No. 22-7466

IN THE

Supreme Court of the United States

RICHARD GLOSSIP,

Petitioner,

vs.

STATE OF OKLAHOMA,

Respondents.

On Petition for Writ of Certiorari to the Oklahoma Court of Criminal Appeals

BRIEF AMICUS CURIAE OF VICTIM FAMILY MEMBERS DEREK VAN TREESE, DONNA VAN TREESE, AND ALANA MILETO, AND THE OKLAHOMA DISTRICT ATTORNEYS ASSOCIATION IN OPPOSITION TO THE PETITION

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QUESTIONS PRESENTED

1. Does this Court have jurisdiction to review a state court's denial of a fifth collateral attack when that denial is based on the state's successive petition statute, the petition clearly does not meet the statutory criteria for consideration, and there is no claim that the state ground is inadequate or not independent of federal law?

2. Does a state attorney general's confession of error reopen an otherwise barred claim when the state court has already considered and rejected the claim and the confession, finding that (1) the attorney general cannot waive the state procedural rule, (2) the evidence in question was known to the defense before trial, and (3) the evidence is not material?

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INTEREST OF *AMICI CURIAE*

On January 7, 1997, Richard Glossip commissioned the murder of Barry Van Treese. Among many other important family relationships, Barry Van Treese was the beloved father of Derek Van Treese, husband of Donna Van Treese, and brother of Alana Mileto (the *amici* "Van Treese family").[1] Today—9645 days later—the Van Treese family has an interest in seeing

1. The parties were notified of *amici*'s intent to file this brief on May 18, 2023. Pursuant to Supreme Court Rule 37.6, *amici* represent that this brief was not authored in whole or in part by any party or counsel for any party. No person or party other than *amici*, their counsel, or the Criminal Justice Legal Foundation made a monetary contribution to the preparation or submission of this brief.

Oklahoma's duly imposed sentence on Glossip carried out without further delay.

Founded in 1974, the Oklahoma District Attorneys Association (ODAA) supports Oklahoma prosecutors in every aspect of their mission. The ODAA is interested in this case because the state court unanimously concluded that Oklahoma prosecutors properly followed all legal requirements in prosecuting Mr. Glossip, a decision which should stand.

SUMMARY OF THE ARGUMENT

" … to no one deny or delay right or justice …."
— Magna Carta, § 40, 9 Hen. III, ch. 14 (1225).

This case involves Glossip's effort to overturn an aggravated murder conviction that is nearly two decades old. The Oklahoma state courts have carefully reviewed that conviction and resulting death sentence. They have concluded that Glossip is guilty and his sentence is proper.

But in the last few months, a new Oklahoma Attorney General has arrived on the scene. For reasons that are unclear, he personally believes that a new trial is warranted—an opinion unanimously rejected by the Oklahoma Court of Criminal Appeals (OCCA) below as "not based in law or fact." App. 15a.

The Attorney General's opinion does not provide a basis for reviewing the decision below, which is fully supported by multiple independent and adequate state grounds. Any further delay would inflict enormous suffering on the Van Treese family. The Court should deny certiorari.

PROCEDURAL BACKGROUND

A. The First Twenty-Five Years of Litigation.

On January 7, 1997, Barry Van Treese was murdered. On July 31, 1998. Glossip was first sentenced to death for the first-degree malice murder of Barry Van Treese. Three years later, the OCCA overturned his conviction for ineffective assistance of counsel. *Glossip* v. *State*, 29 P. 3d 597 (Okla. Crim. App. 2001). Another three years later, on August 27, 2004, Glossip was retried and resentenced to death—a sentence the OCCA affirmed in 2007. *Glossip* v. State, 157 P. 3d 143 (Okla. Crim. App. 2007). Eight years later, this Court approved Oklahoma's method of execution. *Glossip* v. *Gross*, 576 U. S. 863, 874 (2015).

Another eight years have elapsed and, at the beginning of this year, Glossip was set to be executed in February—more than eighteen years after his (second) death sentence.

B. The Last Year of Litigation.

As Glossip's execution was approaching, in November 2022, a new Oklahoma Attorney General was elected. And, perhaps sensing political opportunity, shortly after assuming office in January 2023, the new Attorney General hastily commissioned an "independent" review of Glossip's conviction. Conveniently, the Attorney General hired a political supporter with limited experience in capital litigation. And that review suddenly discovered "new" evidence related to a prosecution witness's mental health, evidence that the prosecution had purportedly not disclosed.

Armed with this "new" evidence, Glossip filed his fifth successive petition for post-conviction relief in the OCCA. And then, on cue, the Attorney General filed a response requesting that the OCCA vacate Glossip's 19-

year-old murder conviction and send the case back to the district court for a new trial. App. 4a. The Attorney General stated that he was "not suggesting that Glossip is innocent of any charge made against him," App. 4a, but that he was "troubled" by the "new" evidence. Response to Stay Application 4.

