

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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RICHARD EUGENE GLOSSIP, )  
 )  
 ) Petitioner, )  
 )  
 ) v. ) No. 22-7466  
 )  
OKLAHOMA, )  
 )  
 ) Respondent. )  
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Pages: 1 through 112  
Place: Washington, D.C.  
Date: October 9, 2024

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RICHARD EUGENE GLOSSIP, )

Petitioner, )

v. ) No. 22-7466

OKLAHOMA, )

Respondent. )

- - - - -

Washington, D.C.

Wednesday, October 9, 2024

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:05 a.m.

APPEARANCES:

SETH P. WAXMAN, ESQUIRE, Washington, D.C.; on behalf of the Petitioner.

PAUL D. CLEMENT, ESQUIRE, Alexandria, Virginia; on behalf of the Respondent in support of the Petitioner.

CHRISTOPHER G. MICHEL, ESQUIRE, Washington, D.C.; Court-appointed amicus curiae in support of the judgment below.

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P R O C E E D I N G S

(10:05 a.m.)

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

Mr. Waxman.

ORAL ARGUMENT OF SETH P. WAXMAN

ON BEHALF OF THE PETITIONER

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

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

1 falsely denied to the court her prior knowledge.

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

5           As to independence, the court's  
6 opinion is suffused with merits determinations  
7 on the Brady and Napue claims. And, certainly,  
8 there is no "clear and express statement" that  
9 the court's decision is based on a bona fide  
10 separate, adequate, and independent grounds, as  
11 long required by this Court to preclude review.  
12 Nor is there any adequate bar.

13           By rejecting the State's waiver, the  
14 court created a jurisdictional threshold it had  
15 never applied in any other case. The  
16 disposition was "without support in prior state  
17 law," as required by over 60 years of this  
18 Court's precedent to establish adequacy.

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

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

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

6 I welcome the Court's questions.

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

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

13 MR. WAXMAN: Yes.

14 JUSTICE THOMAS: Did you interview  
15 them?

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

16           It very well could have made a  
17 significant difference in the outcome of the  
18 case. Just --

19           JUSTICE SOTOMAYOR: Mr. Waxman, the  
20 issue wasn't about him taking lithium. The  
21 issue was about why he was taking the lithium.

22           MR. WAXMAN: Yes, of course.

23           JUSTICE SOTOMAYOR: And so the fact  
24 that the jury knew he had taken lithium during  
25 incarceration doesn't tell them anything about

1 whether he had bipolar -- a bipolar condition,  
2 that his use of drugs would have led to  
3 impulsive and violent behavior, correct?

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

5 JUSTICE SOTOMAYOR: And would have  
6 explained the murder, correct?

7 MR. WAXMAN: I'm sorry? And would  
8 have explained the murder.

9 JUSTICE SOTOMAYOR: And would have  
10 explained the murder.

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

13 MR. WAXMAN: Okay.

14 JUSTICE SOTOMAYOR: There's a lot --  
15 and you spent a whole lot of time in your  
16 introduction, a lot of spilt in here on whether  
17 the PCPA is an adequate and independent state  
18 ground. I'm not even sure why we're doing all  
19 that when -- you're right, the court below  
20 seemed to confuse the merits with the procedural  
21 bar, but it's very clear that a procedural bar  
22 is always waiveable under Oklahoma law. Legions  
23 of cases say that, correct?

24 MR. WAXMAN: Correct.

25 JUSTICE SOTOMAYOR: So --

1 MR. WAXMAN: And under federal law.

2 JUSTICE SOTOMAYOR: -- so, once you  
3 waived, the only issue before the court was the  
4 substantive issue of whether there was a  
5 violation of federal law, correct?

6 MR. WAXMAN: Correct.

7 JUSTICE SOTOMAYOR: So that's really  
8 the only issue before us, the procedural bar. A  
9 lot of spilt in, goes on and on about, is this  
10 the first time they didn't waive it? Is it not  
11 the first time they didn't waive it?

12 The reason that's true is because they  
13 accept the waiver when there's a violation of a  
14 right, and they don't accept the waiver when  
15 there's no violation of a right. Here, they  
16 found no violation of a right, so they reached  
17 the substantive legal issue and said: We're not  
18 going to waive.

19 You don't find any case in Oklahoma  
20 law -- and your adversary, Mr. Waxman, can tell  
21 me -- where they found a constitutional  
22 violation either under state or federal law and  
23 said: We won't accept a PCPA waiver. Can't  
24 find it because it doesn't exist.

25 So now we're on the federal issue,

1       okay? That's all I'm looking at. Was there a  
2       Napue? Was there a Brady violation? That's  
3       your argument, correct?

4                   MR. WAXMAN: Correct.

5                   JUSTICE SOTOMAYOR: Now, on the  
6       Van Treese issue, that's non-record evidence, so  
7       it's not before us.

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

11                  JUSTICE SOTOMAYOR: So whatever that  
12      was.

13                  MR. WAXMAN: It was never even  
14      suggested then.

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

18                  MR. WAXMAN: Correct.

19                  JUSTICE SOTOMAYOR: -- he submitted an  
20      affidavit.

21                  MR. WAXMAN: Correct.

22                  JUSTICE SOTOMAYOR: And he said in  
23      that affidavit that Justin Sneed was on lithium  
24      as treatment for bipolar disorder would have  
25      been an important fact for the defense to know.

1 MR. WAXMAN: Correct.

2 JUSTICE SOTOMAYOR: So he concedes the  
3 basis of the Napue order -- violation here,  
4 didn't he?

5 MR. WAXMAN: Certainly the Brady  
6 violation.

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

12 MR. WAXMAN: That's right.

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

18 I thought the essence of the Napue  
19 violation is: Was there a falsehood? Did the  
20 prosecutor know it was a falsehood? Not whether  
21 the defendant knew it was a falsehood but  
22 whether the prosecutor has an obligation to  
23 correct it. Is that correct?

24 MR. WAXMAN: It is correct that both  
25 Napue and its subsequent cases and Brady and its

1 progeny both look to the -- the obligation, the  
2 constitutional obligation of the prosecutor, and  
3 not what the defense could have discovered.

4 JUSTICE SOTOMAYOR: All right. Now  
5 let's go to --

6 CHIEF JUSTICE ROBERTS: Thank you,  
7 counsel. We'll -- we'll get back shortly  
8 through the seriatim questions.

9 Justice Alito?

10 JUSTICE ALITO: You don't have a  
11 question?

12 JUSTICE THOMAS: Go ahead.

13 JUSTICE ALITO: Sorry.

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

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

22 Why isn't that a quintessential clear  
23 statement under -- under Long? Even if it does  
24 not overcome the procedural bar, then -- and it  
25 goes on, then to the federal issue?

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

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

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

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

25           In paragraph 26, the -- the Oklahoma



1 court goes through the two requirements under  
2 state law under 1089. The issue is one that  
3 could have been presented previously because the  
4 factual basis for the claim was ascertainable  
5 through the exercise of reasonable diligence.

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

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

14 JUSTICE ALITO: What's ambiguous about  
15 that?

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

20 There is also no denying that it is  
21 preceded by two paragraphs discussing the merits  
22 of the Brady claim and succeeded by a paragraph  
23 which also goes in -- which goes in detail in  
24 explaining why the Brady claim fails.

25 JUSTICE ALITO: But what does that

1 show? Yes, there's no dispute that they -- they  
2 held in the alternative that there was no  
3 federal constitutional violation, but there is  
4 the Oklahoma statute. It has two requirements.

5 They -- they -- they go through the  
6 two requirements, and they say that they weren't  
7 satisfied, and -- and they say: Even if it  
8 could overcome the procedural bar, it still  
9 would not provide a basis for -- for relief.

10 I -- I don't see what's unclear or  
11 even ambiguous about that.

12 MR. WAXMAN: Justice Alito, with  
13 respect, let me make two points.

14 Number one -- I guess maybe  
15 two-and-a-half points.

16 Number one, when the court deals with  
17 the Napue claim, which it does not address until  
18 paragraph 28, it never mentions procedural bar  
19 whatsoever. It is fully adjudicated on the  
20 merits.

21 Number two, the -- I think that -- I  
22 think that one has to concede that, at a  
23 minimum, a minimum, with respect to the Brady  
24 claim, there is -- it is certainly interwoven  
25 with -- and it's physically on the page --

1 interwoven with what may or may not have been an  
2 adjudication of the state procedural bar.  
3 Certainly, it was influenced by it.

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

16           JUSTICE ALITO: All right. Going on  
17 to another point, you rely very heavily on a  
18 note that says "Lithium? Dr. Trumpet?". And  
19 you read a lot into that.

20           And the Van Treese family's amicus  
21 brief provides a pretty compelling  
22 counter-reading of that. And -- and you want us  
23 to say, well, just pretend it doesn't exist and  
24 read those notes the way we think they should be  
25 read, those cryptic notes the way we think they

1 should be read, because it's not the -- the  
2 material that the Van Treese brief relies on is  
3 not in the record of the case. We shouldn't  
4 even remand for an exploration of this?

5 MR. WAXMAN: As to the -- I'll deal  
6 with the remand first and then the weight that  
7 ought to be given to the Van Treese brief's  
8 eleventh-and-a-half-hour explanation of these  
9 notes.

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

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

22 MR. WAXMAN: -- investigations that  
23 had been done, and --

24 JUSTICE ALITO: -- I get your point.  
25 Your point is we shouldn't consider it because

1 it's not in the record, right? That's the short  
2 answer?

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

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

18 There are a lot of other things that  
19 are accounted for in those notes that have  
20 nothing to do with that interview.

21 JUSTICE ALITO: All right. Let me  
22 just --

23 MR. WAXMAN: But even if --

24 JUSTICE ALITO: Let me -- let me go on  
25 to one other question because the time is

1 limited.

2           You read McCarty, a 2005 case where  
3 the Oklahoma Court of Criminal Appeals accepted  
4 the State's waiver of 1089, you rely on that,  
5 but there is no reasoning in McCarty. The court  
6 simply said that in a footnote the State  
7 expressly waived any procedural bar.

8           Do you -- do you read this for the  
9 proposition that the Oklahoma court must accept  
10 all 1089 waivers in future cases?

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

19           And going all the way back to the  
20 1960s --

21           JUSTICE ALITO: So one departure in  
22 the application of a discretionary -- if the --  
23 in a discretionary rule, if the rule is applied  
24 in a discretion -- in -- in a -- in -- in a  
25 habeas petitioner-friendly way in one case,

1 that's the end of the matter?

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

13 And in Johnson versus Mississippi,  
14 this Court said, "A state procedural rule is not  
15 adequate unless strictly or regularly followed."

