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1 IN THE SUPREME COURT OF THE UNITED STATES
2 - - - - -
3 RICHARD EUGENE GLOSSIP,)
4 Petitioner,)
5 v.) No. 22-7466
6 OKLAHOMA,)
7 Respondent.)
8 - - - - -
9
10 Washington, D.C.
11 Wednesday, October 9, 2024
12
13 The above-entitled matter came on for
14 oral argument before the Supreme Court of the
15 United States at 10:05 a.m.
16
17 APPEARANCES:
18 SETH P. WAXMAN, ESQUIRE, Washington, D.C.; on behalf
19 of the Petitioner.
20 PAUL D. CLEMENT, ESQUIRE, Alexandria, Virginia; on
21 behalf of the Respondent in support of the
22 Petitioner.
23 CHRISTOPHER G. MICHEL, ESQUIRE, Washington, D.C.;
24 Court-appointed amicus curiae in support of the
25 judgment below.

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1 P R O C E E D I N G S

2 (10:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument this morning in Case 22-7466, Glossip
5 versus Oklahoma.

6 Mr. Waxman.

7 ORAL ARGUMENT OF SETH P. WAXMAN

8 ON BEHALF OF THE PETITIONER

9 MR. WAXMAN: Mr. Chief Justice, and
10 may it please the Court:

11 Richard Glossip was convicted on the
12 word of one man, Justin Sneed, the undisputed
13 murderer in this case. Oklahoma has now
14 disclosed evidence revealing that Mr. Sneed lied
15 to the jury about his history of psychiatric
16 treatment, including the fact that a prison
17 psychiatrist prescribed lithium to treat his
18 previously undiagnosed bipolar disorder. The
19 prosecution suppressed that evidence and then
20 failed to correct Mr. Sneed's perjured denial,
21 just as it suppressed evidence that in the
22 middle of trial, in violation of the court's
23 sequestration order, Sneed altered his testimony
24 about the knife wounds on the victim at the
25 urgent request of the prosecutor, who then

1 falsely denied to the court her prior knowledge.

2 There is no adequate or independent
3 jurisdictional bar to review and no warrant for
4 an evidentiary hearing.

5 As to independence, the court's
6 opinion is suffused with merits determinations
7 on the Brady and Napue claims. And, certainly,
8 there is no "clear and express statement" that
9 the court's decision is based on a bona fide
10 separate, adequate, and independent grounds, as
11 long required by this Court to preclude review.

12 Nor is there any adequate bar. By
13 rejecting the State's waiver, the court created
14 a jurisdictional threshold it had never applied
15 in any other case. The disposition was "without
16 support in prior state law," as required by over
17 60 years of this Court's precedent to establish
18 adequacy.

19 No evidentiary hearing could alter the
20 conclusion that Mr. Glossip was denied due
21 process. There's no dispute that, contrary to
22 Sneed's sworn testimony, the State's own
23 suppressed record shows that he was, in fact,
24 treated by a psychiatrist for bipolar disorder,
25 just as there is no dispute that Sneed changed

1 his testimony about the knife at the urgent
2 mid-trial request of the prosecutor, who then
3 falsely denied that very fact to the court.

4 This Court should reverse and remand
5 for a new trial.

6 I welcome the Court's questions.

7 JUSTICE THOMAS: Mr. Waxman, you place
8 quite a bit of weight on the note -- notes from
9 Smothermon and Ackley, and from your opening
10 statement, you clearly do not agree with them.

11 Did you at any point get a statement
12 from either one of the prosecutors?

13 MR. WAXMAN: Yes.

14 JUSTICE THOMAS: Did you interview
15 them?

16 MR. WAXMAN: Well, to be clear, we --
17 we did get a sworn statement, which I believe is
18 at page 960 of the Joint Appendix, from Gary
19 Ackley in which, for -- among other things, he
20 never mentions the fact that -- he never
21 mentions the account that he has now provided to
22 the -- in the amicus brief for the Van Treese
23 family.

24 And, as to Ms. Smothermon,
25 Ms. Smothermon was interviewed both by the

1 independent -- the legislature's independent
2 counsel and by the attorney general's
3 independent counsel, Mr. Duncan. She gave
4 different answers each time, none of which was
5 the account she's now provided in an unsworn
6 letter attached to the Van Treese brief.

7 JUSTICE THOMAS: Well, it would seem
8 that, because not only, you know, their
9 reputations are being impugned, but they are
10 central to this case, it would seem that they --
11 that an interview of these two prosecutors would
12 be central. They suggest that the -- their
13 interviews were generally about prosecuting
14 capital cases and not specifically about the
15 details of this.

16 MR. WAXMAN: Well, their current
17 unsworn statement appended at the very last
18 minute for the very first time in a merits
19 amicus brief before this Court deserves all the
20 benefit of the doubt that they -- you know, to
21 which they're entitled.

22 When -- in the context of --
23 Mr. Ackley did file an affidavit. It is in the
24 record in this case. And it is not in any way
25 consistent with his current account. As to --

1 JUSTICE THOMAS: Did they make
2 themselves unavailable? Sorry to interrupt you.

3 MR. WAXMAN: Well, he -- he made
4 himself available. He provided us a
5 declaration.

6 JUSTICE THOMAS: No, it's -- what
7 you're saying is -- would make sense if, for
8 some reason, they had made themselves
9 unavailable. They suggest that they were not
10 sought out and given an opportunity to give
11 detailed accounts of what those notes meant
12 and -- and what they did during the trial.

13 MR. WAXMAN: Justice Thomas, with
14 respect, there is a reason why both independent
15 counsels and the attorney general of the State
16 credited the account of what those notes show,
17 and the -- and their own words, her own words on
18 the notes can't be disputed.

19 And the reason that they gave for that
20 explanation amounts to the fact that, in
21 context, this is a prosecutor who, one,
22 destroyed and disbursed material evidence both
23 before and during the appeal of this case and
24 during post-conviction proceedings; two, she
25 falsely told the court that it had complied with

1 its obligation to provide the substance of all
2 statements by Justin Sneed; number three, they
3 belittled the formal discovery request for
4 mental health records as a "fishing expedition"
5 and said that no such records existed.

6 She -- this is a prosecutor who
7 engineered a mid-trial change in Justin Sneed's
8 testimony and then denied doing so in the court
9 and stood silent in the face of the testimony --
10 the false testimony that she elicited about
11 psychiatric treatment. And I think --

12 CHIEF JUSTICE ROBERTS: Mr. Waxman,
13 the counsel appointed by the Court argues that a
14 central element of your case is the jury -- that
15 the jury would have regarded the matter
16 differently if they knew that the lithium had
17 been prescribed by a psychiatrist as opposed to
18 someone else because the jury knew about the
19 lithium and what they didn't know is that it was
20 prescribed by a psychiatrist.

21 Do you -- do you really think it would
22 make that much of a difference to the jury?

23 MR. WAXMAN: Well, I think that's not
24 the only material difference here, that the --
25 the -- the fact was not only that he was -- it

1 was that he lied and was allowed to lie when he
2 said that he never saw a psychiatrist, which the
3 defense -- which -- you know, it is one thing
4 for a witness to stand up in court and testify
5 on the basis of a promise of leniency by the
6 prosecution.

7 It's one thing for a witness to
8 speculate or be inaccurate about what actually
9 happened. What the jury is told, this is a
10 witness who lied about the fact that he had seen
11 psychiatric testimony and was diagnosed with
12 bipolar disorder, and this is a witness who, at
13 the mid-trial inducement of the prosecutor,
14 changed his testimony about whether, in fact, he
15 had also stabbed the victim.

16 It very well could have made a
17 significant difference in the --

18 JUSTICE SOTOMAYOR: Mr. Waxman --

19 MR. WAXMAN: -- outcome of the case.

20 Just the --

21 JUSTICE SOTOMAYOR: -- the issue
22 wasn't about him taking lithium. The issue was
23 about why he was taking the lithium.

24 MR. WAXMAN: Yes, of course.

25 JUSTICE SOTOMAYOR: And so the fact

1 that the jury knew he had taken lithium during
2 incarceration doesn't tell them anything about
3 whether he had bipolar -- a bipolar condition,
4 that his use of drugs would have led to
5 impulsive and violent behavior, correct?

6 MR. WAXMAN: That's correct. And --

7 JUSTICE SOTOMAYOR: And would have
8 explained the murder, correct?

9 MR. WAXMAN: I'm sorry?

10 JUSTICE SOTOMAYOR: And would have
11 explained --

12 MR. WAXMAN: And would have explained
13 the murder.

14 JUSTICE SOTOMAYOR: -- the murder.

15 Now can I go back to the two questions
16 here? I have three of my own, okay?

17 MR. WAXMAN: Okay.

18 JUSTICE SOTOMAYOR: There's a lot --
19 and you spent a whole lot of time in your
20 introduction, a lot of spilt ink here, on
21 whether the PCPA is an adequate and independent
22 state ground. I'm not even sure why we're doing
23 all that when -- you're right, the court below
24 seemed to confuse the merits with the procedural
25 bar, but it's very clear that a procedural bar

1 is always waiveable under Oklahoma law. Legions
2 of cases say that, correct?

3 MR. WAXMAN: Correct.

4 JUSTICE SOTOMAYOR: So --

5 MR. WAXMAN: And under federal law.

6 JUSTICE SOTOMAYOR: -- so, once you
7 waived, the only issue before the court was the
8 substantive issue of whether there was a
9 violation of federal law, correct?

10 MR. WAXMAN: Correct.

11 JUSTICE SOTOMAYOR: So that's really
12 the only issue before us, the procedural bar. A
13 lot of spilt ink goes on and on about is this
14 the first time they didn't waive it, is it not
15 the first time they didn't waive it.

16 The reason that's true is because they
17 accept the waiver when there's a violation of a
18 right, and they don't accept the waiver when
19 there's no violation of a right.

20 Here, they found no violation of a
21 right, so they reached the substantive legal
22 issue and said: We're not going to waive.

23 You don't find any case in Oklahoma
24 law -- and your adversary, Mr. Waxman, can tell
25 me -- where they found a constitutional

1 violation either under state or federal law and
2 said: We won't accept a PCPA waiver. Can't
3 find it because it doesn't exist.

4 So now we're on the federal issue,
5 okay? That's all I'm looking at. Was there a
6 Napue? Was there a Brady violation? That's
7 your argument, correct?

8 MR. WAXMAN: Correct.

9 JUSTICE SOTOMAYOR: Now, on the
10 Van Treese issue, that's non-record evidence, so
11 it's not before us.

12 MR. WAXMAN: It's not only not before
13 you, it wasn't the basis on -- it wasn't before
14 the Oklahoma Court of Criminal Appeals.

15 JUSTICE SOTOMAYOR: So whatever that
16 was.

17 MR. WAXMAN: It was never even
18 suggested then.

19 JUSTICE SOTOMAYOR: Now we know we had
20 two independent counsels. At least one of them,
21 if not both, talked to Gary Ackley because --

22 MR. WAXMAN: Correct.

23 JUSTICE SOTOMAYOR: -- he submitted an
24 affidavit.

25 MR. WAXMAN: Correct.

1 JUSTICE SOTOMAYOR: And he said in
2 that affidavit that Justice Sneed was on lithium
3 as treatment for bipolar disorder would have
4 been an important fact for the defense to know.

5 MR. WAXMAN: Correct.

6 JUSTICE SOTOMAYOR: So he concedes the
7 basis of the Napue -- violation here, didn't he?

8 MR. WAXMAN: Certainly the Brady
9 violation.

10 JUSTICE SOTOMAYOR: Right. Now, if
11 he's changed his testimony now in unsworn
12 materials, that's irrelevant to us here, and
13 it's irrelevant to the finding the Oklahoma
14 court made below, correct?

15 MR. WAXMAN: That's right.

16 JUSTICE SOTOMAYOR: All right. So now
17 let's go to the substance of the issue that the
18 Chief raised, which was: Could he have found
19 this earlier and does that make a difference to
20 the Napue violation and the Brady violation?

21 I thought the essence of the Napue
22 violation is: Was there a falsehood? Did the
23 prosecutor know it was a falsehood? Not whether
24 the defendant knew it was a falsehood but
25 whether the prosecutor has an obligation to

1 correct it. Is that correct?

2 MR. WAXMAN: It is correct that both
3 the Napue and its subsequent cases and Brady and
4 its progeny both look to the -- the obligation,
5 the constitutional obligation, of the prosecutor
6 and not what the defense could have discovered.

7 JUSTICE SOTOMAYOR: All right. Now
8 let's go to --

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel. We'll -- we'll get back shortly
11 through the seriatim questions.

12 Justice Alito?

13 JUSTICE ALITO: You didn't ask -- you
14 don't have a question?

15 JUSTICE THOMAS: No, go.

16 JUSTICE ALITO: Sorry.

17 All right. Well, Mr. Waxman, Justice
18 Sotomayor has taken us through the whole case,
19 so maybe there's not much left to discuss, but I
20 did have a few questions.

21 The Oklahoma Court of Criminal Appeals
22 said in paragraph 24 of its opinion, "Even if
23 this claim overcomes procedural bar, the facts
24 do not rise to the level of a Brady violation."

25 Why isn't that a quintessential clear

1 statement under -- under Long? Even if it does
2 not overcome the procedural bar, then -- and it
3 goes on, then to the federal issue?

4 MR. WAXMAN: Well, I -- I think -- I
5 think that the sentence you just read me is
6 susceptible to at least two interpretations.
7 One is the one you're implying, and the other is
8 that they have just finished dispensing with a
9 number of other claims in their opinion, all of
10 which they very clearly unequivocally barred on
11 state procedural default grounds.

12 When they come to the Brady claim, the
13 court says: Even if this claim overcomes
14 procedural bar, I will then now spend the next
15 four paragraphs -- well, three of the next four
16 paragraphs discussing the merits of the Brady
17 claim.