The five judges of the OCCA carefully considered the Attorney General's confession of being "troubled" by the new evidence. That Court was unimpressed. In a 22-page opinion, the OCCA observed that the Attorney General's "concession alone cannot overcome the limitations on successive post-conviction review." App. 15a. After reviewing the evidence and arguments, the OCCA concluded that the Attorney General's "concession is not based in law or fact." App. 15a. With regard to whether the issues were somehow new, the OCCA noted that the evidence surrounding the state's witness's (Sneed's) mental health issues was previously available. App. 16a. The OCCA observed that defense counsel presumably did not want to inquire about the topic further "due to the danger of showing that [Sneed] was mentally vulnerable to Glossip's manipulation and control." App. 16a-17a. And with regard to whether the prosecution had concealed this information, the OCCA reached a factual conclusion that information about Sneed "was not knowingly concealed by the prosecution," Sneed's testimony "was not clearly false," and that the whole issue was "not material under the law." App. 17a. The OCCA also found that the evidence did "not create a reasonable probability that the result of the proceeding would have been different" if the topic had been further explored at trial. App. 17a.

Glossip now seeks certiorari, raising two fact-bound questions about whether the OCCA's factual conclusions should be overturned. Pet. i.

ARGUMENT

The "new" evidence issue Glossip asks this Court to review was carefully considered by Oklahoma's highest court for criminal cases. The OCCA reached the fact-bound conclusion that there was no "new" evidence—and thus no reason to doubt the integrity of Glossip's convictions and sentence. No federal legal issue exists warranting further review. Such review is barred by adequate and independent state grounds for the OCCA's decision.

In addition, the OCCA's factual conclusions below were entirely correct. The purported concealment of evidence never occurred. See *infra*, at 11. And the dispute pertains to evidence that was not material to Glossip's aggravated murder conviction. See *infra*, at 12.

At bottom, Glossip asks this Court to adopt the novel theory that, when a state Attorney General personally disagrees with a decision below, that unhappiness trumps all other procedural requirements. But "the proper administration of the criminal law cannot be left merely to the stipulation of parties." *Young* v. *United States*, 315 U. S. 257, 259 (1942). This Court has no authority to give decisive weight to the Attorney General's views over the OCCA's—and there is no reason to do so given the trauma that any further delay would inflict on the victim's family.

I. This Court Lacks Jurisdiction to Review Glossip's Claims Because the OCCA's Decision Below Rests on Adequate and Independent State Grounds.

When a party seeks review of a decision in this Court, "the first and fundamental question is that of jurisdiction …. This question the court is bound to ask

and answer for itself, even when not otherwise suggested ….” *Steel Co.* v. *Citizens for a Better Env't*, 523 U. S. 83, 94 (1998) (internal quotation marks omitted). If the answer to that first question is negative, “ ‘the only function remaining to the court is that of announcing the fact and dismissing the cause.’ ” *Ibid.* (quoting *Ex Parte McCardle*, 74 U. S. (7 Wall.) 506, 514 (1869)).

The petitioner's statement on jurisdiction, in its entirety, is: “This Court has jurisdiction under 28 U. S. C. § 1257(a).” Pet. 3. That is not remotely close to sufficient.

> “This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment…. In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional.” *Coleman* v. *Thompson*, 501 U. S. 722, 729 (1991), modified on other grounds in *Martinez* v. *Ryan*, 566 U. S. 1, 9 (2012).

The present proceeding is petitioner's *fifth* application for post-conviction relief. App. 3a. Oklahoma has a successive petition rule for capital cases. See Okla. Stat., Tit. 22, § 1089(D)(8) (“§ 1089”). This statute is patterned after the federal successive petition limitations enacted in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Cf. 28 U. S. C. §§ 2244(b), 2255(h). The analogous requirements were added into the Oklahoma statute in 1995, as AEDPA was moving through Congress. See 1995 Okla. Sess. Laws ch. 256, § 4. A claim such as Glossip's, resting on a long-established principle of law, cannot be considered on the merits unless (1) the claim has a factual basis that could not have been presented earlier through the exercise of reasonable diligence, and (2) there is “clear

and convincing evidence that, but for the alleged error, no reasonable fact finder would have found the applicant guilty of the underlying offense or would have rendered the penalty of death." § 1089(D)(8)(b); cf. 28 U. S. C. § 2244(b)(2)(B).

The Oklahoma Court of Criminal Appeals (OCCA) began its discussion of the claims by noting that its review was limited by § 1089. App. 9a-10a, ¶ 16. On the claim presented in the certiorari petition, the OCCA unambiguously found that this claim did not meet the standard of that section. App. 16a, ¶ 26. This is plainly a holding of state law. See Pet. 14-15, 16, n. 6 (conceding as much). This holding is sufficient to support the judgment.

The fact that the court went on to state an alternative holding on the merits of the federal question, App. 17a, ¶ 28, does not open the door to review in this Court. See *Harris* v. *Reed*, 489 U. S. 255, 264, n. 10 (1989). The OCCA did not believe that the evidence even rises to the level of materiality for a challenge under *Napue* v. *Illinois*, 360 U. S. 264 (1959), a holding that petitioner asks this Court to review. Pet. 16. It does not matter for the purpose of the jurisdictional question. The state successive petition rule, like its federal counterpart, sets a much higher standard for successive petitions. Whether the evidence meets the higher § 1089 standard is a question of state law, and it is independent of the question of whether the evidence meets the lower federal substantive standard of materiality.

The OCCA also held that the Attorney General's confession of error was not binding on the court under § 1089. Glossip asserts confidently that the Attorney General will waive the procedural default in this Court, Pet. 16, n. 6, as if that matters. It does not. While this Court has held that the state may waive some

nonjurisdictional procedural limitations imposed by federal law, see, *e.g.*, *Collins* v. *Youngblood*, 497 U. S. 37, 41 (1990), the state has no obligation to follow a similar rule. The state court of last resort for criminal cases has held that § 1089(D)(8) is not waivable, and that decision is binding in this Court. *Hollingsworth* v. *Perry*, 570 U. S. 693, 718 (2013). A concession by the Attorney General cannot move a decision on an adequate and independent state ground outside this Court's jurisdiction into something inside this Court's jurisdiction. "[N]o action of the parties can confer subject-matter jurisdiction upon a federal court." *Insurance Corp. of Ireland* v. *Compagnie Des Bauxites De Guinee*, 456 U. S. 694, 702 (1982).