16 JUSTICE ALITO: All right. Thank you.

17 MR. WAXMAN: Okay.

18 CHIEF JUSTICE ROBERTS: Justice  
19 Sotomayor?

20 JUSTICE SOTOMAYOR: Counselor, no  
21 matter how we get past this, we have to reach  
22 whether the court ruled correctly on the  
23 constitutional issue, correct?

24 MR. WAXMAN: Well, I -- I -- I think  
25 so based on my -- my position and the State's

1 position that there is no jurisdictional bar.

2 JUSTICE SOTOMAYOR: And everything  
3 that the Oklahoma courts have done, you said a  
4 hundred years of their history, party  
5 presentation, the fact that they've never had a  
6 case with a constitutional violation where they  
7 didn't accept the waiver, correct?

8 MR. WAXMAN: That's right.

9 JUSTICE SOTOMAYOR: And --

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

22 JUSTICE SOTOMAYOR: So I go back to  
23 the -- this is not AEDPA, correct? Our review  
24 is not AEDPA? Meaning --

25 MR. WAXMAN: Did you say --



1 JUSTICE SOTOMAYOR: It's not AEDPA  
2 review.

3 MR. WAXMAN: AEDPA?

4 JUSTICE SOTOMAYOR: AEDPA.

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

6 JUSTICE SOTOMAYOR: No, no, no.

7 MR. WAXMAN: This is a direct review

8 --

9 JUSTICE SOTOMAYOR: This is a straight  
10 did they get --

11 MR. WAXMAN: -- from a state supreme  
12 court.

13 JUSTICE SOTOMAYOR: -- if they -- if  
14 they reach the -- if they reach the  
15 constitutional question and we de novo decide  
16 whether they got the law right, correct?

17 MR. WAXMAN: That's my understanding.

18 JUSTICE SOTOMAYOR: So whatever they  
19 said their reasons or thinking was, we have to  
20 look at the record and decide whether the facts  
21 and law support your argument that there were  
22 Brady and Napue violations, correct?

23 MR. WAXMAN: Yes.

24 JUSTICE SOTOMAYOR: Now tell me  
25 succinctly why, even assuming their finding that

1 they could have determined this issue earlier,  
2 Brady and Napue violations would have occurred?

3 MR. WAXMAN: Well, the --

4 JUSTICE SOTOMAYOR: I say "they,"  
5 meaning the court below.

6 MR. WAXMAN: Yeah. So, you know, the  
7 -- part of the adequacy determination, leaving  
8 aside this novel and unforeseen refusal to give  
9 credit to the -- the State's waiver of  
10 procedural bars, is whether there is fair and --  
11 "fair and substantial support" for the prongs of  
12 the State procedural defar -- departure.

13 Here, the court's analysis of  
14 diligence, which is paragraph 27 of the -- the  
15 court's opinion, defies any reasonable  
16 application of state law. The -- the  
17 supposition is that Mr. Glossip's lawyers should  
18 have brought a claim of constitutional error  
19 before they knew the salient facts establishing  
20 the error.

21 In this context, we have, number one,  
22 with respect to the --

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

1 MR. WAXMAN: Federal law -- you know,  
2 maybe I'm missing something here, but federal  
3 law doesn't -- I mean, the federal requirement  
4 of adequacy and independence is federal law, and  
5 those -- that definition of fair and substantial  
6 support comes from --

7 JUSTICE SOTOMAYOR: You -- you  
8 misunderstood my question, okay?

9 MR. WAXMAN: Okay. I apologize.

10 JUSTICE SOTOMAYOR: I -- I'm past the  
11 procedural bar.

12 MR. WAXMAN: Okay.

13 JUSTICE SOTOMAYOR: I was past it long  
14 ago because I think we need to get to the  
15 federal question.

16 MR. WAXMAN: I hear you.

17 JUSTICE SOTOMAYOR: All right? So  
18 even -- is there a Napue or a Brady violation if  
19 they could have discovered this earlier?

20 MR. WAXMAN: The answer to that  
21 question is yes because the adequacy prong of  
22 this Court's --

23 JUSTICE SOTOMAYOR: Forget adequacy.

24 MR. WAXMAN: Okay. The answer is --  
25 the answer is yes, the relevant --

1 JUSTICE SOTOMAYOR. Forget -- let's  
2 assume they had granted your waiver.

3 MR. WAXMAN: Okay.

4 JUSTICE SOTOMAYOR: All right? Let's  
5 assume that. So adequacy and independence is  
6 not at issue.

7 Under federal -- and this had  
8 happened, and it was the first case before the  
9 court, and they come up and they say: There was  
10 a Napue violation, there's a Brady violation.  
11 And your other side comes up and says: No,  
12 there wasn't, because you could have found this  
13 earlier.

14 MR. WAXMAN: Okay. The answer to your  
15 question is twofold.

16 Number one, as this Court has said in  
17 several cases, Brady and Napue do not stand for  
18 the proposition -- stand for the opposite of the  
19 proposition that the prosecution may hide and  
20 the defense must try to seek. That's the  
21 antithesis of what Brady and Napue and their  
22 progeny provide.

23 In addition, it is simply preposterous  
24 to argue either with respect to the -- you know,  
25 what's -- the document that is in -- on page

1 1005 of the Joint Appendix, that is, the -- the  
2 jail record, that this document could have been  
3 discovered in the face of a solicited denial  
4 under oath that he'd ever had psychiatric  
5 treatment, and the State's mocking of a  
6 discovery request, number one, for all -- the  
7 substance of all statements of Justin Sneed to  
8 the prosecutor, which is required not only by  
9 the Due Process Clause but also under state  
10 statutory law, Title 22, Section 2002(a)(1)(C),  
11 which requires the prosecution to produce the  
12 substance of any oral statements made to the  
13 prosecution by a co-defendant.

14           And how on earth could defense counsel  
15 have known that in Ms. Smothermon's files there  
16 was a memo that she sent immediately after the  
17 medical examiner testified to Mr. Sneed's  
18 lawyer, saying we "need to get to Justin today.  
19 The knife is our biggest problem," and then  
20 received back handwritten notes discovered in  
21 Box 8 that -- I guess it was Box 7 -- that, in  
22 fact, Sneed was going to change his testimony  
23 and say that he did stab the victim.

24           And the prosecutor then, in response  
25 to a mistrial motion, affirmatively tells the

1 court --

2 JUSTICE SOTOMAYOR: Counsel, the --  
3 the last --

4 MR. WAXMAN: -- we're hearing this for  
5 the first time.

6 JUSTICE SOTOMAYOR: -- the one fact  
7 you didn't mention is that there was a defense  
8 request for medical records --

9 MR. WAXMAN: Absolutely.

10 JUSTICE SOTOMAYOR: -- that were  
11 resisted by the government, and they succeeded.  
12 They never turned over his medical records.

13 MR. WAXMAN: That's correct.

14 JUSTICE SOTOMAYOR: So they had no way  
15 of determining from his medical records the  
16 lithium issue.

17 MR. WAXMAN: Correct.

18 JUSTICE SOTOMAYOR: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice Kagan?

20 JUSTICE BARRETT: You forgot Justice  
21 Kavanaugh.

22 CHIEF JUSTICE ROBERTS: Yeah, sorry.

23 (Laughter.)

24 CHIEF JUSTICE ROBERTS: Justice  
25 Kavanaugh?

1 Justice Barrett?

2 JUSTICE BARRETT: No.

3 CHIEF JUSTICE ROBERTS: Justice  
4 Jackson?

5 JUSTICE JACKSON: So, from your  
6 colloquy with Justice Alito, it seems that there  
7 is agreement that the court in this case applied  
8 the procedural bar, right? I mean, at least you  
9 -- it's in the alternative, but they did  
10 actually apply the bar, is that right?

11 MR. WAXMAN: As -- arguably, as to  
12 Brady, not as to Napue.

13 JUSTICE JACKSON: All right. So even  
14 with respect to Brady, I guess -- doesn't that  
15 seem to be the problem, though, from the  
16 standpoint of AISG when the bar has been clearly  
17 waived? I think that was Justice Sotomayor's  
18 initial point. Can parties in Oklahoma waive  
19 non-jurisdictional procedural bars?

20 MR. WAXMAN: Of course.

21 JUSTICE JACKSON: They can. Right.

22 MR. WAXMAN: Of course.

23 JUSTICE JACKSON: And -- and -- and  
24 what happens when those waivers occur? I mean,  
25 do -- do the Oklahoma courts routinely proceed

1 to either evaluate the reasons for the waiver or  
2 reject it and continue on anyway?

3 I thought they just accepted -- if a  
4 party says, this is a non-jurisdictional bar, I  
5 have a right to raise it, but I'm waiving that  
6 right, the Oklahoma court's standard practice,  
7 just like most courts, if not all courts, is to  
8 accept that and go on, right?

9 MR. WAXMAN: Yes. Like the federal  
10 courts, the Oklahoma courts honor the principle  
11 of party presentation and adversarial  
12 presentation in honoring the waiver of those  
13 non-jurisdictional bars.

14 JUSTICE JACKSON: As a matter of  
15 practice. So we don't need a rule necessarily  
16 that Oklahoma always accepts these. They just  
17 do it. I mean, that's what -- we don't have any  
18 evidence that they've ever rejected it, correct,  
19 the waiver?

20 MR. WAXMAN: That's correct.

21 JUSTICE JACKSON: Okay.

22 MR. WAXMAN: And, in fact, the rule  
23 that this Court applies on the adequacy prong is  
24 that it is -- the refusal to accept a waiver is  
25 not adequate unless it has been done



1 consistently in the past.

2 JUSTICE JACKSON: Correct. Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you,  
4 counsel.

5 MR. WAXMAN: Yeah. Nothing? Thank  
6 you.

7 CHIEF JUSTICE ROBERTS: Mr. Clement.

8 ORAL ARGUMENT OF PAUL D. CLEMENT ON BEHALF OF THE  
9 RESPONDENT, IN SUPPORT OF THE PETITIONER

10 MR. CLEMENT: Mr. Chief Justice, and  
11 may it please the Court:

12 Attorney General Drummond did not  
13 confess error here lightly. Indeed, he  
14 continues to defend multiple capital convictions  
15 and opposed Mr. Glossip's penultimate cert  
16 petition. But, after commissioning an  
17 independent review, he reluctantly reached the  
18 conclusion that Brady and Napue violations by  
19 the State's own prosecutors obligated him to  
20 confess error and waive procedural obstacles as  
21 his predecessor had done in McCarty.

22 That confession demanded respectful  
23 consideration and resolution of the issues on  
24 the merits, as in McCarty. Instead, the court  
25 invoked procedural bars and essentially treated

1 the confession of error as unfounded.

2 The resulting decision made errors on  
3 two important federal constitutional issues, and  
4 those errors are not shielded by adequate  
5 independent grounds.

