No. 22-7466

IN THE

Supreme Court of the United States

RICHARD EUGENE GLOSSIP,

Petitioner,

v.

OKLAHOMA,

Respondent.

ON WRIT OF CERTIORARI TO THE
OKLAHOMA COURT OF CRIMINAL APPEALS

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Court-appointed Amicus's brief confirms that the case against Richard Glossip hinges on the credibility of Justin Sneed. While claiming "compelling" evidence of Glossip's guilt, Amicus relies almost entirely on Sneed's testimony and the OCCA's recitation of it. *See* Br. 1, 5-6, 35 (citing JA318, 329-334 (Sneed trial testimony) and JA495-498, 504-506 (the OCCA's recitation of Sneed's testimony)). Amicus elsewhere overstates the strength of the other evidence against Glossip, by selectively discussing evidence and ignoring related prosecutorial misconduct. Because Sneed's reliability was likely determinative of guilt or innocence, the prosecution's suppression of information that could have impeached Sneed and its failure to correct his false testimony denied Glossip a fair trial.

The record amply establishes that Glossip was denied due process under *Napue* v. *Illinois*, 360 U.S. 264 (1959), and *Brady* v. *Maryland*, 373 U.S. 83 (1963). Sneed told the jury he had never seen a psychiatrist and that he was prescribed lithium for a cold. In fact, he had been treated by Dr. Trombka, a psychiatrist, who prescribed him lithium to treat bipolar disorder. That false testimony, and the prosecution's suppression of evidence revealing the truth, denied Glossip a uniquely powerful opportunity to show the jury that Sneed's memory was unreliable and that he was willing to lie on the stand.

Amicus stakes his response on baseless speculation that the prosecutor's notes might not mean Sneed was treated by Dr. Trombka for a psychiatric disorder. That theory was not the basis for the decision below, and for good reason: Independent evidence that was also withheld from Glossip confirms that Dr. Trombka treated

Sneed for bipolar disorder. Neither the State, two independent investigations, nor the OCCA has ever suggested otherwise.

On jurisdiction, Amicus again offers a theory the OCCA did not adopt. Whether courts have relied on the Post-Conviction Procedure Act or similar bars in other cases does not alter the fact that the OCCA did not clearly rely upon the Act in this case independently of federal law. And while Amicus disputes that the State waived reliance on the Act, the OCCA clearly acknowledged the State's waiver yet still rejected it, grievously deviating from prior practice.

Finally, throughout his brief, Amicus seeks to downplay the State's confession of error, claiming Glossip "abandoned" the confession. That is wrong. While Glossip no longer presses a claim that the confession of error *ipso facto* requires a new trial, the significance of the State's confession suffuses this case. On the merits, it confirms there are no material factual disputes and that Glossip's conviction violated *Napue* and *Brady*. And the confession underscores why the decision below lacks an adequate and independent state-law ground.

ARGUMENT

I. THE STATE VIOLATED *NAPUE*

A. Sneed's Testimony Was False And The Prosecution Knew It

At trial, prosecutor Connie Smothermon asked Sneed to tell the jury whether he had been prescribed any medications. He testified:

> 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.

JA312-313. Smothermon asked Sneed to confirm: "you don't know why they gave you that?" Sneed replied, "No." Having successfully neutralized Sneed's lithium prescription, Smothermon moved on. JA313.

This testimony was false, and the prosecution knew it was false and failed to correct it. Pet. Br. 24-31. Smothermon's notes of her pre-trial interview with Sneed—suppressed until early 2023—indicate Sneed was treated by a psychiatrist, Dr. Trombka, who prescribed lithium for a condition later revealed to be bipolar disorder. Pet. Br. 10-11, 25-26. All of Amicus's responses turn on speculation about the import of Smothermon's notes. That rationale was not the basis of the OCCA's decision. The OCCA deemed Sneed's testimony "not clearly false" on the theory that Sneed might simply have been "in denial of his mental health disorders." JA991. That reasoning contravenes this Court's *Napue* precedents, Pet Br. 28-29, and Amicus abandons it.

Amicus's attempted factual disputes fail. It is undisputed Sneed was prescribed lithium while jailed after his arrest, and Dr. Trombka was the "sole psychiatrist" providing "psychiatric and mental health services" to inmates at the jail at the time and thus the only person who could have prescribed Sneed's lithium. JA930-931; Supp.JA1002-1003. Contrary to Amicus's mischaracterization (at 33), Dr. Trombka did not attest that any other doctor could have prescribed lithium; he attested that "only a physician could have ordered the lithium" and that the only other doctor working at the jail "was not trained in psychiatry," "would not prescribe lithium or

any similar psychotropic drug," and would instead have "refer[red] [any] patient to [Dr. Trombka]." JA931.

