that the prosecutors honored their due-process obligations to Ms. Warden while shirking their obligations to Mr. Wood at the same time. On independent review of the record, this Court can only conclude that the prosecutors' failure to correct Ms. Warden's false testimony about her deal, and their failure to disclose it when they were ordered to do so six months before trial, affected the outcome of Mr. Wood's trial and capital sentencing proceedings.

The prosecutors' obligations to Ms. Warden were to fulfill the promises they made to her in order to induce her guilty plea. A "constant factor" in plea negotiations is that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello v. New York*, 404 U.S. 257, 262 (1971). Mr. Burnett and Ms. Smith ensured that their promise to Ms. Warden would be fulfilled when they allowed her sentence to be reduced to 35 years, just two short weeks after she testified against Mr. Wood. On this record, Mr. Burnett's "strenuous" objection to reducing Ms. Warden's sentence to reflect the true and complete deal they struck with her could not have been aimed at avoiding honoring her rights under *Santobello*. However "strenuous" his objection to doing so might have been, the

only explanation for the objection is Mr. Burnett's desire to keep the true nature of Ms. Warden's deal hidden from Mr. Wood for all time.

The prosecutors' obligations to Mr. Wood required them to disclose the full and complete extent of the deal with Ms. Warden and to correct her testimony about it when they knew she was not being fully candid. The true nature of the deal with Ms. Warden—a 35-year sentence in exchange for her testimony against Mr. Wood, rather than a 45-year sentence—would further have impeached her testimony at trial. *Accord United States v. Bagley*, 473 U.S. 667, 676–77 (1985) (payments to critical government witnesses); *Giglio v. United States*, 405 U.S. 150, 153–54 (1972) (agreement not to prosecute testifying codefendant). Together with the nature of Ms. Warden's reduced charges, which allowed her to discharge her 35-year sentence at a faster rate than common sense might otherwise dictate,[5] knowledge of the true nature of the deal with Ms. Warden would have allowed Mr. Wood's counsel to fully expose to the jury her incentive to cooperate with prosecutors and testify against him. *See Kyles v. Whitley*, 514 U.S. 419, 435 (1995) (a due-process violation occurs when "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict"); *accord Glossip v. Oklahoma*, 604 U.S. 226, 248 (2025) (prosecutors' failure to correct false testimony about a cooperating witness's need for a certain medication was material because his "credibility plainly would have suffered" if they had done so).

Not only did the prosecutors shirk their due-process obligations to Mr. Wood, they also directly violated the trial judge's order to disclose their cooperation agreement

[5] *See supra* note 3.

with Ms. Warden. They surely knew her testimony about the benefits she received from testifying was false: the cooperation memorandum bears both of their signatures. The record shows that prosecutors honored their due-process obligations to a witness who had agreed to help them prove their case against Mr. Wood, and shirked their due-process obligations to Mr. Wood in order to make that witness's testimony seem more credible. And yet, in the face of the prosecutors' apparent contempt of court and their decision not to correct trial testimony they knew to be false, the lower courts blessed these violations of Mr. Wood's rights under *Brady* and *Napue*.

In addition to its failure to independently review the full record, the OCCA applied three incorrect legal standards to assess the materiality of his *Napue* and *Brady* claims. *First*, nothing in this Court's cases involving *Brady* or *Napue* allowed the OCCA to apply any kind of "presumption" that attorney-witnesses "adhered to their oaths as officers of the court" when they testified at the reference hearing. (App. 14a) Both of Mr. Wood's claims rest on the factual premise that a prosecutor has committed *some* kind of misconduct—a failure to disclose exculpatory evidence (*Brady*) or a knowing failure to correct false testimony (*Napue*). A lawyer who commits this kind of misconduct surely falls short of the statutory oath that all Oklahoma attorneys take—that they will "do no falsehood or consent that any be done in open court." Okla. Stat. tit. 5, § 2.

Second, whether a witness's testimony "provides the essential link between the principal and the crime" (App. 17a (citing *Haber v. Wainwright*, 756 F.2d 1520, 1523–24 (11th Cir. 1985))) is not the proper metric of materiality under *Brady*. Indeed, *Haber* was decided three months before this Court decided *Bagley*, in which this Court reiterated that a *Brady* violation is material if as long as

is a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." 473 U.S. at 682 (citing *Strickland v. Washington*, 466 U.S. 668, 694 (1984)).

