No. 22-7466

In the
Supreme Court of the United States

RICHARD EUGENE GLOSSIP,
Petitioner,
v.
STATE OF OKLAHOMA,
Respondent.

On Writ of Certiorari to the Oklahoma Court of Criminal Appeals

REPLY BRIEF FOR RESPONDENT IN SUPPORT OF PETITIONER

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The OCCA had no valid basis to order Oklahoma to execute Richard Glossip over the objection of the State's chief law officer. Indeed, its decision was riddled with errors from start to finish. When the prosecution takes the extraordinary step of confessing error in criminal cases, courts are obliged to take the confession seriously, not apply procedural obstacles the State has waived. That is particularly true in capital cases, and doubly so when the confessed error involves prosecutorial misconduct. Yet the OCCA all but chastised the State for its confession. Court-appointed Amicus tries to rehabilitate that blithe dismissal, but his arguments not only require a massive supplementation of the OCCA's spartan reasoning, but still fall short. According to Amicus, this Court is powerless to correct glaring constitutional errors and prevent a man from being sent to his death, because (Amicus says) the State failed to rearticulate its procedural-bar waiver with sufficient precision and because the OCCA deviated from previous practice in an earlier round of Glossip's case. Those arguments fail on their own terms: The State's procedural-bar waiver was clear to the OCCA; and Glossip's case represents the *first and only* time in which the OCCA has rejected such a waiver. *Cf. Cruz v. Arizona*, 598 U.S. 17, 29 (2023). Moreover, there was nothing adequate or independent about the OCCA's cursory dismissal of troubling and confessed federal constitutional errors. The OCCA misapplied this Court's caselaw, mentioned state-law standards only in passing, and minimized serious and confessed prosecutorial misconduct.

Amicus' efforts to defend the judgment on the merits fare no better. He attempts to minimize the import of the prosecution's concealed notes, insisting that they reveal only the mundane fact that Sneed "was prescribed lithium by a psychiatrist, as opposed to another medical specialist." Br.29. But there is a world of difference between a star witness with bipolar disorder and one with a toothache, as even Sneed appreciated. That repeatedly concealed fact would have opened the door to crippling impeachment and all manner of questions about the diagnosis and why Sneed falsely denied having seen a psychiatrist. And if the best Amicus can muster on materiality is to claim that devastating impeachment evidence is immaterial because the State's star witness' credibility was already damaged beyond repair, then the *Brady* violation is plain as day, as is (regrettably) the motivation for the *Napue* violation. Moreover, efforts by various amici to offer alternative takes on Smothermon's notes only underscore that the due process violations foreclosed any adversarial testing during the trial and that the OCCA denied Glossip's alternative request for an evidentiary hearing.

The judiciary is tasked with impartially adjudicating cases. It is not supposed to cling to convictions and order the ultimate deprivation of liberty when even the prosecutors have lost faith in the basic fairness of the prosecution and waived any procedural bars. When a prosecutor confesses constitutional error, he follows the best of our traditions. In dismissing that confession, invoking waived procedural bars, and minimizing reinforcing *Brady* and *Napue* errors, the OCCA deviated from those traditions. Its decision cannot stand.

ARGUMENT

I. Prosecutorial Misconduct Committed And Confessed By The State Violated Due Process.

A. Glossip's *Brady* and *Napue* Rights Were Violated.

1. Withholding evidence of Sneed's psychiatric treatment violated *Brady*.

As the Attorney General, Independent Counsel, and even Ms. Smothermon's co-counsel all now recognize, the suppressed evidence that Sneed was being "treat[ed] for bipolar disorder" by a psychiatrist is *Brady* material. JA940; *see* Rex Duncan, *Independent Counsel Report in the Matter of Richard Eugene Glossip* 11-13 (Apr. 3, 2023), https://tinyurl.com/4xefhhez ("Duncan Report"). The defense could have used that withheld evidence in manifold ways: to attack Sneed's overall credibility; to directly impeach his (false) testimony about never having seen a psychiatrist; and to advance an alternative theory of the murder—that it was a spontaneous product of Sneed's bipolar-disorder- and illicit-drug-induced mania, rather than Glossip's pre-planning. Amicus' counterarguments are unpersuasive.

Amicus begins by denying that "evidence [was] 'suppressed by the State.'" Br.39. That blinks reality. It is undisputed that prosecutors never turned over evidence that Sneed was being treated for bipolar disorder while in custody and that lithium was prescribed as treatment for that serious condition, not for a cold by mistake. It is equally undisputed that

prosecutors never turned over Smothermon's notes, which linked Sneed's lithium to the jail psychiatrist. There is simply no denying that the prosecutors suppressed *Brady* material.