Further, Amicus barely acknowledges—let alone disputes—Sneed's bipolar diagnosis. Nor can he. That diagnosis is confirmed by the Oklahoma County Sheriff's Office Medical Information Sheet, JA933; Supp.JA1005, which the prosecution had access to but Glossip did not because that document was itself suppressed in violation of *Brady* until it was recently disclosed to Reed Smith, *see* Reed Smith LLP, *Independent Investigation of* State v. Richard E. Glossip, *Fifth Supplemental Report* 8 (Mar. 27, 2023) ("Reed Smith 5th Supp."); JA930-931. Amicus questions the document's provenance, but the record shows it was sent from the Sheriff's Department to the Department of Corrections as part of Sneed's medical file and was therefore readily accessible by the prosecution and subject to *Brady*. JA931; Reed Smith 5th Supp. 8; *see also Kyles* v. *Whitley*, 514 U.S. 419, 421-422, 438 (1995) (rejecting argument that *Brady* does not extend to "evidence known only to police investigators and not to the prosecutor"). Moreover, Dr. Trombka attested that Sneed's medical records would also have included a "file … contain[ing] [his] notes and diagnosis." JA931. Glossip sought discovery of those medical records, but the State refused to disclose them and successfully blocked his discovery motion, calling it a "fishing expedition." JA620-622, 632.

Against that backdrop, the State and two independent, exhaustive investigations all agree the only reasonable conclusion is that Smothermon's notes—referencing "Dr. Trumpet" and Sneed's "lithium"—refer to Dr. Trombka and his treatment of Sneed, including the lithium he prescribed. *See* Duncan, *Independent Counsel Report in the* Matter of Richard Eugene Glossip, Oklahoma County Case CF-1997-244 12 (Apr. 3, 2023)

("Duncan Report"); Reed Smith 5th Supp. 6, 29; JA979 (describing State's "careful[] consideration" of a "voluminous record" and Independent Counsel's review). Smothermon's notes track the truth too closely to be a coincidence.

Amicus's contrary speculation relies on Smothermon's self-serving statement—notably not a denial—that she is "not convinced" that "Dr. Trumpet" referred to Dr. Trombka. But the record makes clear it does.[1] Amicus relies (at 31) on Smothermon's co-counsel, Ackley, but his affidavit states only that he "d[id] not recall" any discussion of psychiatric treatment. JA940. And Amicus's suggestion (at 31, 33) that Sneed's testimony denying psychiatric treatment must have been true because Sneed previously told the same story in his competency proceedings, *see* JA14, 700—attributing the lithium then to "tooth pain," JA700—disregards that Sneed, by Amicus's own admission (at 37), cannot be trusted.

This case is thus far afield from *Moore* v. *Illinois*, 408 U.S. 786 (1972). *See* Br. 30-31. There, a witness (Powell) testified he "observed [the defendant] enter the bar with a shotgun and shoot [the victim]." 408 U.S. at 789. Later, the State disclosed a diagram, sketched on the back of another witness's police statement, that placed Powell with his back to the door. *Id.* at 797-798. The Court concluded the diagram did not show Powell's

[1] Smothermon's explanations have shifted. In unsworn hearsay manufactured for an amicus brief, Smothermon claims her notes recorded questions Glossip's defense team posed to Sneed. Van Treese Br. App. 8a, 10a. In an interview with the State's Independent Counsel, Smothermon claims to have said "Dr. Trumpet" was a "personal note" she made to herself about a "jazz musician." *Id.* at 31a.

testimony was false because the diagram did not indicate what direction Powell was looking or that it was impossible to see the door from Powell's seat. *Id.* at 798. Here, in contrast, Sneed's testimony cannot be harmonized with the truth revealed by Smothermon's notes.

Smothermon's notes similarly confirm prosecutors' knowledge that Sneed's testimony was false. Amicus does not dispute that Smothermon attended the pretrial interview and wrote the notes. As a "seasoned capital homicide prosecutor[] in the DA's office," Smothermon "could be expected to make the connection between the jail psychiatrist and prescriptions (lithium) for mental health issues." Duncan Report 12. No one—including both independent investigators, the State, and the OCCA—has credited Amicus's theory that Smothermon was ignorant.[2]

B. The Testimony Was Material

Napue requires reversal when there is "any reasonable likelihood" false testimony "could … have affected" the verdict. *Giglio* v. *United States*, 405 U.S. 150, 154 (1972) (quoting *Napue*, 360 U.S. at 271). That standard is amply met here. Had the prosecution corrected Sneed's testimony, the jury would have had even stronger reason than it already had to doubt Sneed's truthfulness and to question his cognition and memory at the time of the crime. Pet. Br. 26-28.