Given that the state court decision rests on an independent state ground, this Court could review that decision only if the state ground were inadequate. See *Cruz* v. *Arizona*, 598 U. S. 17, 25 (2023), https://www.supremecourt.gov/opinions/22pdf/598us1r3_j4ek.pdf. No such claim is made in the certiorari petition, and none would be likely to succeed if made. The Tenth Circuit has repeatedly rejected claims that § 1089 is inadequate. *Williams* v. *Trammell*, 782 F. 3d 1184, 1214 (CA10 2015); *Banks* v. *Workman*, 692 F. 3d 1133, 1145 (CA10 2012). The fact that the state court employs some flexibility in applying its rule does not render it inadequate. *Walker* v. *Martin*, 562 U. S. 307, 311 (2011). No unforeseeable and unsupported departure from preexisting law and practice is involved here. Cf. *Cruz*, *supra*, at 26. The OCCA's holding is solidly grounded in the text of a quarter-century-old statute.

The decision at issue here does not depend on the Oklahoma Court of Criminal Appeal's resolution of a federal question. This Court therefore has no jurisdiction to review the decision.

II. Because Glossip Is Clearly Guilty of Aggravated Murder, There Is No Significant Federal Question to Review.

It would blink reality to ignore the broader plan afoot here. Glossip and his abolitionist supporters are attempting to create the specter of an innocent person being executed, so that they can further their campaign against the death penalty.[2] Such efforts to prove that an innocent person has been executed have a long and checkered past. See Markman & Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 Stan. L. Rev. 121 (1988) (refuting claims of executions of innocent persons). To be sure, reasonable people can differ on the wisdom of the death penalty. But no fair-minded person—without a political agenda—could conclude that Glossip is anything other than guilty.

A. Vast Evidence Established Glossip's Guilt Beyond Any Reasonable Doubt.

The compelling evidence establishing Glossip's guilt in his (second) trial has been reviewed in the seemingly countless proceedings in the 18 years (and counting) since. A brief review will be helpful here.

As the OCCA explained below, App. 5a-7a, Barry Van Treese was the owner of the Best Budget Inn in Oklahoma City. Glossip worked as the manager, and he lived on the premises with his girlfriend D-Anna Wood. Glossip hired Justin Sneed to do maintenance work at the motel—and also hired him to murder Van Treese.

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2. See, *e.g.*, Forman, *Richard Glossip Supporters, including Dr. Phil, Rally at State Capitol*, Tulsa World, May 9, 2023, updated May 10, 2023, available at https://tulsaworld.com/news/local/government-politics/richard-glossip-supporters-including-dr-phil-rally-at-state-capitol/article_f57fffbe-ee84-11ed-88a4-3b6b8cfef26a.html.

By all credible accounts, Sneed was under Glossip's control.

In the early morning hours of January 7, 1997, Sneed entered room 102 and bludgeoned Van Treese to death with a baseball bat. Sneed then went to Glossip's room and told him he had killed Van Treese and that a window was broken during the attack. Glossip told Wood that two drunks had broken out a window.

Glossip went to Van Treese's room to help cover the busted window, but later denied seeing Van Treese's body. Glossip told Sneed to drive Van Treese's car to a nearby parking lot and retrieve money that would be under the seat. The envelope contained $4,000, which Glossip divided with Sneed. Police later recovered $1,700 from Sneed and $1,200 from Glossip.

That morning, day-desk manager Billye Hooper noticed that Van Treese's car was gone and asked Glossip where it was located. Glossip told Hooper that Van Treese left to obtain supplies to repair and remodel rooms. Glossip told the housekeeper that he and Sneed would clean the downstairs rooms, including 102. Glossip, Wood, and security guard Cliff Everhart later drove around looking for Van Treese. Glossip kept Everhart away from Room 102.

Later, Everhart and Oklahoma City Police Sgt. Tim Brown began discussing Glossip's conflicting statements, so they decided to check Room 102 on their own. At about 10:00 p.m. they discovered Van Treese's body in his room. Glossip later told investigators that he was deceitful because he felt like he was involved in the crime; he said he was not trying to protect Sneed.

Sneed later told investigators and testified at trial that Glossip offered him $10,000 to kill Van Treese. Glossip feared he would be fired due to discrepancies in the motel's finances, so he hired Sneed to kill Van

Treese. Sneed has never come forward stating that he wishes to recant or change his trial testimony.

B. No "New" Evidence Exists, and Prosecutors Never "Concealed" Anything.

Against this backdrop of overwhelming evidence of guilt, Glossip does not argue (much less attempt to prove) that he is innocent of the crimes against him. Nor does the Attorney General stake out such a far-fetched position. Instead, the parties jointly claim that a new trial is required in light of purported "new" evidence that prosecutors concealed. Pet. 1. But no new evidence exists, and prosecutors never concealed anything.