The disclosure of a pretrial competency report did not make up for the withheld evidence. *Contra* Br.39, that report simply repeats the same falsehoods Sneed offered at trial: It relates that "Sneed denied any psychiatric treatment in his history and said he has never been hospitalized or had outpatient counseling," and that he was "taking lithium at the jail and said it was administered after his tooth was pulled." JA700-01. Worse, it states that Sneed *did not "ha*[*ve*] *any serious mental problems*." JA701 (emphasis added). The report thus did not remotely excuse the failure to disclose that Sneed had been treated by a psychiatrist for bipolar disorder.

The suppressed evidence was plainly "favorable to" Glossip. *Contra* Br.38. It would have provided direct and devastating impeachment evidence showing that Sneed was lying when he told the jury he had "never seen no psychiatrist or anything." JA313; *see* JA940 (sworn affidavit from prosecutor Gary Ackley). That alone suffices: When "the 'reliability of a given witness may well be determinative of guilt or innocence,'" evidence that undermines his credibility is favorable to the defense, full stop. *Giglio v. United States*, 405 U.S. 150, 154 (1972). And despite what Amicus suggests, there is no too-incredible-to-impeach exception. The fact that Sneed's credibility already hung by a thread, if anything, makes the impeachment evidence more critical. And there is a fundamental difference

between evidence showing a witness to be generally unreliable or motivated to cooperate, and evidence that proves the witness is willing to lie on the stand. In addition, the defense could have used the suppressed evidence to argue that Sneed murdered Van Treese during a "manic" or "paranoid" episode related to his bipolar disorder. JA932; *see* JA964-65, 968; Glossip.Br.10-11.

Amicus errs in suggesting that the suppressed evidence revealed only that Sneed "took lithium from a psychiatrist," not his "diagnosis with bipolar disorder." Br.41. That slices matters too thinly. At a minimum, the suppressed notes revealed that Sneed took lithium from a psychiatrist, which alone would have been sufficient to impeach him. Furthermore, the prosecutors not only suppressed Smothermon's notes, but also blocked Glossip from obtaining the underlying records demonstrating that Sneed's lithium prescription was for a diagnosed bipolar disorder. As Dr. Trombka's affidavit explains, the Oklahoma County Jail kept a medical file on Sneed—which included a medical information sheet documenting that Sneed had already been diagnosed with bipolar disorder when he was transferred to the Oklahoma Department of Corrections on July 8, 1998, and clarifying the reason for the lithium—but the file was not disclosed to the defense. *See* JA1002-03, 1005. By failing to disclose those records and suppressing Smothermon's notes, which would have underscored the importance of those records and directly revealed the link between the lithium and the jail psychiatrist, the prosecution not only precluded Glossip from learning the truth, but was able to advance the false theory that Sneed was prescribed lithium mistakenly.

Amicus' suggestion that Smothermon's notes "are not 'material,'" Br.40, fares even worse. Amicus pays lip-service to the rule that "[m]ateriality must be assessed in light 'of the entire record,'" Br.34, but fails to apply it. "[T]he State's entire case relied" on Sneed's testimony. JA29. Unless the jury believed Sneed, there was essentially no way to conclude that Glossip was more than an accessory after the fact. *See* JA28. And, as the OCCA observed in unanimously reversing Glossip's initial conviction, "[t]he evidence at trial tending to corroborate Sneed's testimony was extremely weak." JA23; *see also* JA555-59. The reality that "Sneed was nobody's idea of a strong witness," Br.37, only makes the suppression of devastating impeachment evidence more material. If Sneed's credibility already hung by a thread, material demonstrating that he was willing to lie on the stand under oath could easily have been the decisive blow.

2. The *Brady* violation was exacerbated by a *Napue* violation.

Smothermon's long-suppressed notes reveal that the prosecution knew Sneed had been prescribed lithium by a psychiatrist. Yet the prosecution not only suppressed that information in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), but further concealed the truth by eliciting false testimony in violation of *Napue v. Illinois*, 360 U.S. 264 (1959). That separate constitutional violation compounded the *Brady* violation and prejudiced Glossip for the same basic reasons.

