CAPITAL CASE
No. 22-7466

IN THE
Supreme Court of the United States

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

On Writ of Certiorari
to the Oklahoma Court of Criminal Appeals

BRIEF OF *AMICUS CURIAE* THE INNOCENCE PROJECT IN SUPPORT OF PETITIONER RICHARD EUGENE GLOSSIP

VANESSA POTKIN
M. CHRIS FABRICANT
INNOCENCE PROJECT, INC.
40 Worth Street, Suite 701
New York, NY 10013
(212) 364-5340

ANDRIANNA D. KASTANEK
Counsel of Record
JUSTIN J. GILLETTE
JOHNATHAN T. HALL
ANDREW L. OSBORNE
JENNER & BLOCK LLP
353 North Clark Street
Chicago, IL 60654
(312) 222-9350
akastanek@jenner.com

Counsel for Amicus Curiae

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae, the Innocence Project, is a nonprofit organization that works to free the innocent, prevent wrongful convictions, and create fair, compassionate, and equitable systems of justice for everyone. Since its founding in 1992, the Innocence Project has used DNA and other scientific advancements to prove innocence. Beginning with the exoneration of Glen Woodall, the first Innocence Project client, it has helped free or exonerate more than 240 people. Collectively, Innocence Project clients have spent more than 3,700 years behind bars.

The Innocence Project is equally dedicated to eliminating the inequities and failings that lead to wrongful convictions by working with policymakers and partner organizations to spearhead federal and state-based legislative changes. To date, the Innocence Project's efforts have led to the passage of more than 200 transformative state laws and federal reforms that promote greater police and prosecutor accountability; improve access to justice, including through post-conviction DNA testing; and meaningfully compensate the wrongfully convicted. The Innocence Project also works to strengthen the standards governing the use of science in criminal legal systems.

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[1] Under Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus*, its members, or its counsel, make a monetary contribution to the preparation or submission of this brief.

The Innocence Project serves as the headquarters of the Innocence Network, a coalition of seventy-one organizations that provide investigative support and legal representation to people with claims of innocence throughout the United States and in twelve countries outside of the United States.

The Innocence Project thus has expertise that bears directly on the issues presented in this case, which implicate many of the hallmarks of a wrongful conviction—including an acknowledgment by the State itself that it committed prosecutorial misconduct that renders Richard Glossip's capital conviction fundamentally unreliable.

SUMMARY OF ARGUMENT

The State of Oklahoma violated Richard Eugene Glossip's right to due process under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and *Napue* v. *Illinois*, 360 U.S. 264 (1959). The State withheld material evidence that would have undercut the credibility of Justin Sneed—"the State's one indispensable" and "sole inculpatory witness," Respondent's Br. at 1, 21, 48—by showing that Sneed suffered from a serious psychiatric condition. And the State failed to correct Sneed's testimony denying that he was under a psychiatrist's care, when the State knew that testimony was false. *See Napue*, 360 U.S. at 269. Indeed, the State now agrees that Mr. Glossip's conviction must be vacated because due process errors plagued his trial, rendering Mr. Glossip's conviction "constitutionally unsupportable." Respondent's Br. at 38–39, 43–44.

Prosecutorial misconduct of the sort the State has acknowledged in this case is a distressingly common factor in wrongful convictions. Careful, systematic reviews of post-conviction exonerations reveal that they are overwhelmingly the product of official misconduct. Violations of *Brady* in particular often lead to the conviction of innocent people. By preventing the defense from presenting material evidence to the jury, *Brady* violations disturb the truth-seeking function of the trial process and thereby enable "miscarriage[s] of justice." *United States* v. *Bagley*, 473 U.S. 667, 675 (1985). And the *Brady* violation at issue here is even more significant because it relates to the credibility of highly suspect informant testimony—itself a frequent contributor to wrongful convictions.

In denying Mr. Glossip relief, the Oklahoma Court of Criminal Appeals also ignored *Kyles* v. *Whitley*, 514 U.S. 419 (1995). *Kyles* instructs that the cumulative effect of suppressed evidence is the "touchstone on [*Brady*] materiality." *Banks* v. *Dretke*, 540 U.S. 668, 698 (2004). The rule of *Kyles* has emerged as a fundamental safeguard against wrongful convictions, as applied by this Court as well as other federal and state courts.

What's more, Mr. Glossip's case bears other indicia of a wrongful conviction, including a police investigation characterized by "tunnel vision" that focused exclusively on Mr. Glossip in the immediate aftermath of the murder, and the State's failure to collect and preserve important evidence that could have allowed Mr. Glossip to demonstrate his innocence at trial. Together, these factors produced the unacceptable risk that Mr. Glossip was

convicted, and will be executed, for a crime he did not commit.

This Court must prevent the grave miscarriage of justice that would occur if Mr. Glossip were put to death based on a trial the State itself acknowledges was unconstitutional.

ARGUMENT

I. Government Misconduct, Particularly The Withholding Of *Brady* Evidence, Is An Overwhelming Factor In Wrongful Convictions.

