No. 22-_____
(CAPITAL CASE)

IN THE
Supreme Court of the United States

RICHARD EUGENE GLOSSIP, PETITIONER,

v.

STATE OF OKLAHOMA, RESPONDENT.

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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

Justin Sneed was, in the State's words, its "indispensable witness," and Richard Glossip's "fate turned on Sneed's credibility." Sneed is the person who "bludgeoned the victim to death, and his testimony linking Glossip to the murder was central to the conviction." State Stay Resp. 10, *Glossip v. Oklahoma*, No. 22A941 (U.S.). He only claimed Mr. Glossip was involved after being fed Mr. Glossip's name six times and threatened with execution. And his accounting of basic facts about the crime has shifted dramatically with each telling.

With Sneed's credibility already tenuous, the State undisputedly hid from the jury Sneed's having "seen a psychiatrist" who diagnosed Sneed with a psychiatric condition that rendered him volatile and "potentially violent," particularly when combined with methamphetamine use, a street drug Sneed was abusing at the time he murdered Barry Van Treese. *Id.* In fact, the State allowed Sneed to affirmatively tell the jury he had *not* seen a psychiatrist.

Before the Oklahoma Court of Criminal Appeals (OCCA), the State confessed error, admitting that the failure to disclose the truth about Sneed's psychiatric condition, leaving the jury with Sneed's uncorrected false testimony and then suppressing this information for a quarter-century, rendered "Glossip's trial unfair and unreliable." *Id.* at 4–5. Before this Court, the State has admitted Mr. Glossip is entitled to a new trial on these grounds, as well as in light of "cumulative error" regarding "multiple issues raised in Glossip's Post-Conviction Relief Application." *Id.* at 4. But the OCCA has refused to stop the execution of an innocent man who never had a fair trial.

This petition presents the following questions:

1. a. Whether the State's suppression of the key prosecution witness's admission he was under the care of a psychiatrist and failure to correct that witness's false testimony about that care and related diagnosis violate the due process of law. *See Brady v. Maryland*, 373 U.S. 83 (1963); *Napue v. Illinois*, 360 U.S. 264 (1959).

   b. Whether the entirety of the suppressed evidence must be considered when assessing the materiality of *Brady* and *Napue* claims. *See Kyles v. Whitley*, 514 U.S. 419 (1995).

2. Whether due process of law requires reversal, where a capital conviction is so infected with errors that the State no longer seeks to defend it. *See Escobar v. Texas*, 143 S. Ct. 557 (2023) (mem.).

PARTIES TO THE PROCEEDING

The petitioner is Richard Eugene Glossip.

The respondent is the State of Oklahoma.

STATEMENT OF RELATED PROCEEDINGS

State v. Richard Eugene Glossip, No. CF-97-244, Oklahoma County District Court for the State of Oklahoma. Judgment entered July 31, 1998.

Glossip v. State, No. D-1998-948, 29 P.3d 597 (Okla. Crim. App. 2001). Judgment entered July 17, 2001.

State v. Richard Eugene Glossip, No. CF-97-244, Oklahoma County District Court for the State of Oklahoma. Judgment entered on August 27, 2004.

Glossip v. State, No. D-2005-310, 157 P.3d 143 (Okla. Crim. App. 2007). Judgment entered April 13, 2007.

Glossip v. Oklahoma, No. 07-7449, 552 U.S. 1167 (Jan. 22, 2008) (mem.).

Glossip v. State, No. PCD-2004-978, Oklahoma Court of Criminal Appeals. Judgement entered December 6, 2007.

Glossip v. Trammell, No. 08-CV-00326-HE, Western District of Oklahoma. Judgment entered September 28, 2010.

Glossip v. Trammell, No. 10-624, 530 Fed. App'x 708 (10th Cir. 2013). Judgment entered July 25, 2013.

Glossip v. Trammell, No. 13-8943, 572 U.S. 1104 (May 5, 2014) (mem.)

Glossip v. State, No. PCD-2015-820, Oklahoma Court of Criminal Appeals. Judgment entered September 28, 2015.