Amicus wisely declines to defend the OCCA's speculation that Sneed "was more than likely in denial of his mental health disorders," JA991, as that at best

indicates why Sneed lied, not that he told the truth. Amicus' effort to supply an alternative rationale goes nowhere. Sneed testified that he had "never seen no psychiatrist or anything" and did not "know why" he was given lithium, suggesting he mistakenly received it when he "asked for some Sudafed because [he] had a cold." JA312-13. That was false—and that conclusion does not rest solely on Sneed's statement to Smothermon, *contra* Br.33. Sneed's (undisclosed) medical information sheet relates that Sneed had been diagnosed with "bi-polar" and prescribed "lithium." JA1005. "[T]he only medical health professional who would have ordered Mr. Sneed to be prescribed lithium" was Dr. Trombka, "the sole psychiatrist" at the jail where Sneed was held. JA1002-03. And even if somehow some other psychiatrist prescribed lithium for his bipolar disorder, his testimony that he had "never" seen a psychiatrist was plainly false.

Contra Br.34, Smothermon "knew Sneed's testimony was false." Her handwritten notes indicate that Sneed told her, in a private conversation, that "Dr. Trumpet" had prescribed him lithium. JA927. And the idea that the prosecution could not connect "Dr. Trumpet" with Dr. Trombka—who "was generally known to be the only psychiatrist treating patients at the Oklahoma County Jail in 1997," JA975—just does not wash. *See* Duncan Report 11-12. Indeed, regardless of whether she knew the precise diagnosis, Smothermon at least had to know that Sneed had seen the jail psychiatrist and been prescribed lithium for psychiatric reasons. Consequently, she knew Sneed was lying when he testified under oath that he had "never seen no psychiatrist or anything" and did not

"know why" he was given lithium. JA312-13. That readily satisfies *Napue*'s knowledge requirement.

Materiality is also readily satisfied. Amicus concedes that *Napue* requires only "a 'reasonable likelihood'" that "false testimony could … have affected the judgment of the jury." 360 U.S. at 271; *see* Br.36, 40. And, as explained, it is highly likely that any remaining credibility would have been shattered had jurors known Sneed was suffering from a serious mental illness and lied about it. *See* pp.4-6, *supra*.

Amicus tries to minimize Sneed's dissembling by suggesting he conveyed "that he had been *prescribed* lithium." Br.35 (emphasis added). In fact, Sneed tried to pass off the lithium as a mistake, testifying that he "asked for some Sudafed because [he] had a cold, but then shortly after that somehow they ended up *giving* [*him*] Lithium for some reason." JA312 (emphasis added). Given that, "a reasonable jury" certainly would *not* "have understood that it was to treat a mental-health condition." *Contra* Br.35. Instead, the jury (and defense counsel) would have understood exactly what Sneed suggested—i.e., that he was given lithium by mistake. Moreover, Sneed's lie was not a simple matter of being prescribed "lithium from a psychiatrist, rather than some other medical provider," Br.35; it prevented the jury from learning that Sneed was suffering from a serious but untreated mental disorder when he murdered Van Treese—and that, when asked about it at trial, he perjured himself.

Keeping that information from the jury was plainly material. As Amicus concedes, the jury already had ample reason to doubt Sneed's story. These additional revelations could have easily

removed any remaining doubt on that score. As emphasized, it is one thing for a witness to have a motive to lie or gaps in his story. It is another for the jury to watch the absolutely central witness take an oath and then lie on the stand. And when the lie forecloses inquiry into an alternative explanation for the crime that would have relegated Glossip to an accessory after the fact, there can be no serious doubt that a prosecutor's failure to correct the lie is reversible *Napue* error. That was the conclusion of multiple independent investigations, and it was the conclusion that an Attorney General who has opposed relief in this very case (and numerous other capital cases) reluctantly reached after ordering an independent review. Despite Amicus' best efforts, there is simply no basis for avoiding that conclusion.

Perhaps recognizing that the OCCA's actual judgment—dismissing serious *Brady* and *Napue* errors without any need for further factual development—is indefensible, Amicus briefly argues (in the alternative) that "the Court should remand for further fact development" on "the meaning of the Smothermon notes and Sneed's medical history." Br.42. Other amici go further and offer alternative explanations for the notes by reference to extra-record materials. The State does not think an evidentiary hearing is necessary. Under any reading of the notes, prosecutors violated *Brady* by withholding material evidence that would have allowed Glossip to learn that Sneed was prescribed lithium for a bipolar diagnosis in violation of *Brady*. And even apart from the notes, the prosecution blocked Glossip from obtaining medical records that made the reason for Sneed's lithium prescription crystal clear. The failure to

comply with *Brady* alone suffices to order a new trial and obviate the need for an evidentiary hearing. *See* pp.3-6, *supra*. What is more, under any reasonable reading of the notes, Smothermon elicited false testimony in violation of *Napue*; as noted, that is the conclusion reached, based on the State's own records, by multiple investigations and by an Attorney General not predisposed to confess error.