6 When the State's one indispensable  
7 witness was under bipolar -- had bipolar  
8 disorder and not a toothache or a common cold,  
9 that fact is highly material and merits a new  
10 trial.

11 I welcome the Court's questions.

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

18 MR. CLEMENT: I mean, I -- I would  
19 expect that, Justice Thomas, and --

20 JUSTICE THOMAS: Well -- well,  
21 shouldn't these two prosecutors -- it seems as  
22 though their reputations are being impugned, and  
23 according to them, they did not receive an  
24 opportunity to explain in depth.

25 MR. CLEMENT: Justice Thomas, that's

1 hard to square with the record here. There were  
2 two independent investigations. As Mr. Waxman  
3 has indicated, Mr. Axley -- Ackley submitted a  
4 affidavit under -- under oath.

5 And, you know, I -- and -- and,  
6 ultimately, I think the attorney general, having  
7 commissioned a second independent review, looked  
8 at the results of that, looked at the notes.  
9 And he has to make his own judgment because,  
10 ultimately, the prosecutor has to decide whether  
11 a Napue violation has occurred.

12 JUSTICE THOMAS: Well, when I looked  
13 at the note of Ms. Smothermon, I couldn't make  
14 heads or tails of it. It had a few names. It  
15 had "lithium" and a question mark. And she  
16 explains what it was.

17 And according to her explanation, if  
18 it's true, it was simply about a conversation  
19 that Glossip's lawyer had with -- was it Sneed?

20 MR. CLEMENT: Sneed.

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

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

1                   First, it's inconsistent with her  
2 earlier explanations for the notes.

3                   Second, when General Drummond is  
4 making this determination, the notes don't stand  
5 alone. There's also the medical information  
6 sheet that was never disclosed to the  
7 defendants.

8                   JUSTICE THOMAS: Where was that --  
9 what was that sheet?

10                  MR. CLEMENT: That sheet's at Joint  
11 Appendix page 933, and it shows that -- that  
12 when he was transferred from the jail facility  
13 to the correctional facility, he was -- he was  
14 under lithium for bipolar disorder.

15                  So, if -- if -- if we're looking at  
16 those notes in conjunction with that medical  
17 information sheet, it seems quite -- the -- the  
18 inescapable conclusion that the attorney general  
19 had to make on his own was --

20                  JUSTICE THOMAS: I think her point was  
21 simply, I mean, even that sheet -- is that the  
22 sheet that she says the sheriff filled out?  
23 That it didn't come from -- actually from a  
24 doctor?

25                  MR. CLEMENT: Well, but -- but it's

1 the -- the State's own record --

2 JUSTICE THOMAS: It was a transport --

3 MR. CLEMENT: -- that at the point of  
4 transfer he was, A, under lithium, and, B, it  
5 was for bipolar disorder.

6 And so I -- I mean, again, I think you  
7 ultimately have to draw the most plausible  
8 inference from all the information available.  
9 And the most --

10 JUSTICE THOMAS: But you didn't,  
11 though. Her point is that you didn't ask her,  
12 that you didn't have an in-depth conversation  
13 with her about it. You're drawing it from the  
14 note and -- which she thinks is inadequate  
15 information.

16 MR. CLEMENT: Well, the attorney  
17 general is basing his judgment in part on the  
18 independent investigation of Mr. Duncan. He  
19 talked to Ms. Smothermon. Afterwards,  
20 Ms. Smothermon says it wasn't a sufficiently  
21 lengthy conversation.

22 JUSTICE THOMAS: She's --

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

1           The original request below was for an  
2           evidentiary hearing, and the State did not  
3           oppose an evidentiary hearing.

4           Now we think, if you look at those  
5           notes in light of the medical information sheet,  
6           there's no need for an evidentiary hearing.  
7           But, ultimately, we -- we didn't resist it  
8           below. If the court had granted it, we wouldn't  
9           be here.

10           And the attorney general just wants to  
11           get to the bottom of this, but he also, under  
12           Napue, has to make his own judgment about  
13           whether the prosecutors have elicited perjured  
14           testimony and failed to correct it, and his best  
15           judgment, based on these records and this  
16           information, is that there was a Napue violation  
17           here.

18           JUSTICE JACKSON: But are you saying  
19           that we are -- that -- that the question of  
20           Brady and Napue or a Napue violation is resolved  
21           because the attorney general has reached that  
22           conclusion?

23           MR. CLEMENT: Absolutely not. And we  
24           --

25           JUSTICE JACKSON: All right. So why

1 wouldn't we send it back? I mean, it's my  
2 understanding -- if we send it back for an  
3 evidentiary hearing? It's my understanding that  
4 there's never been a court determination of any  
5 of these facts. Justice Thomas is saying there  
6 are some disputes about what the notes mean and  
7 whatnot. So I just -- I guess I don't  
8 understand why we wouldn't, at the minimum, have  
9 some sort of requirement that a court make a  
10 finding about these things?

11 MR. CLEMENT: I -- I mean, look,  
12 again, we didn't resist an evidentiary hearing  
13 below. We would be satisfied if you vacate the  
14 judgment below and order an evidentiary hearing.  
15 We do think an evidentiary hearing is not  
16 necessary here because I -- I -- I just think,  
17 if you look at those notes in conjunction with  
18 the medical information sheet, there's no  
19 factual dispute. I don't think there's any  
20 factual dispute that they -- that -- that,  
21 certainly, the two in conjunction with each  
22 other are Brady material. I don't know --

23 JUSTICE SOTOMAYOR: Counselor --

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

25 JUSTICE SOTOMAYOR: -- whether the

1 prosecutor actually knew about it, knowledge is  
2 imputed to her, right?

3 MR. CLEMENT: I -- I -- I would  
4 certainly think so, and so I don't -- I don't --

5 JUSTICE SOTOMAYOR: I think, under --  
6 under the law, anything in the prosecutor's  
7 possession, which includes prison records, is --  
8 the knowledge is imputed to the prosecutor,  
9 correct?

10 MR. CLEMENT: Right. And, ultimately  
11 -- look, ultimately, the question is, did she  
12 elicit perjured testimony and fail to correct  
13 it? And it seems like, especially when you look  
14 at it in conjunction with the medical records  
15 and then you keep in mind that the medical  
16 records were withheld in contradistinction of --  
17 or in contravention of Oklahoma law and Brady, I  
18 think there's only one conclusion to be make --  
19 made here.

20 And you can certainly understand why  
21 the attorney general -- I mean, whoever is the  
22 -- if you think an evidentiary hearing is fine,  
23 I mean is necessary, then the attorney general  
24 will be there, confessing error again, because,  
25 as you can understand, given all the evidence



1 here of the Napue violation, the Brady  
2 violation, I mean, even under the most -- even  
3 under Smothermon's explanation that these are  
4 notes that she took based on what the -- what  
5 Sneed told her, there's an obligation under  
6 Oklahoma law to turn over all the defense -- all  
7 the -- all the witnesses' statements. So any --  
8 and especially -- and, here, there was a request  
9 for it.

10 JUSTICE KAGAN: Mr. Clement --

11 MR. CLEMENT: So --

12 JUSTICE KAGAN: I'm sorry. Please.

13 MR. CLEMENT: No, no. So -- so just  
14 looking at all of that material, the attorney  
15 general drew, I think, the only conclusion that  
16 he could.

17 JUSTICE KAGAN: Can I ask you,  
18 Mr. Clement, about some of the questions that  
19 Justice Alito was asking Mr. Waxman about, the  
20 whether there is an independent and adequate  
21 state ground here, and -- and -- and really  
22 focus on these couple of pages of the Oklahoma  
23 court's opinion, which I find difficult to say  
24 the least, and ask you what you make of them?

25 MR. CLEMENT: So a -- a couple of

1 things. One is I do think the easiest ground to  
2 say there is not an adequate independent state  
3 ground here is the waiver issue as opposed to  
4 splicing the opinion.

5 If you're going to splice the opinion  
6 --

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

9 MR. CLEMENT: I mean that it is an  
10 established principle of Oklahoma law and  
11 federal law up until this point that party  
12 presentation that procedural bars are defenses  
13 that the State has to invoke and can waive.

14 And that is a hundred years of  
15 unbroken practice. McCarty is a perfect example  
16 of that. In some respects, I think the fact  
17 that there wasn't an elaborate explanation that  
18 they were accepting the State's waiver is kind  
19 of the point. When the State waives a defense,  
20 you move on and you discuss the merits, which is  
21 exactly what the Court did in the McCarty  
22 decision.

23 This Court's decision in Trest against  
24 Cain, which was a unanimous decision, says that  
25 procedural default is a defense that the State

1 must raise or it waives. So you just have this,  
2 you know, incredibly, like, unbroken tradition  
3 that procedural defects, procedural bars are  
4 defenses that the State can waive.

5 JUSTICE KAGAN: And --

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

9 JUSTICE KAGAN: And suppose we want to  
10 go beyond that because it is true that we rarely  
11 say that there's no adequacy because this --  
12 this is so out of the ordinary. It -- it's a  
13 very rare kind of thing for us to say.

14 And if we want to just look at -- at  
15 what the Oklahoma court did in terms of  
16 justifying its denial of the confession of error  
17 and its determination to proceed, how -- what do  
18 you -- how do you describe what they did?

19 MR. CLEMENT: Sure. I think it's easy  
20 as to Napue, and it's a little more complicated  
21 as to Brady.

22 As to Napue, I think paragraph 28  
23 stands alone. It's their only resolution of the  
24 Napue claim. They don't talk about the  
25 procedural bars at all.

1 JUSTICE KAGAN: There -- there might  
2 be in that paragraph, the last sentence is an  
3 oblique, very oblique, reference to the  
4 materiality prong of -- of the procedural bar  
5 statute.

6 MR. CLEMENT: Well, I read it  
7 differently. I read it as oblique reference to  
8 the materiality standard under Napue.

9 JUSTICE KAGAN: Of Napue, okay.

10 MR. CLEMENT: But, if we're into the  
11 world of competing oblique references, that's  
12 when I think Justice O'Connor comes to the  
13 rescue and says that if you're not clear about  
14 it and it's ambiguous, then the federal issue is  
15 before this Court to decide.

16 JUSTICE KAGAN: And paragraph 27?

17 MR. CLEMENT: Paragraph 27, I think,  
18 is where the court is wrestling with the Brady  
19 issue. I think it's pretty clear that's Brady  
20 -- a Brady paragraph, not a Napue paragraph.  
21 And I think that --

22 JUSTICE KAGAN: And then you get,  
23 like -- that's all the way down, right, until  
24 the last sentence, which is the "Moreover"  
25 sentence, and the "Moreover" sentence might

1 suggest, again, a reference to the procedural  
2 bar. Is that -- is that true?