18 And, at a minimum, Justice Alito, I
19 think we have to acknowledge that paragraphs 24
20 through 28 -- and this is repeated again at
21 paragraph 41 and paragraph 12 -- that the -- any
22 statements by the court with respect to the
23 state procedural bar are, to quote this Court's
24 precedents, interwoven with and influenced by
25 its consideration of the federal constitutional

1 claims.

2 JUSTICE ALITO: Why -- why is that so?

3 In paragraph 26, the -- the Oklahoma
4 court goes through the two requirements under
5 state law under 1089: "The issue is one that
6 could have been presented previously because the
7 factual basis for the claim was ascertainable
8 through the exercise of reasonable diligence."

9 And then it goes on to the -- to the
10 innocence requirement: "And the facts are not
11 sufficient to establish by clear and convincing
12 evidence that, but for the alleged error, no
13 reasonable fact finder would have found the
14 applicant guilty of the underlying offense or
15 would have rendered the penalty of death."

16 MR. WAXMAN: I -- I don't deny --

17 JUSTICE ALITO: What -- what's
18 ambiguous about that?

19 MR. WAXMAN: Justice Alito, there is
20 no denying that the entirety of paragraph 26 is
21 a near-verbatim recitation of the two prongs of
22 the state procedural bar.

23 There is also no denying that it is
24 preceded by two paragraphs discussing the merits
25 of the Brady claim and succeeded by a paragraph

1 which also goes in -- in which goes in detail in
2 explaining why the Brady claim fails.

3 JUSTICE ALITO: But what does that
4 show? Yes, there's no dispute that they -- they
5 held in the alternative that there was no
6 federal constitutional violation. But there is
7 the Oklahoma statute. It has two requirements.
8 They -- they -- they go through the two
9 requirements, and they say that they weren't
10 satisfied, and -- and they say: Even if it
11 could overcome the procedural bar, it still
12 would not provide a basis for -- for relief.

13 I -- I don't see what's unclear --

14 MR. WAXMAN: Just --

15 JUSTICE ALITO: -- or even ambiguous
16 about that.

17 MR. WAXMAN: Justice Alito, with
18 respect, let me make two points. Number one --
19 I guess maybe two-and-a-half points.

20 Number one, when the court deals with
21 the Napue claim, which it does not address until
22 paragraph 28, it never mentions procedural bar
23 whatsoever. It is fully adjudicated on the
24 merits.

25 Number two, the -- I think that -- I

1 think that one has to concede that at a minimum,
2 a minimum, with respect to the Brady claim,
3 there is -- it is certainly interwoven with --
4 and it's physically on the page interwoven with
5 what may or may not have been an adjudication of
6 the state procedural bar. Certainly, it was
7 influenced by it.

8 And this Court, 41 years ago in Long
9 versus Michigan and -- reiterated 30 years ago
10 also in another opinion by Justice O'Connor,
11 reiterated that -- and I'm quoting -- "After
12 Long, a state court that wishes to look to
13 federal law for guidance ... as an alternative
14 holding while still relying on adequate and
15 independent state ground[s] can avoid the
16 presumption of [federal jurisdiction] by stating
17 'clearly and expressly that [it's decision] is
18 ... based on bona fide separate, adequate, and
19 independent grounds.'"

20 JUSTICE ALITO: All right. Going on
21 to a -- a -- another point, you rely very
22 heavily on a note that says "Lithium?
23 Dr. Trumpet?", and you read a lot into that.

24 And the Van Treese family's amicus
25 brief provides a pretty compelling

1 counter-reading of that. And -- and you want us
2 to say, well, just pretend it doesn't exist and
3 read those notes the way we think they should be
4 read, those cryptic notes the way we think they
5 should be read, because it's not the -- the
6 material that the Van Treese brief relies on is
7 not in the record of the case.

8 We shouldn't even remand for an
9 exploration of this?

10 MR. WAXMAN: As to the -- I'll deal
11 with the remand first and then the weight that
12 ought to be given to the Van Treese brief's
13 eleventh-and-a-half-hour explanation of these
14 notes.

15 There is the -- this case comes to you
16 based on a holding of the Oklahoma Court of
17 Appeals that did not have that account in front
18 of it because the Van Treese family did not
19 present it to the court and was predicated on a
20 series of factual allegations and
21 interpretations that were presented both by the
22 prosecutor, the attorney general, and by
23 Mr. Glossip, and fully supported in great detail
24 and with reasoning by the two independent
25 investigators, the --

1 JUSTICE ALITO: All right. I -- I --

2 MR. WAXMAN: -- investigations that
3 had been done, and --

4 JUSTICE ALITO: -- I get your point.
5 Your point is we shouldn't consider it because
6 it's not in the record, right? That's the short
7 answer?

8 MR. WAXMAN: I -- I think you
9 shouldn't consider it for a whole lot of
10 reasons, one of which is that it is
11 inconsistent -- it not only was never mentioned
12 at a time when, surely, if it was the case, it
13 would have been, and is inconsistent with what
14 Mr. Ackley says in his declaration.

15 But let me -- let me just say this,
16 Justice Alito. Even assuming that this account
17 is true, there's no denying the fact -- and it's
18 also in the record -- that on -- while his first
19 conviction was on appeal, he was visited in
20 prison by Mr. Glossip's defense lawyer and an
21 investigator. And that is clearly reflected in
22 the notes of both Ms. Smothermon and Mr. Ackley.

23 There are a lot of other things that
24 are accounted for in those notes that have
25 nothing to do with that interview.

1 JUSTICE ALITO: All right. Let me
2 just --

3 MR. WAXMAN: But even if --

4 JUSTICE ALITO: -- let me -- let me go
5 on to one other question because the time is
6 limited.

7 You read McCarty, a 2005 case where
8 the Oklahoma Court of Criminal Appeals accepted
9 the State's waiver of 1089, and you rely on
10 that. But there is no reasoning in McCarty.
11 The court simply said that in a footnote the
12 State expressly waived any procedural bar.

13 Do you -- do you read this for the
14 proposition that the Oklahoma court must accept
15 all 1089 waivers in future cases?

16 MR. WAXMAN: I do. But even if I were
17 wrong about that and it reflected the fact that
18 it was a discretionary rule, it is clear from
19 this Court's cases, Beard versus Kindler and
20 Walker versus Martin, that a discretionary rule
21 is inadequate unless applied consistent with an
22 intelligible principle that is "firmly
23 established and regularly followed."

24 And going all the way back to the
25 1960s --

1 JUSTICE ALITO: So one departure in
2 the application of a discretionary -- if the --
3 in a discretionary rule, if the rule is applied
4 in a discretion -- in -- in a -- in -- in a
5 habeas petitioner-friendly way in one case,
6 that's the end of the matter?

7 MR. WAXMAN: Well, I -- I think that
8 there -- that there is a non-discretionary rule
9 that that is the rule of party presentation that
10 Oklahoma has followed for a hundred years, and
11 McCarty is entirely consistent with that. But
12 even if it were simply an instance of some
13 discretion, again, this Court said in -- you
14 know, 60 or 70 years ago and has reiterated
15 since that a declination -- a state -- the
16 invocation of a state procedural rule "without
17 support in prior state law" is inadequate.

18 And in Johnson versus Mississippi,
19 this Court said, "[A] state procedural
20 [rule] ... is not 'adequate' unless 'strictly or
21 regularly followed.'"

22 JUSTICE ALITO: All right. Thank you.

23 MR. WAXMAN: Okay.

24 CHIEF JUSTICE ROBERTS: Justice
25 Sotomayor?

1 JUSTICE SOTOMAYOR: Counselor, no
2 matter how we get past this, we have to reach
3 whether the court ruled correctly on the
4 constitutional issue, correct?

5 MR. WAXMAN: Well, I -- I -- I think
6 so based on my -- my position and the State's
7 position that there is no jurisdictional bar.

8 JUSTICE SOTOMAYOR: And everything
9 that the Oklahoma courts have done, you said a
10 hundred years of their history, party
11 presentation, the fact that they've never had a
12 case with a constitutional violation where they
13 didn't accept the waiver, correct?

14 MR. WAXMAN: That's right.

15 JUSTICE SOTOMAYOR: And --

16 MR. WAXMAN: In fact, in this
17 Court's -- in -- in the Oklahoma Court of
18 Criminal Appeals' jurisprudence, there is a
19 case -- it's cited by everybody, Valdez versus
20 the State -- which says that the power to grant
21 post- -- relief post-conviction "when an error
22 complained of has resulted in a miscarriage of
23 justice, or constitutes a substantive violation
24 of a constitutional or statutory right." So
25 this is not a rule that the court is "powerless"

1 to grant a waiver or that it does not, in fact,
2 routinely defer to party presentation.

3 JUSTICE SOTOMAYOR: So I go back to
4 the -- this is not AEDPA, correct? Our review
5 is not AEPDA? Meaning --

6 MR. WAXMAN: Did you say --

7 JUSTICE SOTOMAYOR: It's not AEPDA
8 review.

9 MR. WAXMAN: AEDPA?

10 JUSTICE SOTOMAYOR: AEDPA.

11 MR. WAXMAN: Oh, yeah. No, no, no.

12 JUSTICE SOTOMAYOR: No, no, no.

13 MR. WAXMAN: This is a direct
14 review --

15 JUSTICE SOTOMAYOR: This is a straight
16 did they get --

17 MR. WAXMAN: -- from a state supreme
18 court.

19 JUSTICE SOTOMAYOR: -- if they -- if
20 they reach the -- if they reach the
21 constitutional question and we de novo decide
22 whether they got the law right, correct?

23 MR. WAXMAN: That's my understanding.

24 JUSTICE SOTOMAYOR: So whatever they
25 said their reasons or thinking was, we have to

1 look at the record and decide whether the facts
2 and law support your argument that there were
3 Brady and Napue violations, correct?

4 MR. WAXMAN: Yes.

5 JUSTICE SOTOMAYOR: Now tell me
6 succinctly why, even assuming their finding that
7 they could have determined this issue earlier,
8 Brady and Napue violations would have occurred.

9 MR. WAXMAN: Well, the --

10 JUSTICE SOTOMAYOR: I say "they,"
11 meaning the court below.

12 MR. WAXMAN: Yeah. So, you know,
13 the -- part of the adequacy determination,
14 leaving aside this novel and unforeseen refusal
15 to give credit to the -- the State's waiver of
16 procedural bars, is whether there is fair and --
17 "fair and substantial support" for the prongs of
18 the State procedural -- depart.

19 Here, the court's analysis of
20 diligence, which is paragraph 27 of the -- the
21 court's opinion, defies any reasonable
22 application of state law. The -- the
23 supposition is that Mr. Glossip's lawyers should
24 have brought a claim of constitutional error
25 before they knew the salient facts establishing

1 the error.

2 In this context, we have, number one,
3 with respect to the --

4 JUSTICE SOTOMAYOR: It doesn't matter
5 what state law says about that. The question is
6 what does federal law say about it, correct?

7 MR. WAXMAN: Federal law -- I -- you
8 know, I -- maybe I'm missing something here, but
9 federal law doesn't -- I mean, the federal
10 requirement of adequacy and independence is
11 federal law, and those -- that definition of
12 fair and substantial support comes from --

13 JUSTICE SOTOMAYOR: I -- I -- you
14 miss -- you misunderstood my question, okay?

15 MR. WAXMAN: Okay. I -- I apologize.

16 JUSTICE SOTOMAYOR: I -- I'm past the
17 procedural bar.

18 MR. WAXMAN: Okay.

19 JUSTICE SOTOMAYOR: I was past it long
20 ago because I think we need to get to the
21 federal question.

22 MR. WAXMAN: I hear you.

23 JUSTICE SOTOMAYOR: All right? So
24 even -- is there a Napue or a Brady violation if
25 they could have discovered this earlier?

1 MR. WAXMAN: The answer to that
2 question is yes because the adequacy prong of
3 this Court's --

4 JUSTICE SOTOMAYOR: Forget adequacy.

5 MR. WAXMAN: Okay. The answer is --
6 the answer is yes, the --

7 JUSTICE SOTOMAYOR. Forget -- let's
8 assume they had granted your waiver.

9 MR. WAXMAN: Okay.

10 JUSTICE SOTOMAYOR: All right? Let's
11 assume that.

12 MR. WAXMAN: Okay.

13 JUSTICE SOTOMAYOR: So adequacy and
14 independence is not at issue.

15 Under federal -- and this had
16 happened, and it was the first case before the
17 court, and they come up and they say: There was
18 a Napue violation, there's a Brady violation.
19 And your other side comes up and says: No,
20 there wasn't, because you could have found this
21 earlier.

22 MR. WAXMAN: Okay. The answer to your
23 question is twofold.

24 Number one, as this Court has said in
25 several cases, Brady and Napue do not stand for

1 the proposition -- stand for the opposite of the
2 proposition that the prosecution may hide and
3 the defense must try to seek. That's the
4 antithesis of what Brady and Napue and their
5 progeny provide.

6 In addition, it is simply preposterous
7 to argue either with respect to the -- you know,
8 what's -- the -- the document that is in -- on
9 page 1005 of the Joint Appendix, that is, the --
10 the jail record, that this document could have
11 been discovered in the face of a solicited
12 denial under oath that he'd ever had psychiatric
13 treatment and the State's mocking of a discovery
14 request, number one, for all -- the substance of
15 all statements of Justin Sneed to the
16 prosecutor, which is required not only by the
17 Due Process Clause but also under state
18 statutory law, Title 22, Section 2002(a)(1)(C),
19 which requires the prosecution to produce the
20 substance of any oral statements made to the
21 prosecution by a co-defendant.

22 And how on earth could defense counsel
23 have known that in Ms. Smothermon's files there
24 was a memo that she sent immediately after the
25 medical examiner testified to Mr. Sneed's

1 lawyer, saying we "need to get to Justin today.
2 The knife is our biggest problem," and then
3 received back handwritten notes discovered in
4 Box 8 that -- I guess it was Box 7 -- that, in
5 fact, Sneed was going to change his testimony
6 and say that he did stab the victim.