That said, had the OCCA vacated Glossip's scheduled execution and ordered an evidentiary hearing to consider the possibility of a less damning explanation for Smothermon's notes, the Attorney General would have gladly participated, and there would have been no need for this Court's immediate intervention. Indeed, Glossip requested an evidentiary hearing as an alternative remedy, and the State did not oppose that relief. JA923, 973-79. The State's only interest here is ensuring that justice is done in its courts. To the extent an evidentiary hearing will further that end, rather than produce unnecessary delay, the State has no objection. But the parties are here because the OCCA waved away serious *Brady* and *Napue* violations and refused to order an evidentiary hearing or grant any other relief. With or without instructions to hold an evidentiary hearing on remand, that judgment should be vacated.

B. The OCCA Failed to Give Meaningful Weight to the State's Confession of Prosecutorial Misconduct.

This Court's grant of certiorari encompassed the question whether the OCCA erred by summarily rejecting the Attorney General's confession of error. *See* 144 S.Ct. 691; Pet. i. The Attorney General has

thoroughly briefed the issue, explaining that a State's chief law officer's confession of prejudicial prosecutorial misconduct in a capital case merits respectful consideration, not the back of the hand. AG.Br.31-40. Amicus asks this Court to bypass this issue altogether because Glossip's brief does not separately address it. While this Court can certainly reverse without reaching this issue, the OCCA's failure to accord any weight to the State's confession, and its related rejection of the State's effort to waive procedural hurdles, are properly before this Court and provide additional grounds for reversal.

1. Confessions of error demand respectful consideration, especially when they relate to the State's own prosecutors' misconduct.

This Court has long held, in the context of both state and federal prosecutions, that "[c]onfessions of error are … entitled to and given great weight." *Sibron v. New York*, 392 U.S. 40, 58 (1968); *see Young v. United States*, 315 U.S. 257, 258 (1942). That rule follows from first principles. A prosecutor confessing error is no ordinary litigant. The prosecutor "transcends" the role of "an adversary," *United States v. Bagley*, 473 U.S. 667, 675 n.6 (1985); he is a "peculiar … servant of the law," *Berger v. United States*, 295 U.S. 78, 88 (1935), whose "special duty [is] to seek justice, not merely to convict," *Connick v. Thompson*, 563 U.S. 51, 65-66 (2011). State Attorneys General take the same oath to uphold the Constitution as the federal Attorney General and state-court judges. *See* U.S. Const. art. VI, cl.3. And State Attorneys General are uniquely positioned to identify

prosecutorial misconduct in state courts and determine when it renders a conviction unsustainable. Accordingly, when (as here) a State's chief law officer confesses prosecutorial misconduct, a court may not (as the OCCA did) simply brush the confession aside.

Amicus concedes that *this Court* gives "great weight" to confessions of error, Br.44, but maintains that *state courts* need not give confessions *any* weight, Br.43-47. That is mistaken. As noted, this Court has given that "great weight" in cases arising out of state and federal court. *See, e.g.*, *Sibron*, 392 U.S. at 59. And the respect owed to prosecutors' confessions flows from federal constitutional principles rooted in the Oath and Due Process Clauses. Prosecutors need not initiate prosecutions at all and have substantial discretion over which charges to pursue and which evidence to admit. That discretion does not exist to empower prosecutors, but as a liberty-protecting safeguard. When a prosecutor errs on the side of not bringing charges, she errs on the side of liberty. The same is true of confessions of error. When the State's chief law officer concludes that a prosecution transgressed constitutional limits and a conviction once obtained is no longer defensible, the courts must give that grave and liberty-enhancing judgment respectful consideration.