3 MR. CLEMENT: "Moreover" as to the  
4 Brady.

5 JUSTICE KAGAN: Yeah.

6 MR. CLEMENT: It says "this issue,"  
7 and I think the "this issue" there is Brady.  
8 And that's an inference based on the fact that  
9 the rest of paragraph 27 is all focused on what  
10 the defense counsel knew or should have known.  
11 And maybe that's marginally relevant for Brady,  
12 but it's completely irrelevant for Napue.

13 JUSTICE KAGAN: At the most, what you  
14 have here in these two paragraphs is very  
15 significant discussions of the substance and  
16 then maybe a sentence about, oh, there's this  
17 procedural bar thing that we're doing too. Is  
18 that -- is that correct?

19 MR. CLEMENT: I -- I think that's  
20 correct. The other point I would make here --

21 JUSTICE KAGAN: And, you know, in a  
22 way, this actually relates to the first point  
23 that you made about how unusual it is to deny  
24 the State's request for a waiver here, because  
25 that's sort of what they start with. They say

1 they have these two claims and the State has  
2 come forward and said this warrants  
3 post-conviction relief, and we're not accepting  
4 that because the State -- the State's concession  
5 is not based in law or fact.

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

7 MR. CLEMENT: I -- I -- I just mean,  
8 you know, I'm not -- you know, I just take that  
9 to be the back of the hand to the confession of  
10 error. I think, if you --

11 JUSTICE KAGAN: I mean, the State has  
12 only come forward with Napue arguments and Brady  
13 arguments, is that right? So they must be  
14 saying we're not -- we're not going with the  
15 State because we don't agree with their views of  
16 Napue and Brady, as we're going to now explain.

17 MR. CLEMENT: I think that's a fair  
18 inference. I also think that one of the things  
19 that complicates this is -- and -- and maybe I  
20 read the one sentence a little differently than  
21 Justice Alito did, but they start with the Brady  
22 claim, you know, on the -- on the merits, if you  
23 will, and then, you know, in the context of  
24 that, they basically say there was no Brady  
25 violation here because you should have known

1 everything you needed to know from the fact that  
2 he had -- was taking lithium. And then I think  
3 that essentially infects the rest of the  
4 analysis about diligence and all of the -- the  
5 rest.

6 So I think this is a classic case  
7 where they are interwoven. But -- but I will  
8 say -- and -- and -- and, you know, maybe you  
9 think that, you know, this is -- that the  
10 adequacy prong is so rare that it doesn't apply  
11 here, but this does seem to me to be a classic  
12 case for it because --

13 JUSTICE KAGAN: Of interwoven;  
14 therefore, you know, not independent?

15 MR. CLEMENT: Well, yeah. Interwoven,  
16 not independent, but also inadequate because,  
17 gee whiz, you know, this Court unanimously has  
18 said, everybody has always said, look, if it's  
19 not jurisdictional, procedural bars are defenses  
20 that you can waive. Even this opinion isn't  
21 very clear about it.

22 Paragraph 24 refers to 1089(D) as a  
23 procedural bar. Paragraph 40 --

24 JUSTICE ALITO: Well, whether --  
25 whether --

1 JUSTICE KAGAN: And is it --

2 JUSTICE BARRETT: Mr. Clement --

3 JUSTICE KAGAN: -- is it possible that  
4 -- is it possible that, you know, they know that  
5 they're doing something very unusual here, which  
6 is rejecting the State's request for a waiver,  
7 and they're just throwing everything in the  
8 kitchen sink in? They're saying, you know, we  
9 don't see the merits of these claims, either the  
10 Brady claim or the Napue claim. They're saying  
11 there's this procedural bar statute hanging  
12 around and we kind of think that that's been  
13 violated too. And we actually don't know, like,  
14 if you took this piece out, if you took that  
15 piece out, how they would have come out.

16 MR. CLEMENT: I -- I think that is  
17 fair, and I think that gets you into Michigan  
18 v. Long and Coleman against Thompson. I also  
19 think it is fair to say what is clear is they  
20 have not accepted the State's procedural bar --  
21 the waiver of procedural bar defenses for the  
22 first time in -- in the court's history.

23 JUSTICE BARRETT: But, Mr. Clement --

24 JUSTICE ALITO: Mr. Clement, whether a  
25 procedural bar must -- whether the waiver of a



1 procedural bar must be accepted by the Oklahoma  
2 court is a question of Oklahoma law, right?

3 The Oklahoma Court of Criminal Appeals  
4 can say: We always accept these, we never  
5 accept them, or sometimes we accept them, right?

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

8 JUSTICE ALITO: And you have exactly  
9 one case, McCarty, for the proposition that this  
10 must -- this waiver must be accepted. Exactly  
11 one.

12 Have -- can you cite one other case  
13 where we've deemed a state decision inadequate  
14 for conflicting with one prior opinion?

15 I thought our decision said that  
16 there's inadequacy when they conflict with  
17 many -- with many "past unambiguous holdings."

18 MR. CLEMENT: So, at least according  
19 to the dissenters in Cruz, that was a case where  
20 you found inadequacy when there wasn't a single  
21 case on point, and it was a question of first  
22 impression.

23 I would say, though, this. I mean, I  
24 think it's important to understand McCarty does  
25 not stand alone. I mean, in addition to

1 accepting the State's waiver in McCarty, the  
2 Oklahoma Court of Criminal Appeals on numerous  
3 occasions -- Valdez, Malicoat, both cases we  
4 cite in our briefs -- they basically treat the  
5 bars as things that the court itself can relax  
6 or waive. And that is equally inconsistent with  
7 treating them as a jurisdictional requirement  
8 that can't be waived.

9 That stands, again, against the  
10 backdrop of Oklahoma party presentation  
11 principles, this Court decision in Trest v.  
12 Cain. The Tenth Circuit has treated 1089(D) as  
13 a procedural bar that the State can waive.

14 And I think, ultimately, the question  
15 for adequacy -- I mean, you know, this Court's  
16 cases say a law -- a rule is adequate -- a state  
17 rule is adequate if it's firmly established and  
18 regularly applied.

19 The question for inadequacy is whether  
20 it's an unexplained departure from past  
21 practice.

22 CHIEF JUSTICE ROBERTS: Thank you,  
23 counsel.

24 Justice Thomas, anything further?

25 JUSTICE THOMAS: Just one point with

1 respect to the transport order.

2 I think my concern is that in their  
3 letter, the prosecutors say they did not see the  
4 transport order until 2022.

5 So my problem is, if they don't -- if  
6 they never saw it, then how is there a Brady or  
7 Napue violation?

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

11 JUSTICE THOMAS: No. They say it was  
12 not in their files.

13 MR. CLEMENT: I -- I don't think -- I  
14 mean, you know, let's keep -- keep in mind the  
15 precise dynamic we have here, right? This is --  
16 the interview takes place before the second  
17 trial. So Glossip -- I mean Sneed has been in  
18 state custody for close to five years at this  
19 point. He's been transferred from the jail to  
20 the correctional facility.

21 I think the State is charged for Brady  
22 purposes with that transfer sheet being  
23 exchanged.

24 JUSTICE THOMAS: But wouldn't it  
25 matter that -- whether or not they have it? I

1 mean, you're -- again, I go back to the  
2 prosecutors. You're -- what I'm hearing is, and  
3 they're hearing, is that they did not turn over  
4 Brady material or that they permitted false  
5 testimony to take place, and they're saying:  
6 Look, it did not happen.

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

10                   MR. CLEMENT: Well, with respect,  
11 Justice Thomas, you do have materials from them.  
12 Ackley's affidavit is in the Joint Appendix  
13 before this Court.

14                   And it's not like Smothermon never  
15 talked to anybody. She's talked to people at  
16 various junctures, and her story has changed  
17 over time.

18                   Again, I don't want to overstate the  
19 point because we didn't resist an evidentiary  
20 hearing --

21                   JUSTICE THOMAS: But they are central  
22 to this. It would seem like any dealings with  
23 them would also be central and we would not be  
24 arguing about Napue and Brady if that had been  
25 cleared up.

1                   MR. CLEMENT: I -- I -- I mean, I  
2 think they would still be submitting amicus  
3 briefs with new stories. And at a certain  
4 point, you've got to deal with what is in front  
5 of you and what is in the record.

6                   And the attorney general had to deal  
7 what was in front of him and in the record. And  
8 particularly when you read the notes in light of  
9 that sheet, all of which is in the record now, I  
10 think General Drummond made the correct  
11 conclusion --

12                   JUSTICE THOMAS: So -- so what are we  
13 to do with the point that they make that they  
14 were frozen out of the process?

15                   MR. CLEMENT: I -- I -- I -- I -- they  
16 had access to both independent investigations.  
17 And I think, at a certain point, I mean, you  
18 know, this -- if I were in their positions, I'd  
19 be complaining about the process as well.

20                   But, you know, the -- the ultimate  
21 process that I think matters here is the process  
22 in Glossip's trial, and that was fundamentally  
23 distorted when he is allowed to make the lithium  
24 use innocuous by saying: Oh, it was for, you  
25 know, a common cold, and I've never seen a

1 psychiatrist.

2 CHIEF JUSTICE ROBERTS: Justice Alito?  
3 Justice Sotomayor?

4 JUSTICE SOTOMAYOR: At least one of  
5 the two prosecutors was interviewed in some way  
6 because we have an affidavit from him that was  
7 provided before the OCCA while this case was  
8 pending, correct?

9 MR. CLEMENT: That is absolutely  
10 correct.

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

14 MR. CLEMENT: Smothermon.

15 JUSTICE SOTOMAYOR: -- Smothermon,  
16 whether she was interviewed?

17 MR. CLEMENT: I mean, she was inter-  
18 -- I know she was interviewed by -- by -- by  
19 Duncan, who is the independent prosecutor  
20 appointed by the attorney general. I think she  
21 also talked to people in the context of the  
22 ReedSmith independent investigation. But  
23 Mr. Waxman --

24 JUSTICE SOTOMAYOR: So --

25 MR. CLEMENT: -- may be able to fill

1 that in. But --

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

6 They had -- they were interviewed,  
7 correct?

8 MR. CLEMENT: My understanding is that  
9 they were interviewed. I think they do not  
10 think that the interview was as longstanding and  
11 as interactive as they had hoped.

12 As I say, I mean, you know, it's --  
13 it -- they're -- they --

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

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

18 JUSTICE SOTOMAYOR: All right.

19 MR. CLEMENT: -- the attorney general  
20 here had --

21 JUSTICE SOTOMAYOR: Can I go back to  
22 your respectful consideration to an attorney  
23 general's confession of error, and Justice  
24 Jackson asked you whether the Court has to  
25 accept the confession of error, and you said no.

1                   And I think that's correct. The  
2 Court, as I understand the rule of confession of  
3 error, it's especially relevant to questions of  
4 fact, correct?