7 And the prosecutor then, in response
8 to a mistrial motion, affirmatively tells the
9 court --

10 JUSTICE SOTOMAYOR: Counsel, the --
11 the last --

12 MR. WAXMAN: -- we're hearing this for
13 the first time.

14 JUSTICE SOTOMAYOR: -- the one fact
15 you didn't mention is that there was a defense
16 request for medical records --

17 MR. WAXMAN: Absolutely.

18 JUSTICE SOTOMAYOR: -- that were
19 resisted by the government, and they succeeded.
20 They never turned over his medical records.

21 MR. WAXMAN: That's correct.

22 JUSTICE SOTOMAYOR: So they had no way
23 of determining from his medical records the
24 lithium issue?

25 MR. WAXMAN: Correct.

1 JUSTICE SOTOMAYOR: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice Kagan?

3 JUSTICE BARRETT: You forgot Justice

4 Kavanaugh.

5 CHIEF JUSTICE ROBERTS: Yeah, sorry.

6 (Laughter.)

7 CHIEF JUSTICE ROBERTS: Justice

8 Kavanaugh?

9 Justice Barrett?

10 JUSTICE BARRETT: No.

11 CHIEF JUSTICE ROBERTS: Justice

12 Jackson?

13 JUSTICE JACKSON: So, from your

14 colloquy with Justice Alito, it seems that there

15 is agreement that the court in this case applied

16 the procedural bar, right? I mean, at least

17 you -- it's in the alternative, but they did

18 actually apply the bar, is that right?

19 MR. WAXMAN: As -- arguably, as to

20 Brady, not as to Napue.

21 JUSTICE JACKSON: All right. So even

22 with respect to Brady, I guess -- doesn't that

23 seem to be the problem, though, from the

24 standpoint of AISG when the bar has been clearly

25 waived? I think that was Justice Sotomayor's

1 initial point. Can parties in Oklahoma waive
2 non-jurisdictional procedural bars?

3 MR. WAXMAN: Of course.

4 JUSTICE JACKSON: They can. Right.

5 MR. WAXMAN: Of course.

6 JUSTICE JACKSON: And -- and -- and
7 what happens when those waivers occur? I mean,
8 do -- do the Oklahoma courts routinely proceed
9 to either evaluate the reasons for the waiver or
10 reject it and continue on anyway?

11 I thought they just accepted -- if a
12 party says, this is a non-jurisdictional bar, I
13 have a right to raise it, but I'm waiving that
14 right, the Oklahoma courts' standard practice,
15 just like most courts, if not all courts, is to
16 accept that and go on, right?

17 MR. WAXMAN: Yes. Like the federal
18 courts, the Oklahoma courts honor the principle
19 of party presentation and adversarial
20 presentation in honoring the waiver of those
21 non-jurisdictional bars.

22 JUSTICE JACKSON: As a matter of
23 practice. So we don't need a rule necessarily
24 that Oklahoma always accepts these. They just
25 do it. I mean, that's what -- we don't have any

1 evidence that they've ever rejected it, correct,
2 the waiver?

3 MR. WAXMAN: That's correct.

4 JUSTICE JACKSON: Okay.

5 MR. WAXMAN: And, in fact, the rule
6 that this Court applies on the adequacy prong is
7 that it is -- the refusal to accept a waiver is
8 not adequate unless it has been done
9 consistently in the past.

10 JUSTICE JACKSON: Correct. Thank you.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 MR. WAXMAN: Yeah. Nothing? Thank
14 you.

15 CHIEF JUSTICE ROBERTS: Mr. Clement.

16 ORAL ARGUMENT OF PAUL D. CLEMENT ON BEHALF OF THE
17 RESPONDENT, IN SUPPORT OF THE PETITIONER

18 MR. CLEMENT: Mr. Chief Justice, and
19 may it please the Court:

20 Attorney General Drummond did not
21 confess error here lightly. Indeed, he
22 continues to defend multiple capital convictions
23 and opposed Mr. Glossip's penultimate cert
24 petition. But, after commissioning an
25 independent review, he reluctantly reached the

1 conclusion that Brady and Napue violations by
2 the State's own prosecutors obligated him to
3 confess error and waive procedural obstacles, as
4 his predecessor had done in McCarty.

5 That confession demanded respectful
6 consideration and resolution of the issues on
7 the merits, as in McCarty. Instead, the court
8 invoked procedural bars and essentially treated
9 the confession of error as unfounded.

10 The resulting decision made errors on
11 two important federal constitutional issues, and
12 those errors are not shielded by adequate
13 independent grounds.

14 When the State's one indispensable
15 witness was under bipolar -- had -- had bipolar
16 disorder and not a toothache or a common cold,
17 that fact is highly material and merits a new
18 trial.

19 I welcome the Court's questions.

20 JUSTICE THOMAS: Mr. Clement, back to
21 the prosecutors. If you had -- if they were
22 using a note of yours from 20 years ago,
23 wouldn't you expect them to call you and have an
24 in-depth investigation as to what your note
25 meant?

1 MR. CLEMENT: I -- I mean, I -- I
2 would expect that, Justice Thomas, and --

3 JUSTICE THOMAS: Well -- well,
4 shouldn't these two prosecutors -- it seems as
5 though their reputations are being impugned,
6 and, according to them, they did not receive an
7 opportunity to explain in depth.

8 MR. CLEMENT: Justice Thomas, that's
9 hard to square with the record here. There were
10 two independent investigations. As Mr. Waxman
11 has indicated, Mr. Axley -- Ackley submitted a
12 affidavit under -- under oath.

13 And, you know, I -- and -- and,
14 ultimately, I think the attorney general, having
15 commissioned a second independent review, looked
16 at the results of that, looked at the notes, and
17 he has to make his own judgment because,
18 ultimately, the prosecutor has to decide whether
19 a Napue violation has occurred.

20 JUSTICE THOMAS: Well, when I looked
21 at the note of Ms. Smothermon, I couldn't make
22 heads or tails of it. It had a few names. It
23 had "lithium" and a question mark. And she
24 explains what it was.

25 And, according to her explanation, if

1 it's true, it's -- it was simply about a
2 conversation that Glossip's lawyer had with --
3 was it Sneed?

4 MR. CLEMENT: Sneed.

5 JUSTICE THOMAS: Sneed. And if that's
6 the case, I don't see how there's any basis for
7 either of those two violations.

8 MR. CLEMENT: So there's a couple of
9 problems with that explanation, Justice Thomas.

10 First, it's inconsistent with her
11 earlier explanations for the notes.

12 Second, when General Drummond is
13 making this determination, the notes don't stand
14 alone. There's also the medical information
15 sheet that was never disclosed to the defense.

16 JUSTICE THOMAS: Where -- where was
17 that -- what was that sheet?

18 MR. CLEMENT: That sheet's at Joint
19 Appendix page 933, and it shows that -- that
20 when he was transferred from the jail facility
21 to the correctional facility, he was -- he was
22 under lithium for bipolar disorder.

23 So, if -- if -- if we're looking at
24 those notes in conjunction with that medical
25 information sheet, it seems quite -- the -- the

1 inescapable conclusion that the attorney general
2 had to make on his own was --

3 JUSTICE THOMAS: I think her point was
4 simply, I mean, even that sheet -- is that the
5 sheet that she says the sheriff filled out?
6 That it didn't come from -- actually from a
7 doctor?

8 MR. CLEMENT: Well, but -- but it's
9 the -- the State's own record --

10 JUSTICE THOMAS: It was a transport --

11 MR. CLEMENT: -- that at the point of
12 transfer he was, A, under lithium, and, B, it
13 was for bipolar disorder.

14 And so I -- I mean, again, I think you
15 ultimately have to draw the most plausible
16 inference from all the information available.
17 And the most --

18 JUSTICE THOMAS: But you didn't,
19 though. Her point is that you didn't ask her,
20 that you didn't have an in-depth conversation
21 with her about it. You're drawing it from the
22 note and -- which she thinks is inadequate
23 information.

24 MR. CLEMENT: Well, the attorney
25 general is basing his judgment in part on the

1 independent investigation of Mr. Duncan. He
2 talked to Ms. Smothermon. Afterwards,
3 Ms. Smothermon says it wasn't a sufficiently
4 lengthy conversation.

5 JUSTICE THOMAS: She's --

6 MR. CLEMENT: I mean, at a certain
7 point, I mean -- and -- but let me put one more
8 contextual point on the table here.

9 The original request below was for an
10 evidentiary hearing, and the State did not
11 oppose an evidentiary hearing.

12 Now we think, if you look at those
13 notes in light of the medical information sheet,
14 there's no need for an evidentiary hearing.
15 But, ultimately, we -- we didn't resist it
16 below. If the court had granted it, we wouldn't
17 be here.

18 And the attorney general just wants to
19 get to the bottom of this, but he also, under
20 Napue, has to make his own judgment about
21 whether the prosecutors have elicited perjured
22 testimony and failed to correct it, and his best
23 judgment, based on these records and this
24 information, is that there was a Napue violation
25 here.

1 JUSTICE JACKSON: But are you saying
2 that we are -- that -- that the question of
3 Brady and Napue or a Napue violation is resolved
4 because the attorney general has reached that
5 conclusion?

6 MR. CLEMENT: Absolutely not. And
7 we --

8 JUSTICE JACKSON: All right. So why
9 wouldn't we send it back? I mean, it's my
10 understanding -- if we send it back for an
11 evidentiary hearing? It's my understanding that
12 there's never been a court determination of any
13 of these facts. Justice Thomas is saying there
14 are some disputes about what the notes mean and
15 whatnot. So I just -- I guess I don't
16 understand why we wouldn't, at the minimum, have
17 some sort of requirement that a court make a
18 finding about these things.

19 MR. CLEMENT: I -- I -- I -- I mean,
20 look, again, we didn't resist an evidentiary
21 hearing below. We would be satisfied if you
22 vacate the judgment below and order an
23 evidentiary hearing. We do think an evidentiary
24 hearing is not necessary here because I -- I --
25 I just think, if you look at those notes in

1 conjunction with the medical information sheet,
2 there's no factual dispute. I don't think
3 there's any factual dispute that they -- that --
4 that, certainly, the two in conjunction with
5 each other are Brady material. I don't know --

6 JUSTICE SOTOMAYOR: Counselor --

7 MR. CLEMENT: -- how they're not.

8 JUSTICE SOTOMAYOR: -- whether the
9 prosecutor actually knew about it, knowledge is
10 imputed to her, right?

11 MR. CLEMENT: I -- I -- I would
12 certainly think so, and so I don't -- I don't --

13 JUSTICE SOTOMAYOR: I think, under --
14 under the law, anything in the prosecutor's
15 possession, which includes prison records, is --
16 the knowledge is imputed to the prosecutor,
17 correct?

18 MR. CLEMENT: Right. And,
19 ultimately -- look, ultimately, the question is,
20 did she elicit perjured testimony and fail to
21 correct it? And it seems like, especially when
22 you look at it in conjunction with the medical
23 records and then you keep in mind that the
24 medical records were withheld, in
25 contradistinction of -- or in contravention of

1 Oklahoma law and Brady, I think there's only one
2 conclusion to be made -- made here.

3 And you can certainly understand why
4 the attorney general -- I mean, whoever is
5 the -- if you think an evidentiary hearing is
6 fine, I mean is necessary, then the attorney
7 general will be there, confessing error again,
8 because, as you can understand, given all the
9 evidence here of the Napue violation, the Brady
10 violation, I mean, even under the most -- even
11 under Smothermon's explanation that these are
12 notes that she took based on what the -- what
13 Sneed told her, there's an obligation under
14 Oklahoma law to turn over all the defense -- all
15 the -- all the witnesses' statements. So any --
16 and especially -- and, here, there was a request
17 for it.

18 JUSTICE KAGAN: Mr. --

19 MR. CLEMENT: So --

20 JUSTICE KAGAN: I'm sorry. Please.

21 MR. CLEMENT: No, no. So -- so just
22 looking at all of that material, the attorney
23 general drew, I think, the only conclusion that
24 he could.

25 JUSTICE KAGAN: Can I ask you,

1 Mr. Clement, about some of the questions that
2 Justice Alito was asking Mr. Waxman about, the
3 whether there is an independent and adequate
4 state ground here, and -- and -- and really
5 focus on these couple of pages of the Oklahoma
6 court's opinion, which I find difficult to say
7 the least, and ask you what you make of them?

8 MR. CLEMENT: So a -- a -- a couple of
9 things. One is I do think the easiest ground to
10 say there is not an adequate independent state
11 ground here is the waiver issue as opposed to
12 splicing the opinion.

13 If you're going to splice the
14 opinion --

15 JUSTICE KAGAN: When you say "the
16 waiver issue," what do you mean by that?

17 MR. CLEMENT: I mean that it is an
18 established principle of Oklahoma law and
19 federal law up until this point that party
20 presentation that procedural bars are defenses
21 that the State has to invoke and can waive.

22 And that is a hundred years of
23 unbroken practice. McCarty is a perfect example
24 of that. In some respects, I think the fact
25 that there wasn't an elaborate explanation that

1 they were accepting the State's waiver is kind
2 of the point. When the State waives a defense,
3 you move on and you discuss the merits, which is
4 exactly what the Court did in the McCarty
5 decision.

6 This Court's decision in Trest against
7 Cain, which was a unanimous decision, says that
8 procedural default is a defense that the State
9 must raise or it waives. So you -- you just
10 have this, you know, incredibly, like, unbroken
11 tradition that procedural defects, procedural
12 bars, are defenses that the State can waive.

13 JUSTICE KAGAN: And --

14 MR. CLEMENT: And, here, for the first
15 time, they say no, that's -- that's for us to
16 do, not for you to do, Mr. Attorney General.

17 JUSTICE KAGAN: And -- and -- and
18 suppose we want to go beyond that because it is
19 true that we rarely say that there's no adequacy
20 because this -- this is so out of the ordinary.
21 It -- it's a very rare kind of thing for us to
22 say.

23 And if we want to just look at -- at
24 what the Oklahoma court did in terms of
25 justifying its denial of the confession of error

1 and its determination to proceed, how -- what do
2 you -- how do you describe what they did?