None of Amicus' cases holds otherwise. They merely reject the extreme view that a district attorney has "power to instruct a court to undo [a given] verdict" without *any* judicial review. *See Commonwealth v. Brown*, 196 A.3d 130, 142-47 (Pa. 2018); *Parlton v. United States*, 75 F.2d 772, 773 (D.C. Cir. 1935). They also appropriately refuse to rubber-

stamp confessions of error where the government irrationally "oscillated" between two positions, *Johnson v. McCaughtry*, 265 F.3d 559, 564 (7th Cir. 2001), or "did nothing to demonstrate … that it ha[d] diligently reviewed the record," *Andonian v. United States*, 2020 WL 6049933, at *7 (C.D. Cal. Aug. 10, 2020), *aff'd*, 2022 WL 4462695 (9th Cir. Sept. 26, 2022). But even Amicus' proffered cases recognize that confessions of error are "afforded 'great weight.'" *Id.*; *see also Brown*, 196 A.3d at 148; *People v. Alvarado*, 184 Cal.Rptr. 483, 492 (Ct. App. 1982).

Here, that principle is at its apex. The confession of error came not from a lone district attorney, but from Oklahoma's chief law officer. And that judgment followed an exhaustive review, conducted after carefully weighing the recommendation of an independent counsel who had reviewed the case in its entirety—following a separate, legislatively commissioned investigation reaching the same conclusion. *Cf. Wharton v. Superintendent*, 95 F.4th 140, 145-46 (3d Cir. 2024) (government confessed error despite manifest unfamiliarity with record); *Andonian*, 2020 WL 6049933, at *7 (same). Under these circumstances, the Attorney General's confession demanded respectful consideration, not blithe dismissal.

2. The OCCA further erred in dismissing *Escobar* and ignoring the practical effect of its decision.

The OCCA failed to give the Attorney General's confession the respectful consideration it deserved. Indeed, the OCCA did not substantively engage with the confession at all: It summarily rejected it as "not

based in law or fact." JA990; *see* JA981-82. That *ipse dixit* is divorced from reality and lays bare the OCCA's refusal to give the confession its due.

The OCCA's perfunctory dismissal of the confession is not meaningfully different from what transpired in *Ex parte Escobar*, 2022 WL 221497, at *1 (Tex. Crim. App. Jan. 26, 2022). There, the Texas court was aware that the prosecution had confessed error and supported vacating a capital conviction, but the court denied relief without even acknowledging the confession. *See Ex parte Escobar*, 676 S.W.3d 664, 666, 669 (Tex. Crim. App. 2023). This Court vacated and remanded "for further consideration in light of the confession of error." 143 S.Ct. 557, 557 (2023).

Amicus does not defend the OCCA's effort to distinguish *Escobar* on the counterfactual ground that "Texas confessed error in a brief before the United States Supreme Court," rather than "before its own state courts." *Compare* JA990 n.8, *with* Br.47. Instead, he claims *Escobar* is "different from" this case because the Texas court "had not considered" the confession of error. Br.47. That is a distinction without a difference. The Texas court *was* "aware that the State was actively supporting Applicant's request for relief," *Escobar*, 676 S.W.3d at 666; it just did not deign to address it, *id.* at 673. This case is of a piece: The OCCA rejected the confession of error without giving it the weight due a coordinate oath-bound officer and without any meaningful analysis.

Lacking an answer to what the OCCA actually did—or to the reality that this Court has *never* countenanced a death sentence over a State's confession of error—Amicus attacks a strawman. The

Attorney General has not claimed the power to "compel judges to vacate criminal convictions" or attempted to "reduce[]" the OCCA to a "mere rubber stamp[]." *Contra* Br.48. The Attorney General recognizes that courts "ha[ve] the final say" on questions of law. AG.Br.36; *see* AG.Br.2. But courts still must afford significant weight to confessions of error—particularly when they come from a sovereign's chief law officer, pertain to serious prosecutorial misconduct, and involve the ultimate penalty.

At both the state and federal level, our system of criminal justice is predicated on the notion that an individual will not be deprived of life or liberty unless a prosecutor decides to bring criminal charges and the judiciary has ensured that the prosecution comports with the Constitution. The division of responsibility between the prosecutor and the judiciary is a critical safeguard of individual liberty. The prosecutor's special role and responsibility does not disappear once a conviction is secured. *Cf.* Okla. R. Prof. Cond. 3.8(h). When a prosecutor becomes aware of evidence of prosecutorial misconduct that rises to the level of prejudicial constitutional error, she is duty-bound to confess error. When a prosecutor takes that momentous step, she "follows the best of our traditions." *Zorach v. Clauson*, 343 U.S. 306, 314 (1952). But when courts treat that confession like any other litigation position of any other litigant, they deviate from those traditions.