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[2] Even the account constructed in the Van Treese amicus brief confirms the prosecution's knowledge. Whether Sneed told Smothermon he was prescribed lithium by Dr. Trumpet (Trombka) or reported that the defense team had asked about his being prescribed lithium by Dr. Trumpet (Trombka), the upshot is the same: The interview put Smothermon on notice of the lithium's connection to the psychiatrist.

Nothing Amicus says casts doubt on that conclusion. To start, Amicus applies the wrong materiality standard, disputing (at 37) whether the jury "would have changed its mind" had Sneed's false testimony been corrected. A *Napue* violation "corrupt[s] … the truth-seeking function of the trial process[,]" and so a conviction "must be set aside if there is any reasonable likelihood that the false testimony *could have affected* the judgment of the jury." *United States* v. *Agurs*, 427 U.S. 97, 103-104 (1976) (emphasis added).

Underscoring that the jury knew Sneed had taken lithium, Amicus contends (at 35) that the jury presumably "would have understood" on its own that the lithium was intended "to treat a mental-health condition." That explanation obscures that Sneed's false explanation for the lithium actively misled the jury into thinking the lithium was prescribed in error when he complained of a cold. JA312-313. Amicus's theory also assumes that a lay jury would have had enough specialized medical knowledge to know that lithium is used to treat mood disorders of the sort that require psychiatric care. Finally, Amicus's argument ignores that jurors' own conjecture that Sneed might have had some kind of mental-health condition is no substitute for evidence that Sneed was prescribed lithium by a psychiatrist treating him for bipolar disorder. *See Wearry* v. *Cain*, 577 U.S. 385, 390 n.3 (2016).

Amicus next speculates (at 35-36) that Sneed's false testimony might not have mattered because the prosecution presented evidence about Glossip's alleged motive and actions after Van Treese was killed. That vastly understates the significance of the testimony of Sneed, the State's "star witness." JA25. It also overstates the other circumstantial evidence. Evidence that Glossip "was likely to be fired by Van Treese," Br. 35, was weak

and attenuated—indeed, the prosecution largely shifted away from that motive theory after Glossip's first trial. *See* JA495-497. The witnesses the State relied on to promote that motive admitted they never saw or heard Van Treese tell Glossip he intended to fire him. *See* JA80, 88, 263, 390. Likewise, evidence that Glossip took steps to cover up the murder after the fact does not implicate Glossip in the murder itself. As in *Wearry*, evidence that a defendant "may have been involved in events related to the murder *after* it occurred" cannot negate the materiality of a due-process violation when the defendant has been convicted of capital murder. 577 U.S. at 393.[3] And Amicus's reliance (at 35) on Glossip's "unexplained large sum of cash" ignores that the record supported innocent explanations for that cash and that the State suppressed evidence that could have undermined the State's contrary view. Pet. Br. 15-16, 35-36.

Finally, Amicus notes (at 37) Sneed had already been impeached on other grounds. But impeachment evidence does not become immaterial merely because the witness's credibility is already in doubt—if anything, that makes the additional, potentially fatal, evidence even more critical. In *Napue* itself, Illinois argued the

[3] In claiming Glossip took "elaborate steps" to cover up the murder, Amicus again relies almost exclusively on Sneed's testimony or the OCCA's recitation of it. Br. 5-6, 35. Sneed's account aside, the evidence shows Glossip helped Sneed repair a window in Van Treese's room (from the outside) and failed to tell police until his second interview that Sneed had told him he had killed Van Treese. JA22, 228. Far from providing no "plausible reason" for these actions, Br. 35, Glossip explained he did not initially believe Sneed when he said he killed Van Treese and did not want to involve himself in any trouble. JA230-231; *see also* Reed Smith, *Independent Investigation of* State v. Richard E. Glossip*: Final Report* 25 (June 7, 2022) (quoting January 9, 1997, interrogation of Richard Glossip).

false testimony was immaterial because "the jury [had been] apprised of other grounds for believing that the witness may have had an interest in testifying against petitioner," but the Court rejected that argument, saying it could not "turn[] what was otherwise a tainted trial into a fair one." 360 U.S. at 270. In *Banks* v. *Dretke*, this Court again rejected the argument that there was no material *Brady* violation because the witness had already been "heavily impeached at trial," holding instead that "one could not plausibly deny the existence of the requisite 'reasonable probability of a different result' had the suppressed information been disclosed to the defense." 540 U.S. 668, 702-03 (2004). And in *Wearry*, suppressed impeachment evidence was material because the witness's "credibility, already impugned by his many inconsistent stories, would have been further diminished" by further impeachment. 577 U.S. at 393. The same is true here.

