No. 22A941
CAPITAL CASE

IN THE
Supreme Court of the United States

RICHARD GLOSSIP,
Applicant,
v.
STATE OF OKLAHOMA,
Respondent.

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

RESPONSE TO UNOPPOSED APPLICATION FOR STAY OF EXECUTION

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Execution Scheduled for May 18th, 2023, at 10:00 a.m. CT

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INTRODUCTION

This Court has long held that "the prosecutor's role transcends that of an adversary: he 'is the representative not of an ordinary party to a controversy, but of a sovereignty … whose interest … in a criminal prosecution is not that it shall win a case, but 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 Solicitor General Frederick Lehmann famously put the point, the government "wins its point whenever justice is done [to] its citizens in the courts." *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (quoting Solicitor General Lehmann). That solemn duty is at its zenith in a capital case, where the stakes could hardly be higher and the consequences of an unjust result irreversible. Guided by this command, and in light of new factual developments unearthed in an independent investigation and raised on post-conviction review, the State of Oklahoma recently made the difficult decision to confess error and support vacating the conviction of Richard Glossip ("Glossip") in a *Successive Application for Post-Conviction Relief* filed with the Oklahoma Court of Criminal Appeals ("OCCA"). While the State has previously opposed relief for Glossip (and continues to oppose the petition in No. 22-6500), it has concluded, based on careful review of new information that has come to light, including a report by an independent counsel appointed by the State, that Glossip's capital sentence cannot be sustained. Regrettably, the OCCA refused to accept that confession of error, and Glossip intends to promptly file a petition seeking review of that unprecedented decision. The State intends to acquiesce in that petition. Consequently, the State

supports Glossip's request to stay his execution, which is currently scheduled for May 18, 2023. Absent this Court's intervention, an execution will move forward under circumstances where the Attorney General has already confessed error—a result that would be unthinkable. In those unprecedented circumstances, this Court should grant the application for a stay of execution.

STATEMENT OF THE CASE

At the outset, it is important to understand what is—and what is not—at issue here or at stake here. Glossip's current application for a stay of execution is entirely separate from the meritless lawsuit Glossip and numerous other death row inmates filed challenging Oklahoma's method of execution. *See, e.g.*, *Glossip v. Gross*, 576 U.S. 863 (2015) (affirming the district court's denial of a preliminary injunction to inmates); *Coddington v. Crow*, No. 22-6100, 2022 WL 10860283 (10th Cir. Oct. 19, 2022) (unpublished) (affirming the district court's grant of summary judgment to the State); *Coddington v. Crow*, No. 22A622 (inmates apparently declining to file a petition for a writ of certiorari with this Court). Glossip's application likewise does not depend on the merits of the petition for writ of certiorari currently pending before this Court in No. 22-6500. The State stands by the arguments in its brief in opposition in Case No. 22-6500; as the State there explained, this Court lacks jurisdiction over claims procedurally defaulted by adequate and independent state law grounds.

The issue underlying the application here, and that will be squarely presented in a new, forthcoming petition for certiorari, is different. Specifically, the present

application involves a due process violation under *Napue v. People of State of Illinois*, 360 U.S. 264 (1959), relating to the most critical basis to impeach the most critical witness against the defendant in a capital murder case, and the OCCA's refusal to accept a confession of error in a capital case.

Simply put, the State does not agree with everything Glossip has said in this case or in this Court and it continues to oppose the petition in No. 22-6500. But having come to the difficult but essential conclusion that Glossip's capital conviction is unsustainable and a new trial imperative, the State agrees that a stay pending resolution of Glossip's forthcoming petition is appropriate.

The State reached this conclusion about Glossip's conviction through extensive diligence. Given the ongoing concerns regarding possible misconduct during Glossip's prosecution, on January 26, 2023, the Oklahoma Attorney General retained an independent counsel, former district attorney and Republican legislator Rex Duncan, to review Oklahoma's prosecution, conviction, sentencing, and post-conviction appeals related to Glossip.

On March 27, 2023, Glossip filed a *Successive Application for Post-Conviction Relief* with the OCCA, raising a variety of claims, including a *Napue* claim about the central witness at Glossip's trial. Resp.App.1a. A week later, on April 3, 2023, the State's Independent Counsel issued his report to the Oklahoma Attorney General regarding the handling of Glossip's case. In his report, the Independent Counsel informed the Oklahoma Attorney General:

> In my view, the State must vacate Glossip's conviction due to its decades-long failure to disclose what I believe is *Brady* material, correct what I believe was false trial testimony of its star witness, and what I believe was a violation of the Court ordered Rule of Sequestration of witnesses (The Rule). In my view, this case is also permeated by failures to secure, safeguard and maintain evidence in a capital murder case….
>
> Trying any case a third time is unfortunate and rare, but I believe it is appropriate in this case.