And *third*, the prosecutors' knowing failure to correct Ms. Warden's false testimony is material under *Napue* regardless of whether there was "substantial evidence" of guilt. (App. 20a–21a (citing *Hovey v. Ayers*, 458 F.3d 892, 920 (9th Cir. 2006))) The passage in *Hovey* on which the OCCA relied discussed a *Brady* claim, not a *Napue* claim. The prejudice standard under *Brady* are different from *Napue*, with the *Napue* standard being more favorable to a criminal defendant. *See Glossip*, 604 U.S. at 290 (Thomas, J., dissenting) ("This Court applies a defendant-friendly standard of materiality to *Napue* claims because they involve corruption of the truth-seeking function of the trial process.") (quoting *United States v. Agurs*, 427 U.S. 97, 104 (1976)). In order to show that a *Napue* violation was not material, the state, as the "beneficiary of the constitutional error," must "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Glossip*, 604 U.S. at 246 (quoting *Bagley*, 473 U.S. at 680 n.9). This inquiry asks whether "the guilty verdict actually rendered in *this* trial was surely unattributable to the error." *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (emphasis in original) (discussing *Chapman v. California*, 386 U.S. 18, 24 (1967)). The OCCA did not ask this crucial question.

The OCCA found, contrary to the credible testimony of Mr. Burnett and the supporting evidence uncovered by the referee judge's own investigation, that the cooperation memorandum reflected no part of the actual agreement with Ms. Warden. Based on Ms. Warden's cross-examination at trial, the OCCA denied that Ms. Warden's false, uncorrected testimony about her deal had any

conceivable effect on the outcome of Mr. Wood's case. "Counsel questioned Ms. Warden's motives for accepting the plea agreement and testifying against [Mr. Wood]. Any additional impeachment evidence Petitioner's counsel might have presented… would not have affected [the jury's] assessment of her credibility." (App. 21a) But this conclusion misapplies the materiality component of the *Napue* inquiry.

Cross-examination could have elicited additional evidence that Ms. Warden had agreed to a 35-year sentence based on a conviction for a crime that would allow her to discharge that sentence in approximately 12 years. This additional evidence may have tipped the balance of a juror's credibility assessment the other way. *See Wearry v. Cain*, 577 U.S. 385, 393–94 (2016) (per curiam) (explaining that further impeachment of a witness whose credibility had been "already impugned" undermined confidence in the verdict). Yet the prosecutor's successful objection to Mr. Wood's counsel's question about whether Ms. Warden might "get out faster" than the nominal 45-year (or the true 35-year) sentence might suggest prevented even this modest additional impeachment. This fact bolsters the conclusion that the *Napue* violation here "prejudiced the defense." *Glossip*, 604 U.S. at 251 (citing *Kyles v. Whitley*, 514 U.S. 419, 441 (1995)).

The similarities between the *Napue* violations in *Glossip* and the *Napue* violations in Mr. Wood's case are nothing short of striking. As Justin Sneed was in *Glossip*, Ms. Warden was the prosecution's key witness at both the guilt and penalty phases of Mr. Wood's capital trial. The prosecutors in *Glossip* and the prosecutors in Mr. Wood's case—all employed at the same district attorney's office—drew from the same playbook: (1) Ms. Warden's testimony provided the prosecution with its only direct

evidence incriminating Mr. Wood, even though other circumstantial evidence implicated him—just as Mr. Burnett testified at the evidentiary hearing below, Ms. Warden's testimony gave the prosecution the "certainty of a conviction" against Mr. Wood; (2) Ms. Warden's testimony provided the prosecution with its only evidence of Mr. Wood's motive for the crime—Ms. Warden testified she knew he "wanted money"; and (3) prosecutors used Ms. Warden's testimony to craft the entire theory of their case against Mr. Wood by portraying Ms. Warden to the jury as someone who was just a "go-along girl[]" with "no prior felony convictions" and only committed these crimes under Mr. Wood's manipulation and control. And as in *Glossip*, "[t]he prosecution weaved these suggestions into its closing argument[s]" to the jury at both the first stage and penalty phase of Mr. Wood's capital trial. *Id.* at 235.