Glossip v. Oklahoma, No. 15-6340, 576 U.S. 1094 (Sept. 30, 2015) (mem.).

Glossip v. State, No. PCD-2022-589, Oklahoma Court of Criminal Appeals. Judgment entered November 10, 2022.

Glossip v. State, No. PCD-2022-819, Oklahoma Court of Criminal Appeals. Judgment entered November 17, 2022.

Glossip v. State, No. PCD-2023-267, Oklahoma Court of Criminal Appeals. Judgment entered April 20, 2023.[1]

[1] There are additional cases arising from Mr. Glossip's death sentence, including from this Court. *See, e.g.*, *Glossip v. Gross*, 576 U.S. 863 (2015). However, those matters concern the manner in which the State of Oklahoma intends to carry out that sentence or conduct its clemency proceedings, not the conviction and sentences themselves. *See Nance v. Ward*, 142 S. Ct. 2214, 2223 (2022) (holding 42 U.S.C. § 1983 is appropriate for challenging method of execution as opposed to validity of a sentence).

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PETITION FOR WRIT OF CERTIORARI

Petitioner Richard Eugene Glossip respectfully petitions for a writ of certiorari to review the judgment of the Oklahoma Court of Criminal Appeals.

INTRODUCTION

Mr. Glossip again comes before this Court, this time supported by the chief law enforcement officer very State that will soon kill him unless this Court intervenes. Even at this late stage of his case, after Mr. Glossip has faced nine execution dates, new evidence continues to emerge that the State knew full well that the evidence it used to convict him and sentence him to death was false. The State has only recently disclosed evidence showing that it knew its critical witness, Justin Sneed, was lying and that it nevertheless did not correct the record for the jury. The State agrees this failure, and the cumulative effect of the other errors in this case, require a new trial before Mr. Glossip can be punished at all, let alone put to death.

The State said so before the Oklahoma Court of Criminal Appeals (OCCA). Yet that court refused the State's confession of error. In addressing the merits of Mr. Glossip's claims, the OCCA not only ignored the considered judgment of the State officer chiefly responsible for enforcing Oklahoma's laws, but imposed a standard at odds with this Court's precedents to reach that result, requiring Mr. Glossip to show that Sneed intentionally lied, rather than simply offered a false statement. Contrary to the OCCA's ruling, this Court has long and clearly held that

the State has a duty to correct material falsehoods, whatever the intention of the speaker. *See Napue v. Illinois*, 360 U.S. 264 (1959). The OCCA's resolution of a related *Brady v. Maryland*, 373 U.S. 83 (1963) claim—that the State suppressed evidence of its key witness's bipolar disorder—also creates a conflict between Oklahoma courts and the Tenth Circuit Court of Appeals.

The OCCA's failure to accept the State's concession that the conviction was unreliable—in a capital case, no less—was a serious error in its own right. The State of Oklahoma has taken the unprecedented step of joining Mr. Glossip's effort to set his capital conviction aside. That decision came after substantial deliberation, including the results of two separate independent investigations both of which concluded that Mr. Glossip's conviction is unreliable and should be set aside. Although the State did not agree in toto with the analysis of either independent report, the State made its position clear to the OCCA: "Consistent with *Napue v. Illinois*, 360 U.S. 264 (1959), the State is compelled to correct [Sneed's] misstatements and permit the trier of fact the opportunity to weigh Sneed's credibility with the accurate information." App. 150a. The State also conceded "cumulative errors, such as violation of the rule of sequestration and destruction of evidence, that when taken together with Sneed's misstatements warrant a remand to the district court" for retrial. App. 150a. The OCCA rejected the concessions, claiming, contrary to the evidence, they were "not based in law or fact." App. 15a. Here, too, the OCCA flouted this Court's precedents, which required it to consider

the cumulative effect of the *Brady* claims before it and to give effect to the State's confession of error. *See Escobar v. Texas*, 143 S. Ct. 557, 557 (2023) (mem.); *Kyles v. Whitley*, 514 U.S. 419, 436 (1995).