3 MR. CLEMENT: Sure. I think it's easy
4 as to Napue, and it's a little more complicated
5 as to Brady.

6 As to Napue, I think paragraph 28
7 stands alone. It's their only resolution of the
8 Napue claim. They don't talk about the
9 procedural bars at all.

10 JUSTICE KAGAN: There -- there might
11 be in that paragraph, the last sentence is an
12 oblique, very oblique, reference to the
13 materiality prong of -- of the procedural bar
14 statute.

15 MR. CLEMENT: Well, I -- I read it
16 differently. I read it as oblique reference to
17 the materiality standard under Napue.

18 JUSTICE KAGAN: Of Napue, okay.

19 MR. CLEMENT: But, if we're into the
20 world of competing oblique references, that's
21 when I think Justice O'Connor comes to the
22 rescue and says that if you're not clear about
23 it and it's ambiguous, then the federal issue is
24 before this Court to decide.

25 JUSTICE KAGAN: And paragraph 27?

1 MR. CLEMENT: Paragraph 27, I think,
2 is where the court is wrestling with the Brady
3 issue. I think it's pretty clear that's
4 Brady -- a -- a Brady paragraph, not a Napue
5 paragraph. And I think that --

6 JUSTICE KAGAN: And then you get,
7 like -- that's all the way down, right, until
8 the last sentence, which is the "Moreover"
9 sentence, and the "Moreover" sentence might
10 suggest, again, a reference to the procedural
11 bar. Is that -- is that true?

12 MR. CLEMENT: "Moreover" as to the
13 Brady. It says --

14 JUSTICE KAGAN: Yeah.

15 MR. CLEMENT: -- "this issue," and I
16 think the "this issue" there is Brady. And
17 that's an inference based on the fact that the
18 rest of paragraph 27 is all focused on what the
19 defense counsel knew or should have known. And
20 maybe that's marginally relevant for Brady, but
21 it's completely irrelevant for Napue.

22 JUSTICE KAGAN: At the most, what you
23 have here in these two paragraphs is very
24 significant discussions of the substance and
25 then maybe a sentence about, oh, there's this

1 procedural bar thing that we're doing too. Is
2 that -- is that correct?

3 MR. CLEMENT: I -- I think that's
4 correct. The other point I would make --

5 JUSTICE KAGAN: And, you know, in a
6 way, this actually relates to the first point
7 that you made about how unusual it is to deny
8 the State's request for a waiver here, because
9 that's sort of what they start with. They say
10 they have these two claims and the State has
11 come forward and said this warrants
12 post-conviction relief, and we're not accepting
13 that because the State -- the State's concession
14 is not based in law or fact.

15 What -- what do you take that to mean?

16 MR. CLEMENT: I -- I -- I just mean,
17 you know, I'm not -- you know, I just take that
18 to be the back of the hand to the confession of
19 error. I think, if you --

20 JUSTICE KAGAN: I mean, the State has
21 only come forward with Napue arguments and Brady
22 arguments, is that right? So they must be
23 saying we're not -- we're not going with the
24 State because we don't agree with their views of
25 Napue and Brady, as we're going to now explain.

1 MR. CLEMENT: I -- I think that's a
2 fair inference. I also think that one of the
3 things that complicates this is -- and -- and
4 maybe I read the one sentence a little
5 differently than Justice Alito did, but they
6 start with the Brad -- Brady claim on -- you
7 know, on the -- on the merits, if you will, and
8 then, you know, in the context of that, they
9 basically say there was no Brady violation here
10 because you should have known everything you
11 needed to know from the fact that he had -- was
12 taking lithium. And then I think that
13 essentially infects the rest of the analysis
14 about diligence and all of the -- the rest.

15 So I think this is a classic case
16 where they are interwoven. But -- but I will
17 say -- and -- and -- and, you know, maybe you
18 think that, you know, this is -- that the
19 adequacy prong is so rare that it doesn't apply
20 here, but this does seem to me to be a classic
21 case for it because --

22 JUSTICE KAGAN: Of interwoven;
23 therefore, you know, not independent?

24 MR. CLEMENT: Well, yeah. Interwoven,
25 not independent, but also inadequate because,

1 gee whiz, you know, this Court unanimously has
2 said, everybody has always said, look, if it's
3 not jurisdictional, procedural bars are defenses
4 that you can waive. Even this opinion isn't
5 very clear about it.

6 Paragraph 24 refers to 1089(D) as a
7 procedural bar. Paragraph 40 --

8 JUSTICE ALITO: Well, whether --
9 whether --

10 JUSTICE KAVANAUGH: Whoever -- whoever
11 received --

12 JUSTICE KAGAN: And -- and is it --

13 JUSTICE BARRETT: Mr. Clement --

14 JUSTICE KAGAN: -- is it possible
15 that -- is it possible that, you know, they know
16 that they're doing something very unusual here,
17 which is rejecting the State's request for a
18 waiver, and they're just throwing everything in
19 the kitchen sink in? They're saying, you know,
20 we don't see the merits of these claims, either
21 the Brady claim or the Napue claim. They're
22 saying there's this procedural bar statute
23 hanging around and we kind of think that that's
24 been violated too. And we actually don't know,
25 like, if you took this piece out, if you took

1 that piece out, how they would have come out.

2 MR. CLEMENT: I -- I -- I think that
3 is fair, and I think that gets you into Michigan
4 v. Long and Coleman against Thompson. I also
5 think it is fair to say what is clear is they
6 have not accepted the State's procedural bar --
7 the waiver of procedural bar defenses for the
8 first time in -- in the court's history.

9 JUSTICE BARRETT: But, Mr. Clement --

10 JUSTICE ALITO: Mr. Clement, whether a
11 procedural bar must -- whether the waiver of a
12 procedural bar must be accepted by the Oklahoma
13 court is a question of Oklahoma law, right?

14 The Oklahoma Court of Criminal Appeals
15 can say: We always accept these, we never
16 accept them, or sometimes we accept them, right?

17 MR. CLEMENT: It's definitely a
18 question of Oklahoma law, but --

19 JUSTICE ALITO: And you have exactly
20 one case, McCarty, for the proposition that this
21 must -- this waiver must be accepted. Exactly
22 one.

23 Have -- can you cite one other case
24 where we've deemed a state decision inadequate
25 for conflicting with one prior opinion?

1 I thought our decision said that
2 there's inadequacy when they conflict with
3 many -- with many "past unambiguous holdings."

4 MR. CLEMENT: So, at least according
5 to the dissenters in Cruz, that was a case where
6 you found inadequacy when there wasn't a single
7 case on point, and it was a question of first
8 impression.

9 I would say, though, this. I mean, I
10 think it's important to understand McCarty does
11 not stand alone. I mean, in addition to
12 accepting the State's waiver in McCarty, the
13 Oklahoma Court of Criminal Appeals on numerous
14 occasions -- Valdez, Malicoat, both cases we
15 cite in our briefs -- they basically treat the
16 bars as things that the court itself can relax
17 or waive. And that is equally inconsistent with
18 treating them as a jurisdictional requirement
19 that can't be waived.

20 That stands, again, against the
21 backdrop of Oklahoma party presentation
22 principles, this Court decision in Trest v.
23 Cain. The Tenth Circuit has treated 1089(D) as
24 a procedural bar that the State can waive.

25 And I think, ultimately, the question

1 for adequacy -- I mean, you know, this Court's
2 cases say a law -- a rule is adequate -- a state
3 rule is adequate if it's firmly established and
4 regularly applied.

5 The question for inadequacy is whether
6 it's an unexplained departure from past
7 practice.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 Justice Thomas, anything further?

11 JUSTICE THOMAS: Just one point with
12 respect to the transport order.

13 I think my concern is that in their
14 letter, the prosecutors say they did not see the
15 transport order until 2022.

16 So my problem is, if they don't -- if
17 they never saw it, then how is there a Brady or
18 Napue violation?

19 MR. CLEMENT: So I think there's a
20 Brady violation because, whether they saw it or
21 not, it was something that was available to --

22 JUSTICE THOMAS: No. They say it was
23 not in their files.

24 MR. CLEMENT: I -- I don't think -- I
25 mean, you know, let's keep -- keep in mind the

1 precise dynamic we have here, right? This is --
2 the interview takes place before the second
3 trial. So Gloss -- I mean Sneed has been in
4 state custody for close to five years at this
5 point. He's been transferred from the jail to
6 the correctional facility.

7 I think the State is charged for Brady
8 purposes with that transfer sheet --

9 JUSTICE THOMAS: But wouldn't it --

10 MR. CLEMENT: -- being exchanged.

11 JUSTICE THOMAS: -- matter that --
12 whether or not they have it? I mean, you're --
13 again, I go back to the prosecutors. You're --
14 what I'm hearing is, and they're hearing, is
15 that they did not turn over Brady material or
16 that they permitted false testimony to take
17 place, and they're saying: Look, it did not
18 happen.

19 And why wouldn't they be interviewed?
20 Why don't we have materials from them other than
21 in an amicus brief in this case?

22 MR. CLEMENT: Well, with respect,
23 Justice Thomas, you do have materials from them.
24 Ackley's affidavit is in the Joint Appendix
25 before this Court.

1 And it's not like Smothermon never
2 talked to anybody. She's talked to people at
3 various junctures, and her story has changed
4 over time.

5 Again, I don't want to overstate the
6 point because we didn't resist an evidentiary
7 hearing --

8 JUSTICE THOMAS: But they are central
9 to this. It would seem like any dealings with
10 them would also be central and we would not be
11 arguing about Napue and Brady if that had been
12 cleared up.

13 MR. CLEMENT: I -- I -- I mean, I
14 think they would still be submitting a -- amicus
15 briefs with new stories. And at a certain
16 point, you've got to deal with what is in front
17 of you and what is in the record.

18 And the attorney general had to deal
19 what was in front of him and in the record. And
20 particularly when you read the notes in light of
21 that sheet, all of which is in the record now, I
22 think General Drummond made the correct
23 conclusion --

24 JUSTICE THOMAS: So -- so what are we
25 to do with the point that they make that they

1 were frozen out of the process?

2 MR. CLEMENT: I -- I -- I -- I -- they
3 had access to both independent investigations.
4 And I think, at a certain point, I mean, you
5 know, this -- if I were in their positions, I'd
6 be complaining about the process as well.

7 But, you know, the -- the ultimate
8 process that I think matters here is the process
9 in Glossip's trial, and that was fundamentally
10 distorted when he is allowed to make the lithium
11 use innocuous by saying: Oh, it was for, you
12 know, a common cold, and I've never seen a
13 psychiatrist.

14 CHIEF JUSTICE ROBERTS: Justice Alito?
15 Justice Sotomayor?

16 JUSTICE SOTOMAYOR: At least one of
17 the two prosecutors was interviewed in some way
18 because we have an affidavit from him that was
19 provided before the OCCA while this case was
20 pending, correct?

21 MR. CLEMENT: That is absolutely
22 correct.

23 JUSTICE SOTOMAYOR: Do you know as a
24 matter of fact or not whether or not the first
25 prosecutor -- I can't say her name --

1 MR. CLEMENT: Smothermon.

2 JUSTICE SOTOMAYOR: -- Smothermon,
3 whether she was interviewed?

4 MR. CLEMENT: I mean, she was
5 inter- -- I know she was interviewed by -- by --
6 by Duncan, who is the independent prosecutor
7 appointed by the attorney general. I think she
8 also talked to people in the context of the Reed
9 Smith independent investigation. But
10 Mr. Waxman --

11 JUSTICE SOTOMAYOR: So --

12 MR. CLEMENT: -- may be able to fill
13 that in. But --

14 JUSTICE SOTOMAYOR: -- so I -- I --
15 I'm having a hard time understanding what the
16 current claim by both of them is: We weren't
17 able to give our full story.

18 They had -- they were interviewed,
19 correct?

20 MR. CLEMENT: My understanding is that
21 they were interviewed. I think they do not
22 think that the interview was as longstanding and
23 as interactive as they had hoped.

24 As I say, I mean, you know, it's --
25 it -- they're -- they --

1 JUSTICE SOTOMAYOR: But there were --
2 it -- it wasn't as if they were boxed out?

3 MR. CLEMENT: I -- I don't believe
4 that they were boxed out. And, again --

5 JUSTICE SOTOMAYOR: All right.

6 MR. CLEMENT: -- the attorney general
7 here had --

8 JUSTICE SOTOMAYOR: Can I go back to
9 your respectful consideration to an attorney
10 general's confession of error, and Justice
11 Jackson asked you whether the Court has to
12 accept the confession of error, and you said no.

13 And I think that's correct. The
14 Court, as I understand the rule of confession of
15 error, it's especially relevant to questions of
16 fact, correct --

17 MR. CLEMENT: I -- I -- I --

18 JUSTICE SOTOMAYOR: -- not questions
19 of law? The court has to be satisfied that
20 there's a basis in law and fact for the
21 confession, correct?

22 MR. CLEMENT: -- I -- I think, as to
23 both, it's respectful consideration. And I
24 think it's at its zenith when it's prosecutorial
25 misconduct because I think the prosecutors are

1 in a particularly good position to judge what --
2 I mean, you know, starting with: What does
3 "Dr. Trumpet?" in the notes mean in the context
4 of a community where everybody knows that
5 Dr. Trombka is the sole psychiatrist at the
6 jail? I mean, I -- I think a prosecutor is
7 going to have a -- a good basis to say, yeah,
8 everybody knows that's just some kind of
9 shorthand for "Trombka."

10 JUSTICE SOTOMAYOR: That's an issue of
11 fact, and the AG says: If my prosecutor says
12 she didn't know, I'm not accepting that because
13 she should have known.

14 MR. CLEMENT: And -- and -- and I
15 don't find it plausible in light of everything
16 that I now have before me.

17 And I -- you know -- and there's --
18 there's the question of what Smothermon had
19 before her in 2003, but now there's the question
20 of -- I mean, because I think the Napue
21 obligation on the government is a continuing
22 one.

23 So, when they're looking at it,
24 they're looking at the testimony that their
25 prosecutor elicited. They're looking that -- at

1 that in context of the notes and the medical
2 information sheet.