II. There Is No Impediment To Reversal.

A. The OCCA's Refusal to Accept the State's Waiver of §1089(D) Was Part and Parcel of Its Dismissal of the State's Confession and an Unprecedented Departure.

1. In responding to Glossip's most recent post-conviction application, the State intentionally eschewed reliance on the procedural hurdles of §1089(D)(8)(b). That waiver was part and parcel of the State's confession of error and the OCCA understood it as such. The OCCA rejected it and made clear that the decision to waive or apply §1089(D) was its alone. *See* JA982, 985, 990. To the best of the State's knowledge, Glossip's case represents the only time the OCCA has *ever* rejected the State's decision to waive this procedural bar.

The OCCA's approach was not just unprecedented; it *broke* from the court's own precedent. In *McCarty v. State*, 114 P.3d 1089 (Okla. Crim. App. 2005), the State "waived procedural bars and consented to an evidentiary hearing" due to serious concerns about the integrity of the conviction. *Id.* at 1090. The OCCA accepted that waiver and "remanded the case for an evidentiary hearing." *Id.* When the case returned to the OCCA, the State again "waived any procedural bars that may arguably apply" to three of McCarty's claims. *Id.* at 1091 n.7, 1092 n.13, 1094 n.24. The OCCA honored each waiver, ignored the procedural hurdles that §1089(D)(8)(b) would otherwise impose, and proceeded to adjudicate those claims on the merits. *See id.* at 1091-95.

Here, by contrast, the OCCA summarily rejected the Attorney General's efforts to waive §1089(D)(8)(b).

JA775 ("This Court alone will determine whether" to set aside procedural barriers); *see* JA982, 985, 990. In so doing, the OCCA departed not only from past practice, but from basic rules of adversarial litigation that are central to federal- and Oklahoma-court adjudication. *See, e.g.*, *Wood v. Milyard*, 566 U.S. 463, 472-73 (2012); *Reddell v. Johnson*, 942 P.2d 200, 202 (Okla. 1997). Simply put, the OCCA's refusal to honor the State's waiver was "so novel and unfounded that it does not constitute an adequate state procedural ground." *Cruz*, 598 U.S. at 29.

2. Amicus' primary effort to defend the OCCA is to suggest that the Attorney General's waiver was insufficiently clear or "deliberate[]." Br.25-26, 28. Needless to say, the OCCA did not fault the Attorney General for ambiguity or ask for clarification. It understood the waiver to be part and parcel of the State's confession and gave it the same weight it gave to the confession on the merits, which is to say none. To the extent Amicus suggests that the OCCA applied §1089(D) because it did not understand the State to have waived it, Amicus is mistaken.

The State's brief incorporated by reference a prior waiver of state-law procedural requirements and expressly requested that Glossip's claims be squarely addressed on the merits. JA975; *see* JA717-18. The State reinforced its intent by declining to invoke §1089(D) in its brief, *see* JA973-979, citing instead the less-demanding standard of §1089(C), *see* JA976. Amicus cannot deny that the Attorney General expressly "adopt[ed] and incorporate[d] by reference" "*all*" of its prior briefing that was "consistent with [its] confession of error." JA975 (emphasis added). Amicus

suggests, however, that the global incorporation failed to capture the State's prior waiver of §1089(D)(8)(b) because the earlier waiver was limited to "the claims within [Glossip's] fourth post-conviction application." Br.26 (quoting JA717). But that language was designed to distinguish prior successive petitions in which the State had invoked procedural bars. The language was not designed to exclude Glossip's fifth application—which *had not yet been filed*. Once that application materialized, the State's response to it expressly incorporated the waiver "consistent with [the Attorney General's] confession of error," JA975; reviving that objection after having waived it in the previous round, by contrast, would have been wholly inconsistent with the confession. The OCCA understood all this, and never expressed any doubts or asked for clarification. Instead, the OCCA rejected the waiver, just as it had rejected the State's effort to waive §1089(D) vis-à-vis Glossip's fourth application even though the State's waiver there was a paragon of clarity. *See* JA717-18, 775, 990.[1]

After arguing that the Attorney General's waiver was insufficiently clear, Amicus suggests a different sort of waiver. But *contra* Br.27, the Attorney General has never "told this Court" (or any other) that the OCCA can reject the State's considered decision to

[1] Nor does the Attorney General's predecessor's statement vis-à-vis Glossip's fourth application, that he intended to "raise all procedural defenses going forward," JA719, move the needle. The Attorney General's predecessor could neither predict the future—his aspirational statement pre-dated the release of Box 8, the independent counsel investigation, and Glossip's fifth application—nor bind his successors. *See, e.g.*, *Biodiversity Assocs. v. Cables*, 357 F.3d 1152, 1172 (10th Cir. 2004).

waive §1089(D). The lone brief Amicus cites merely acknowledged the OCCA's rejection of the waiver vis-à-vis Glossip's fourth application, and explained that—*assuming the bar applied*—it was an adequate and independent ground for rejecting the claims in that application. *See* No. 22-6500 BIO.12-20 & n.5.