"A conviction based on testimony implicating concealed incentives to an important witness is potentially tainted." *Cargle v. Mullin*, 317 F.3d 1196, 1216 (10th Cir. 2003) (citing *Giglio*, 405 U.S. at 154–55; *Carriger v. Stewart*, 132 F.3d 463, 479–82 (9th Cir. 1997)). The prosecution "may permissibly offer certain forms of advantageous treatment… to secure the cooperation of a witness." *Id.* at 1215. But this practice requires "certain procedural safeguards, prohibiting the government's deliberate use of perjured testimony, requiring the government to timely disclose the terms of witness agreements, and providing the defense an adequate opportunity to cross-examine the witnesses about those agreements." *Id.* at 1216 (cleaned up and citation omitted). Here, by hiding Ms. Warden's cooperation agreement and the trilateral agreement with Payne County, and by hiding the benefits extended to Coleman Givens, the prosecutors shirked their duty to Mr. Wood. The Tenth Circuit corrected the failure of Oklahoma

County prosecutors' along these lines in *Cargle*. This Court did so in *Glossip*. It should also do so for Mr. Wood.

3. The failure of Chief Judge Lumpkin to recuse himself when he received non-record evidence bearing on the materiality prong of Mr. Wood's claims violated Mr. Wood's due-process rights.

Where, as here, a state has opened its postconviction courts to hear a prisoner's federal constitutional claims, those courts must operate with the "fundamental fairness mandated by the Due Process Clause." *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987); *see also Evitts v. Lucey*, 469 U.S. 387, 401 (1985) (explaining that "when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause"). "It is axiomatic that a fair trial in a fair tribunal is a basic requirement of due process." *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 876 (2009) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).

The "Due Process Clause may sometimes demand recusal even when a judge has no actual bias" against or in favor of a litigant. *Rippo v. Baker*, 580 U.S. 285, 287 (2017) (per curiam) (quoting *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986)). "The Court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias." *Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016) (quoting *Caperton*, 556 U.S. at 881) (cleaned up). The "significant, personal involvement" of a judge on a multi-member court in the case of a death-row prisoner gives rise to "an unacceptable risk of actual bias," one that so endangers

the "appearance of neutrality that his participation in the case must be forbidden if the guarantee of due process is to be adequately implemented." *Id.* at 14 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

Chief Judge Lumpkin's behavior while Mr. Wood's case was pending before his court meets this standard. His failure to recuse himself once Mr. Wood challenged the appearance of bias on his part amounts to a due-process violation.

The *ex parte* communications between Chief Judge Lumpkin and Attorney General Drummond ostensibly concerned the scheduling of Mr. Wood's execution. But Judge Lumpkin's views on the proper interval between executions in Oklahoma were well known at the time General Drummond reached out. So General Drummond's outreach seemed calculated to influence the court's consideration of Mr. Wood's *Brady* and *Napue* claims by providing prejudicial information about him in an *ex parte* format.

In January 2024, General Drummond publicly asked the OCCA to adjust the schedule of executions in order to space them out every 90 days, rather than at the 60-day intervals at which executions in Oklahoma had previously been proceeding.[6] In support of this motion, General Drummond presented an affidavit from the Director of the Department of Corrections, who explained that because of the intensity of preparing for an execution for the volunteer DOC staff who participate in executions, the 60-day intervals were "too onerous and not sustainable."[7]

---

[6] *See* Joint Motion to Set the Phase Three Execution Dates at 90-Day Intervals, *State v. Tremane Wood et al.*, No. D-2005-171 et al., (Okla. Crim. App. filed Jan. 30, 2024).

[7] *Id.* exh. A, ¶ 5.