5                   MR. CLEMENT: I --

6                   JUSTICE SOTOMAYOR: Not questions of  
7 law? The court has to be satisfied that there's  
8 a basis in law and fact for the confession,  
9 correct?

10                  MR. CLEMENT: I -- I think, as to  
11 both, it's respectful consideration. And I  
12 think it's at its zenith when it's prosecutorial  
13 misconduct because I think the prosecutors are  
14 in a particularly good position to judge what --  
15 I mean, you know, starting with: What does  
16 "Dr. Trumpet?" in the notes mean in the context  
17 of a community where everybody knows that  
18 Dr. Trombka is the sole psychiatrist at the  
19 jail? I mean, I think a prosecutor is going to  
20 have a -- a good basis to say everybody knows  
21 that's just some kind of shorthand for  
22 "Trombka."

23                  JUSTICE SOTOMAYOR: That's an issue of  
24 fact, and the AG says: If my prosecutor says  
25 she didn't know, I'm not accepting that because



1 she should have known.

2 MR. CLEMENT: And -- and -- and I  
3 don't find it plausible in light of everything  
4 that I now have before me.

5 And I -- you know -- and there's --  
6 there's the question of what Smothermon had  
7 before her in 2003, but now there's the question  
8 of -- I mean, because I think the Napue  
9 obligation on the government is a continuing  
10 one.

11 So, when they're looking at it,  
12 they're looking at the testimony that their  
13 prosecutor elicited. They're looking that -- at  
14 that in context of the notes and the medical  
15 information sheet.

16 And General Drummond reached the  
17 conclusion -- regretfully, but reached the  
18 conclusion: Our prosecutors elicited perjury  
19 here, and a man's going to go to his death. We  
20 can't allow that to happen.

21 JUSTICE SOTOMAYOR: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice Kagan?  
23 Justice Kavanaugh?

24 JUSTICE KAVANAUGH: And your view is  
25 that the result likely would have been

1 different, right?

2 MR. CLEMENT: We think the result  
3 would have been different with respect to the  
4 standard that's applied under Brady and under  
5 Napue.

6 JUSTICE KAVANAUGH: And what -- can  
7 you spell that out? I mean, I think it's  
8 obvious, but -- but spell out why you think  
9 that.

10 MR. CLEMENT: Well, you know, this is  
11 a case where there's just no disputing the fact  
12 that the State has one indispensable witness.  
13 That witness is Sneed. He's the person who  
14 committed the murder. He's the person -- until  
15 the police talked to him, Glossip was only  
16 charged as an accessory after the fact.

17 So there's every indication this is  
18 the absolute critical witness. And if that  
19 witness lies on the stand, perjures himself on  
20 the stand, that seems to me that that could have  
21 a reasonable probability of leading to a  
22 different result for at least two reasons.

23 One is this is the key witness, and  
24 the jury has just seen him under oath lie to  
25 their faces. And if that comes out -- I mean,

1 whatever other problems with his credibility  
2 that the prosecutors have at that point, they  
3 have a much bigger problem at that point. And  
4 without his testimony, there's no way to get the  
5 conviction of murder, let alone the death  
6 penalty.

7           The second thing, though, of course,  
8 is that defense counsel, I think, logically,  
9 if -- if -- if Sneed's testimony hadn't led them  
10 away from bipolar disorder, then they bring in a  
11 psychiatric expert and they make a big deal  
12 about how his confessed methamphetamine use,  
13 combined with bipolar disorder, makes him  
14 somebody who could act impulsively and  
15 violently, and that opens up a whole other  
16 defense for the -- for -- for -- for -- for  
17 Glossip.

18           Now, to be clear, I'm in an unusual  
19 position here because General Drummond has not  
20 only confessed error, but he's made it clear  
21 that he's not going to drop this prosecution or  
22 doesn't accept that this is, you know, the  
23 poster child for an actual innocence case and he  
24 intends to -- to -- to -- to reinstitute criminal  
25 process.

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

4                   JUSTICE KAVANAUGH:   Okay.  Thank you.

5                   CHIEF JUSTICE ROBERTS:  Justice  
6                   Barrett?

7                   JUSTICE BARRETT:  On McCarty, so that  
8                   is the only case, right --

9                   MR. CLEMENT:  Well --

10                  JUSTICE BARRETT:  -- that you have?  I  
11                  mean, otherwise, it's party presentation for a  
12                  long time but not zeroing in on the procedural  
13                  bar at issue here?  I just want to be sure I  
14                  understand.  I'm not trying to be hostile.

15                  MR. CLEMENT:  And -- and -- and I'm  
16                  not trying to be evasive.  I don't view it as  
17                  our only case because I think Valdez and  
18                  Malicoat, both decisions of the OCCA that treat  
19                  it as non-jurisdictional because they say the  
20                  court itself can excuse 1089(D) if there's  
21                  manifest injustice or a serious statutory or  
22                  constitutional error.  And -- and -- and that's  
23                  -- that's invoked even in paragraph 40 of the  
24                  opinion here.

25                  So -- so I don't think -- the way I

1 think of party presentation in all of that, I  
2 don't think that the court can have it both  
3 ways. If it's jurisdictional --

4 JUSTICE BARRETT: Mm-hmm.

5 MR. CLEMENT: -- it's jurisdictional,  
6 and nobody gets to waive it. And so that's why  
7 I don't think McCarty stands alone. And, of  
8 course, you know, we're talking -- the standard  
9 is unexpected departure.

10 JUSTICE BARRETT: Mm-hmm.

11 MR. CLEMENT: Okay? Here's -- here's  
12 the Attorney General's Office. We got McCarty,  
13 but we got Valdez, we have Malicoat, we have the  
14 Tenth Circuit saying 1089(D) is a procedural  
15 defense that we can waive --

16 JUSTICE BARRETT: Did you cite  
17 McCarty, or did -- I don't -- so, in the  
18 fourth -- let me make sure I've the sequencing  
19 right too. This is the fifth post-conviction  
20 application --

21 MR. CLEMENT: Yeah.

22 JUSTICE BARRETT: -- right? And in  
23 the fourth, they also refused to accept the  
24 confession of error and the waiver, right?

25 MR. CLEMENT: That is true.

1 JUSTICE BARRETT: So, when the fifth  
2 came up, it wasn't as -- as much of a surprise,  
3 right? I mean, why wasn't the attorney general  
4 ready at that point to say, you know, but you --  
5 there's McCarty and you can't -- you can't  
6 reject our waiver?

7 MR. CLEMENT: I mean, look, in a  
8 perfect world, I mean, you know, maybe we would  
9 have done that. But, in the real world, we  
10 thought we were waiving it. I mean, I know this  
11 is, like, in the weeds, but, you know, we  
12 expressly argue that the evidence is sufficient  
13 under 1089(C), which is the standard for the  
14 first habeas petition. So it's clear to  
15 everybody -- I mean, you know, my -- my friend  
16 and your friend, your Court-appointed friend,  
17 says, well, maybe it wasn't clear enough to the  
18 Oklahoma Court of Criminals Appeals.

19 But it was crystal-clear to them that  
20 we were trying to waive it and they weren't  
21 going to let us. And I think the fact that, you  
22 know, yes, it's two cases in the history of man,  
23 both involving Mr. Glossip, I think that still  
24 puts us well within the edits.

25 And the only thing I was going to add,

1 and I know I said it before, but I think it's  
2 really powerful, is Trest, Trest against Cain,  
3 this Court unanimously says, yeah, of course,  
4 procedural bars, procedural default, that's a  
5 defense. The State can waive it.

6 And the State can waive it not just by  
7 intentional relinquishment but by abandonment.  
8 That's Wood against Milyard. And, like, even if  
9 there's some question about whether we were  
10 sufficient in intentionally relinquishing it, we  
11 absolutely abandoned it.

12 So I -- I -- I just think this is a  
13 case where -- and -- and there's a systemic  
14 issue here, right, because, I mean, it's  
15 Oklahoma law. They get to do what they want.  
16 But, if Oklahoma is going to say you can't waive  
17 under these circumstances, it's going to create  
18 a whole federal courts exam about how it is that  
19 a -- a state prosecutor is supposed to confess  
20 error when they discover a Brady or a Napue  
21 violation after the first, like, state habeas  
22 petition has been filed.

23 And, you know, I've tried to think  
24 through it all, and I think, at the end of the  
25 day, there must be a due process right to

1 present that somewhere, but, boy, that's a --

2 JUSTICE BARRETT: But we don't have  
3 that issue?

4 MR. CLEMENT: It's -- well, I don't  
5 think -- you don't have it directly. And it's a  
6 lot harder issue than whether invoking this as  
7 an unwaivable jurisdictional bar for the first  
8 time in the history of man is adequate. I think  
9 that's a far easier question than the due  
10 process question about is there some ability to  
11 bring this kind of confession of error to some  
12 court somewhere and get to the merits.

13 JUSTICE BARRETT: Okay. I want to ask  
14 you about the standard of review for looking at  
15 Smothermon's notes because one of the  
16 difficulties, I think, with the notes is that,  
17 putting aside whether the Van Treese brief is in  
18 the record, it's not, it still -- it still  
19 reveals that there are multiple plausible  
20 interpretations of the notes.

21 So are we supposed to be applying kind  
22 of a preponderance standard, that we think it's  
23 most likely that they reflect that she knew  
24 about the psychiatric examination?

25 MR. CLEMENT: I think that's right. I



1 think it is a preponderance.

2 JUSTICE BARRETT: Okay. Okay.

3 MR. CLEMENT: And I think -- not be to  
4 be repetitive, but I think that's also the  
5 standard for the prosecutor because the  
6 prosecutor in the first instance, I think you  
7 want them to confess Napue errors. You want  
8 them to confess Brady errors.

9 And I don't think you want them  
10 applying a clear and convincing standard or  
11 beyond a reasonable doubt. I think you want  
12 them to say straight up, if -- if -- if we blew  
13 it and there's a Napue violation here, we should  
14 confess it.

15 CHIEF JUSTICE ROBERTS: Justice  
16 Jackson?

17 JUSTICE JACKSON: So just going back  
18 to Justice Barrett's question about whether  
19 McCarty is your only case, if I'm hearing you  
20 correctly, it is not because the principle that  
21 you're relying on is the fact that it is firmly  
22 established in Oklahoma law and procedure that  
23 non-jurisdictional procedural bars are waiveable  
24 and the courts accept those waivers. They do it  
25 when a party waives a non-procedural

1 jurisdictional bar.