This petition and the pending application for stay of execution—along with the State's extraordinary joinder of that application—are necessary because of the OCCA's failure to uphold this Court's precedents and to accept what the State's chief law enforcement officer recognizes: that Mr. Glossip's conviction is a grave miscarriage of justice and to execute him would be an unthinkable, irreversible travesty.

OPINION BELOW

The April 20, 2023 opinion of the Oklahoma Court of Criminal Appeals is published. *See Glossip v. State*, __ P.3d __, 2023 OK CR 5, 2023 Okla. Crim. App. LEXIS 4, 2023 WL 3012463; App. 1a–26a.

JURISDICTION

The Oklahoma Court of Criminal Appeals entered judgment on April 20, 2023. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law."

STATEMENT

A. Sneed and the Conviction

In the pre-dawn hours of January 7, 1997, Justin Sneed brutally murdered motel owner Barry Van Treese in a guest room in his Oklahoma City motel, the Best Budget Inn. Sneed would ultimately receive a life-without-parole sentence, escaping exposure to the death penalty in exchange for his testimony implicating Mr. Glossip, the motel's manager, in an alleged murder-for-hire scheme. Mr. Glossip's conviction—and execution—undisputedly hinge on the credibility of Justin Sneed.[2]

Sneed lived rent-free at the Best Budget Inn, where he worked informally as a handyman. He was addicted to methamphetamine and, it would eventually emerge, had a violent criminal history and modus operandi of robbing men whom a female accomplice had lured into a motel room. Richard Glossip, prior to Sneed's implicating him in this case, had no history of violence. When police arrested Sneed a week after the murder, they had to say Mr. Glossip's name six times, repeatedly tell him Mr. Glossip was implicating him, and remind him he was facing capital charges himself before he said anything so much as suggesting that Mr. Glossip was involved in the murder. App. 272a–97a.

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[2] Because many of the salient facts are already before the Court, they are repeated here only to the extent they are material to the Court's consideration of the questions presented and for the Court to determine its jurisdiction. *See* Pet. 3–31, *Glossip v. Oklahoma*, 22-6500 (U.S.).

After a 1998 trial, Mr. Glossip's conviction was unanimously reversed because of the ineffective assistance of his trial counsel, who had, among other crucial failings, neglected to show the jury the video of police coercing Sneed to implicate Mr. Glossip. App. 252a–53a. In the first trial, the State sought death under the theory that the crime was "heinous, atrocious, or cruel," Okla. Stat. § 21-701.12(4), but on retrial, the court precluded consideration of that circumstance (due to the conceded fact that only Sneed was responsible for Mr. Van Treese's bludgeoning), and in the immediate run-up to the trial, the State instead newly asserted the "murder for remuneration" aggravating factor against Mr. Glossip. *See* Okla. Stat. § 21-701-12(3). At retrial, Sneed again testified, offering the critical evidence implicating Mr. Glossip in the murder. The second jury never saw the video either, although this time, the appellate court found that acceptable. App. 209a–10a.

Sneed's credibility has always been tenuous. Aside from the coercive circumstances under which Sneed's story first emerged, on even seminal questions—such as why Sneed murdered Van Treese—his accounting is conflicted: he claimed alternatively it was a plot to either rob Van Treese, App. 289a–97a, or to murder him so Mr. Glossip "could run the motel without [Van Treese] being boss." App. 317a. Important details of the crime—who did what, when, and where—also shifted repeatedly across tellings.

The State courts have at times recognized the weakness of Sneed as a witness. In its 2001 opinion reversing Mr. Glossip's original conviction, the OCCA recognized the interrogation was "important impeachment evidence against Justin Sneed," and its omission was a "glaring deficiency in counsel's performance." App. 252a. One member of the OCCA later opined if there were ever evidence of Sneed's recantation, a reversal would be required. App. 169a.