II. THE STATE VIOLATED *BRADY*

The prosecution's failure to disclose evidence of Sneed's psychiatric treatment violated *Brady*. It was favorable impeachment evidence, and the suppression denied Glossip an opportunity to investigate Sneed's psychiatric issues and expose Sneed's false denials. Pet. Br. 32-33. The net effect of all the suppressed evidence collectively confirms Glossip was denied a fair trial. Pet. Br. 33-37; *see Kyles*, 514 U.S. at 421-422, 436-437.

Amicus's claim (at 38-39) that the evidence could not have impeached Sneed repeats his *Napue* arguments and fails for the same reasons. The record confirms Sneed's bipolar disorder and that only Dr. Trombka could have prescribed the lithium. Smothermon's notes confirm the prosecution was aware of Sneed's psychiatric treatment yet failed to disclose it to the defense. Two

independent investigations and the State reached the same conclusion after careful review of the whole record, and no evidence supports Amicus's contrary speculation. *Supra* pp. 3-5.

Amicus's argument (at 39) that the evidence was not suppressed fares no better. Evidence is "suppressed" for *Brady* purposes whenever the prosecution "withholds" it. *Smith* v. *Cain*, 565 U.S. 73, 75 (2012). It is undisputed that the State never disclosed its evidence of Sneed's psychiatric treatment or the reason for his lithium prescription until 2023.

Amicus's argument that defense counsel could have independently discovered Sneed's psychiatric treatment turns *Brady* on its head. Like *Napue*, the *Brady* obligation stems from the duty of the prosecutor to "comport with standards of justice." *Brady*, 373 U.S. at 87-88; *see* Pet. Br. 29. A prosecutor is not excused from that duty just because there is a chance the defense could divine the information on its own, and such a rule would create perverse incentives at odds with *Brady*'s prescription that "a prosecutor anxious about tacking too close to the wind [should] disclose a favorable piece of evidence." *Kyles*, 514 U.S. at 439-440. This Court in *Banks* accordingly rejected the "notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed." 540 U.S. at 695.

Amicus's argument also fails on its own terms by omitting the State's role in obstructing the defense's investigation. Before trial, Glossip requested all statements made by Sneed to the District Attorney's office. JA41. But the State never disclosed Sneed's statements about lithium and "Dr. Trumpet." Glossip also sought discovery of Sneed's medical records, specifically

including records of any psychiatric treatment, JA621, and the State blocked that effort, calling it "nothing more than a fishing expedition," JA620-622; *supra* p. 4. The notion that defense counsel made a "'strategic decision'" not to pursue evidence of Sneed's psychiatric treatment, Br. 39, flouts that record. And while Amicus touts Sneed's pretrial competency report, that report did not state any history of psychiatric treatment. *Id.*; JA700. To the contrary, it repeated Sneed's false denials. JA14, 700.

The suppressed evidence was manifestly material. Pet. Br. 33-39. Sneed was the State's key witness, and impeaching his reliability could well have been "determinative of guilt or innocence." *Giglio*, 405 U.S. at 154. Had Sneed been impeached on the grounds discussed—and had the jury learned of Sneed's untreated bipolar disorder at the time of the murder—there is easily a "reasonable probability of a different result." *Banks*, 540 U.S. at 698-699.[4]

As in his *Napue* argument, Amicus speculates (Br. 40-41) that the jury could have disregarded evidence of Sneed's psychiatric treatment because (Amicus posits) there is little difference between "a troubled murderer who took lithium" and "a troubled murderer who took lithium from a psychiatrist." But possible "reasons a juror might disregard new evidence" do not excuse "ignoring reasons she might not." *Wearry*, 577 U.S. 394. And as discussed above, Amicus's attempts to downplay the

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[4] Amicus asserts (at 40) that "*Brady*'s materiality standard is higher than *Napue*'s," but the cited authority does not say so, *see United States* v. *Bagley*, 473 U.S. 667, 679 n.9 (1985) (plurality op.), and *Giglio* says the opposite, 405 U.S. at 154; *see also Wearry*, 577 U.S. at 392.

significance of Sneed's psychiatric care and the severity of his psychiatric disorder fail. *Supra* pp. 4, 7.