3 And General Drummond reached the
4 conclusion -- regretfully, but reached the
5 conclusion: Our prosecutors elicited perjury
6 here, and a man's going to go to his death. We
7 can't allow that to happen.

8 JUSTICE SOTOMAYOR: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice Kagan?
10 Justice Kavanaugh?

11 JUSTICE KAVANAUGH: And your view is
12 that the result likely would have been
13 different, right?

14 MR. CLEMENT: We think the result
15 would have been different with respect to the
16 standard that's applied under Brady and under
17 Napue.

18 JUSTICE KAVANAUGH: And what -- can
19 you spell that out? I mean, I think it's
20 obvious, but -- but spell out why you think
21 that.

22 MR. CLEMENT: Well, you know, this is
23 a case where there's just no disputing the fact
24 that the State has one indispensable witness.
25 That witness is Sneed. He's the person who

1 committed the murder. He's the person -- until
2 the police talked to him, Glossip was only
3 charged as an accessory after the fact.

4 So there's every indication this is
5 the absolute critical witness. And if that
6 witness lies on the stand, perjures himself on
7 the stand, that seems to me that that could have
8 a reasonable probability of leading to a
9 different result for at least two reasons.

10 One is this is the key witness, and
11 the jury has just seen him under oath lie to
12 their faces. And if that comes out -- I mean,
13 whatever other problems with his credibility
14 that the prosecutors have at that point, they
15 have a much bigger problem at that point. And
16 without his testimony, there's no way to get the
17 conviction of murder, let alone the death
18 penalty.

19 The second thing, though, of course,
20 is that defense counsel, I think, logically,
21 if -- if -- if Sneed's testimony hadn't led them
22 away from bipolar disorder, then they bring in a
23 psychiatric expert and they make a big deal
24 about how his confessed -- methamphetamine use,
25 combined with bipolar disorder, makes him

1 somebody who could act impulsively and
2 violently, and that opens up a whole other
3 defense for the -- for -- for -- for -- for
4 Glossip.

5 Now, to be clear, I'm in an unusual
6 position here because General Drummond has not
7 only confessed error, but he's made it clear
8 that he's not going to drop this prosecution or
9 doesn't accept that this is, you know, the
10 poster child for an actual innocence case and he
11 intends to -- to -- to -- to reinitiate criminal
12 process.

13 But I think he thinks that given the
14 centrality of Sneed's testimony in this perjury,
15 this -- this is not a conviction that can stand.

16 JUSTICE KAVANAUGH: Okay. Thank you.

17 CHIEF JUSTICE ROBERTS: Justice
18 Barrett?

19 JUSTICE BARRETT: On McCarty, so that
20 is the only case, right --

21 MR. CLEMENT: Well --

22 JUSTICE BARRETT: -- that you have? I
23 mean, otherwise, it's party presentation for a
24 long time but not zeroing in on the procedural
25 bar at issue here? I just want to be sure I

1 understand. I'm not trying to be hostile.

2 MR. CLEMENT: And -- and -- and I'm
3 not trying to be evasive. I don't view it as
4 our only case because I think Valdez and
5 Malicoat, both decisions of the OCCA that treat
6 it as non-jurisdictional because they say the
7 court itself can excuse 1089(D) if it -- there's
8 manifest injustice or a serious statutory or
9 constitutional error. And -- and -- and
10 that's -- that's invoked even in paragraph 40 of
11 the opinion here.

12 So -- so I don't think -- the way I
13 think of party presentation in all of that, I
14 don't think that the court can have it both
15 ways. If it's jurisdictional --

16 JUSTICE BARRETT: Mm-hmm.

17 MR. CLEMENT: -- it's jurisdictional
18 and nobody gets to waive it. And so that's why
19 I don't think McCarty stands alone. And, of
20 course, you know, we're talking -- the standard
21 is unexpected departure.

22 JUSTICE BARRETT: Mm-hmm.

23 MR. CLEMENT: Okay? Here's -- here's
24 the attorney general's office. We got McCarty,
25 but we got Valdez, we have Malicoat, we have the

1 Tenth Circuit saying 1089(D) is a procedural
2 defense that we can waive --

3 JUSTICE BARRETT: Did you cite
4 McCarty, or did -- I don't -- so, in the
5 fourth -- let me make sure I've got the
6 sequencing right too. This is the fifth
7 post-conviction application --

8 MR. CLEMENT: Yeah.

9 JUSTICE BARRETT: -- right? And in
10 the fourth, they also refused to accept the
11 confession of error and the waiver, right?

12 MR. CLEMENT: That is true.

13 JUSTICE BARRETT: So, when the fifth
14 came up, it wasn't as -- as much of a surprise,
15 right? I mean, why wasn't the attorney general
16 ready at that point to say, you know, but you --
17 there's McCarty and you can't -- you can't
18 reject our waiver?

19 MR. CLEMENT: I mean, look, in a
20 perfect world, I mean, you know, maybe we would
21 have done that. But, in the real world, we
22 thought we were waiving it. I mean, I know this
23 is, like, in the weeds, but, you know, we -- we
24 expressly argue that the evidence is sufficient
25 under 1089(C), which is the standard for the

1 first habeas petition. So it's clear to
2 everybody -- I mean, you know, my -- my friend
3 and your friend, your Court-appointed friend,
4 says, well, maybe it wasn't clear enough to the
5 Oklahoma Court of Criminals Appeals.

6 But it was crystal clear to them that
7 we were trying to waive it and they weren't
8 going to let us. And I think the fact that, you
9 know, yes, it's two cases in the history of man,
10 both involving Mr. Glossip, I -- I think that
11 still puts us well within the edits.

12 And the only thing I was going to add,
13 and I know I said it before, but I think it's
14 really powerful, is Trest, Trest against Cain,
15 this Court unanimously says, yeah, of course,
16 procedural bars, procedural default, that's a
17 defense. The State can waive it.

18 And the State can waive it not just by
19 intentional relinquishment but by abandonment.
20 That's Wood against Milyard. And, like, even if
21 there's some question about whether we were
22 sufficient in intentionally relinquishing it, we
23 absolutely abandoned it.

24 So I -- I -- I just think this is a
25 case where -- and -- and there's a systemic

1 issue here, right, because, I mean, it's
2 Oklahoma law. They get to do what they want.
3 But, if Oklahoma is going to say you can't waive
4 under these circumstances, it's going to create
5 a whole federal courts exam about how it is that
6 a -- a state prosecutor is supposed to confess
7 error when they discover a Brady or a Napue
8 violation after the first, like, state habeas
9 petition has been filed.

10 And, you know, I've tried to think
11 through it all, and I think, at the end of the
12 day, there must be a due process right to
13 present that somewhere, but, boy, that's a --

14 JUSTICE BARRETT: But we don't have
15 that issue?

16 MR. CLEMENT: It's -- well, I don't
17 think -- you don't have it directly. And it's a
18 lot harder issue than whether invoking this as
19 an unwaiveable jurisdictional bar for the first
20 time in the history of man is adequate. I think
21 that's a far easier question than the due
22 process question about is there some ability to
23 bring this kind of confession of error to some
24 court somewhere and get to the merits.

25 JUSTICE BARRETT: Okay. I want to ask

1 you about the standard of review for looking at
2 Smothermon's notes because one of the
3 difficulties, I think, with the notes is that,
4 putting aside whether the Van Treese brief is in
5 the record, it's not, it still -- it still
6 reveals that there are multiple plausible
7 interpretations of the notes.

8 So are we supposed to be -- applying
9 kind of a preponderance standard, that we think
10 it's most likely that they reflect that she knew
11 about the psychiatric examination?

12 MR. CLEMENT: I -- I think that's
13 right. I think it is a preponderance.

14 JUSTICE BARRETT: Okay. Okay.

15 MR. CLEMENT: And I think, not to be
16 repetitive, but I think that's also the standard
17 for the prosecutor, because the prosecutor in
18 the first instance, I -- I think you want them
19 to confess Napue errors. You want them to
20 confess Brady errors. And I don't think you
21 want them applying a clear and convincing
22 standard or beyond a reasonable doubt. I think
23 you want them to say straight up, if -- if -- if
24 we blew it and there's a Napue violation here,
25 we should confess it.

1 CHIEF JUSTICE ROBERTS: Justice
2 Jackson?

3 JUSTICE JACKSON: So just going back
4 to Justice Barrett's question about whether
5 McCarty is your only case, if I'm hearing you
6 correctly, it is not because the principle that
7 you're relying on is the fact that it is firmly
8 established in Oklahoma law and procedure that
9 non-jurisdictional procedural bars are waiveable
10 and the courts accept those waivers. They do it
11 when a party waives a non-procedural
12 jurisdictional bar.

13 So it's pretty much every case in
14 which a non-jurisdictional procedural bar has
15 been offered and accepted by the court, right?

16 MR. CLEMENT: I -- that -- that's our
17 view. And I think it's buttressed by the fact
18 that the Valdez and Malicoat cases, even though
19 they're not sort of confession of error or
20 express waiver cases, they show the Oklahoma
21 Court of Criminal Appeals treating 1089(D) as
22 non-jurisdictional because, if it's
23 non-jurisdictional, they can't excuse it because
24 of --

25 JUSTICE JACKSON: Right. So it fits

1 into the category of a non-procedural -- a -- a
2 non-jurisdictional.

3 MR. CLEMENT: Right.

4 JUSTICE JACKSON: I think that part of
5 the problem here that is what is confusing about
6 Oklahoma's opinion is that they seem to be
7 conflating which I -- what I think are two
8 different bases for not applying the procedural
9 bar, right? One is the waiver, and the other is
10 potentially the confession of error.

11 In your discussion with Justice
12 Barrett, it's -- you talked a little bit about
13 Glossip IV. And in my reading of that, that was
14 a situation in which there was a waiver
15 expressly made, but I didn't know that there was
16 also a confession of error.

17 Am I right about that in that?

18 MR. CLEMENT: You're absolutely right
19 about that. In fact --

20 JUSTICE JACKSON: All right. So --

21 MR. CLEMENT: -- it was the least
22 confession of -- I mean it was the furthest
23 removed --

24 JUSTICE JACKSON: Exactly.

25 MR. CLEMENT: -- from a confession of

1 error. It's like there's a lot of chum in the
2 water and we just want you to decide the merits,
3 but we think they are absolutely wrong.

4 JUSTICE JACKSON: And so I think
5 that's really important because the prosecutor,
6 I think, is actually making two different
7 determinations that might be relevant to whether
8 or not the procedural bar applies.

9 The first is whether or not to waive
10 it, which is what they do in Glossip IV. And
11 the second is whether or not to confess error,
12 which they go on to do in Glossip V.

13 And only the latter, the confession of
14 error, is the one that might call into question
15 the -- the, you know, reasons for it, the court
16 saying, well, you're confessing error, but let
17 me figure out whether or not it's based in law
18 and fact, and I'll only accept it under those
19 conditions.

20 If I'm right about that, then the real
21 problem happened with its deviating from the
22 ordinary practice of allowing parties to waive
23 and accepting them. And that's why you said, I
24 think, in response to Justice Kagan that the
25 waiver track is the easiest way to understand

1 why we don't have an AISG here.

2 MR. CLEMENT: Absolutely, Your Honor.
3 And, again, just in all candor to this Court,
4 I'm representing Oklahoma. Oklahoma, in a lot
5 of other cases, is going to be saying that's
6 adequate and independent state ground.

7 But I think we want to be in a
8 position where, if we make a determination that
9 there's been a constitutional problem with one
10 of our prosecutions, we want to be able to
11 confess that error and get to the merits of it.

12 JUSTICE JACKSON: No, I understand,
13 but I don't want to conflate the two. I mean,
14 when there is a waiver, courts don't ordinarily
15 go into why you are waiving.

16 MR. CLEMENT: Yeah.

17 JUSTICE JACKSON: You say this is my
18 right to press this procedural bar and I'm
19 waiving it, and the court says, fine, we move on
20 to the merits of the argument.

21 What happened here, I appreciate the
22 attorney general goes on to explain the reason
23 why he wants to waive it, it's a confession of
24 error, but I don't think the court gets to
25 reject the waiver if it disagrees with the

1 confession of error because waiver is a separate
2 basis for, you know, relinquishing the
3 procedural bar.

4 MR. CLEMENT: I agree entirely. And I
5 think, ultimately, getting back to Justice
6 Kagan's question, it may also explain why the
7 opinion is sort of intertwined --

8 JUSTICE JACKSON: Correct.

9 MR. CLEMENT: -- because --

10 JUSTICE JACKSON: Correct.

11 MR. CLEMENT: -- they are sort of
12 treating them as one and the same. In -- in
13 fact, I think it's --

14 JUSTICE JACKSON: Exactly.

15 MR. CLEMENT: -- you know, paragraph
16 25 or 26 specifically says the confession can't
17 overcome 1089(D), which is perfect evidence that
18 they've kind of conflated the two --

19 JUSTICE JACKSON: Correct.

20 MR. CLEMENT: -- because the
21 confession isn't what overcomes 1089(D). It's
22 the waiver that should at least historically
23 everywhere but Oklahoma.

24 JUSTICE JACKSON: Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Mr. Michel.

3 ORAL ARGUMENT OF CHRISTOPHER G. MICHEL,

4 COURT-APPOINTED AMICUS CURIAE

5 IN SUPPORT OF THE JUDGMENT BELOW

6 MR. MICHEL: Mr. Chief Justice, and

7 may it please the Court:

8 Over the past 20 years, the Oklahoma
9 Court of Criminal Appeals has reviewed and
10 upheld Petitioner's conviction six separate
11 times, finding compelling evidence that he
12 commissioned the murder of Barry Van Treese.
13 Petitioner now contends that the note
14 "Dr. Trumpet?" would have so transformed his
15 case as to justify vacating his conviction.

16 That is wrong. The court below
17 correctly rejected Petitioner's claims on
18 adequate and independent state grounds, that he
19 failed to show reasonable diligence or clear and
20 convincing evidence of innocence.