Although Sneed's credibility was tenuous, his testimony was critical. The "State's evidence was circumstantial except for the testimony of Justin Sneed," and the trial judge observed that without it, Mr. Glossip could not even have been charged with murder. App. 249a. Below, before the OCCA, the State repeatedly described Sneed as the State's "key witness." App. 151a–53a.

Quite reasonably, then, before the retrial, Mr. Glossip's lawyer requested that the State disclose all Sneed's statements, written and oral, specifically including statements made between Mr. Glossip's first and second trials. App. 432a–33a. The State insisted it had provided everything. App. 435a. After two decades of further suppression, the information at bar only emerged in the past few months.

B. The State's Files

On August 31, 2022, Mr. Glossip was, for the first time, provided access to the set of records at issue in the already pending Petition (No. 22-6500). The Office of the Attorney General had obtained the trial prosecutor's files and made seven

banker's boxes of materials available to Mr. Glossip (withholding materials it deemed work product in an eighth box). These disclosures contained a memo demonstrating the State coached Sneed to change his testimony on material aspects regarding the manner in which he murdered Van Treese to avoid conflicting with other evidence, coaching he accepted and delivered upon in Mr. Glossip's retrial. Around the same time, the office that represented Sneed at the time of trial released for the first time correspondence corroborating, as Sneed himself put it, his desire to "re-cant" his prior testimony. The OCCA's resolution of the related *Brady* claim is the subject of Mr. Glossip's pending Petition. Pet. i, *Glossip v. Oklahoma*, No. 22-6500 (U.S.).

On January 27, 2023, the State granted Mr. Glossip access to additional materials (mostly prosecutors' notes) from the District Attorney's files, materials the OCCA referred to as "Box 8." App. 8a. Box 8 contained a notation that between the first and second trials, Sneed told the State he had been under the care of a "Dr. Trumpet" and was "on lithium." App. 101a, 269a.[3] Prior to this January, the State had not disclosed these statements.[4]

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[3] The scan of this document by the OCCA is of poor quality. In addition to the version of the notes that are part of the state court record, App. 101a, a clearer version of the key part of those notes is appended. App. 269a.

[4] A record from an early evaluation of Sneed by a non-MD psychologist did note he had taken lithium, but reported it was given—apparently in error—after he had a tooth pulled, and that Sneed denied any psychiatric treatment. App. 441a. The State subsequently opposed discovery of any of Sneed's actual medical records. App. 495a.

Upon disclosure, counsel for Mr. Glossip quickly discovered that a Dr. Larry Trombka was the Oklahoma County jail's only psychiatrist at the time Sneed saw him, and that Dr. Trombka had diagnosed Sneed with bipolar disorder, for which he prescribed lithium. Dr. Trombka also volunteered that methamphetamine use can exacerbate symptoms of bipolar disorder, rendering the person "more paranoid or potentially violent." App. 104a.

This information flatly contradicts Sneed's testimony at Mr. Glossip's retrial. On direct examination, the prosecutor elicited the following testimony from Sneed:

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

App. 267a. That was false; Sneed had seen a psychiatrist, as he had relayed to the prosecutor who conducted this exchange, and the lithium was not in response to a request for Sudafed (or a pulled tooth), but a treatment prescribed for a serious mental health disorder. Sneed was never impeached about his falsehood, and the jury never learned about the dangerous interplay of bipolar disorder with methamphetamine, because despite Mr. Glossip's explicit request, the State did not disclose Sneed's statements.

Based on these disclosures, on March 27, 2023, Mr. Glossip filed a new successive application for post-conviction relief. App. 68a–147a. That application

raised, *inter alia,* issues concerning Sneed's suppressed statement about his psychiatric treatment. App. 82a–83a. In the same application, Mr. Glossip raised a claim of cumulative error, explaining that *Kyles v. Whitley*, 514 U.S. 419 (1995), required the OCCA to consider collectively the state's "misconduct in general and suppress[ion of] evidence in particular." App. 81a, 91a–97a. He requested that the OCCA consider the entirety of the record and the errors in the case both in assessing Sneed's suppressed statement, but also as an independent ground for relief, enumerating the myriad problems with the conviction undermining the "'fundamental fairness of the proceeding.'" App. 92a (quoting *Strickland v. Washington*, 466 U.S. 668, 696 (1984)).