Indeed, Amicus's materiality discussion (Br. 40-41) completely ignores Sneed's bipolar diagnosis and makes no attempt to deny the impact that diagnosis would have had on the jury's evaluation of Sneed's testimony. The materiality of *Brady* evidence is not considered in a vacuum, but in context. Evidence is material when its suppression may have had an "adverse effect … on the preparation or presentation of the defendant's case." *Bagley*, 473 U.S. at 683 (plurality op.). Although Smothermon's notes did not themselves identify Sneed's bipolar diagnosis, *cf.* Br. 41, disclosure of Sneed's statements revealing his psychiatric care by Dr. Trombka would have led the defense directly to Sneed's bipolar disorder—exactly what happened when Smothermon's notes were finally disclosed, *see* Pet. Br. 9-10; Reed Smith 5th Supp. 6.

Brady materiality also requires considering all suppressed evidence "collectively" and evaluating the "net effect" of the suppression. *Kyles*, 514 U.S. at 421-422, 436-437. Suppressing Smothermon's notes was part of a larger pattern of prosecutorial misconduct aimed at rehabilitating Sneed's tenuous credibility. Pet. Br. 8-16, 33-38.[5] The materiality analysis must consider the prosecution's suppression of evidence of Sneed's psychiatric treatment alongside its mid-trial efforts to alter Sneed's

[5] No procedural bar precludes the Court's consideration of that broader context. *Cf.* Br. 41-42. In assessing whether the State violated *Brady* by failing to disclose evidence of Sneed's psychiatric treatment—a claim squarely before the Court, *see* Pet. i; Pet. Br. 38-50; *infra* Part III—the Court considers the "net effect" of the suppressed evidence "collectively." *Kyles*, 514 U.S. at 421-422, 436-437. Whether other standalone claims were procedurally barred does not alter the Court's approach to the claim before it.

testimony to remedy the "biggest problem" in the State's case: the conflict between Sneed's account of the murder and the forensic evidence concerning the knife found at the scene. Pet. Br. 12-15, 35. Amicus does not dispute the import of the documents relating to the knife and does not defend Smothermon's actions. Br. 41. In both instances, the prosecution's suppression of critical evidence falsely propped up Sneed's credibility while hamstringing the defense's ability to respond. The same goes for the suppression of prior inconsistent statements undermining Clifford Everhart's testimony concerning Glossip's cash—among the only evidence corroborating Sneed's account of Glossip's role in the murder. Pet. Br. 15-16, 35-36.

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As to both *Napue* and *Brady*, the undisputed record confirms what Glossip, the State, and two independent investigations have all concluded: The prosecution knew its star witness had been treated by a psychiatrist who prescribed lithium for a serious psychiatric disorder, it suppressed that evidence, and it allowed Sneed to deny it falsely on the stand. Given the pivotal role of Sneed's testimony, the jury could easily have reached a different verdict had it known the truth, to say the least. No evidentiary hearing is necessary to confirm that the State violated Glossip's due-process rights. *Cf.* Br. 42. The OCCA denied relief on purely legal grounds, concluding that no evidentiary hearing was necessary. JA995. Amicus identifies no serious basis to dispute the factual premises of that decision. *Supra* pp. 3-5. And no further fact development could change the conclusion that the subjects of Amicus's proposed hearing—Sneed's documented medical history and the meaning of Smothermon's notes—are the very matters Glossip should have been entitled to develop and use in cross-examining

Sneed; they are not subjects whose prior development is a precondition for obtaining the right to cross-examine effectively in the first place.

Amicus touts (at 34) Glossip's motion for an evidentiary hearing but omits key context: Glossip filed that motion in the alternative to his application for postconviction relief—which asserted his entitlement to relief based on the existing record—in case the State raised any factual disputes. JA883, 923. As Glossip explained, "[t]he anticipated testimony of the[] [proposed] witnesses" would be "consistent with the contents of the declarations and affidavits submitted with the Application and the factual allegations in the Application." Amicus App.7a. Subsequently, however, the State confessed error, admitting the legally relevant facts of this case after conducting its own "careful review" of the record. JA979. As the OCCA concluded, once the parties and the court all agreed on the relevant factual points, an evidentiary hearing became—and remains—unnecessary. JA995.