The "new" evidence that Glossip cites is the State's alleged failure to disclose evidence about prosecution witness Justin Sneed's mental health treatment and that Sneed "lied" about his mental health treatment to the jury when he said he had never seen a psychiatrist. The OCCA demolished this argument in its opinion below. The OCCA noted that a "competency examination and lithium medication was mentioned in Glossip's brief filed in the appeal of his first conviction"—that is, all the way back in 1998. App. 16a. In his petition to this Court, Glossip claims that Sneed's testimony at trial that he had never seen a psychiatrist was objectively false—"as known to the State but not to the defense." Pet. 16. But Glossip did know the relevant facts—a quarter of a century earlier.[3]

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3. Excerpts from Glossip's 1998 brief to the OCCA discussing Sneed's competency evaluation are attached to this brief as Appendix A. Excerpts from Sneed's 1997 competency evaluation (cc'ed to Glossip's counsel) are attached as Appendix B. Excerpts from a 2001 trial court hearing discussing Sneed's psychiatric issues are attached as Appendix C.

A prosecutor's failure to correct testimony when the defense has the same information may not be *Napue* error at all. See *Long* v. *Pfister*, 874 F. 3d 544, 548-550 (CA7 2017) (en banc). If it is, the claim was surely defaulted by failure to raise it at trial or in any of the numerous reviews between trial and the present petition. See *People* v. *Carrasco*, 59 Cal.4th 924, 966-967, 330 P. 3d 859, 894 (2014).

Moreover, Glossip argues that this mental health issue was "crucial" to assessing Sneed's credibility. Pet. 16. But, once again, the OCCA refuted this claim below, noting that the defense made a conscious choice not to explore the subject. Presumably the reason that defense counsel "did not want to inquire about Sneed's mental health [was] due to the danger of showing that he was mentally vulnerable to Glossip's manipulation and control." App. 16a-17a.[4]

In addition, Glossip's argument hinges on the prosecutor's knowing concealment of information from the defense. But no evidence of knowing concealment exists—as demonstrated by the failure of both Glossip and the Attorney General to point to any evidence that the prosecutors were deliberately withholding information from the defense. See Pet. 16; Resp. App. 9-10. The OCCA specifically found that Sneed's condition was "not knowingly concealed by the prosecution." App.

4. In light of this finding by the OCCA, this case stands in a dramatically different posture than a Tenth Circuit case where prosecutors withheld a diagnosis of a severe mental disorder that made a key witness "hostile, assaultive, combative, and even potentially homicidal" and demonstrated that witness "was known to blur reality and fantasy and project blame onto others." *Browning* v. *Trammell*, 717 F. 3d 1092, 1106 (CA10 2013). Cf. Pet. 17 (arguing the OCCA decision below conflicts with *Browning* even though *Browning* was never cited below).

17a. That conclusion is well supported. See *supra*, at 11, note 3.

Finally, neither Glossip nor the Attorney General have made any attempt to marshal the evidence and explain how this dispute could call the import of Sneed's testimony into question. Here again, the OCCA's conclusion is well-supported: "This known mental health treatment evidence does not create a reasonable probability that the result of the proceeding would have been different had Sneed's testimony regarding his use of lithium been further developed at trial." App. 17a.

Any of the conclusions recited above—all supported by substantial evidence—suggest review in this Court would be pointless. Glossip's petition asks this Court to review the question of whether federal due process requirements require "disclosure and correction of false statements." Pet.15. But where the statements were disclosed and not false—as this Court must assume in light of the well-supported findings below—no such federal question even fairly exists. Cf. *NLRB* v. *Hendricks County Rural Electric Corp.*, 454 U. S. 170, 176, n. 8 (1981) (improvident grant of cross-petition that presented primarily a question of fact, "which does not merit Court review").

C. The Attorney General's Dissatisfaction with the Ruling Below is Not Itself Evidence and Does Not Warrant Granting Certiorari.

Against this overwhelming factual record, Glossip and his comrade-in-arms (Oklahoma's Attorney General) end up relying almost exclusively on one purported piece of "evidence": the Attorney General's confession of error. But the Attorney General's opinion about the evidence is not itself evidence.

It is first important to try to understand exactly what the Attorney General is confessing. Based on his response to Glossip's application for a stay of execution, one gains some sense of the Attorney General's views. In his response, the Attorney General points to the alleged "independent" review of the case by one of his political supporters, Rex Duncan. But surprisingly, the Attorney General concedes that he does "not agree with all findings and conclusions made by" Duncan. Resp. Stay App. 4. Presumably, that is because the Attorney General believes that Duncan did not reliably evaluate all the issues in this case.

The Attorney General then reports that he is "troubled" by a purported *Napue* violation concerning Sneed. *Id.* The predicate for a *Napue* violation is the State's *knowing* elicitation of false testimony. *Napue* v. *Illinois*, 360 U. S. 264, 269 (1959) (discussing the "principle that a State may not *knowingly* use false evidence") (emphasis added); see also *United States* v. *Agurs*, 427 U. S. 97, 103 (1976) (a conviction "obtained by the *knowing* use of perjured testimony is fundamentally unfair") (emphasis added). But, remarkably, the Attorney General does not appear to allege knowing wrongdoing here. As there was no "knowing" use of "perjured" testimony, there was no *Napue* violation—by the Attorney General's own admission.

The Attorney General also attempts to analogize this case to *Escobar* v. *Texas*, 143 S. Ct. 557, 214 L. Ed. 2d 330 (2023). There, the State confessed error. In a summary disposition, this Court GVRed the case and sent it back to the Texas Court of Criminal Appeals. Resp. Stay App. 7. But that case stood in a dramatically different posture than this one.