The additional errors prosecutors injected into the case are numerous and significant. The Application in the OCCA that is the subject of the still-pending prior petition for certiorari identifies additional serious *Brady* and prosecutor misconduct issues concerning Sneed. App. 353a–430a. For one thing, Justin Sneed had multiple conversations with prosecutors in which he threatened to withhold testimony in the second trial absent a better deal, and even explicitly discussed his wish to *recant* his testimony in his correspondence, calling it a "mistake," but none of this was disclosed to the defense. App. 396a–408a. Sneed's own lawyer told him—consistent with the position the prosecutor had taken—that if he did not repeat his testimony, he would be subject to the death penalty, (App. 405a), although

Oklahoma law specifically provided to the contrary. *See State v. Dyer,* 2001 OK CR 31, 34 P.3d 652.

The State also realized midway through the second trial, after the medical examiner testified, that its "biggest problem [was] still the knife" that had clearly been used in the attack on Van Treese, and which Sneed had explicitly denied using himself. But rather than address this problem openly, the prosecutor secretly sent a memo to Sneed's lawyer detailing "a few items that have been testified to" that she "needed to discuss with Justin," specifying they "should get to him" that afternoon, before he took the stand the next morning. App. 409a. Sneed's lawyer provided the prosecutor with information Sneed would agree to testify to, and Sneed then did change his testimony to say he was the one who had made the knife wounds, and not only did the prosecutor fail to alert the defense to this exchange or change, she affirmatively lied on the record, telling the Court she and the defense were both only just hearing Sneed's new version for the first time. App. 417a.

While these were perhaps the largest *Brady* violations, they were not the only ones. In interviews conducted before the second trial, several witnesses told prosecutors important things they did not include in the summaries they provided to the defense. For instance, the State presented testimony that the necessary repairs made after Van Treese's death only cost about $2,000, in support of its argument that Glossip was derelict in his duties for not doing that himself. But another one of its witnesses, Bill Sunday, told prosecutors the repairs cost more

than twelve times that much, $25,000, a fact the State left out of the summary it provided of Sunday's statements. App. 84a–85a. Similarly, in an aspect of the State's case the OCCA would later rely upon as essential corroboration, (App. 239a), prosecutors argued that the approximately $1,700 Mr. Glossip was carrying when arrested leaving a criminal defense lawyer's office could only have been money he and Sneed stole from Van Treese and then split between them. It then presented the testimony of Cliff Everhart that while he knew Glossip had sold a big screen TV and couch, he did not know for how much. App. 85a. Prosecutors' never-disclosed notes reveal that Everhart in fact told them it was $900, accounting in just that one item for more than half of the money the State was trying to claim was stolen. App. 239a.

Relatedly, the State destroyed and/or lost key evidence. Prior to the case even approaching its second trial, it is undisputed that the Oklahoma City Police Department, apparently at the direction of the District Attorney's Office, destroyed a box of 10 items of evidence, including the shower curtain and duct tape the killer(s) used to cover the motel room window and various documents seized from the victim's car believed to contain motel financial records crucial to confirming or refuting the State's alleged motive. App. 92a. Similarly, they either destroyed or lost a surveillance video that almost certainly showed Sneed and anyone he was with during the timeframe surrounding the killing. App. 86a.

This was also a trial in which the prosecutor wrote down her own notes of the State's witnesses' testimony on large posterboards and left them on display around the courtroom throughout the testimony of its witnesses, a tactic the District Court in federal habeas recognized the trial court never should have allowed. *See Glossip v. Trammell,* 530 Fed. App'x 708, 718 (10th Cir. 2013). And these are only the errors the State directly caused, among the myriad other failures in Oklahoma's justice system that occurred throughout the life of this case.