III. No Adequate And Independent State-Law Ground Precludes Review

A. The OCCA's Judgment Was Not Independent Of Federal Law

The OCCA's state-law holding depended inextricably on its analyses of Glossip's federal *Brady* and *Napue* claims. Though the decision invoked a state-law procedural bar, "resolution of the state procedural law question depend[ed] on a federal constitutional ruling." *Ake* v. *Oklahoma*, 470 U.S. 68, 75 (1985).

Amicus observes (at 18-19) that courts have treated the Oklahoma Post-Conviction Procedure Act as an adequate and independent state-law ground in other cases

for jurisdictional purposes or under AEDPA's statutory procedural bar. Those cases have little relevance to whether the OCCA clearly rested on an independent state-law ground in this case. It did not. Although the OCCA recited the two-part standard of the Act, JA990, it offered only its merits assessment of the *Brady* and *Napue* claims to justify its state-law conclusions and did not "plain[ly] state[]" that its discussion of federal law served "only for the purpose of guidance" rather than to "compel the result," *Michigan* v. *Long*, 463 U.S. 1032, 1041 (1983); *see* JA989-992; Pet. Br. 41-43.

The federal habeas cases are even less relevant because none addresses this Court's jurisdiction. *See* Br. 18. Several of Amicus's cited cases address AEDPA's own diligence and materiality requirements and do not involve any question whether state law is independent of federal law. *Id.* at 19 (citing cases).

The OCCA's *Napue* and *Brady* analyses cannot be swept aside as mere alternative holdings. *Cf.* Br. 19-20. Those analyses formed the basis of the OCCA's state-law holdings. To start, as to *Napue*, the OCCA stated only that the withheld evidence "does not create a *Napue* error"; it did not mention procedural bar at all. JA991 (¶28). Amicus relies on paragraph 26 but ignores that paragraph 24 indicates that the "issue" addressed there is limited to Glossip's *Brady* claim. JA989-990. Regardless, even as to that issue, the OCCA derived the conclusion that Glossip's claim "could have been and should have been raised earlier"—the diligence prong of the Post-Conviction Procedure Act—from its conclusion that "Sneed's previous evaluation and his trial testimony revealed that he was under the care of [a] doctor who prescribed lithium," *i.e.*, that there was no *Brady* violation. JA991-992 (¶¶26-27). And the only reason supporting the OCCA's conclusion under the materiality prong

of the Act was that the "known mental health treatment evidence does not create a reasonable probability that the result of the proceeding would have been different had Sneed's testimony regarding his use of lithium been further developed at trial," *i.e.*, the error was not material under *Brady* and *Napue*. JA991-992 (¶28). Whether the OCCA's decision "is characterized as 'entirely dependent on,' 'resting primarily on,' or 'influenced by' a question of federal law," its state-law determination is not independent of federal law. *Foster* v. *Chatman*, 578 U.S. 488, 499 n.4 (2016) (citations omitted).

To the extent *Coleman* v. *Thompson*, 501 U.S. 722, 735 (1991), established a predicate requirement for *Long*'s plain-statement rule, it is easily satisfied here. At a minimum, the OCCA's decision is "interwoven with … federal law." *Long*, 463 U.S. at 1040. The OCCA cited federal cases and analyzed the merits of both the *Brady* and *Napue* claims, relying for its ruling on the materiality standards of federal law, not the Post-Conviction Procedure Act. *See* JA989-992; Pet. Br. 42. Under *Coleman*, that is sufficient to invoke the plain-statement rule: "[A] state court that wishes to look to federal law for guidance or as an alternative holding while still relying on an independent and adequate state ground can avoid the presumption by stating clearly and expressly that [its decision] is … based on bona fide separate, adequate, and independent grounds." 501 U.S. at 733 (quotation marks omitted). No such statement appears in the OCCA's decision.

Amicus's attempts (Br. 22) to distinguish *Ake* and *Foster* fail. If anything, the state courts' reliance on state law was stated even more plainly in those cases, and this Court still found jurisdiction. In *Ake* v. *State*, the petitioner argued his federal constitutional right to counsel should have entitled him to the services of a

psychologist and an investigator. 663 P.2d 1, 6 (Okla. Crim. App. 1983), *rev'd*, 470 U.S. 68 (1985). The OCCA's purportedly independent state-law holding stated: "*In addition*, the argument was not preserved in the motion for a new trial. It was thereby waived." *Id.* (emphasis added).