Independent Counsel Report p. 15.[1]

The State did not agree with all findings and conclusions made by the Independent Counsel. However, the State was troubled by a *Napue* violation concerning the central witness at Glossip's trial—specifically, the fact that recently released prosecution notes appear to identify a psychiatrist, Dr. Lawrence Trombka, who treated the State's indispensable witness, Justin Sneed ("Sneed"), for a serious psychiatric condition. Resp.App.33a–37a. Despite this knowledge, the State permitted Sneed to effectively hide his psychiatric condition and the reason for his prior lithium prescription through materially false testimony to the jury. 2004 Trial Tr. Vol. 12, 64:3-8. As a result, on April 6, 2023, the State filed a Response with the OCCA confessing error and supporting Glossip's request for post-conviction relief. App.26a. In addition, the State confessed to cumulative error in response to multiple issues raised in Glossip's Post-Conviction Relief Application that, when taken together with the incorrect testimony of the State's key witness, the State believes

[1] Available at: https://www.oag.ok.gov/sites/g/files/gmc766/f/documents/2023/glossip_report_4.3.2023_redacted.pdf

establish that Glossip's trial was unfair and unreliable. App.30a–31a. Consequently, the State asserted that it was not comfortable advocating that the result of the trial would have been the same but for these errors. App.31a.

Despite the State's confession of error, on April 20, 2023, the OCCA entered an opinion and mandate denying Glossip's application for post-conviction relief. The State's support for Glossip's request for stay of execution—which will be followed by the State's acquiescence in Glossip's forthcoming petition for certiorari arising out of the OCCA's April 6 decision—follows the OCCA's refusal to give full and fair consideration, the proper deference per this Court's guidance, or accept the State's considered judgment that the conviction of Glossip can no longer be sustained.

ARGUMENT

A party seeking a stay must (1) make a strong showing that they are likely to succeed on the merits, (2) show that they will suffer irreparable injury absent a stay, (3) demonstrate that the threatened injury outweighs Defendant's injury from a stay, and (4) show that the stay will advance the public interest. *Nken v. Holder*, 556 U.S. 418, 426 (2009); *Hill v. McDonough*, 547 U.S. 573, 584 (2006).

Glossip amply meets these elements.

I. Glossip is likely to succeed on the merits of his forthcoming petition.

While the State continues to oppose the petition for writ of certiorari in No. 22-6500, the State intends to acquiesce in Glossip's forthcoming petition for writ of certiorari with respect to the OCCA's opinion and mandate issued on April 20, 2023.

Under these circumstances, this Court is overwhelmingly likely to hold the petition in No. 22-6500 and provide Glossip relief in the context of his forthcoming petition. *See, e.g., Escobar v. Texas*, 143 S.Ct. 557 (2023) (granting petition, vacating lower court opinion, and remanding in light of Attorney General's confession of error).

This Court has recognized that "[c]onfessions of error are, of course, entitled to and given great weight …." *Sibron v. New York*, 392 U.S. 40, 58 (1968). Further, this Court has indicated that a confession of error made on behalf of a state through a state official is entitled to greater weight than that of an officer of a state political subdivision, *e.g.,* a district attorney. *Id*. at 58–59.

Here, the State made its confession of error through its Attorney General who serves as "the chief law officer of the state." Okla. Stat. tit. 74, § 18. Therefore, it should be given great weight.

To be sure, confessions of error do not "relieve this Court of the performance of the judicial function." *Sibron*, 392 U.S. at 58. But the deference due to a confession of error is at its zenith when it comes to prosecutorial misconduct, particularly in a capital case. Whatever is the proper course when the government confesses error on a pure question of law, there is little scope for second guessing a state's highest law enforcement officer when he or she has lost confidence in a conviction the state has procured based on a *Napue* violation. That is particularly true in a capital case, where the prospect of executing an individual based on a conviction that the prosecutor believes is constitutionally flawed is all but unthinkable.

The OCCA nonetheless dismissed the Attorney General's confession of error, deeming it "not based in or law of fact." App. 14a. That is doubly incorrect.

Starting with the law, this case is on all fours with *Escobar*, a capital case in which this Court recently GVRed. *See Escobar v. Texas*, 143 S. Ct. 557 (2023). The OCCA dismissed *Escobar* in a footnote, App.14a n.8, but the grounds on which it distinguished that case are both legally irrelevant and factually inaccurate. The OCCA asserted that, in *Escobar*, the State never "confessed error before its own state courts as the Attorney General has done [here]." App.15a n.8. That is untrue. The State did, in fact, confess error in its own state courts. *See* Brief of Respondent State of Texas in Support of Petitioner at 29-30, *Escobar v. Texas*, No. 21-1601 (2023), 2022 WL 4781414.

More important, the error confessed in *Escobar* is the same basic error here: In both cases, the government learned during post-conviction proceedings that the prosecution likely violated the due process obligations set forth in *Napue*. There is no reason why this Court would be less likely to grant relief here than it was there. In all events, whatever force the OCCA believed the timing of the confession had, it certainly has no effect on this Court's authority to grant a stay of execution in these circumstances. *Cf. Wearry v. Cain*, 577 U.S. 385 (2016) (granting summary reversal, on post-conviction review, of a 14-year-old murder conviction on the ground that the prosecution did not satisfy its obligations under *Brady*).