C. The Second Independent Investigation

Meanwhile, the Oklahoma Attorney General's office was conducting its own investigation into the reliability of Mr. Glossip's conviction. In January, the Attorney General commissioned an independent inquiry to "ensure that we are appropriately responding to all evidence that has been presented" noting that the "[c]ircumstances surrounding this case necessitate a thorough review." Shelby Banks, *Oklahoma Attorney General Orders Independent Review of Glossip's Case*, FOX 23 (Jan. 26, 2023). That inquiry was in addition to the investigation the ad hoc group of sixty-two Oklahoma legislators had already commissioned from the law firm Reed Smith, which had concluded that Mr. Glossip's conviction was fundamentally flawed.[5]

[5] The legislator's inquiry is discussed at length in Mr. Glossip's earlier pending Petition. Pet. 26–30, *Glossip v. Oklahoma*, No. 22-6500 (U.S.).

The Attorney General appointed Rex Duncan, a former District Attorney, to conduct the independent investigation. As part of that investigation, Mr. Duncan reviewed the entirety of the State's file in the case, the documents related to the trial and conviction, and the materials related to the legislators' independent investigation. His review was comprehensive, was premised on "full and transparent access" to the State's files. App. 48a, Rex Duncan, *Independent Counsel Report in the Matter of Richard Eugene Glossip, Case CF-1997-244* at 3 (Apr. 3, 2023), (hereinafter "Independent Report"). He also made clear that his conclusions were his own, and the Attorney General "did not influence" the investigation. App. 48a.

The Independent Report concluded that the prosecution's withholding evidence, particularly the evidence regarding Sneed's bipolar disorder, rendered it impossible for the State to "have confidence in the process *and* result." App. 50a. Duncan concluded the "cumulative effect of errors, omissions, lost evidence, and possible misconduct cannot be underestimated." App. 51a. Although the Independent Report recounts many errors warranting a new trial, particularly salient here is the State's suppression of Sneed's statements concerning his psychiatric treatment. App. 59a. As the Independent Report put it, "A release of all Sneed's records would have made a monumental difference . . . ." App. 65a.

D. The State's Confession of Error and the OCCA's Decision

In light of the Independent Report, the Attorney General conceded several important points and ultimately requested that the OCCA reverse Mr. Glossip's conviction in light of the State's failure to correct Sneed's false testimony. First, it conceded that Mr. Glossip was "not made aware of Dr. Trombka's treatment of Sneed until he recently received the prosecutor's notes." App. 152a. That is, the Attorney General has conceded the State suppressed Sneed's statement regarding his treatment and that Mr. Glossip and his counsel were only recently made aware of Sneed's diagnosis.

The State also conceded that the State failed to correct Sneed's false testimony and that failure materially affected the outcome. On that basis, the Attorney General sought before the OCCA to have Mr. Glossip's conviction reversed so the State could proceed with the case in the District Court as it saw fit, this time observing all that due process demands. The Attorney General explained it is "undisputed" that Sneed "was the State's key witness at trial" and the State "may have had reason to know of Sneed's misstatements." App. 153a. In light of what the Attorney General deemed a "concealment," the State conceded "the trier of fact was [not] able to properly evaluate the case against Glossip." App. 153a.

Despite the State's concessions, the OCCA denied Mr. Glossip's application on April 20, 2023. App. 1a–26a. Regarding the State's failure to disclose Sneed's treatment and its failure to correct the false testimony, the OCCA denied relief on

both procedural grounds and the merits. While not denying that "Dr. Trumpet" was Dr. Trombka, that Dr. Trombka was a psychiatrist, and that he had treated Sneed in 1997, diagnosing him with bipolar disorder, the OCCA insisted Sneed's testimony that he had never seen a psychiatrist was somehow "not clearly false." App. 17a. It posited Sneed "was more than likely in denial of his mental health disorders" than intentionally lying. App. 17a. The OCCA could not, however, even suggest Sneed's statements were factually true. App. 17a. Without further explanation, the OCCA concluded that despite both parties agreeing that they did, the falsehood and suppressed statement did not "create a reasonable probability that the result of the proceeding would have been different." App. 17a. The OCCA then tersely rejected the cumulative error claim, insisting it could only consider the errors raised in the present application, and it could never find cumulative error if it had "fail[ed] to sustain any of the alleged errors raised." App. 21a.