In *Escobar*, the Texas Court of Criminal Appeals first issued a ruling "without acknowledging the State's concession of error …." Brief of Respondent Texas in

Support of Petitioner 30, *Escobar* v. *Texas*, No 21-1601, 2022 WL 4781414 (U.S.). The Texas court then "refused the State's request to reconsider … without comment." *Ibid.* The net effect was that the Texas court ruled "without recognizing the State's changed position that [Escobar] was entitled to relief." *Ibid.* In a per curium, one-sentence order, this Court remanded "for further consideration in light of the confession of error by Texas." 143 S. Ct. 557.

In contrast, here a GVR "for further consideration" would be pointless. The OCCA has *already* considered the Attorney General's confession of error, concluding the confession was "not based in law or fact." App. 15a. Under Oklahoma law, that is the last word on the subject. The Attorney General never explains why this Court should GVR this case to send a claim back to a state court that has already reviewed—and rejected—this very claim. Cf. *Stutson* v. *United States*, 516 U. S. 163, 178 (1996) (Scalia, J., dissenting) (criticizing what "might be called 'no-fault V & R': vacation of a judgment and remand *without* any determination of error in the judgment below").

The Attorney General also argues that his confession of error "should be given great weight" because he is the "chief law officer" of Oklahoma. Resp. Stay App. 6. But the reality is that the Attorney General is a Johnny-come-lately to this case. Cf. *Sibron* v. *New York*, 392 U. S. 40, 58 (1968) (rejecting prosecutor's confession of error where the prosecutor "seems to have come late to the opinion" that the conviction could not be sustained). The Attorney General does not argue that the prosecutors who actually handled the case for more than a decade share his opinion. Nor does the Attorney General claim to have personally reviewed the entire record here.

The Attorney General's view relies essentially on the "independent" review by Rex Duncan. And that review, in turn, relies heavily on "[t]housands of hours of investigation and voluminous reports" from defense firms. App. 48a. And, it turns out, the key defense firm (Reed Smith) is committed to removing death sentences from the criminal justice system.[5]

Against this backdrop, the Attorney General is asking this Court to defer to a report by another lawyer who relied on a defense firm's biased assessment of the evidence. This is not the stuff from which substantial deference is made. Indeed, Duncan's acclamatory tone reveals the true, political nature of his report. App. 66a ("Your decision to seek a stay of execution and more thoroughly examine this case may be the bravest leadership decision I've ever witnessed").

While this Court has considered the views of law enforcement officers in determining how to handle a case, it has emphasized that the public interest is in ultimately reaching an outcome "which promotes a well-ordered society …. That interest is entrusted to our consideration and protection as well as that of the [law] enforcing officers." *Young* v. *United States*, 315 U. S. 257, 259 (1942). As a result, "the proper administration of the criminal law cannot be left merely to the stipulation of parties." *Ibid.* And, "it is the uniform practice of this Court to conduct its own examination of the record in all cases where the Federal Government or a State confesses that a conviction has been erroneously obtained." *Sibron*, 392 U. S., at 58. In sum, "private agreements between litigants … cannot relieve this Court of performance of its judicial function." *Garcia* v. *United States*, 469 U. S. 70, 79 (1984).

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5. https://www.reedsmith.com/en/probono/justice-for-prisoners.

Here, the Attorney General is asking this federal court to essentially re-work Oklahoma's separation of powers. Under Oklahoma law, the Oklahoma Attorney General does not have the last word on the validity of Glossip's conviction—the OCCA does. For this Court "to accept [the Attorney General's] view blindly in the circumstances, when [the OCCA] … has expressed the contrary view, would be a disservice to the State of [Oklahoma]." *Sibron*, 392 U. S., at 59. Adopting the Attorney General's position would transfer the last word from five judges with protection against political influence to a single, politically elected official. Whether that would be wise is debatable. But whether that is within the power of this Court is not debatable—that question about the allocation of state power is a matter for the citizens of Oklahoma.

III. Compounding the Decades-Long Delay in Obtaining Justice Will Inflict Immeasurable Harm on the Van Treese Family.

In evaluating whether to grant certiorari here, another factor is important: For more than two decades, the pain and grief suffered by the Van Treese family has been compounded by the interminable delays in executing Glossip's sentence. The family members deserve justice and closure.

A. The Van Treese Family Is Being Victimized by Excessive Delay.

The facts surrounding Glossip's brutal murder of Barry Van Treese have been set out in other filings with the Court. What has not been set out before is the harm to the victim's family of that murder—and of the seemingly interminable delay in having Glossip's sentence carried out.

Barry Van Treese's son—Derek—is one of the *amici* here. The impact of delay on him and his family should be considered by the Court as it evaluates how to proceed. Derek offers his victim impact statement for the use of this Court, which tracks other impact statements from other family members as well.[6]

Derek is the eldest of five children from Barry Van Treese's second marriage. In January 1997, Derek was 16 years old when his father was murdered. Derek had spoken with him just the day before, and though he didn't know it at the time, "I'll talk to you later" were the last words he ever said to his father. Now, "I love you" is how Derek finishes conversations with his family.

During the first trial and conviction of Richard Glossip, Derek was at Marine Corps boot camp. As a naive 18-year-old, he was expecting the system to work as advertised, and he was determined to move on with life. After the first conviction, he thought the matter was settled. It was not.