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

5 MR. CLEMENT: That -- that's our view.  
6 And I think it's buttressed by the fact that the  
7 Valdez and Malicoat cases, even though they're  
8 not sort of confession of error or express  
9 waiver cases, they show the Oklahoma Court of  
10 Criminal Appeals treating 1089(D) as  
11 non-jurisdictional because, if it's  
12 non-jurisdictional, they can't excuse it because  
13 of --

14 JUSTICE JACKSON: Right. So it fits  
15 into the category of a non-procedural -- a  
16 non-jurisdictional.

17 MR. CLEMENT: Right.

18 JUSTICE JACKSON: I think that part of  
19 the problem here that is what is confusing about  
20 Oklahoma's opinion is that they seem to be  
21 conflating which I -- what I think are two  
22 different bases for not applying the procedural  
23 bar, right? One is the waiver, and the other is  
24 potentially the confession of error.

25 In your discussion with Justice

1 Barrett, it's -- you talked a little bit about  
2 Glossip IV. And in my reading of that, that was  
3 a situation in which there was a waiver  
4 expressly made, but I didn't know that there was  
5 also a confession of error. Am I right about  
6 that in that?

7 MR. CLEMENT: You're absolutely right  
8 about that. In fact --

9 JUSTICE JACKSON: All right. So --

10 MR. CLEMENT: -- it was the least  
11 confession of -- I mean it was the furthest  
12 removed --

13 JUSTICE JACKSON: Exactly.

14 MR. CLEMENT: -- from a confession of  
15 error. It's like there's a lot of chum in the  
16 water and we just want you to decide the merits,  
17 but we think they are absolutely wrong.

18 JUSTICE JACKSON: And so I think  
19 that's really important because the prosecutor,  
20 I think, is actually making two different  
21 determinations that might be relevant to whether  
22 or not the procedural bar applies.

23 The first is whether or not to waive  
24 it, which is what they do in Glossip IV. And  
25 the second is whether or not to confess error,

1 which they go on to do in *Glossip V.*

2           And only the latter, the confession of  
3 error, is the one that might call into question  
4 the -- the, you know, reasons for it, the court  
5 saying, well, you're confessing error, but let  
6 me figure out whether or not it's based in law  
7 and fact, and I'll only accept it under those  
8 conditions.

9           If I'm right about that, then the real  
10 problem happened with its deviating from the  
11 ordinary practice of allowing parties to waive  
12 and accepting them. And that's why you said, I  
13 think, in response to Justice Kagan that the  
14 waiver track is the easiest way to understand  
15 why we don't have an AISG here.

16           MR. CLEMENT: Absolutely, Your Honor.  
17 And, again, just in all candor to this Court,  
18 I'm representing Oklahoma. Oklahoma, in a lot  
19 of other cases, is going to be saying that's  
20 adequate and independent state ground.

21           But I think we want to be in a  
22 position where, if we make a determination that  
23 there's been a constitutional problem with one  
24 of our prosecutions, we want to be able to  
25 confess that error and get to the merits of it.

1 JUSTICE JACKSON: No, I understand,  
2 but I don't want to conflate the two. I mean,  
3 when there is a waiver, courts don't ordinarily  
4 go into why you are waiving.

5 MR. CLEMENT: Yeah.

6 JUSTICE JACKSON: You say this is my  
7 right to press this procedural bar and I'm  
8 waiving it, and the court says, fine, we move on  
9 to the merits of the argument.

10 What happened here, I appreciate the  
11 attorney general goes on to explain the reason  
12 why he wants to waive it, it's a confession of  
13 error, but I don't think the court gets to  
14 reject the waiver if it disagrees with the  
15 confession of error because waiver is a separate  
16 basis for, you know, relinquishing the  
17 procedural bar.

18 MR. CLEMENT: I agree entirely. And I  
19 think, ultimately, getting back to Justice  
20 Kagan's question, it may also explain why the  
21 opinion is sort of intertwined --

22 JUSTICE JACKSON: Correct.

23 MR. CLEMENT: -- because --

24 JUSTICE JACKSON: Correct.

25 MR. CLEMENT: -- they are sort of

1 treating them as one and the same. In fact, I  
2 think --

3 JUSTICE JACKSON: Exactly.

4 MR. CLEMENT: -- you know, paragraph  
5 25 or 26 specifically says the confession can't  
6 overcome 1089(D), which is perfect evidence that  
7 they've kind of conflated the two --

8 JUSTICE JACKSON: Correct.

9 MR. CLEMENT: -- because the  
10 confession isn't what overcomes 1089(D). It's  
11 the waiver that should at least historically  
12 everywhere but Oklahoma.

13 JUSTICE JACKSON: Thank you.

14 CHIEF JUSTICE ROBERTS: Thank you,  
15 counsel.

16 Mr. Michel.

17 ORAL ARGUMENT OF CHRISTOPHER G. MICHEL,

18 COURT-APPOINTED AMICUS CURIAE

19 IN SUPPORT OF THE JUDGMENT BELOW

20 MR. MICHEL: Mr. Chief Justice, and  
21 may it please the Court:

22 Over the past 20 years, the Oklahoma  
23 Court of Criminal Appeals has reviewed and  
24 upheld Petitioner's conviction six separate  
25 times, finding compelling evidence that he

1 commissioned the murder of Barry Van Treese.  
2 Petitioner now contends that the note  
3 "Dr. Trumpet?" would have so transformed his  
4 case as to justify vacating his conviction.

5 That is wrong. The court below  
6 correctly rejected Petitioner's claims on  
7 adequate and independent state grounds, that he  
8 failed to show reasonable diligence or clear and  
9 convincing evidence of innocence.

10 The attorney general did not waive  
11 those bars in this case, and the court was free  
12 to apply them in any event. This Court should  
13 accordingly dismiss the case for lack of  
14 jurisdiction, leaving Petitioner free to pursue  
15 state law clemency or other available relief.

16 If the Court reaches the merits, it  
17 should affirm. The cryptic note does not  
18 establish any of the threshold elements of  
19 Petitioner's claim, and perhaps, most clearly,  
20 the note is immaterial because it adds nothing  
21 of substance to what Petitioner already knew.

22 Critically, Petitioner has known since  
23 he received the competency report in 1997 that  
24 Justin Sneed took lithium and had a mental  
25 illness, but Petitioner chose not to question

1 Sneed's mental health at the trial because he  
2 knew that doing so would reinforce the  
3 prosecution's theory that Sneed was vulnerable  
4 to his manipulation.

5 Nothing in the note would have changed  
6 that decision or the jury's, particularly  
7 considering the extensive other evidence against  
8 Petitioner, including his motive to commit the  
9 crime and his coverup of the body.

10 The parties rely heavily on the  
11 attorney general's confession of error, but  
12 courts, not executives, determine whether to  
13 vacate final judgments of conviction. The court  
14 here decided the case on the law and the facts.  
15 This Court cannot ask for any more than that.  
16 It should leave the conviction in place.

17 I welcome the Court's questions.

18 JUSTICE THOMAS: What do you make of  
19 the absence of statements by the prosecutors in  
20 this record and the absence of Ackley's notes  
21 from the same meeting?

22 MR. MICHEL: Well, I think, as the Van  
23 Treese family's amicus brief explains, it  
24 indicates that the investigation the attorney  
25 general conducted here and the other independent



1 investigations were not particularly thorough.

2 I will note that the Ackley affidavit  
3 -- this is at JA 940 -- says that he thinks the  
4 mental condition was disclosed to the Petitioner  
5 with the competency report in 1997. And I agree  
6 with that, and that's their witness who, I  
7 think, has conceded an important point against  
8 them.

9 CHIEF JUSTICE ROBERTS: Mr. Michel, I  
10 asked -- I forget whether it was Mr. Waxman or  
11 Mr. Clement -- about your argument in the brief  
12 that all that's at issue here is whether or not  
13 the lithium was prescribed by a psychiatrist or  
14 by someone else and that that alone was not  
15 sufficient to affect the jury's deliberations.

16 Now they had responses to that that  
17 elaborate on what they regarded as the  
18 significance of not just who prescribed it but  
19 the lithium itself, in other words, the -- the  
20 bipolar disorder determination. And we heard --  
21 you know, emphasized that, contrary to what he  
22 had said, it's not simply for a cold.

23 I wondered if you could respond to  
24 that.

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

1           I think materiality -- I think this  
2 question goes to materiality. It's a  
3 comparative doctrine. You have to compare what  
4 was in the case before the new information and  
5 then determine whether the new information would  
6 have made a difference.

7           And I think, in this case, that  
8 determination -- that determination can be  
9 speculative in some cases. This is perhaps the  
10 rare case where the defendant's own conduct  
11 sheds considerable light on the importance of  
12 the information. After all, as I said at the  
13 outset, Petitioner has known since 1997 that  
14 Sneed took lithium.

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

19           If Petitioner thought that Sneed's  
20 mental health was important to his defense,  
21 surely, that would have been a bright red flag  
22 that he would have presented that defense at  
23 trial. The notion that the marginal additional  
24 information that he was arguably based on the  
25 notes treated by a psychiatrist would have

1 changed that decision, I think, is difficult to  
2 reconcile with the record.

3 I would also note the way you get from  
4 the notes, "Dr. Trumpet?," which I think my  
5 friend said they were able to do in a matter of  
6 hours because it was well-known that Dr. Trombka  
7 was the chief psychiatrist at the jail, they  
8 already had the roadmap to do it.

9 Remember, the competency report says  
10 that Sneed received lithium at the jail.  
11 They've had that since 1997. They could have  
12 simply gone to the jail and said: Who's the  
13 chief psychiatrist? And they would have been  
14 told Dr. Lawrence Trombka, and then they could  
15 have asked Dr. Trombka the same question that  
16 they asked in 2023, and he would have said:  
17 Well, if anybody treated Sneed, I treated him.

18 But they chose not to do that. And I  
19 think, one, that's overwhelming evidence of lack  
20 of diligence and that the state procedural bar  
21 is satisfied, but it's also overwhelming  
22 evidence on materiality because Petitioner  
23 didn't do this out of negligence. He did it out  
24 of strategy. And that was because, as the  
25 Oklahoma Court of Criminal Appeals explained on

1 page JA 991, arguing that Sneed had a mental  
2 deficiency or a mental illness would have  
3 reinforced the prosecution's theory that Sneed  
4 was vulnerable to Glossip's -- to Petitioner's  
5 manipulation.

6 JUSTICE KAGAN: Isn't that --

7 JUSTICE SOTOMAYOR: Counsel --

8 JUSTICE KAGAN: -- a separate  
9 question, though, about just he lied on the  
10 stand? And in a case where the entire case  
11 rested on the testimony of one person and his  
12 credibility, if you can show that he lied on the  
13 stand when he said "I never saw a psychiatrist  
14 and I didn't get a prescription from the  
15 psychiatrist, it was, you know, they gave me  
16 lithium for a common cold," and -- and then the  
17 prosecutor says: Well, that was a lie, I better  
18 correct that under Napue and -- and doesn't,  
19 that seems pretty material to me.