3. Amicus' attempts to defend the substance of the OCCA's unprecedented rejection of the Attorney General's waiver are weaker still. Amicus does not identify *any* case—other than Glossip's fourth application—in which the OCCA has rejected an Attorney General's waiver of §1089(D)(8)(b). *See* Br.27-28. That the OCCA dismissed the State's waiver with respect to *two* of Glossip's post-conviction applications, but no others, makes the departure from standard practice vis-à-vis Glossip all the more extraordinary. *Contra* Br.27. And Amicus does not (and cannot) dispute that the OCCA's uniform prior practice was to honor such waivers. *See* Br.27-28 (citing *McCarty*). The question, then, is not whether *McCarty* "announce[d] a categorical rule that an express waiver of a procedural bar must always be accepted," Br.28, but whether the OCCA's rejection of the Attorney General's waiver was a "novel and unfounded" approach without "substantial support in prior state law." *Cruz*, 598 U.S. at 26, 29. It plainly was.

Amicus errs in suggesting that *McCarty* merely "shows … that the OCCA has *discretion* to accept [or reject] a waiver of a procedural bar." Br.28. *McCarty* contains absolutely no indication that the OCCA understood itself to be exercising its own discretion rather than applying age-old principles of party

presentation; to the contrary, the court simply noted each waiver of §1089(D) and proceeded to honor the State's request to adjudicate each claim the merits. *See* 114 P.3d at 1091 & n.7, 1092 & n.13, 1094 & n.24. Further, given the close parallels between §1089(D) and AEDPA's procedural bar, *see* Br.13, 17, there is every reason to read *McCarty* as reflecting well-entrenched Oklahoma principles of party presentation, *see, e.g.*, *Reddell*, 942 P.2d at 202, and following the federal rule that courts may not "override … a State's deliberate waiver" of procedural defenses to a habeas petition, *Wood*, 566 U.S. at 466.

Finally, the "consequences of the [OCCA's approach] compound its novelty." *Cruz*, 598 U.S. at 28. Glossip's case represents both the first time the OCCA has rejected an intentional waiver of §1089(D) *and* the first time it has ordered the State to carry out an execution over the constitutional objections of its chief law officer. It is not clear that a State that provides a post-conviction review process can constitutionally prevent prosecutors from waiving an obstacle to confessing error and adjudicating federal constitutional claims on the merits. But this Court need not resolve that federal constitutional question. Given the doubly unprecedented and unfounded nature of the OCCA's application of §1089(D)(8)(b), it does not constitute an adequate state ground for rejecting Glossip's claims. State law thus presents no barrier to resolving the merits of the *Brady* and *Napue* issues and granting Glossip relief.

B. The OCCA's §1089(D)(8)(b) Reasoning Was Neither Adequate nor Independent From Its *Brady* and *Napue* Errors.

Even apart from the unprecedented nature of the OCCA's reliance on §1089(D)(8)(b) over the Attorney General's objection, the OCCA's specific application of that provision in the extraordinary circumstances here was neither an adequate nor an independent ground for its decision.

1. The OCCA's uncritical assertion that the *Brady* and *Napue* violations could have been raised earlier and did not affect the outcome is not an adequate basis for its decision.

Section 1089(D)(8)(b) is generally a valid limitation on requests for post-conviction relief in capital cases. The State routinely invokes it, and the OCCA routinely applies it to bar claims that are untimely or would not have altered the jury's decision. *See* AG.Br.41-42. Here, however, the OCCA applied that "generally sound rule" in such a manifestly erroneous manner way that it is "inadequate to stop consideration of … federal question[s]. *Cf. Cruz*, 598 U.S. at 26. The record of Sneed's repeated *denials* that he had ever seen a psychiatrist or received psychiatric treatment squarely contradicts the OCCA's assertion that Glossip "knew or should have known" that Sneed "was under the care of [a] doctor who prescribed lithium" as a "mental health treatment," JA991, and especially so in light of the prosecution's successful opposition to Glossip's discovery request for Sneed's medical records. The OCCA's conclusion that Sneed's testimony "was not clearly false," JA991, is equally

untenable. And the same goes for its unadorned conclusion that the *Brady* and *Napue* violations could not reasonably have affected the jury's decision to sentence Glossip to death. JA991-92.