This petition follows.

REASONS FOR GRANTING THE PETITION

I. DUE PROCESS REQUIRES DISCLOSURE AND CORRECTION OF MATERIAL, FALSE STATEMENTS

As the State recognizes, it was required to disclose Sneed's statement that he was under the care of a psychiatrist. It was also required to correct his false testimony concerning his diagnosis and treatment. It agrees it did neither. The OCCA, however, effectively ruled neither was required here, relieving the State of any responsibility—or accountability—and violating the due process of law.

A. Sneed's Statements Were Material and False

In addressing the *Napue* claim on the merits, the OCCA ruled that Sneed's testimony was not "clearly false," because it was already known he "was under the care of doctor [sic] who prescribed lithium" and he "was more than likely in denial of his mental health disorders." App. 17a. Thus, it concluded testimony was only "false" for *Napue* purposes if the witness was intentionally lying, without regard for the actual truth or falsity of his testimony.[6] But Sneed did not testify that he did not believe himself to be mentally ill, which may or may not have been true; he testified that he had never seen a psychiatrist, App. 267a, which was objectively false, as known to the State but not to the defense. Moreover, it treated the fact that it was known a doctor had prescribed Sneed lithium as obviously establishing Sneed had mental health problems, even though Sneed himself testified that the lithium was *not* from a psychiatrist. App. 267a. Both cannot be true; if, as the OCCA insisted, the fact of a lithium prescription establishes mental health problems, then it was incumbent on the State, when its witness testified otherwise, to correct the record. Quite simply, regardless of his intentions, the testimony of central witness Justin Sneed on a point crucial to assessing his credibility was false, and the State knew that and said nothing.

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[6] Although the OCCA also denied the decision on procedural grounds, the State will likely waive any reliance on them in light of its expressed intent to support certiorari. State Stay Resp. 1, *Glossip v. Oklahoma*, No. 22A941 (U.S.). In any event, the OCCA's conclusion on this front was factually unsupported and patently unreasonable.

B. The OCCA's Decision Conflicts with Decisions of this Court as well as the Tenth Circuit

The OCCA's decision flatly contradicts this Court's precedent and creates a conflict with the Tenth Circuit Court of Appeals. First, this Court's precedents require the State to correct material falsehoods, regardless of whether the witness offering the falsehood intended to deceive the jury. *See Napue*, 360 U.S. at 269. The focus of the inquiry is whether the statement is "false," requiring an examination of the fundamental reliability of the proceeding, not the motivations of the witness offering the material falsehood. *Id.*

The OCCA's decision, speculating about whether Sneed might have been in "denial," rather than lying, misses the point and conflicts with this Court's mandates. App. 17a. Whatever his intentions, the State's key witness offered a material falsehood, the State knew or should have known about it, and the State was required to correct it.

Next, the OCCA's decision also creates a conflict of authority with the Tenth Circuit Court of Appeals. The Tenth Circuit has held mental health information about a witness is material—as a matter of clearly established federal law—"at least when the eyewitness is 'the *only* evidence linking [the defendant] to the crime,' and the impeachment evidence casts substantial doubt upon its reliability." *Browning v. Tramwell*, 717 F.3d 1092, 1106 (10th Cir. 2013) (quoting *Smith v. Cain*, 565 U.S. 73, 76 (2012)) (emphasis in *Smith*). In that case, the impeachment in question was very similar to the evidence here: a psychiatric report indicating the

witness in question had psychiatric issues that rendered him potentially violent. *Id.* at 1095–96. Here, Sneed's role as the key witness and the State's suppression of his statement places the OCCA squarely at odds with the Tenth Circuit.