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

22 MR. MICHEL: I mean, a couple  
23 responses, Justice Kagan.

24 I think, first, there are threshold  
25 elements under Napue, including whether this was

1 false testimony. I don't think it was false  
2 testimony, but I want to take your question on  
3 its own terms.

4 This false testimony that Sneed saw a  
5 psychiatrist, that would have been harmful to  
6 Petitioner under his theory of the case.

7 Remember, the prosecution's --

8 JUSTICE KAGAN: False is false. You  
9 know, like, whether you can, like, parse the  
10 content of the testimony this way or that way,  
11 the critical question that a jury is asking is,  
12 do I believe this guy and everything he says and  
13 particularly, do I believe him when he points  
14 the finger at the accused?

15 And if I know that he has gotten up to  
16 the stand and lied about anything, whether it's  
17 important or not -- it might have been  
18 important; it might not have been important --  
19 if he's lying, if he's trying to cover up  
20 something about his own behavior, I'm going to  
21 take that into account in deciding whether, when  
22 he accuses the defendant, he's telling the  
23 truth.

24 MR. MICHEL: Justice Kagan, I think,  
25 in many cases where we were starting from the

1 blank slate that the witness is presumed to be  
2 credible, one lie would be important.

3 In this case, the witness admitted  
4 that he beat a man to death with a baseball bat.  
5 The witness admitted that he was testifying in  
6 exchange for avoiding the death penalty.

7 The jury already had significant  
8 credibility questions about Justin Sneed. And  
9 the notion that this --

10 JUSTICE KAGAN: I have to say I find  
11 that an -- an odd argument, Mr. Michel. It's  
12 like this witness was so not credible anyway  
13 that we don't have to consider any further lies  
14 that he tells?

15 MR. MICHEL: No. What I think is  
16 difficult to understand is if the jury would  
17 have believed Justin Sneed and convicted  
18 Petitioner despite those problems, and yet,  
19 because Justin Sneed saw a psychiatrist  
20 according to the notes, the jury would have done  
21 a 180 and reached a different result.

22 JUSTICE KAGAN: You know, a Napue  
23 violation is a pretty dramatic thing when a  
24 prosecutor says, like, whoa, whoa, stop there,  
25 that was a lie. You know, I think a reasonable

1 jury takes that into account when it's like:  
2 Wow, that was such a significant lie that the  
3 prosecutor had to sort of say stop.

4 MR. MICHEL: I -- I -- I don't think  
5 that would have happened in this case given the  
6 distinctive nature of the witness that we're  
7 talking about. I also want to underscore that  
8 this is a tangential issue. Justin Sneed  
9 testified for five hours. The question about  
10 lithium was about -- was about 30 seconds.

11 JUSTICE BARRETT: But, I guess, Mr.  
12 Michel --

13 JUSTICE SOTOMAYOR: Would it have made  
14 -- I'm sorry.

15 JUSTICE BARRETT: Oh, no, go ahead.

16 JUSTICE SOTOMAYOR: What do we do with  
17 the other violations that the prosecutor  
18 committed? Presumably, he lied about the knife  
19 incident, which was provoked by the prosecutor  
20 and not his initial statement. There was  
21 withheld -- a ton of other withheld information.

22 Once you find a violation and you're  
23 deciding on materiality, are you entitled to  
24 ignore all that other evidence having been  
25 improperly withheld?

1                   I know that it was in Glossip IV and  
2 -- and prior rulings the court didn't find any  
3 one of those a violation, but do we ignore it?  
4 Meaning because we're -- we would be looking at  
5 this issue de novo, so does the calculus of  
6 materiality take into account everything?

7                   MR. MICHEL: So I think this is  
8 several steps down the road. Of course, I think  
9 you should dismiss the case for lack of  
10 jurisdiction because there's inadequately  
11 defended state grounds.

12                  JUSTICE SOTOMAYOR: You've already  
13 lost it, but I'm asking you this question.

14                  So I -- I give you points --

15                  MR. MICHEL: I'm hoping I might find a  
16 few.

17                  JUSTICE SOTOMAYOR: -- I give you  
18 points for -- for trying to --

19                  MR. MICHEL: Yeah.

20                  JUSTICE SOTOMAYOR: -- revive, but  
21 let's get to the end, that we accept what  
22 Justice Kagan has said, that there was a  
23 falsehood. And now you're saying there was,  
24 even if she knew about it, it wasn't material.

25                  At that point, because, according to



1 you, he lied outside of court a number of times,  
2 but does all the other withheld evidence that  
3 shows not just one or two lies but a whole body  
4 of changed testimony, do we consider that?

5 MR. MICHEL: I do think the Court has  
6 said in cases like Kyles versus Whitley that if  
7 you get all the way to the materiality  
8 standard -- I think there are many off ramps  
9 before that in this case -- you would consider  
10 all of the other evidence.

11 I think it's notable on the knife  
12 point, however, which my friend Mr. Waxman  
13 mentioned at length, the -- the State does not  
14 concede error on that point. The State  
15 discusses at length why it doesn't support his  
16 position on that. And that's actually the  
17 subject of the fourth post-conviction relief  
18 application.

19 JUSTICE SOTOMAYOR: No. But I do  
20 think that we know that he had an accomplice, a  
21 girlfriend, in prior robberies, and he never had  
22 Mr. Sneed present at the robbery. And yet,  
23 there were two types of wounds. So it suggests  
24 the presence of a second person. And if it's  
25 not Mr. Sneed, then this robbery is much more

1 consistent with his pattern.

2 MR. MICHEL: I think the Oklahoma  
3 Court --

4 JUSTICE SOTOMAYOR: And that pattern  
5 was withheld from defense counsel. So that's  
6 why I'm asking about materiality.

7 MR. MICHEL: I mean, to be very clear,  
8 the -- the pattern is not the knife. The  
9 question about the knife is the wounds on the  
10 body and --

11 JUSTICE SOTOMAYOR: No, I agree --

12 MR. MICHEL: Right. It's the Oklahoma  
13 Court --

14 JUSTICE SOTOMAYOR: -- but I -- it had  
15 to do with whether there was one or two people  
16 involved.

17 JUSTICE BARRETT: Mr. Michel, I do  
18 want to ask you about the adequate and  
19 independent state grounds because this is  
20 unusual, not to accept, you know, the waiver of  
21 the procedural bar and, you know, you heard us  
22 talk about that with Mr. Clement and Mr. Waxman.

23 What's your response to that?

24 MR. MICHEL: So, Justice Barrett, I  
25 actually don't think it -- it's that usual,

1 although that's partly because we have a very  
2 small sample size. As I -- as I read the cases,  
3 there's only one case in which the Oklahoma  
4 attorney general has squarely waived a  
5 procedural bar and the Oklahoma Court of  
6 Criminal Appeals has squarely addressed what to  
7 do with that. And that's the decision on the  
8 fourth post-conviction review application, in  
9 which the Oklahoma Court of Criminal Appeals, on  
10 JA 775, said that it was not going to accept the  
11 attorney general's waiver of the procedural  
12 bars.

13           The attorney general -- in this Court,  
14 this attorney general told you that was an  
15 adequate and independent state ground and that  
16 this Court, accordingly, lacks jurisdiction over  
17 -- over the fourth post-conviction relief  
18 application.

19           So this -- this decision, I actually  
20 think, does not actually address a waiver of a  
21 procedural bar because the attorney general  
22 quite understandably, after he received that  
23 decision from the Oklahoma Court of Criminal  
24 Appeals, did not actually waive the procedural  
25 bar in this case.

1                   Instead, if you look at JA 976 and  
2                   977, the attorney general says, "What Glossip  
3                   has to do is meet the procedural bar." Then he  
4                   goes on to describe the diligence prong and the  
5                   innocence prong and why, in the attorney  
6                   general's legal opinion, those requirements are  
7                   satisfied.

8                   But arguing that the requirements are  
9                   satisfied is not the same thing as waiving the  
10                  procedural bar. And in the one case where the  
11                  Oklahoma Court of Criminal Appeals has addressed  
12                  that, it has said that it doesn't have to accept  
13                  the waiver.

14                  JUSTICE BARRETT: What about  
15                  Mr. Clement's saying that we have a hundred  
16                  years of practice and that this is just what the  
17                  law is, and procedural bars are always waivable;  
18                  they are not jurisdictional?

19                  MR. MICHEL: With -- with all respect  
20                  to Mr. Clement, I don't think you have a hundred  
21                  years of this. I think the one case he's  
22                  pointed to, as several of the Justices pointed  
23                  out, is the McCarty case from 2005 --

24                  JUSTICE JACKSON: But why is that?  
25                  Why are you making the sample size so small? I

1 mean, I understand that's the only case that  
2 involves an attorney general who expressly  
3 waives a procedural bar, but procedural bars are  
4 waived -- of all kinds are waived all the time.

5 So why wouldn't what Oklahoma courts  
6 do when a procedural bar is waived, why wouldn't  
7 that be the universe of cases that we're looking  
8 at?

9 MR. MICHEL: Well, I think I would  
10 start with the statute that's before the Court  
11 in this case. I think whether that bar has been  
12 waived --

13 JUSTICE JACKSON: Are you saying that  
14 statute is a jurisdictional one?

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

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

25 MR. MICHEL: I don't understand my

1 friends to argue -- perhaps this morning they  
2 did for the first time -- that Oklahoma has an  
3 absolute rigid categorical rule  
4 transsubstantively across all areas that  
5 procedural --

6 JUSTICE JACKSON: No, but we don't  
7 need that.

8 MR. MICHEL: -- non-jurisdictional  
9 procedural bars have to be accepted.

10 JUSTICE JACKSON: We don't need that  
11 under Cruz. We don't need a rule that says we  
12 have to accept it. What we need is the practice  
13 --

14 MR. MICHEL: Right.

15 JUSTICE JACKSON: -- of the court when  
16 this kind of thing happens.

17 MR. MICHEL: Right.

18 JUSTICE JACKSON: And so have you  
19 shown a case in which a non-jurisdictional  
20 procedural bar has been rejected by the  
21 Oklahoma --

22 MR. MICHEL: Absolutely.

23 JUSTICE JACKSON: Which one?

24 MR. MICHEL: The one that's before  
25 you. The one that's before you --

1 JUSTICE JACKSON: Other than the one  
2 that's before us. We're trying to determine  
3 whether the one that's before us --

4 MR. MICHEL: Oh, I'm sorry. I'm  
5 sorry.

6 JUSTICE JACKSON: -- is a deviation.

7 MR. MICHEL: Right. I'm sorry.

8 JUSTICE JACKSON: Right?

9 MR. MICHEL: The one -- the fourth  
10 post-conviction relief application, which is  
11 also before you on this --

12 JUSTICE JACKSON: Not -- not  
13 Mr. Glossip's situation. Do you have a case  
14 that does not involve a person named Glossip --  
15 (Laughter.)