That holding was plainly intended as an alternative state-law rationale "in addition" to the federal constitutional analysis, yet this Court held that it was not an adequate and independent state-law ground for the decision. That was because the state-law waiver rule did not apply to "fundamental trial error," including constitutional errors, and thus "application of the procedural bar depend[ed] on an antecedent ruling on federal law." *Ake*, 470 U.S. at 74-75. The OCCA's decision in *Ake* did not even acknowledge this exception to the waiver rule, let alone analyze it. Even so, this Court found the state court was required to "rule, either explicitly or implicitly, on the merits of the constitutional question." *Id.* at 75.

Similarly, the state habeas court in *Foster* considered whether the petitioner had "shown any change in the facts sufficient to overcome the res judicata bar" on his *Batson* claim. *Foster* v. *Humphrey*, 2013 Ga. Super. LEXIS 89, at *22 (Ga. Super. Ct. Dec. 4, 2013). After doing so, the court concluded that the *Batson* claim "was 'not reviewable based on the doctrine of res judicata' under Georgia law." *Foster*, 578 U.S. at 497. But this Court recognized that the habeas court had necessarily analyzed the *Batson* claim on the merits to determine whether the state-law bar applied. Thus the "application of res judicata to [petitioner]'s *Batson* claim was not independent of the merits of his federal constitutional challenge." *Id.* at 498-499.

As Amicus points out (at 20-21), the OCCA could have written a different opinion relying on the Oklahoma Post-Conviction Procedure Act—even an "unexplained summary order[]"—that was clearly independent of federal law. It did not. *See Long*, 463 U.S. at 1040 (requiring independence to be "apparent from the four corners of the opinion"). The decision the OCCA did write was interwoven with and influenced by the court's application of federal law.

B. The OCCA's Judgment Did Not Rest On An Adequate State-Law Ground

An "unforeseeable and unsupported state-court decision on a question of state procedure does not constitute an adequate ground to preclude this Court's review of a federal question." *Bouie* v. *City of Columbia*, 378 U.S. 347, 354 (1964). The OCCA's application of the Post-Conviction Procedure Act was inadequate in two respects.

1. First, the OCCA rejected the State's waiver of the Act's diligence and materiality limitations on the unprecedented rationale that the OCCA can decide to invoke the procedural bar itself even when the State specifically declines to assert it, thus treating the bar as effectively jurisdictional. Pet. Br. 46-47.[6]

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[6] Amicus suggests (at 25-26) this argument is "waived" because "neither party advanced [it] in its certiorari-stage filings." But Glossip argued the OCCA's decision was inadequate, Cert. Reply 11-12, and the State specifically cited the OCCA's failure to accord any deference to the confession as one reason the decision was not adequate, State Br. Supp. Cert. 22-23. In any event, the Court added the jurisdictional question when it granted certiorari; the parties could not have waived their answers to that question before it was asked.

Amicus principally responds (at 26-27) that the State never waived the Act's requirements. The record shows otherwise. In its response to Glossip's previous post-conviction application, the State had "waive[d] its right to argue the claims within this fourth post-conviction application are waived because they could have been raised previously" and asked the OCCA to "fully adjudicate those claims." JA717-718. In its response to the post-conviction application now at issue, the State confessed error, urged vacatur of the conviction, and "adopt[ed] and incorporate[d] by reference all prior State briefings to this Court related to Glossip's … multiple applications for post-conviction relief" "[t]o the extent that they are consistent with th[e] confession of error," including its prior waiver. JA975. The State also explained that "post-conviction relief is appropriate with respect to Sneed's false testimony to the jury" because the requirements of §1089(C) were satisfied. JA976-977.[7] The OCCA thus clearly understood the State to have waived the application of §1089(D)(8)(b) by seeking vacatur. JA981-982. But it concluded it could not accept that waiver because its review was "limited by the legislatively enacted Post-Conviction Procedure Act" in §1089(D)(8). *Id.*[8]

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[7] While §1089(C) imposes a lower standard for post-conviction applications than the bar for successive applications in §1089(D)(8)(b), Br. 27 n.4, it blinks reality to suggest that the State waived reliance on §1089(C) but not §1089(D)(8)(b) when it asked the OCCA to "vacate Glossip's conviction and … remand[] to the district court." JA979. That outcome would have been possible only if both provisions were satisfied.