As for the facts, the State's confession of error is amply supported by the record. "[I]t is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." *Napue*, 360 U.S. at 269. Likewise, "[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Id*. This principle also "does not cease to apply merely because the false testimony goes only to the credibility of the witness," especially when that witness was the acknowledged perpetrator of the murder and the key witness in his alleged accomplice's capital trial. *Id*.

Here, the State's conviction of Glossip was obtained through false testimony that was not corrected by the prosecution. Specifically, the State's indispensable witness at Glossip's second trial, Justin Sneed, was the person who actually delivered the fatal blows to the victim. Evidence that was previously withheld by the State reveals that Sneed appears to have been diagnosed with bipolar affective disorder[2] in 1997 after the murder while in the custody of the Oklahoma County Jail. Resp.App.33a–38a. Sneed was prescribed lithium by a psychiatrist. *Id.* Based on newly released interview notes that were previously withheld by the State, the prosecutor was aware that Sneed had been treated by a "Dr. Trumpet." Resp.App.34a.

[2] Glossip redacted this diagnosis in his Successive Application for Post-Conviction Relief, (March 27, 2023), Case No. PCD-2023-267 with the OCCA. Resp.App.15a. The Attachments to that Application were also redacted by Glossip. Resp.App. 33a–38a. However, the State did not redact this diagnosis in its filing with the OCCA because the State believes that the public interest in this information outweighs the privacy concerns. App.28a.

Glossip argued to the OCCA that "Dr. Trumpet" referred to Dr. Lawrence Trombka. Resp.App.15a. The State believes this is a reasonable conclusion, especially given that it is the State's understanding that Dr. Trombka was generally known to be the sole psychiatrist treating patients at the Oklahoma County Jail in 1997. Resp.App. 37a. Moreover, Sneed was administered a competency exam in July 1997 by a psychologist, Dr. Edith King, Ph.D., which likewise documented that Sneed relayed he was on lithium "after his tooth was pulled" and "denied any psychiatric treatment in his history." State of Oklahoma's Response to Petitioner's Successive Application for Post-Conviction Review (Sept. 16, 2015), Case No. PCD-2015-820, Exhibit B.

Despite this reality, prosecutors allowed Sneed to effectively hide his serious psychiatric condition and the reason for his prior lithium prescription through false testimony to the jury. At the second trial in 2004, Sneed testified as follows on direct examination by the prosecutor:

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

2004 Trial Tr. Vol. 12, 64:3-8. (emphasis added).

In fact, as shown above, Sneed had been treated by a psychiatrist in 1997. Resp.App.36a–38a. Further, he was not prescribed lithium for a cold. Instead, he was prescribed it to treat his serious psychiatric condition that combined with his known methamphetamine use would have had an impact on his credibility and memory recall in addition to causing him to become potentially violent or suffer from paranoia. *Id.* Therefore, Sneed made false statements to the jury. Further, the newly disclosed notes indicate that the prosecutor knew or should have known of Sneed's treatment by a psychiatrist. Consequently, consistent with its obligations under *Napue*, the State believes that the prosecutor should have corrected Sneed's false testimony.

The State is also not comfortable asserting that the outcome of the trial would have been the same if Sneed had testified accurately and been subject to cross-examination based on his serious condition. There is no dispute that Sneed was the State's indispensable witness at the second trial and that Glossip's fate turned on Sneed's credibility.

Sneed personally bludgeoned the victim to death, and his testimony linking Glossip to the murder was central to the conviction and death penalty aggravator (murder for remuneration). If Sneed had accurately disclosed that he had seen a psychiatrist, then the defense would have likely learned of the serious nature of Sneed's psychiatric condition and the true reason for Sneed's lithium prescription. With this information, plus Sneed's history of drug addiction, the State believes that a qualified defense attorney likely could have attacked, *inter alia*, Sneed's ability to

properly recall key facts at the second trial and provide a viable alternative theory of the case that did not involve Glossip. Stated another way, the State has reached the difficult conclusion that the conviction of Glossip was obtained with the benefit of material misstatements to the jury by the State's key witness.

Accordingly, the State feels compelled, consistent with *Napue*, to correct these material misstatements by its key witness and request that the case be remanded to the district court for further proceedings. As a result, the State has confessed error and agrees that Glossip is likely to prevail on the merits of his forthcoming petition.[3]

II. The balance of equities strongly favors a stay of execution.

The equities strongly favor a stay of execution. As Glossip indicated in his Application, he will clearly suffer irreparable harm if he were executed despite the State's conclusion that the conviction can no longer be supported. Further, given its confession of error, the State will not suffer any harm through the grant of a stay. Finally, the public interest is clearly served by not executing a man after the State has concluded that the conviction cannot be sustained. Therefore, the balance of equities strongly favors a stay of execution in this case.

CONCLUSION

This Court should grant the application for a stay of execution.

[3] Because that petition will be filed promptly and the petition in No. 22-6500 is likely to be held pending resolution of the forthcoming petition, there is no reason to require Glossip to re-file a stay request in conjunction with his forthcoming petition or to refrain from granting the stay of execution at this juncture.

Respectfully submitted,

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