16 JUSTICE JACKSON: -- in which the  
17 Court has rejected any non-jurisdictional  
18 procedural bar?

19 MR. MICHEL: Usually --

20 JUSTICE JACKSON: That's waived?

21 MR. MICHEL: Right. Usually, being  
22 able to cite a case that involves the same  
23 litigant seems relatively on point, but I don't  
24 -- I think there is only other case that has  
25 come before the Oklahoma Court of Criminal

1 Appeals where the attorney general has waived  
2 this procedural bar. That's the McCarty case.

3 In three footnotes, the Court of  
4 Criminals Appeals observed that the attorney  
5 general had waived the procedural bar, but it  
6 did not say it was deciding the issues for that  
7 reason. And in the 19 years since McCarty --

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

13 MR. MICHEL: Right. I -- I think  
14 there are three cases under this statute in  
15 which the court has seen waivers, arguably. In  
16 one of those, it rejected the waiver. In  
17 McCarty, it was ambiguous.

18 JUSTICE KAGAN: Not -- not --

19 MR. MICHEL: And in this case, I think  
20 it was also ambiguous.

21 JUSTICE KAGAN: Not a case involving  
22 this -- it doesn't -- not a case involving this  
23 defendant, and we don't have to be in attorney  
24 general confession-of-error land. Just one case  
25 where the Oklahoma court says, even though a



1 party wants to waive this procedural bar, you  
2 know, we're going to insist on opposing it.

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

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

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

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

1 sample size could possibly be that small because  
2 the question we're asking is whether it's  
3 waivable. Right?

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

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

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

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

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

18 MR. MICHEL: No.

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

23 MR. MICHEL: Right.

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

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

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

12 So, to be fair, I think that's quite  
13 relevant.

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

16 MR. MICHEL: Sure.

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

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

1 concession that they're referring to is the  
2 concession that he warrants post-conviction  
3 relief, right?

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

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

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

22           JUSTICE KAGAN: Okay. So if -- if --

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

25           JUSTICE KAGAN: -- if that's -- if

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

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

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

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

21 JUSTICE SOTOMAYOR: Well, I guess what  
22 I was suggesting --

23 MR. MICHEL: In terms of procedural  
24 bars.

25 JUSTICE SOTOMAYOR: -- is you would

1 never get to paragraph 26, except for the prior  
2 determination that the State -- that the State's  
3 concession is wrong, which has to be a  
4 determination on the merits.

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

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

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

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

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

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

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

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

15 But please continue answering.

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

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

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

1 (Laughter.)

2 MR. MICHEL: Yeah. Justice Kagan --

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

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

13 (Laughter.)

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

16 (Laughter.)

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

20 JUSTICE KAGAN: No, but, actually --

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

23 JUSTICE KAGAN: Totally right, it's  
24 not how well written it is. But it's a high bar  
25 to say that something is independent, you know,



1 if there's ambiguity, if there's uncertainty.

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

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

8 Paragraph 26 says that the court --

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

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

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

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

23 Paragraph 27, in particular, if you  
24 look at the last sentence, it says: Moreover  
25 and controlling here is the fact that this issue

1 could have and should have been raised with  
2 reasonable diligence.

3 That's a direct invocation of the bar.

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

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

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

23 But I think, in paragraph 26 and 27,  
24 it does squarely independently and adequately  
25 apply the state procedural bars. That means

1 this Court lacks jurisdiction.

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

13 JUSTICE JACKSON: Can I just -- sorry.

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

21 JUSTICE KAGAN: Okay.

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

23 JUSTICE JACKSON: Yes.

24 MR. MICHEL: Sorry, Justice Jackson.

25 JUSTICE JACKSON: Sorry.

1 MR. MICHEL: Yeah.

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

4 MR. MICHEL: Yeah.

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

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

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

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

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

1 MR. MICHEL: Well, I would look at JA  
2 976.

3 JUSTICE JACKSON: Okay.

4 MR. MICHEL: He says: To obtain --  
5 here, JA 976.

6 JUSTICE JACKSON: Yes.

7 MR. MICHEL: To obtain post-conviction  
8 relief, Glossip needs to show that the issue  
9 could have been raised in a direct appeal and  
10 supports a conclusion that the outcome of the  
11 trial would have been different, citing the  
12 procedural bar.

13 JUSTICE JACKSON: Okay.

14 MR. MICHEL: Then he says: At a  
15 minimum, Glossip was not made aware of Sneed's  
16 treatment. That's the diligence prong.

17 JUSTICE JACKSON: Okay.

18 MR. MICHEL: Then he says: The State  
19 is also not comfortable asserting that the  
20 outcome would have been different. That's the  
21 innocence prong.

22 JUSTICE JACKSON: Does he also say:  
23 I'm incorporating my arguments from Glossip IV,  
24 where he expressly waived?

25 MR. MICHEL: He says: I'm

1 incorporating my arguments from Glossip IV.

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

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

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

18 In other words, it -- it seems odd to  
19 me that he would be talking about the merits of  
20 this claim, trying to get the -- the conviction  
21 vacated, but also still invoking the procedural  
22 bar.

23 And the oddity, it seems to me, is  
24 explained by the previous attempt to waive the  
25 -- the -- the -- the procedural bar that was

1 rejected by the court.

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

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

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

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

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

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

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

25 It was his predecessor in -- in IV,

1 not him.

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

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

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

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

15 JUSTICE JACKSON: Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you,  
17 counsel.

18 Justice Thomas?

19 Justice Alito?

20 Justice Sotomayor?

21 Justice Kagan?

22 Justice Kavanaugh?

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



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

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

10 Can you explain that some more?

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

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

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

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

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

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

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

1 made the conviction more likely.

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

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

21           JUSTICE KAVANAUGH: All right. Thank  
22 you.

23           CHIEF JUSTICE ROBERTS: Justice  
24 Barrett?

25           JUSTICE BARRETT: No.

1 CHIEF JUSTICE ROBERTS: Justice  
2 Jackson?

3 JUSTICE JACKSON: It seems like  
4 there's some pretty significant factual  
5 questions that have been debated. You know,  
6 what did counsel know? What do these notes,  
7 markings mean? Was Sneed's statement that he  
8 never saw a psychiatrist true or false?

9 Would you object to an evidentiary  
10 hearing? As I understood it, no court has ever  
11 actually made findings on those things.

12 MR. MICHEL: I'm not even really sure  
13 if I have standing to object to a -- an  
14 evidentiary hearing.

15 (Laughter.)

16 MR. MICHEL: You know, I don't think  
17 it's -- I guess we all agree that it's not --

18 JUSTICE JACKSON: No, so you all agree  
19 --

20 MR. MICHEL: That it's not necessary.

21 JUSTICE JACKSON: -- that it's  
22 necessary? You say we can look at it and --

23 MR. MICHEL: Well --

24 JUSTICE JACKSON: -- rule in your  
25 favor. I mean, they say we can look at it and

1 rule in their favor. But I'm just trying to  
2 understand, don't we have to have some -- maybe  
3 we don't, but --

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

10 JUSTICE JACKSON: Right.

11 MR. MICHEL: -- about the fact that --

12 JUSTICE JACKSON: If we disagree with  
13 that, if we're getting to the merits, what --  
14 how -- how should we go about deciding whether  
15 there was a Brady or Napue violation here?

16 MR. MICHEL: I think you start with  
17 the premise that it's Petitioner's burden to  
18 prove the -- the Brady and Napue violations.  
19 And based on the evidence that he has chosen to  
20 present, and particularly given that he's now  
21 told you he wants the case decided on the  
22 current record without an evidentiary hearing, I  
23 think the proper conclusion would be that he's  
24 failed to satisfy his burden. And, thus, if you  
25 reach the merits, you should affirm the judgment

1 below.

2 JUSTICE JACKSON: Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you,  
4 counsel.

5 Rebuttal, Mr. Waxman?

6 REBUTTAL ARGUMENT OF SETH P. WAXMAN

7 ON BEHALF OF THE PETITIONER

8 MR. WAXMAN: Thank you, Your Honor. I  
9 have a few, a few short points.

10 Number one, there is -- nothing that  
11 will come up at an evidentiary hearing is going  
12 to avoid the imperative, the necessity for a new  
13 trial for due process violations.

14 If you look at the -- JA 1005, which  
15 is the jail medical report, there is no world in  
16 which that report, which was suppressed by the  
17 defense -- by the prosecution, is not Brady  
18 material and highly, highly relevant impeachment  
19 material.

20 There -- if you look at page 953 of  
21 the Joint Appendix, these are the Smothermon  
22 notes, the Smothermon mid-trial note, "we have  
23 to get to Justin right away," the knife is the  
24 biggest problem. There is no way that that --  
25 those suppressed notes, number one, don't

1 reflect a Napue violation and, number two, are  
2 not Brady material.

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

15           Ms. Smothermon said when she was  
16 questioned, number one, I'm not sure that  
17 Trumpet is Trombka. Explanation number two, I  
18 was referring to Dr. Trumpet, a jazz musician I  
19 wanted to hear. That was a personal note.

20           And so when -- in any event, even if  
21 she's right that all Sneed said was I was  
22 questioned by the defense and I told them that I  
23 was proscribed lithium by Dr. Trumpet, given the  
24 obvious fact that this prosecutor for Oklahoma  
25 County knew as well as everybody else that

1 Dr. Trombka was the only jail psychiatrist, she  
2 committed a Napue violation even under the Van  
3 Treese brief extra-record explanation.

4 Now, there was a question about -- I  
5 think, Justice Thomas, it was yours, but pardon  
6 me if I've misallocated it -- about, well, the  
7 jail records, like, they were in the  
8 prosecutor's file. The jail records are clearly  
9 Brady material.

10 They were -- under this Court's  
11 decision in Kyles and other cases, Brady  
12 material includes not as -- not only what is in  
13 the prosecutor's file but what is also in the  
14 police and investigators' files. That is an  
15 obligation that the prosecution has. And they  
16 were in the -- the sheriff's office files. The  
17 sheriff office ran the jail. The sheriff's  
18 office was -- investigated this crime. A deputy  
19 sheriff was called by the prosecution to report  
20 on his investigation. And Mr. Ackley, at page  
21 26 -- paragraph 26 of his declaration, page 939,  
22 says that he knew about jail records and  
23 misapplications.

24 Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you,



1 Mr. Waxman.

2 The case is submitted.

3 Mr. Michel, this Court appointed you  
4 to brief and argue this case as an amicus curiae  
5 in support of the judgment below. You have ably  
6 discharged that responsibility, for which we are  
7 grateful. Thank you.

8 (Whereupon, at 11:49 a.m., the case  
9 was submitted.)

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## E

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