[8] Amicus asserts (at 27 n.4) the State did not waive reliance on the Post-Conviction Procedure Act but instead merely argued that the Act's limitations were satisfied. But Amicus offers no reason

The OCCA's rejection of the State's waiver contravened Oklahoma law and the court's usual practice of honoring waivers, as illustrated by *McCarty* v. *State*, 114 P.3d 1089 (Okla. Crim. App. 2005). Pet. Br. 46-47. Amicus dismisses *McCarty* (at 38) by claiming the OCCA there "did not announce a categorical rule." The decision suggests otherwise. The OCCA accepted that the State had "expressly waived any procedural bars that may arguably apply," adjudicated the claim on the merits, and granted relief—without any analysis of why accepting the waiver was proper in the specific context of that case. *McCarty*, 114 P.3d at 1091 n.7, 1095.

Even if *McCarty* stood for the proposition that "the OCCA has *discretion* to accept a waiver of a procedural bar," Br. 28, it would still be irreconcilable with the OCCA's decision here. Even a discretionary procedural rule is inadequate unless it is regularly applied consistent with an intelligently delineated principle. *See Walker* v. *Martin*, 562 U.S. 307, 317 (2011). The OCCA in this case did not even suggest it had any such discretion, let alone explain why it was not exercising that discretion. Instead, the OCCA found itself "limited by the legislatively enacted Post-Conviction Procedure Act" in §1089(D)(8). JA981-982. That decision stands in stark contrast to *McCarty* and demonstrates that the OCCA was applying a rule that is not "consistently or regularly applied," *Johnson* v. *Mississippi*, 486 U.S. 578, 589

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why that elusive distinction would carry any consequence under Oklahoma law. In any case, the foregoing discussion demonstrates that the State both waived reliance on the Act and also argued that its restrictions were satisfied.

(1988), resulting in an "unforeseeable" outcome, *Bouie*, 378 U.S. at 354.[9]

2. The OCCA's conclusion that Glossip failed to act diligently by not raising his claims sooner was also an unforeseeable and baseless departure from precedent. *Cruz* v. *Arizona*, 598 U.S. 17 (2023). The key facts underlying Glossip's claims did not become available until January 2023. Nothing in Oklahoma law supports the OCCA's holding that Glossip should have brought his claims before he could possibly have known of those facts. Pet. Br. 47-49.

Davison v. *State*, 531 P.3d 649 (Okla. Crim. App. 2023), confirms Glossip acted diligently for purposes of the Act. Pet. Br. 48-49. Amicus insists (at 24) *Davison* is unique because it focused on "counsel's allegedly deficient performance." But nothing in the opinion turns on whether the underlying claim involved ineffective assistance of counsel. *Davison*, 531 P.3d at 653-654. And while "the OCCA finds a lack of diligence in some cases but not others," Br. 24, *Davison* proves that, when the factual particulars of a claim arise after the filing of an initial application for post-conviction relief, the diligence prong of the Act is necessarily satisfied. *See* 531 P.3d at 653. Amicus cites no Oklahoma decision applying the Post-Conviction Procedure Act's diligence prong to bar relief when the factual predicate was not available

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[9] Amicus cites (at 27) the OCCA's rejection of the State's waiver in Glossip's previous application for relief as an example of the court's consistent application of §1089(D)(8). But like the ruling in this case, that decision was an irregular application of state law. *See* Pet. for Cert. 37-40, *Glossip* v. *Oklahoma*, No. 22-6500 (U.S. Jan. 3, 2023). Further, that decision was unpublished and carried no precedential weight. *McCarty* should have controlled. *See Howard* v. *State*, 738 P.2d 543, 545 (Okla. Crim. App. 1987).

earlier. Nor does Amicus dispute that an arbitrary rule barring federal constitutional claims unless the petitioner raises them before he knew or could possibly have known the relevant facts would violate the federal constitution. Pet. Br. 49.

In fact, Oklahoma has no such rule; the OCCA's application of the diligence requirement was entirely novel and in conflict with Oklahoma law. *Cruz*, 598 U.S. at 27, 32. Like the "recently obtained reports of two forensic psychological evaluations" and other "more recent affidavits" in *Davison*, 531 P.3d at 653, the "factual particulars" of Sneed's psychiatric diagnosis and treatment became available to Glossip only after the release of Box 8 in January 2023, after Glossip had filed his previous applications for relief, JA984; *see* JA644; Pet. Br. 47-48. Had the OCCA applied its own precedent, it too would have accepted that Glossip had acted diligently. Its novel and arbitrary ruling that Glossip had to assert his *Brady* and *Napue* claims before the State disclosed the long-suppressed evidence supporting them poses no bar to this Court's review.

CONCLUSION

The OCCA's judgment should be reversed and a new trial granted.

Respectfully submitted.

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