As a more jaded 24-year-old, Derek attended Glossip's second trial in person. And now—more than 18 years later—he has read every piece of the case, every opinion, and every dissent. He's spent nearly two decades being angry and frustrated with the process and with a system that is supposed to work for the people. He has spent over half his life waiting for justice to be served to the man responsible. During those years, he lost both his grandfathers, his older half-sister, and an uncle—none of whom were able to see the case concluded.

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6. Derek's statement to the Oklahoma Pardon and Parole Board is attached to this brief as Appendix D. The paragraphs that follow come from Derek's statements.

It's been 26 years since the senseless murder of Derek's father. In that time, the State of Oklahoma has had four governors, five attorneys general, and seven directors of the Department of Corrections. There have been new laws enacted regarding the death penalty. There has been a complete examination into the Department of Corrections policies and procedures regarding the death penalty protocols.

In Derek's words to the Board of Pardons and Parole:

> "Two juries, 24 members of the public, have listened to the same evidence. They have found Richard Glossip to be guilty of his charges and have rendered the same sentencing. Countless appeals, reviews, and hundreds of thousands of dollars and man hours have been spent.
>
> "The time is now, I urge you, I beg you to allow justice to finally be served through the word of law and the will of the people. Enough is enough."

B. Research Confirms What the Experience of Victims Makes Plain—Undue Delays in the Administration of Justice Harm Victims of Violent Crimes.

Unsurprisingly, the academic literature confirms what the experiences of families like the Van Treeses makes painfully clear: long after the immediate loss and physical trauma are over, crime victims and their loved ones continue to suffer from psychological wounds that refuse to heal. And yet courts frequently overlook the ways in which delayed proceedings compound that harm and exacerbate the initial injuries victims and families suffer.

It is well known that violent crime inflicts various immediate psychological traumas on victims and those close to them. Most obviously, Post-Traumatic Stress

Disorder (PTSD) is commonly documented among violent crime victims. See Otano, *Victimizing the Victim Again: Weaponizing Continuances in Criminal Cases*, 18 Ave Maria L. Rev. 110, 122 (2020); Parsons & Bergin, *The Impact of Criminal Justice Involvement on Victims' Mental Health*, 23 J. Trauma. Stress 182, 182 (2010); Kilpatrick & Acierno, *Mental Health Needs of Crime Victims: Epidemiology and Outcomes*, 16 J. Trauma. Stress 119, 119 (2003). PTSD can afflict not only the direct victims of violent crime, but also those who experience its profound repercussions indirectly, such as family members and friends. See Kilpatrick & Acierno, 16 J. Trauma. Stress, at 125–127. Depression, substance abuse, panic disorder, agoraphobia, social phobia, obsessive-compulsive disorder, and suicide also number among the consequences of violent crimes. Parsons & Bergin, 23 J. Trauma. Stress, at 182.

Of course, from the victim's perspective, proceedings rarely move quickly enough—"trial is typically delayed through scheduling conflicts, continuances, and other unexpected delays throughout the course of the trial." Ricke, *Victims' Right to a Speedy Trial: Shortcomings, Improvements, and Alternatives to Legislative Protection*, 41 Wash. U. J. L. & Pol'y 181, 183 (2013). "Victims of the crimes are already heightened emotionally with anxiety and anticipation of the impending trial, and these delays lead to further and unnecessary trauma." *Ibid.* It thus is not surprising that "multiple studies" demonstrate "the negative effect on a victim's healing process when there is a prolonged trial of the alleged attacker because the actual judicial process is a burden on the victim." *Id.*, at 193; Orth & Maercker, *Do Trials of Perpetrators Retraumatize Crime Victims?*, 19 J. Interpersonal Violence 212, 215 (2004).

Abundant academic literature thus confirms what common sense and experience make plain. A victim's

experience with the criminal justice system—particularly when the process is long-delayed, convoluted, and seemingly never-ending—compounds the initial effects of violent crime. See Ricke, 41 Wash. U. J. L. & Pol'y, at 182-183; see also Herman, *The Mental Health of Crime Victims: Impact of Legal Intervention*, 16 J. Trauma. Stress 159, 159 (2003). A victim's experience with the criminal justice system often "make the difference between a healing experience and one that exacerbates the initial trauma." Parsons & Bergin, 23 J. Trauma. Stress, at 182.

The harm caused by drawn-out criminal justice proceedings is especially acute in capital cases. Death cases often involve decades of false stops and starts. Delay in death penalty cases means that "[c]hildren who were infants when their loved ones were murdered are now, as adults, still dealing with the complexities of the criminal justice system." Levey, *Balancing the Scales of Justice*, 89 Judicature 289, 290 (2006). "The automatic appeals, and often repeated appeals," in death penalty cases "are continually brutal on victim family members." *Ibid.* "Year after year, survivors summon the strength to go to court, schedule time off work, and relive the murder of their loved ones over and over again .... The years of delay exact an enormous physical, emotional, and financial toll." *Id.,* at 290-291. The delays also keep family members from experiencing a sense of "closure"—the hope that they will be able to put the murder behind them. See Cook, *Stepping into the Gap: Violent Crime Victims, the Right to Closure, and A Discursive Shift Away from Zero Sum Resolutions*, 101 Ky. L. J. 671, 679 (2013).