21 The attorney general did not waive
22 those bars in this case, and the court was free
23 to apply them in any event. This Court should
24 accordingly dismiss the case for lack of
25 jurisdiction, leaving Petitioner free to pursue

1 state law clemency or other available relief.

2 If the Court reaches the merits, it
3 should affirm. The cryptic note does not
4 establish any of the threshold elements of
5 Petitioner's claim, and perhaps, most clearly,
6 the note is immaterial because it adds nothing
7 of substance to what Petitioner already knew.

8 Critically, Petitioner has known since
9 he received the competency report in 1997 that
10 Justin Sneed took lithium and had a mental
11 illness, but Petitioner chose not to question
12 Sneed's mental health at the trial because he
13 knew that doing so would reinforce the
14 prosecution's theory that Sneed was vulnerable
15 to his manipulation.

16 Nothing in the note would have changed
17 that decision or the jury's, particularly
18 considering the extensive other evidence against
19 Petitioner, including his motive to commit the
20 crime and his coverup of the body.

21 The parties rely heavily on the
22 attorney general's confession of error, but
23 courts, not executives, determine whether to
24 vacate final judgments of conviction. The court
25 here decided the case on the law and the facts.

1 This Court cannot ask for any more than that.

2 It should leave the conviction in place.

3 I welcome the Court's questions.

4 JUSTICE THOMAS: What do you make of
5 the absence of statements by the prosecutors in
6 this record and the absence of Ackley's notes
7 from the same meeting?

8 MR. MICHEL: Well, I think, as the Van
9 Treese family's amicus brief explains, it
10 indicates that the investigation the attorney
11 general conducted here and the other independent
12 investigations were not particularly thorough.

13 I will note that the Ackley affidavit
14 -- this is at JA 940 -- says that he thinks the
15 mental condition was disclosed to the Petitioner
16 with the competency report in 1997. And I agree
17 with that, and that's their witness who, I
18 think, has conceded an important point against
19 them.

20 CHIEF JUSTICE ROBERTS: Mr. Michel, I
21 asked -- I -- I forget whether it was Mr. Waxman
22 or Mr. Clement -- about your argument in the
23 brief that all that's at issue here is whether
24 or not the lithium was prescribed by a
25 psychiatrist or by someone else and that that

1 alone was not sufficient to affect the jury's
2 deliberations.

3 Now they had responses to that that
4 elaborate on what they regarded as the
5 significance of not just who prescribed it but
6 the lithium itself, in other words, the -- the
7 bipolar determination. And we heard him, you
8 know, emphasize that, contrary to what he had
9 said, it's not simply for a cold.

10 I wondered if you could respond to
11 that.

12 MR. MICHEL: Sure, Mr. Chief Justice.

13 I think materiality -- I think this
14 question goes to materiality. It's a
15 comparative doctrine. You have to compare what
16 was in the case before the new information and
17 then determine whether the new information would
18 have made a difference.

19 And I think, in this case, that
20 determine -- that determination can be
21 speculative in some cases. This is perhaps the
22 rare case where the defendant's own conduct
23 sheds considerable light on the importance of
24 the information. After all, as I said at the
25 outset, Petitioner has known since 1997 that

1 Sneed took lithium.

2 And if you look at page JA 700, that's
3 the Dr. King competency report. It says, does
4 this patient have a mental illness? And the
5 answer is yes, underlined, exclamation point.

6 If Petitioner thought that Sneed's
7 mental health was important to his defense,
8 surely, that would have been a bright red flag
9 that he would have presented that defense at
10 trial. The notion that the marginal additional
11 information that he was arguably based on the
12 notes treated by a psychiatrist would have
13 changed that decision, I think, is difficult to
14 reconcile with the record.

15 I would also note the way you get from
16 the notes, "Dr. Trumpet?," which I think my
17 friend said they were able to do in a matter of
18 hours because it was well-known that Dr. Trombka
19 was the chief psychiatrist at the jail, they
20 already had the roadmap to do it.

21 Remember, the competency report says
22 that Sneed received lithium at the jail.
23 They've had that since 1997. They could have
24 simply gone to the jail and said: Who's the
25 chief psychiatrist? And they would have been

1 told Dr. Lawrence Trombka, and then they could
2 have asked Dr. Trombka the same question that
3 they asked in 2023, and he would have said:
4 Well, if anybody treated Sneed, I treated him.

5 But they chose not to do that. And I
6 think, one, that's overwhelming evidence of lack
7 of diligence and that the state procedural bar
8 is satisfied, but it's also overwhelming
9 evidence on materiality because Petitioner
10 didn't do this out of negligence. He did it out
11 of strategy. And that was because, as the
12 Oklahoma Court of Criminal Appeals explained on
13 page JA 991, arguing that Sneed had a mental
14 deficiency or a mental illness would have
15 reinforced the prosecution's theory that Sneed
16 was vulnerable to Glossip's -- to Petitioner's
17 manipulation.

18 JUSTICE KAGAN: Isn't there --

19 JUSTICE SOTOMAYOR: Counsel --

20 JUSTICE KAGAN: -- a separate
21 question, though, about just he lied on the
22 stand? And, in a case where the entire case
23 rested on the testimony of one person and his
24 credibility, if you can show that he lied on the
25 stand when he said, I never saw a psychiatrist

1 and I didn't get a prescription from the
2 psychiatrist, it was, you know, they gave me
3 lithium for a common cold, and -- and then the
4 prosecutor says: Well, that was a lie, I better
5 correct that under Napue and -- and doesn't,
6 that seems pretty material to me.

7 I mean, it's just your one witness has
8 been exposed as a liar.

9 MR. MICHEL: A couple of responses,
10 Justice Kagan.

11 I think, first, there are threshold
12 elements under Napue, including whether this was
13 false testimony. I don't think it was false
14 testimony, but I want to take your question on
15 its own terms.

16 This false testimony that Sneed saw a
17 psychiatrist, that would have been harmful to
18 Petitioner under his theory of the case.
19 Remember, the prosecution's --

20 JUSTICE KAGAN: False is false. You
21 know, like, whether you can, like, parse the
22 content of the testimony this way or that way,
23 the critical question that a jury is asking is,
24 do I believe this guy and everything he says and
25 particularly, do I believe him when he points

1 the finger at the accused?

2 And if I know that he has gotten up to
3 the stand and lied about anything, whether it's
4 important or not -- it might have been
5 important; it might not have been important --
6 if he's lying, if he's trying to cover up
7 something about his own behavior, I'm going to
8 take that into account in deciding whether, when
9 he accuses the defendant, he's telling the
10 truth.

11 MR. MICHEL: I -- Justice Kagan, I
12 think, in many cases where we were starting from
13 the blank slate that the witness is presumed to
14 be credible, one lie would be important.

15 In this case, the witness admitted
16 that he beat a man to death with a baseball bat.
17 The witness admitted that he was testifying in
18 exchange for avoiding the death penalty.

19 The jury already had significant
20 credibility questions about Justin Sneed. And
21 the notion that this --

22 JUSTICE KAGAN: I have to say I find
23 that an -- an odd argument, Mr. Michel. It's
24 like this witness was so not credible anyway
25 that we don't have to consider any further lies

1 that he tells?

2 MR. MICHEL: No. What I think is
3 difficult to understand is if the jury would
4 have believed Justin Sneed and convicted
5 Petitioner despite those problems, and yet,
6 because Justin Sneed saw a psychiatrist
7 according to the notes, the jury would have done
8 a 180 and reached a different result.

9 JUSTICE KAGAN: You know, and a -- a
10 Napue violation is a pretty dramatic thing when
11 a prosecutor says, like, whoa, stop there, that
12 was a lie. You know, a -- I think a reasonable
13 jury takes that into account when it's like:
14 Wow, that was such a significant lie that the
15 prosecutor had to sort of say stop.

16 MR. MICHEL: I -- I -- I don't think
17 that would have happened in this case given the
18 distinctive nature of the witness that we're
19 talking about. I also want to underscore that
20 this is a tangential issue. Justin Sneed
21 testified for five hours. The question about
22 lithium was about -- was about 30 seconds.

23 JUSTICE BARRETT: But, I guess, Mr.
24 Michel, what --

25 JUSTICE SOTOMAYOR: Would it have

1 made -- I -- I'm sorry.

2 JUSTICE BARRETT: Oh, no, go ahead.

3 JUSTICE SOTOMAYOR: What do we do with
4 the other violations that the prosecutor
5 committed? Presumably, he lied about the knife
6 incident, which was provoked by the prosecutor
7 and not his initial statement. There was
8 withheld -- a ton of other withheld information.

9 Once you find a violation and you're
10 deciding on materiality, are you entitled to
11 ignore all that other evidence having been
12 improperly withheld?

13 I know that it was in Glossip IV
14 and -- and prior rulings the court didn't find
15 any one of those a violation, but do we ignore
16 it? Meaning because we're -- we would be
17 looking at this issue de novo, so does the
18 calculus of materiality take into account
19 everything?

20 MR. MICHEL: So I think this is
21 several steps down the road. Of course, I think
22 you should dismiss the case for lack of
23 jurisdiction because there's adequate and
24 independent state grounds.

25 JUSTICE SOTOMAYOR: You've already

1 lost it, but I'm asking you this question.

2 So I -- I give you points --

3 MR. MICHEL: I'm hoping I might find a

4 few.

5 JUSTICE SOTOMAYOR: -- I give you

6 points for --

7 MR. MICHEL: Yeah. Right.

8 JUSTICE SOTOMAYOR: -- for trying

9 to --

10 MR. MICHEL: Yeah.

11 JUSTICE SOTOMAYOR: -- revive, but

12 let's get to --

13 MR. MICHEL: Sure.

14 JUSTICE SOTOMAYOR: -- the end, that

15 we accept what Justice Kagan has said, that

16 there was a falsehood. And now you're saying

17 there was, even if she knew about it, it wasn't

18 material.

19 At that point, because, according to

20 you, he lied outside of court a number of times,

21 but does all the other withheld evidence that

22 shows not just one or two lies but a whole body

23 of changed testimony -- do we consider that?

24 MR. MICHEL: I do think the Court has

25 said in cases like Kyles versus Whitley that if

1 you get all the way to the materiality
2 standard -- I think there are many off-ramps
3 before that in this case -- you would consider
4 all of the other evidence.

5 I think it's notable on the knife
6 point, however, which my friend, Mr. Waxman,
7 mentioned at length, the -- the State does not
8 concede error on that point. The State
9 discusses at length why it doesn't support his
10 position on that. And that's actually the
11 subject of the fourth post-conviction relief
12 application.

13 JUSTICE SOTOMAYOR: No. But I do
14 think that we know that he had an accomplice, a
15 girlfriend, in prior robberies, and he never had
16 Mr. Sneed present at the robbery. And yet there
17 were two types of wounds. So it suggests the
18 presence of a second person. And if it's not
19 Mr. Sneed, then this robbery is much more
20 consistent with his pattern.

21 MR. MICHEL: I think the Oklahoma
22 Court --

23 JUSTICE SOTOMAYOR: And that pattern
24 was withheld from defense counsel. So that's
25 why I'm asking about materiality.

1 MR. MICHEL: I mean, to be very clear,
2 the -- the pattern is not the knife. The
3 question about the knife is the wounds on the
4 body and --

5 JUSTICE SOTOMAYOR: No, I agree --

6 MR. MICHEL: Right. The Oklahoma
7 Court --

8 JUSTICE SOTOMAYOR: -- but I -- I --
9 it had to do with whether there was one or two
10 people involved.

11 JUSTICE BARRETT: Mr. Michel, I do
12 want to ask you about the adequate and
13 independent state grounds because this is
14 unusual, not to accept, you know, the waiver of
15 the procedural bar, and, you know, you heard us
16 talk about that with Mr. Clement and Mr. Waxman.

17 What's your response to that?

18 MR. MICHEL: So, Justice Barrett, I
19 actually don't think it -- it's that unusual,
20 although that's partly because we have a very
21 small sample size. As -- as I -- as I read the
22 cases, there's only one case in which the
23 Oklahoma attorney general has squarely waived a
24 procedural bar and the Oklahoma Court of
25 Criminal Appeals has squarely addressed what to

1 do with that, and that's the decision on the
2 fourth post-conviction review application, in
3 which the Oklahoma Court of Criminal Appeals, on
4 page JA 775, said that it was not going to
5 accept the attorney general's waiver of the
6 procedural bars.

7 The attorney general -- in this Court,
8 this attorney general told you that that was an
9 adequate and independent state ground and that
10 this Court, accordingly, lacks jurisdiction over
11 the -- over the fourth post-conviction relief
12 application.

13 So this -- this decision I actually
14 think does not actually address a waiver of a
15 procedural bar because the attorney general,
16 quite understandably, after he received that
17 decision from the Oklahoma Court of Criminal
18 Appeals, did not actually waive the procedural
19 bar in this case.

20 Instead, if you look at JA 976 and
21 977, the attorney general says, "What Glossip
22 has to do is meet the procedural bar." Then he
23 goes on to describe the diligence prong and the
24 innocence prong and why, in the attorney
25 general's legal opinion, those requirements are

1 satisfied.

2 But arguing that the requirements are
3 satisfied is not the same thing as waiving the
4 procedural bar. And in the one case where the
5 Oklahoma Court of Criminal Appeals has addressed
6 that, it has said that it doesn't have to accept
7 the waiver.

8 JUSTICE BARRETT: What about
9 Mr. Clement saying that we have a hundred years
10 of practice and that this is just what the law
11 is and procedural bars are always waiveable;
12 they're not jurisdictional?

13 MR. MICHEL: With -- with all respect
14 to Mr. Clement, I don't think you have a hundred
15 years of this. I think the one case he's
16 pointed to, as several of -- of the Justices
17 pointed out, is the McCarty case from 2005 --

18 JUSTICE JACKSON: But why is that?
19 Why -- why are you making the sample size so
20 small? I mean, I understand that that's the
21 only case that involves an attorney general who
22 expressly waives a -- a procedural bar, but
23 procedural bars are waived -- of all kinds are
24 waived all the time.