Unable to defend the substance of the OCCA's application of §1089(D)(8)(b), Amicus asserts that the adequacy doctrine categorically forbids this Court from "inquiring into the correctness of a state court's application of state law." Br.23. That is not the law. This Court's decisions make clear that a state-law ruling is inadequate if it is "without fair support, or so unfounded as to be essentially arbitrary." *Cruz*, 598 U.S. at 26; *accord Lee v. Kemma*, 534 U.S. 362, 376 (2002); *Ward v. Bd. of Cnty. Comm'rs*, 253 U.S. 17, 22 (1920). The OCCA's upside-down conclusions about diligence and materiality readily meet that standard.

Amicus errs in demanding a showing that the decision below departed from "an established body" of OCCA caselaw. It is black-letter law that state-court decisions involving an "exorbitant application of a generally sound rule" are "inadequate to stop consideration of a federal question." *Lee*, 534 U.S. at 376. In *Lee*, for example, the Missouri Court of Appeals relied on well-established local rules requiring continuance motions to be made in written form, with an affidavit, that did not conflict with *any* prior state-court decision. *Id.* at 382. This Court nonetheless held that it was an "egregious" error for the state court to apply those rules under the specific circumstances of that case. *Id.* at 386-87. And in *Ward*, the Oklahoma Supreme Court dismissed claims to recover taxes that allegedly violated federal law, based on Oklahoma law precluding recovery of taxes

"paid voluntarily." 253 U.S. at 21. This Court reversed, holding that the state court's "decision that the taxes were paid voluntarily was without any fair or substantial support" in the record. *Id.* at 22-23.

Simply put, this Court's review of a federal question cannot be thwarted by a "plainly untenable" state-law ruling, even absent a conflict with an established body of caselaw. *Id.* at 22.

2. The OCCA's §1089(D)(8)(b) holding in this case was entirely dependent on its erroneous analysis of federal issues.

In many cases, the OCCA applies §1089 in ways that are wholly independent of the underlying merits. Here, however, the OCCA's state-law holding was inextricably intertwined with its analysis of Glossip's federal-law claims. The court erroneously concluded that the newly revealed evidence did not meet *Brady*'s materiality standard and proceeded to hold, based solely on this federal-law analysis, that it was also barred by §1089(D)(8)(b). JA989-90. The OCCA's state-law ruling thus "rest[ed] primarily on," and was plainly "influenced by," its resolution of a federal issue. As for *Napue*, the OCCA just rejected it on the merits, without even saying the claim was procedurally barred. JA991-92.

Amicus correctly observes that §1089 rulings do not *necessarily* depend on federal law, Br.18-19; *accord* AG.Br.50, but fails to show that the §1089 ruling *in this case* was independent of federal law. Amicus points to paragraphs 25-27 of the OCCA's decision. Br.19. But paragraph 25 just rejects (without analysis) the State's confession of error and

asserts that it "cannot overcome" §1089(D)(8), and paragraph 26 just parrots §1089(D)(8)'s requirements. JA990. And to the extent paragraph 27 "applie[s]" §1089(D)(8)(b), Br.19, the application concerns only the *Brady* claim and was hopelessly intertwined with the Court's (erroneous) federal-law ruling. AG.Br.50-51.[2]

To be clear, the Attorney General is not suggesting that "a state court's rejection of a *Brady* or *Napue* claim on procedural-default grounds c[an] *never* be independent" of federal-law rulings. *Contra* Br.22 (emphasis added). Nor is the Attorney General attempting to "impose [a] mandatory opinion-writing standard[]" on the OCCA. *Contra* Br.20. The OCCA is free to dismiss post-conviction applications on state-law grounds, federal-law grounds, or both, and its opinions can be long or short. But when, as here, the state-law analysis is entirely derivative of the federal-law analysis (*Brady*) or non-existent (*Napue*), the OCCA's federal-law analysis is not beyond this Court's power to review and correct.

[2] As noted, the *Napue* paragraph (28) does not even mention state law.

CONCLUSION

For the foregoing reasons, this Court should reverse and remand with instructions to vacate the judgment of conviction and order a new trial.

Respectfully submitted,

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