In suffering the harms from delay, the Van Treese family is not alone. Across the Nation, victims suffer immeasurable harm from decades-long delays in executing sentences. U. S. Dept. of Justice, Office of Justice

Programs, Capital Punishment, 2020– Statistical Tables (2021) (Table 12) (as of 2020, the average elapsed time from sentence to execution is 227 months). These delays rob victims' families of even a modicum of peace and closure.

As former Supreme Court Justice Lewis F. Powell, Jr., wrote after a close study of the problem: "[O]ur present system of multi-layered state and federal appeal and collateral review has led to piecemeal and repetitious litigation, and years of delay between sentencing and a judicial resolution as to whether the sentence was permissible under the law. The resulting lack of finality undermines public confidence in our criminal justice system."[7] This Court should bring finality here.

7. Judicial Conference of the United States, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report and Proposal (1989), reprinted in 135 Cong. Rec. 24,694-24,698 (1989).

CONCLUSION

Enough is enough. The petition should be denied.[8]

June, 2023

Respectfully submitted,
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Counsel for Amici Curiae Derek Van Treese et al.

8. If the Court grants certiorari, neither party will defend that judgment below. Undersigned counsel has previously been appointed by the Court to defend a judgment below that was not supported in this Court. *Dickerson* v. *United States*, 530 U. S. 428, 441, n. 7 (2000). And undersigned counsel has a command of the factual record that would permit him to provide a thorough defense of the OCCA's judgment below.

INDEX TO APPENDICES

APPENDIX A

Excerpt from Brief of Appellant, *Glossip* v. *State*,
Okla. Ct. of Crim. App. No. D-98-948, April 17, 2000

Excerpt from Brief of Appellant, *Glossip* v. *State*, Okla. Ct. of Crim. App. No. D-98-948, April 17, 2000, pp. 32-33 (emphasis added):

Likewise, Fournerat's failure to impeach Sneed with statements he made to Dr. Edith King during his competency examination was unreasonable and indicative of trial counsel's lack of preparation. At trial, the prosecution portrayed Sneed as a vulnerable and naive 19-year-old young man who, fearful of becoming destitute and homeless, did the bidding of criminal "mastermind" Mr. Glossip. [Footnote 16 omitted.] Again, Sneed's own statements to Dr. King painted a much different picture: that of a streetwise individual with a criminal history, including writing "hot checks" and taking marijuana, cocaine, LSD, and methamphetamine, and who said "his only hope is to get out of the death penalty is to plead guilty." (Rule 3.11 (B) Application,[*33] Ex. 4)[17] The report, *filed of record in the case on July 17, 1997, and hence available to Fournerat, also indicated that Sneed said at that time he was medicated with lithium* and it helped him "not to feel so angry," that "he used to get angry quite often," would "yell at teachers and reject everyone and get into fights," and was expelled from school for violence and being "a trouble maker." (Rule 3.11 (B) Application, Ex. 4) In addition, far from describing himself as a malleable individual easily manipulated by someone like Appellant, Sneed told Dr. King that aside from his tendency toward violent outbursts, he had a history of "reject[ing] authority." (Rule 3.11 (B) Application, Ex. 4) Counsel's failure to review the record and utilize this

17. This document was among those properly designated by Appellant yet not made part of the record by the Oklahoma County Court Clerk, and in part formed the basis of Appellant's litigation to insure an accurate and complete record.

vital evidence to attack Sneed's credibility and the State's specious theory of the case provides yet another example of his ineffective performance.

APPENDIX B

Excerpts from report of Edith King, Ph.D., Exhibit B to State's Response to Petitioner's Successive Application for Post-Conviction Review, Okla. Crim. App. No. PCD-2015-820, filed Sept. 16, 2015

Excerpts from report of Edith King, Ph.D., Exhibit B to State's Response to Petitioner's Successive Application for Post-Conviction Review, Okla. Crim. App. No. PCD-2015-820, filed Sept. 16, 2015

July 1, 1997

THE HONORABLE JUDGE Richard Freeman
Oklahoma County District Court
321 West Park Avenue
Oklahoma City, OK 73102

RE: Justin B. Sneed
Case No: CF-97-0244

Dear Judge: Richard Freeman

Enclosed, please find the Psychiatric Evaluation for the Determination of Competency to Stand Trial on.

Respectfully submitted,

Edith King, Ph.D.
Director, Forensic Psychology
Oklahoma License Number 134

xc: Fern L. Smith, Assistant District Attorney
George Miskovsky III, Assistant Public Defender
[*2]

DETERMINATION OF COMPETENCY TO STAND TRIAL PSYCHIATRIC EVALUATION

DATE: July 1, 1997

RE: Justin B. Sneed
CF: 97-0244

By Order of the Oklahoma County District Court, Judge Richard Freeman, under Oklahoma Statute Section 1175.3 dated April 22, 1997 and received in this office April 24, 1997. Justin B. Sneed was examined at the Oklahoma County Jail July 1, 1997.

The following statutory questions are responded to accordingly, and a more detailed psychiatric summary is attached.

* * *

[*3] **4. Is the person a mentally ill person or a person requiring treatment as defined by Oklahoma Statute Title 43A, Section 3?**

Yes. Mr. Sneed denied any psychiatric treatment in his history and said he has never been hospitalized or had outpatient counseling. He was apparently married and said his wife used to tell him she thought he had "problems." She thought he had trouble "paying attention" and may have had ADHD (Attention Deficit Hyperactivity Disorder). He admits to using a variety of drugs including marijuana, crank, cocaine, and acid. He said he drank alcohol for one summer but didn't like it.