Judge Lumpkin made clear that he preferred executions to take place as quickly as they could be scheduled. At a hearing in open court on the motion, Judge Lumpkin told General Drummond, "We set a reasonable amount of time to start this out, and y'all keep pushing it and pushing it and pushing it."[8] Judge Lumpkin added, "Who's to say next month you won't come in and say I need 120 days? This stuff needs to stop, and people need to suck it up, realize they have a hard job to do, and get it done in a timely, proficient, professional way."[9]

In a separate writing relating to the court's order respecting the motion, Judge Lumpkin later said, "Personnel in our military continuously face life and death situations, but they step up each day and do their duty. Therefore, I cannot join in extending the spacing between executions to ninety (90) days."[10]

A year passed, and it fell to General Drummond to ask to set Mr. Wood's execution date under the priority his office had established. Mr. Wood's *Brady* and *Napue* claims involving Ms. Warden were still pending before the OCCA. Chief Judge Lumpkin had publicly expressed his view that executions must be carried out promptly, without regard to the toll on volunteer prison staff.[11] Knowing this, General Drummond conveyed to Judge Lumpkin allegations involving Mr. Wood, the use of

---

[8] Ashlynd Huffman, *A judge says 'suck it up' after executions put strain on Oklahoma prison staff*, *The Frontier* (Mar. 28, 2024), *at* <https://www.readfrontier.org/stories/a-judge-says-suck-it-up-after-executions-put-strain-oklahoma-prison-staff/>.

[9] *Id.*

[10] Concurring and Dissenting Statement of Judge Lumpkin at 3, Order, *State v. Tremane Wood et al.*, Nos. D-2005-171 (Okla. Crim. App. May 7, 2024).

[11] *Id.* at 2.

contraband cell phones, drug smuggling, and potentially violent criminal conspiracies—and did so *ex parte*. Ostensibly, these allegations were brought in service of a request to postpone Mr. Wood's execution one month beyond the tentative date of September 11, 2025. But when Chief Judge Lumpkin reminded General Drummond that he could not entertain the request to postpone Mr. Wood's execution without a formal filing with the court. General Drummond responded that he would prefer to keep the September 11 execution date than act in such a way that might tip off Mr. Wood's counsel to the allegations he presented to Chief Judge Lumpkin. But General Drummond could not by then undo the damage he had inflicted on the OCCA's otherwise-impartial consideration of Mr. Wood's claims.

"Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself." *Williams*, 579 U.S. at 16. An objective member of the public could easily conclude that effect of the allegations of criminal wrongdoing that General Drummond raised against Mr. Wood was not limited solely to matters of scheduling. Judge Lumpkin and his court were considering a matter that affected the validity of the conviction on which his execution was based. Combined with Judge Lumpkin's publicly-expressed views about the need to "suck it up" and proceed with scheduled executions, a reasonable observer could conclude that General Drummond's eleventh-hour allegations against Mr. Wood could have influenced Judge Lumpkin's vote on the *Brady* and *Napue* claims presented in Mr. Wood's postconviction application.

Furthermore, a reasonable observer would see her suspicions confirmed when, five days after Judge Lumpkin denied Mr. Wood's recusal motion, the decision

denying relief on his *Brady* and *Napue* claims issued—and bore his name as the authoring judge. In his decision, Judge Lumpkin minimized the secret cooperation memorandum that was unexpectedly and dramatically revealed on the last day of the hearing, dismissing it as a typographical error. He came to this conclusion even though the document bore both prosecutors' signatures and Mr. Burnett had admitted under oath that the document reflected the true and complete agreement with Ms. Warden. He also came to this conclusion despite the uncontradicted testimony from Mr. Burnett that the cooperation memorandum had been hidden so that he would not be exposed for his misconduct at a hearing like the one at which he was testifying.

"A multimember court must not have its guarantee of neutrality undermined, for the appearance of bias demeans the reputation and integrity not just of one jurist, but of the larger institution of which he or she is a part." *Williams*, 579 U.S. at 15. Judge Lumpkin's failure to recuse himself may well have prevented other members of his court from pursuing "lines of analysis" or engaging in "discussions they may have felt constrained to avoid" regarding the outcome of Mr. Wood's claims. *Id.* at 16. Judge Lumpkin's "significant, personal involvement" in receiving *ex parte* communications concerning criminal activity on Mr. Wood's part—while his court was considering whether to order a new trial as a remedy for *Brady* and *Napue* violations—thus "gave rise to an unacceptable risk of actual bias." *Id.* at 14. If this Court does not grant Mr. Wood a new trial outright, it should at least remand his case for the OCCA to consider his claims without Judge Lumpkin's involvement.