25 So why wouldn't what Oklahoma courts

1 do when a procedural bar is waived, why wouldn't
2 that be the universe of cases that we're looking
3 at?

4 MR. MICHEL: Well, I think I would
5 start with the statute that's before the Court
6 in this case. I think whether that bar has been
7 waived --

8 JUSTICE JACKSON: Are you saying that
9 statute is a jurisdictional one?

10 MR. MICHEL: I'm not saying that
11 statute is a jurisdictional one, but --

12 JUSTICE JACKSON: All right. So then
13 we're into the world of non-jurisdictional
14 procedural bars, and the question is, what is
15 Oklahoma's practice when a party, it doesn't
16 have to be this -- attorney general, it can be a
17 party, who could have invoked a -- a
18 non-jurisdictional procedural bar, what does the
19 court do?

20 MR. MICHEL: I -- I don't understand
21 my friends to argue -- perhaps this morning they
22 did for the first time -- that Oklahoma has an
23 absolute rigid categorical rule
24 transsubstantively across all areas that
25 procedural --

1 JUSTICE JACKSON: No, but we don't
2 need that.

3 MR. MICHEL: -- non-jurisdictional
4 procedural bars have to be accepted.

5 JUSTICE JACKSON: We don't need that
6 under Cruz. We don't need a rule that says we
7 have to accept it. What we need is the
8 practice --

9 MR. MICHEL: Right.

10 JUSTICE JACKSON: -- of the court when
11 this kind of thing happens.

12 MR. MICHEL: Right.

13 JUSTICE JACKSON: And so have you
14 shown a case in which a non-jurisdictional
15 procedural bar has been rejected by the
16 Oklahoma --

17 MR. MICHEL: Absolutely.

18 JUSTICE JACKSON: Which one?

19 MR. MICHEL: The one that's before
20 you. The one that's before you --

21 JUSTICE JACKSON: Other than the one
22 that's before us. We're trying to determine
23 whether the one that's before us --

24 MR. MICHEL: No, no, I'm sorry. I'm
25 sorry. I wasn't --

1 JUSTICE JACKSON: -- is a deviation.
2 MR. MICHEL: Right. I'm sorry.
3 JUSTICE JACKSON: Right?
4 MR. MICHEL: The one -- the fourth
5 post-conviction relief application, which is
6 also before you on this cert petition --
7 JUSTICE JACKSON: Not -- not
8 Mr. Glossip's situation. Do you have a case
9 that does not involve a person named Glossip --
10 (Laughter.)
11 JUSTICE JACKSON: -- in which the
12 court has rejected --
13 MR. MICHEL: Right.
14 JUSTICE JACKSON: -- any
15 non-jurisdictional procedural bar?
16 MR. MICHEL: Usually, being --
17 JUSTICE JACKSON: That was waived?
18 MR. MICHEL: Right. I mean, usually,
19 being able to cite a case that involves the same
20 litigant seems relatively on point, but I
21 don't -- I think there's only other case that
22 has come before the Oklahoma Court of Criminal
23 Appeals where the attorney general has waived
24 this procedural bar. That's the McCarty case.
25 In three footnotes, the Court of

1 Criminals Appeals observed that the attorney
2 general had waived the procedural bar, but it
3 did not say it was deciding the issues for that
4 reason. And in the 19 years since McCarty --

5 JUSTICE KAGAN: I think -- I think,
6 Mr. Michel, you are avoiding the question. It
7 was a pretty simple question. One case not
8 involving this defendant in which a waiver has
9 been rejected.

10 MR. MICHEL: Right. I -- I think
11 there are three cases under this statute in
12 which the court has seen waivers. Arguably, in
13 one of those, it rejected the waiver. In
14 McCarty, it was ambiguous. And in --

15 JUSTICE KAGAN: Not -- not --

16 MR. MICHEL: -- in this case, I think
17 it was also ambiguous.

18 JUSTICE KAGAN: -- not a case
19 involving this -- it doesn't -- not a case
20 involving this defendant, and we don't have to
21 be in attorney general confession-of-error land.

22 MR. MICHEL: No.

23 JUSTICE KAGAN: Just one case where
24 the Oklahoma court says, even though a party
25 wants to waive this procedural bar, you know,

1 we're going to insist on opposing it.

2 MR. MICHEL: I -- I don't -- I have
3 not canvassed Oklahoma law for all
4 non-jurisdictional procedural waivers, but I
5 think most courts, including this Court, will
6 exercise discretion to allow those waivers in
7 some cases and not allow them in others.

8 JUSTICE BARRETT: Mr. --

9 MR. MICHEL: And as the Court --

10 JUSTICE BARRETT: Well, I'm -- I'm
11 just wondering what the right sample size is.
12 When we're asking this question about whether
13 this is adequate or not, should we be looking
14 transsubstantively, or should we be looking just
15 at this statute?

16 MR. MICHEL: I think you should be
17 looking just at this statute. I think that's
18 how the Court has analyzed the adequacy cases in
19 the past. And I think several important
20 adequacy cases here are Beard versus Kindler and
21 Walker versus Martin, where the Court looked
22 at --

23 JUSTICE JACKSON: But the thing that's
24 relevant about this statute is whether or not
25 it's jurisdictional. I don't understand how the

1 sample size could possibly be that small because
2 the question we're asking is whether it's
3 waiveable, right?

4 So -- I understand we have a statute
5 and the question is what does a court do when
6 this procedural bar is waived. Fine. But do
7 you -- are you rejecting the proposition that
8 this is a waiveable bar?

9 MR. MICHEL: I'm not rejecting that.
10 I --

11 JUSTICE JACKSON: So you don't say
12 this is a jurisdictional statute.

13 MR. MICHEL: I'm not saying that. I
14 think you could understand it that way, but
15 that's not my position.

16 JUSTICE JACKSON: But you're not
17 saying that, all right.

18 MR. MICHEL: No.

19 JUSTICE JACKSON: So you accept that
20 this is waiveable. And assuming -- I understand
21 you -- you -- your argument is that the attorney
22 general did not waive it.

23 MR. MICHEL: Right.

24 JUSTICE JACKSON: But assuming that he
25 did for a moment, do you have any other

1 procedural bar ever that Oklahoma has rejected?
2 Do we have any reason to believe that Oklahoma's
3 practice is to look at particular statutes and
4 it rejects some waivers with respect to certain
5 statutes and it accepts some? No, right?

6 MR. MICHEL: Well, I mean, I don't
7 want to come back to it, but, if you look at
8 practice, you have the decision on the fourth
9 application in this case, which is the only one
10 in which the Court of Criminal Appeals has
11 addressed this issue. So, to be fair, I think
12 that's quite relevant.

13 JUSTICE KAGAN: Can I ask you about
14 the independence prong?

15 MR. MICHEL: Sure.

16 JUSTICE KAGAN: So the way I -- this
17 is very confusing, two pages, to me. I've read
18 it a dozen times and I'm still not sure what
19 each paragraph is doing exactly, you know, what
20 or where or why.

21 But the first thing they say is, you
22 know, the State has come to us and has confessed
23 error and we're not going to accept that
24 concession, is what they call it. And the
25 concession that they're referring to is the

1 concession that he warrants post-conviction
2 relief, right?

3 And what the State has said in its --
4 in its, you know, concession as they call it
5 is -- focuses on Napue and why it is that Napue
6 supports Glossip here. And -- and it says the
7 State's concession is not based in law or fact.
8 And -- and that's what gets it to everything
9 else that it does, right, because, first, it has
10 to reject the concession, and it says not based
11 on law and fact, essentially meaning that the
12 state's Napue argument is wrong.

13 So, before it gets to anything that
14 might be conceived of as a procedural bar, what
15 it has said is that the State's Napue argument
16 is wrong, correct?

17 MR. MICHEL: I think that's one
18 potential way to read the opinion. I agree with
19 you it's not pellucid in all respects.

20 JUSTICE KAGAN: Okay. So, if -- if --

21 MR. MICHEL: But I do think it's
22 pretty pellucid in paragraph 26.

23 JUSTICE KAGAN: -- if -- if -- if
24 that's -- if that's one way to read the -- like,
25 the only way that they go through the door to

1 start talking about procedural bars is because
2 they say that the State's Napue argument is
3 wrong, you know, they wouldn't have gone through
4 the door except that they made this error of
5 federal law.

6 So this is all founded on an error of
7 federal law, the error being that the State's
8 concession based on Napue is -- is -- is
9 incorrect in law.

10 MR. MICHEL: I don't agree with that,
11 Justice Kagan. I agree that that sentence comes
12 earlier in -- in the opinion, but I did not mean
13 to agree that, as a substantive legal matter,
14 the court had reached the Napue issue before it
15 was applying the procedural bars.

16 I recognize that it's conceivable this
17 opinion could have been written more clearly,
18 but I do think paragraph 26 is pretty darn clear
19 what it applies --

20 JUSTICE KAGAN: Well, I guess what I
21 was suggesting --

22 MR. MICHEL: -- in terms of two
23 procedural bars.

24 JUSTICE KAGAN: -- is you would never
25 get to paragraph 26, except for the prior

1 determination that the State -- that the State's
2 concession is wrong, which has to be a
3 determination on the merits.

4 MR. MICHEL: But --

5 JUSTICE KAGAN: Even if that's not the
6 case -- let's say that I've just made it a
7 little bit too neat, that you have to have that
8 the State is wrong with the merits in order to
9 go into the procedural bar analysis. Even if
10 that's too neat, I mean, like, there are
11 sentences in this opinion -- one -- one sentence
12 we're talking about the merits, one sentence
13 we're talking about the procedural bar.

14 It keeps on going back and forth. I
15 mean, how -- how on earth could one reach a
16 conclusion that the -- that the court would have
17 done exactly what the court did if the court had
18 a different view of the merits?

19 I mean, everything was intertwined
20 with everything else here.

21 MR. MICHEL: Well, I mean, just to
22 respond to your prior question and I think this
23 one too, if it's true that the court had
24 resolved the issue on federal law, I'm not sure
25 what paragraph 26 is doing in the opinion. I

1 mean, there's no reason to address the
2 procedural bars at that point.

3 JUSTICE KAGAN: It's like and another
4 thing.

5 MR. MICHEL: Yeah, well -- but I
6 actually think the reason it's in the opinion is
7 because the court is applying the procedural
8 bars there and that your inference,
9 respectfully, is not a correct reading of the
10 case, but --

11 JUSTICE SOTOMAYOR: I'm sorry. They
12 have to decide -- the claim was based on federal
13 and state law. So they might have been going to
14 it based on the state law.

15 But please continue answering.

16 MR. MICHEL: Well, the procedural bars
17 are a state law threshold, reasonable diligence
18 and clear and convincing evidence of innocence,
19 unless those two threshold --

20 JUSTICE KAGAN: I -- I have to say
21 that is not the way these two pages are written.

22 I mean, it would be very easy to say:
23 Before we get to the merits, the procedural bar
24 is a state -- I mean, that's so not the way
25 these two pages are written.

1 (Laughter.)

2 MR. MICHEL: Yeah. Justice Kagan --

3 JUSTICE KAGAN: It -- it -- it starts
4 with the substantive standard. Then it tells
5 you that the State's concession is wrong as a
6 matter of law. Then, by the way, it tells you
7 some stuff about the procedural bar standard.
8 Then it goes back to the merits again.

9 MR. MICHEL: Justice Kagan, you've
10 issued, you know, a strong legal writing
11 critique of this opinion. But this opinion was
12 issued --

13 (Laughter.)

14 JUSTICE KAGAN: I haven't even
15 started.

16 (Laughter.)

17 MR. MICHEL: The question under this
18 Court's independent and adequate state ground
19 doctrine is not how well written the opinion it
20 is.

21 JUSTICE KAGAN: No, but, actually --

22 MR. MICHEL: It is what did it decide
23 the case under.

24 JUSTICE KAGAN: Totally right, it's
25 not how well written it is. But it's a high bar

1 to say that something is independent, you know,
2 if there's ambiguity, if there's uncertainty.

3 We do not give that benefit of the
4 doubt to the state under Michigan v. Long.
5 Quite the opposite.

6 MR. MICHEL: Justice Kagan, with
7 respect, I think you're striving for ambiguity
8 where there is clarity in paragraph 26.

9 Paragraph 26 says that the court is --
10 JUSTICE KAGAN: Well, paragraph 26 is,
11 number one, one paragraph of six or seven,
12 right? So -- so I -- I don't think that you get
13 to just say: This is my best paragraph.

14 You have to look at the analysis and
15 say: Is it intertwined or is it independent?

16 And, you know, all paragraph 26 does
17 is to state a standard. It's like, okay, we
18 know that they thought that this standard had
19 something to do with something. But the rest of
20 the two pages is, like, totally merits-infused.

21 MR. MICHEL: So I have to respectfully
22 disagree. Twenty-six does not state a standard.
23 It applies the standard and says it's satisfied.

24 Paragraph 27, in particular, if you
25 look at the last sentence, it says: Moreover

1 and controlling here is the fact that this issue
2 could have and should have been raised with
3 reasonable diligence.

4 That's a direct invocation of the bar.

5 I agree that there are other
6 paragraphs in the opinion addressing the federal
7 law issue. But, as this Court held squarely in
8 Harris versus Reed, state courts are allowed to
9 issue alternative holdings, one on the state law
10 and one on the federal law. And that does not
11 mean that the state law holding becomes immune
12 from the adequate and independent state ground
13 doctrine.

14 As the Court said in Coleman versus
15 Thompson, it's ultimately looking for a fair,
16 reasonable reading of what the court did.

17 And this Court, reviewing this case
18 for the sixth time, with a looming execution
19 date on the calendar, trying to decide this
20 quickly, trying to provide reasons for the
21 parties and the public in a case of high public
22 interest, did address both the procedural bar
23 and the merits.

24 But I think, in paragraph 26 and 27,
25 it does squarely independently and adequately

1 apply the state procedural bars. That means
2 this Court lacks jurisdiction.