He is currently taking lithium at the jail and said it was administered after his tooth was pulled. He was not on lithium before coming to the jail and was started on it in March. He does not think he has any serious mental problems although he said he has "deja vu"

sometimes. When he first came to the jail he said he had a strong feeling the pod was familiar. He now has this sensation once or twice a month. The lithium helps him "not to feel so angry" and he used to get angry quite often. He said he used to "yell at teachers and reject everyone and get into fights." It sounds as if he may well have had ADDHD *[sic]* and mood instability which lithium may help. He denies auditory or visual hallucinations but said he sometimes gets a ringing in his ears.

At this time Mr. Sneed gives an impression of being depressed to a moderate degree. He is able to communicate quite well for the most part, but his affect is flat and sad. Medication is probably helpful.

* * *

[*5] **Summary of Psychiatric Examination**

* * *

It may well be that Mr. Sneed has had an atypical mood swing disorder in his past characterized by "ups and downs" including anger outburst. His hyperactivity would be consistent with that picture. His present medication is probably helping him control his moods.

Mr. Sneed is able to assist an attorney and communicate satisfactorily regarding his legal situation. He is in touch with reality and positive in his attitude toward his lawyers. It is recommended that he be considered competent to stand trial.

Edith G. King, Ph.D.
Director, Forensic Psychology
Oklahoma License Number 134
xc: Fern L. Smith, Assistant District Attorney
George Miskovsky III, Assistant Public Defender

APPENDIX C

Excerpt from Findings of Fact and Conclusions
of Law after Evidentiary Hearing on Remand
from the Court of Criminal Appeals,
District Court of Oklahoma County, No. D 98-948;
CF-1997-244, March 18, 2001

Excerpt from Findings of Fact and Conclusions of Law after Evidentiary Hearing on Remand from the Court of Criminal Appeals, District Court of Oklahoma County, No. D 98-948; CF-1997-244, March 18, 2001, p. 5.

Although the parties stipulated as to the authenticity of Dr. Edith King's report on Justin Sneed's competency, it was not admitted during the hearing as it would have been inadmissible at trial. OKLA. STAT. tit. 12, § 2503, "Physician and Psychotherapist-Patient Privilege", applies to Dr. King's report concerning Sneed's competency. Appellant alleges Sneed could have been impeached with some of Dr. King's conclusions or findings. This would have been improper. Sneed's statements to Dr. King were privileged and it is highly unlikely Sneed would have waived his privilege to be impeached. The report is not admissible for trial, nor to establish the claim of ineffective assistance of trial counsel.

APPENDIX D

Derek Van Treese's Statement to Oklahoma Pardon and Parole Board

Derek Van Treese's Statement to Oklahoma Pardon and Parole Board

Members of the board: My name is Derek Van Treese. I'm the eldest of five children from my father's second marriage. I'm a United States Marine, a devoted husband, and a proud father of two sons. I've earned a master's degree, and I've honorably served my country and performed my civic duties. I've taken upon the mantle of being a liaison to the Oklahoma Attorney's General Victims Services unit for my younger siblings. I'd like to recognize the men and women from that office who have been supportive of our family and fought for us through the years.

One of the 14 leadership traits instilled during my service in the Marine Corps is integrity. Integrity means that you are honest and truthful in what you say or do. You put honesty, sense of duty, and sound moral principles above all else. Integrity is the ability of a person or institution to do the right thing regardless of the need to be recognized or rewarded. It requires consistency between one's actions, thoughts, and words.

I was at Marine Corps boot camp in San Diego during the first trial and conviction of Richard Glossip. As an 18-year-old, willing to put my life on the line for my country, I was expecting the system to work as advertised. After the first conviction and sentencing, I thought the issue was settled. After several rounds of appeals, as a slightly more jaded 24-year-old, I attended the second trial in person. I've read every piece of case data, dissent, arguments, and recommendations. I've spent years being angry and frustrated with the process and a system that's supposed to work for the people to perform the duties required by law.

It's been 26 years since the senseless murder of my father. I've spent over half my life waiting for justice to be served to those responsible. In that time, the State of Oklahoma has had 4 governors, 5 attorneys general, and 7 directors of the Department of Corrections. There have been new laws enacted regarding the death penalty. There has been a complete examination into the Department of Corrections policies and procedures regarding the death penalty protocols. There's been a multi-county grand jury, two independent investigations, documentaries, talk shows, and more. This case has been pushed from being a legal matter to being a political issue. It's been pushed from the court of law to the court of public opinion. Enough is enough.

All due diligence has been served. Two juries, 24 members of the public, have listened to the same evidence. They have found Richard Glossip to be guilty of his charges and have rendered the same sentencing. Countless appeals, reviews, and hundreds of thousands of dollars and thousands of man-hours have been spent. The court of Criminal Appeals, just last week, with a unanimous decision, once again denied post-conviction relief and the request to stay. The Court of Criminal Appeals response clearly shows that there was no new evidence and that the claims made by both the defense and the Attorney General were unwarranted and that there was no truth to the allegations presented.

While I agree that the state must take all reasonable action to ensure the adherence to the law, the information in the packet sent by the Attorney General to the board is simply unconscionable to me. Every item listed is rebutted by the Appeals court answer. This unprecedented response shows an unbelievable level of disrespect to every person involved with the case and to our family.

Enough is enough. The time is now, I urge you, I beg you to allow justice to finally be served through the word of law and the will of the people by denying clemency.