Finally, the OCCA's refusal to consider the full record of suppressed evidence and state misconduct also violates this Court's precedent. To assess whether suppressed evidence is material, courts must consider "suppressed evidence . . . collectively, not item by item." *Kyles*, 514 U.S. at 436. Here, the OCCA declined to consider the "cumulative effect of suppression." *Id.* at 437. Instead, having erroneously concluded that no single suppressed item of evidence warranted reversal in isolation, the OCCA declared its work was done: "A cumulative error claim is baseless when this Court fails to sustain any of the alleged errors raised." App. 21a. And the OCCA went further, declining to consider any suppressed evidence it had previously adjudicated, for example, in the application from September that is the subject of Mr. Glossip's already-pending petition before this Court: "Only claims argued in this application may be combined." App. 21a.

This approach to assessing the suppressed evidence flatly contradicts *Kyles*. It also distorts—and minimizes—the fundamental unfairness that results from the State's misconduct. Here, the other claims concerning suppressed evidence are powerful. They include that the State knew, but did not disclose, that Sneed sought to "re-cant" his testimony claiming Mr. Glossip was involved in the murder. App. 375a. And it included a memo recounting how the State coached Sneed to change

his testimony to conform to the medical examiner's retrial testimony that Van Treese was both bludgeoned and stabbed. App. 383a–84a. The OCCA said these items (alone) would not have changed anything. App. 39a, 43a–44a. Mr. Glossip raised them in a prior application immediately upon their discovery, as Oklahoma's timeliness requirements required him to do, and the only reason the act of suppression at issue now was not included then is that the State was, at that time, actively continuing to suppress it, having intentionally removed the key document from the materials made available in September. If states could do that—parcel out items into individual disclosures required to be presented separately, and then insist it can only consider the combined effect of errors if they are presented together—*Kyles* would be a nullity. Thus, in addition to being contrary to *Kyles*, it is also simply unfair to decline to consider the collective impact of this suppressed evidence.

II. WHERE, IN A CAPITAL CASE, THE STATE ADMITS ITS OWN MISCONDUCT REQUIRES REVERSAL, DUE PROCESS DEMANDS THE SAME

The Court, like the OCCA, faces a stark choice: whether the State of Oklahoma can execute a person who its chief law enforcement officer believes is wrongly convicted because of state misconduct. The Oklahoma Attorney General made a careful, deliberate choice to concede error in this case. He reviewed the record and two separate independent investigations, one on behalf of Oklahoma legislators and one the Attorney General commissioned himself. Neither

investigation concluded Mr. Glossip's conviction could withstand scrutiny, and both recommended it should be set aside.

It is against this backdrop that the Attorney General conceded error before the OCCA, personally signing the State's response supporting relief in Mr. Glossip's case. App. 148a–55a. As he has explained to this Court, it is "unthinkable" that Mr. Glossip would be executed despite the State's confession that his conviction is erroneous and unfair. State Stay Resp. 1, *Glossip v. Oklahoma*, No. 22A941 (U.S.). For this reason, the Attorney General has properly taken it upon himself not to "win [the] case," but to see to it that "justice shall be done." *United States v. Bagley*, 473 U.S. 667, 675 n.6 (1985) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). As the Attorney General notes, the confession of error is particularly powerful because it concerns the misconduct of one of his charges. Okla. Stat. tit. 74, § 18 (describing the Attorney General as "the chief law enforcement officer of the state").

Because the confession comes from the State's chief law enforcement officer and concerns state misconduct, Mr. Glossip's case presents an even more compelling case for reversal than the Court's recent order in *Escobar v. Texas*, 143 S. Ct. 557 (2023) (mem.). There, the state no longer defended the scientific evidence at the heart of the case. *See generally* Resp. Br., *Escobar v. Texas*, No. 21-1601 (U.S. Sept. 28, 2022). This Court, with the agreement of the parties, vacated the Texas court's decision, recognizing the salience of the State's confession of error. *See Escobar*, 143

S. Ct. at 557. Here, the unreliability comes not from questionable science, but from the prior conduct of the party confessing error. The OCCA's decision rejecting the State's concession cannot stand.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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