3 It doesn't mean that Petitioner has no
4 other remedies available. He has the state law
5 clemency relief available to him. My
6 understanding is, if this Court dismisses for
7 lack of jurisdiction or affirms on the merits,
8 his execution will be rescheduled. There will
9 then be a clemency hearing scheduled. He will
10 be able to present his views to the clemency
11 board. Of note, the clemency board has changed
12 in its composition since the last clemency
13 hearing. A member of the board who was --

14 JUSTICE JACKSON: Can I just -- sorry.

15 MR. MICHEL: I -- I -- the Court might
16 be interested to know the -- the member of the
17 board who was recused is no longer on the board.
18 That member has been replaced. Another member
19 of the board who voted against clemency is also
20 no longer on the board. That member has been
21 replaced.

22 JUSTICE KAGAN: Okay.

23 MR. MICHEL: So it's a new board.

24 JUSTICE JACKSON: Yes.

25 MR. MICHEL: Sorry, Justice Jackson.

1 JUSTICE JACKSON: Sorry.

2 MR. MICHEL: Yeah.

3 JUSTICE JACKSON: I'm sorry to have
4 cut you off.

5 MR. MICHEL: Yeah.

6 JUSTICE JACKSON: So you -- you talk
7 about a fair understanding of what the court
8 did. Can we go to a -- to the understanding of
9 what you think the AG did here.

10 I understood from your argument that
11 you said that the AG did not waive the bar in
12 this case, and I'm just trying to understand how
13 that could possibly be when he confessed error
14 and asked for the conviction to be vacated on
15 the grounds of the merits of the Napue claim.

16 If he was also asserting the
17 procedural bar, I don't understand how he -- how
18 he's making arguments about the merits in this
19 way.

20 MR. MICHEL: Oh, I think -- I think --

21 JUSTICE JACKSON: Not in the
22 alternative. He doesn't say "and in the
23 alternative," right? He -- he -- he doesn't
24 say: I'm invoking the procedural bar, but if
25 you, you know, somehow think it's overcome, let

1 me go on, right?

2 MR. MICHEL: Well, I would look at JA

3 976.

4 JUSTICE JACKSON: Okay.

5 MR. MICHEL: He says: "To obtain" --

6 here, JA 976.

7 JUSTICE JACKSON: Yes.

8 MR. MICHEL: "To obtain

9 post-conviction relief, Glossip needs to show

10 that the issue could have been raised in a

11 direct appeal and supports a conclusion that the

12 outcome of the trial would have been different,"

13 citing the procedural bar.

14 JUSTICE JACKSON: Okay.

15 MR. MICHEL: Then he says: "At a

16 minimum, Glossip was not made aware of Sneed's

17 treatment." That's the diligence prong.

18 JUSTICE JACKSON: Okay.

19 MR. MICHEL: Then he says: "The State

20 is also not comfortable asserting that the

21 outcome would have been [different]." That's

22 the innocence prong.

23 JUSTICE JACKSON: Does he also say:

24 I'm incorporating my arguments from Glossip IV,

25 where he expressly waived?

1 MR. MICHEL: He says: I'm
2 incorporating my arguments from Glossip IV.

3 But remember, in Glossip IV, he said:
4 I expressly waive for this case, but I will
5 expressly invoke the bar for future cases.
6 Enough is enough.

7 And the Oklahoma Court of Criminal
8 Appeals in that case told him that he wasn't
9 allowed to waive. So I think it's quite
10 responsible for the attorney general does not
11 waive.

12 JUSTICE JACKSON: Well, maybe
13 that's -- maybe -- maybe the -- right. But --
14 but maybe the Oklahoma court's telling him he's
15 not allowed to waive explains why he goes
16 through the procedural bar, but it doesn't
17 explain whether or not he intend to -- intended
18 to invoke it.

19 In other words, it -- it seems odd to
20 me that he would be talking about the merits of
21 this claim, trying to get the -- the conviction
22 vacated, but also still invoking the procedural
23 bar. And the oddity, it seems to me, is
24 explained by the previous attempt to waive
25 the -- the -- the -- the procedural bar that was

1 rejected by the court.

2 He sort of -- it was sort of like law
3 of the case, and so he's talking about it in V
4 because the Oklahoma court has already said:
5 Don't talk to us about the waiver.

6 MR. MICHEL: I mean, I think we have a
7 point of agreement, which is that after the
8 Oklahoma court told him that he couldn't waive,
9 which is, after all, a state law issue, then he
10 didn't waive. He said --

11 JUSTICE JACKSON: Right. But what I'm
12 saying is --

13 MR. MICHEL: -- the bar is satisfied
14 and he prevails on the merits.

15 JUSTICE JACKSON: -- don't we have --
16 don't we have to credit his intention to waive
17 in this case, which he expressed clearly in IV
18 and was told by the court he couldn't.

19 And so I understand that your argument
20 that he doesn't waive in V is, you know, he
21 doesn't make an express waiver statement. But,
22 of course, he doesn't because the court already
23 told him he couldn't waive. So --

24 MR. MICHEL: Well, two -- two points.

25 It was his predecessor in -- in IV,

1 not him.

2 And in all events, the fact that the
3 Oklahoma court told him he couldn't waive is
4 strong evidence that the Oklahoma court, as we
5 discussed earlier, doesn't always accept the
6 attorney general's waivers.

7 I mean, remember, we're talking about
8 the state court --

9 JUSTICE JACKSON: No, no, no. It --
10 I'm asking you, isn't it evidence that he
11 expressly intended to waive?

12 MR. MICHEL: No. The -- the fact that
13 he argued that the bar was satisfied is not
14 evidence that he expressly intended to waive.

15 JUSTICE JACKSON: Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Justice Thomas?

19 Justice Alito?

20 Justice Sotomayor?

21 Justice Kagan?

22 Justice Kavanaugh?

23 JUSTICE KAVANAUGH: Yeah. I think you
24 had said earlier and I want to explore, if you
25 get past all the procedural bars and you get to

1 the point where the prosecutors didn't comply
2 with their obligations, that it still wouldn't
3 have made a difference to the jury had they
4 known that Sneed was bipolar and that he lied on
5 the stand.

6 And I'm having some trouble on that
7 last piece of the argument, if we get there,
8 understanding that, when the whole case depended
9 on his credibility.

10 Can you explain that some more?

11 MR. MICHEL: Yes. And -- and one of
12 the critical arguments in the case -- if you
13 read the closing arguments, for example, there's
14 extensive discussion about whether Petitioner
15 was manipulating Sneed. That's probably the
16 issue that comes up the most in the closing
17 arguments, which are not evidence but are a
18 reflection of what was at issue in the trial.

19 And, therefore, Petitioner's strategic
20 decision in this case not to question Sneed's
21 mental illness, I think, was informed by the
22 fact that he didn't want to support the
23 prosecution's theory.

24 And, as this Court explained, for
25 example, in Wood versus Bartholomew, you can

1 infer from the -- the strategic decisions of the
2 defendant what was material, what was important
3 in the case.

4 If the defendant himself, who has
5 every incentive to raise the arguments that are
6 best for him, doesn't want to raise arguments
7 about Sneed's mental health, that is a strong
8 clue, a strong indicator that it's not material,
9 at least material in the sense that it would
10 change the result in his favor. It may have
11 made the conviction more likely, but, of course,
12 that's not what he needs to show for
13 materiality.

14 JUSTICE KAVANAUGH: Would have made
15 the conviction more likely if the jury knows
16 that not only does he have an incentive to lie,
17 that he's lied on the stand and that he's
18 bipolar, therefore, creating all sorts of
19 avenues for questioning his credibility?

20 MR. MICHEL: I think that the Oklahoma
21 Court of Criminal Appeals explained in -- on
22 page JA 991 that evidence that would have
23 furthered the prosecution's theory that he could
24 be manipulated, that he had a mental illness,
25 would have undercut his theory and would have

1 made the conviction more likely.

2 Now I do want to underscore there is
3 lots of other evidence in the case against
4 Petitioner that doesn't relate to Sneed,
5 including his motive, including his possession
6 of cash, including the fact that he was the only
7 one who knew where the money would be found,
8 and, I think most importantly, his elaborate
9 24-hour coverup, which cannot be explained by
10 anything having to do with Justin Sneed's mental
11 state or whether he had a psychiatrist or
12 whether he had bipolar. That would be, I think,
13 the second-most prevalent issue in the closing
14 arguments.

15 And so I think it's difficult to say
16 the jury would have rejected Petitioner's
17 central defense that he was only an accessory
18 after the fact and yet turned around and
19 accepted it if only it knew that Justin Sneed
20 allegedly saw a psychiatrist.

21 JUSTICE KAVANAUGH: All right. Thank
22 you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Barrett?

25 JUSTICE BARRETT: No.

1 CHIEF JUSTICE ROBERTS: Justice
2 Jackson?
3 JUSTICE JACKSON: There seems like
4 there's some pretty significant factual
5 questions that have been debated. You know,
6 what did counsel know? What do these notes'
7 markings mean? Was Sneed's statement that he
8 never saw a psychiatrist true or false?
9 Would you object to an evidentiary
10 hearing? I -- as I understood it, no court has
11 ever actually made findings on those things.
12 MR. MICHEL: I'm not even really sure
13 if I have standing to object to an evidentiary
14 hearing.
15 (Laughter.)
16 MR. MICHEL: You know, I don't think
17 it's -- I guess we all agree that it's not --
18 JUSTICE JACKSON: No. So you all
19 agree --
20 MR. MICHEL: -- that it's not
21 necessary.
22 JUSTICE JACKSON: -- that it isn't
23 necessary? You say we can look at it and --
24 MR. MICHEL: Well --
25 JUSTICE JACKSON: -- rule in your

1 favor. I mean, they say we can look at it and
2 rule in their favor. But I'm just trying to
3 understand, don't we have to have some -- maybe
4 we don't, but --

5 MR. MICHEL: I mean, I don't want to
6 dodge your question. I think you can dismiss
7 and should dismiss the case for lack of
8 jurisdiction because of the adequate and
9 independent state grounds. If you do that, you
10 don't have to worry --

11 JUSTICE JACKSON: Right.

12 MR. MICHEL: -- about the facts of the
13 notes --

14 JUSTICE JACKSON: If we disagree with
15 that --

16 MR. MICHEL: Yeah.

17 JUSTICE JACKSON: -- if we're getting
18 to the merits, what -- how -- how should we go
19 about deciding --

20 MR. MICHEL: Yeah.

21 JUSTICE JACKSON: -- whether there was
22 a Brady or Napue violation here?

23 MR. MICHEL: I think you should start
24 with the premise that it's Petitioner's burden
25 to prove the -- the Brady and Napue violations.

1 And based on the evidence that he's chosen to
2 present and particularly given that he's now
3 told you he wants the case decided on the
4 current record without an evidentiary hearing, I
5 think the proper conclusion would be that he's
6 failed to satisfy his burden, and, thus, if you
7 reach the merits, you should affirm the judgment
8 below.

9 JUSTICE JACKSON: Thank you.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Rebuttal, Mr. Waxman?

13 REBUTTAL ARGUMENT OF SETH P. WAXMAN
14 ON BEHALF OF THE PETITIONER

15 MR. WAXMAN: Thank you, Your Honor. I
16 have a few -- a few short points.

17 Number one, there is -- nothing that
18 will come up at an evidentiary hearing is going
19 to avoid the imperative, the necessity, for a
20 new trial for due process violations.

21 If you look at the -- JA 1005, which
22 is the jail medical report, there is no world in
23 which that report, which was suppressed by the
24 defense -- by the prosecution, is not Brady
25 material and highly, highly relevant impeachment

1 material.

2 There -- if you look at page 953 of
3 the Joint Appendix, these are the Smothermon
4 notes, the Smothermon mid-trial note, we have to
5 get to Justin right away, the knife is the
6 "biggest problem." There is no way that that --
7 those suppressed notes, number one, don't
8 reflect a Napue violation and, number two, are
9 not Brady material.

10 And, with respect to the meaning of
11 the Smothermon notes, even if you were to take
12 the complete extra-record explanation of this,
13 which -- and, yes, Mr. Ackley and Mr. Smothermon
14 were both interviewed by both independent
15 investigations. Mr. Ackley has a declaration
16 which in no way suggests that when he says that
17 he was told by Sneed about taking lithium and
18 when he was told about the discrepancy in the
19 jail medical records, that it had to do with a
20 relating of questions the defense counsel had
21 had.

22 Ms. Smothermon said when she was
23 questioned, number one, I'm not sure that
24 Trumpet is Trombka. Explanation number two, I
25 was referring to Dr. Trumpet, a jazz musician I

1 wanted to hear. That was a personal note.

2 And so, when -- in any event, even if
3 she's right that all Sneed said was I was
4 questioned by the defense and I told them that I
5 was prescribed lithium by Dr. Trumpet, given the
6 obvious fact that this prosecutor for Oklahoma
7 County knew as well as everybody else that
8 Dr. Trombka was the only jail psychiatrist, she
9 committed a Napue violation even under the Van
10 Treese brief extra-record explanation.

11 Now there was a question about -- I
12 think, Justice Thomas, it was yours, but pardon
13 me if I've misallocated it -- about, well, the
14 jail records, like, they were in the
15 prosecutor's file.

16 The jail records are clearly Brady
17 material. They were -- under this Court's
18 decision in Kyles and other cases, Brady
19 material includes not as only -- not only what
20 is in the prosecutor's file but what is also in
21 the police and investigators' files. That is an
22 obligation that the prosecution has. And they
23 were in the -- the sheriff's office files. The
24 sheriff office ran the jail. The sheriff's
25 office was -- investigated this crime. The -- a

1 deputy sheriff was called by the prosecution to
2 report on his investigation. And Mr. Ackley, at
3 page 26 -- paragraph 26 of his declaration, page
4 939, says that he knew about jail records and
5 misapplications.

6 Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 Mr. Waxman. The case is submitted.

9 Mr. Michel, this Court appointed you
10 to brief and argue this case as an amicus curiae
11 in support of the judgment below. You have ably
12 discharged that responsibility, for which we are
13 grateful. Thank you.

14 (Whereupon, at 11:49 a.m., the case
15 was submitted.)

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