4. The decision below flouts half a century of this Court's precedent, not the least of which is this Court's 2025 decision in *Glossip*.

The parallels between this case and *Glossip* are striking. Both cases involve the suppression of evidence bearing on the credibility of a codefendant who testified against a defendant who ultimately received a death sentence. In both cases, the suppression was cemented at trial through the knowing failure to correct the cooperating witness's false testimony. In both cases, the suppression continued for decades until a review of the prosecutor's files led the defendant to find the evidence that had been hidden from him. Both cases were tried by the same prosecutor's office. In both cases, the OCCA denied relief by mischaracterizing the pertinent evidence in the record.

Glossip highlights just how egregious the OCCA's departure from this Court's long-standing precedent truly is. However "mistaken" the OCCA's "interpretation of *Napue*" was in *Glossip*, 604 U.S. at 252, that court had no reason not to heed the corrective action this Court took in that case when presented with Mr. Wood's claims. The OCCA referred Mr. Wood's postconviction application for a hearing *two weeks* after this Court decided *Glossip*. This Court could not have been clearer about the key parts of a *Napue* violation. "What matters is that [a witness's] testimony was false and a prosecutor knowingly let it stand nonetheless." *Id.* (citing *Napue*, 360 U.S. at 269). In *Glossip*, this Court said that the OCCA improperly focused on the subjective beliefs of the testifying witness rather than the prosecutor's knowledge of and failure to correct false testimony. *See id.* ("Sneed's beliefs are beside the point."). Here, by contrast, the OCCA invented an origin story for the cooperation memorandum—that it reflects no part of the agreement with Ms. Warden—that

flies in the face of the four corners of the document itself, the contemporaneous surrounding events, and the credible testimony of one of the prosecutors at the reference hearing.

The only justification that the OCCA gave for denying relief on Mr. Wood's *Napue* claim relating to Ms. Warden's testimony about the benefits she received in exchange for her testimony was that her testimony was not false—because it matched the terms set forth in the plea agreement. The OCCA had already been admonished that an accurate evaluation of all evidence bearing on a *Napue* violation entails asking "whether a correction could have made a material difference" in the verdict. *Glossip*, 604 U.S. at 253. If, contrary to all the evidence before the OCCA, there was nothing in Ms. Warden's testimony to correct, then *of course* a correction would have made no difference at all to the verdict. But her testimony *was* false, and the prosecutors *certainly* knew that. The OCCA misapplied *Napue* by disregarding all the evidence before it that supported a *Napue* violation, and refused to accumulate the prejudicial effect of all misconduct committed by the prosecutors in order to reject his *Brady* claim.

Moreover, the *ex parte* communications between Judge Lumpkin and General Drummond, involving serious allegations of criminal activity that Mr. Wood was actively participating in give rise to an appearance that the OCCA's decisionmaking process was flawed. A neutral observer, knowing the nature of what Judge Lumpkin and General Drummond were discussing, might question the impartiality of a judge who (1) engages in *ex parte* communications with the state's chief law-enforcement officer in which (2) prejudicial but irrelevant information bearing on a pending case is shared and then (3) denies a motion to recuse himself five days before

(4) he issues a decision that disregards record evidence of a violation of a death-row prisoner's due-process rights. A reasonable observer might question whether the decision not to grant Mr. Wood a new trial—as *Glossip* would require—was to any extent based on a decision to expedite carrying out a death sentence at any cost. This Court must not allow Oklahoma's repeated violations of its citizens' due-process rights to go uncorrected.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JON M. SANDS
Federal Public Defender
AMANDA BASS-CASTRO ALVES
Counsel of Record
KEITH J. HILZENDEGER
ALISON Y. ROSE
Assistant Federal Public Defender
250 North 7th Avenue, Suite 600
Phoenix, Arizona 85007
(602) 382-2700 voice
amanda_bass-castroalves@fd.org