Systematic reviews of exonerations have shown that official misconduct is a driving force behind wrongful convictions. A 2020 report prepared by the National Registry of Exonerations, for example, found that misconduct by government officials contributed to the wrongful convictions of a majority of the first 2,400 exonerated people included in that study. *See* National Registry of Exonerations, *Government Misconduct and Convicting the Innocent: The Role of Prosecutors, Police and Other Law Enforcement* iii-iv (2020), https://tinyurl.com/yc6c35cm [hereinafter *Government Misconduct and Convicting the Innocent*]. The report concluded that 54% of the wrongfully convicted were the victims of some form of official misconduct, with misconduct by police officers contributing to wrongful convictions in 35% of cases, and misconduct by prosecutors playing a role in 30% of cases. *See id.*

The pattern is even starker in murder cases, where official misconduct played a role in 72% of the wrongful

convictions examined by the National Registry of Exonerations. *See Government Misconduct and Convicting the Innocent*, *supra*, at 12 tbl.3. Wrongful convictions are particularly likely in murder cases because the severity of the crime leads "police and prosecutors [to] work harder to secure murder convictions in cases with weak evidence than they do for lesser crimes." *Id.* at 17. The understandable pressure to solve murder cases can create a "strong impulse to secure convictions [that] can also lead to misconduct." *Id.* In particular, "the authorities may be tempted to cut corners, jump to conclusions, and—if they believe they have the killer—manufacture evidence to clinch the case, or hide evidence that suggests innocence." *Id.* As the statistics compiled by the National Registry of Exonerations bear out, the strong incentives to secure convictions in murder prosecutions have led to wrongful convictions in far too many cases.

Violation of the rights recognized in *Brady* and related cases is a particularly common contributor to wrongful convictions. Indeed, concealment of exculpatory evidence was by far the most common form of official misconduct cataloged in the National Registry of Exonerations' systematic review, which found that the prosecution had concealed exculpatory evidence in 44% of the cases considered. *See Government Misconduct and Convicting the Innocent*, *supra*, at 30 tbl.7. For murder cases, the report found that concealment of exculpatory evidence contributed to 61% of wrongful convictions. *See id.*

Although many of the cases considered by the National Registry of Exonerations involved concealment of substantive evidence of innocence, the more common

Brady violation involved concealment of impeachment evidence. In more than one-third of the cases considered, "police and prosecutors concealed evidence that would have undercut witnesses who testified to the defendants' guilt." *Id.* at 32.

Here, the prosecutorial misconduct was so evident that the State itself has confessed error. At trial, the State withheld material evidence that its key witness, Sneed, suffered from a serious psychiatric condition. *See Brady*, 373 U.S. at 87. And then, despite knowing what he said was false, the State never corrected Sneed's testimony about his psychiatric care. *See Napue*, 360 U.S. at 269. But in a rare move, the State has acknowledged these trial failings, years after securing Mr. Glossip's conviction. The State's considered judgment that these errors render Mr. Glossip's conviction "constitutionally unsupportable," Respondent's Br. at 38–39, 43–44, should be compelling, given the State's interest in defending the finality of the criminal convictions it secures.

II. The Suppression Of *Brady* Material Is Even More Problematic When It Relates To The Testimony Of A Highly Incentivized Informant Who Provides The Sole Inculpatory Evidence Supporting A Conviction.

A. Statistics gathered from cases of exonerated people demonstrate the dangers of using unreliable informant testimony. False informant testimony was a factor in nearly 20% of the 375 DNA-based exonerations in the

United States from 1989 to 2020.[2] False or unreliable informant testimony played a role in 242 of the 3,512 known wrongful convictions that have been compiled by the National Registry of Exonerations.[3] And in capital cases, a study concluded that 45.9% of wrongful convictions were based at least in part on unreliable informant testimony—by far, the "leading cause."[4]

In exchange for informants' cooperation, prosecutors routinely offer substantial benefits that incentivize false testimony. Of particular relevance, "[b]ecause an offer of leniency allows [an informant] to avoid the full penal consequences of his own misconduct, such a reward may provide not only a powerful incentive to cooperate, but also a powerful incentive to lie." R. Michael Cassidy, "*Soft Words of Hope":* Giglio, *Accomplice Witnesses, and the Problem of Implied Inducements*, 98 Nw. U. L. Rev. 1129, 1140 (2004). And because the value of the testimony offered by the informant may influence the leniency that the prosecution is willing to offer, informants face "overwhelming incentives to lie" to "please" the prosecutor. Michael S. Ross, *Thinking Outside the Box:*

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[2] *See* Innocence Project, *DNA Exonerations in the United States (1989–2020)*, https://tinyurl.com/32xvne4b (last visited Apr. 29, 2024); *see also* Innocence Project, *Informing Injustice: The Disturbing Use of Jailhouse Informants* (Mar. 6, 2019), https://tinyurl.com/mree2kvj.

[3] *See* National Registry of Exonerations, *Exoneration Detail List*, https://tinyurl.com/y7tr9hzt (last visited Apr. 29, 2024).

[4] *See* Northwestern Univ. Sch. of Law, Center on Wrongful Convictions, *The Snitch System: How Snitch Testimony Sent Randy Steidl and Other Innocent Americans to Death Row* 3 (2005), https://tinyurl.com/2p8j5w9u [hereinafter *The Snitch System*].

How the Enforcement of Ethical Rules Can Minimize the Dangers of Prosecutorial Leniency and Immunity Deals, 23 Cardozo L. Rev. 875, 880 (2002) (citation omitted). Meanwhile, the "prosecutor has a powerful incentive to accept a cooperator's account uncritically," Bennett L. Gershman, *Witness Coaching by Prosecutors*, 23 Cardozo L. Rev. 829, 848 (2002), especially in weaker cases, where the informant's testimony "may be all the government has," Alexandra Natapoff, Comment, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 Golden Gate U. L. Rev. 107, 108 (2006).

Notwithstanding these obvious sources of bias and incentives to lie, experience has shown that juries are all too willing to accept incentivized informant testimony uncritically. Just a few examples illustrate this pervasive problem:

- In 1977, Randall Dale Adams was sentenced to death for the "murder of a police officer during a traffic stop." His conviction rested on informant testimony from the actual killer, who received immunity in exchange for his testimony. The killer eventually recanted, and Adams was exonerated after 13 years on death row. *See The Snitch System*, *supra* note 4, at 3.
- In 1983, Anthony Siliah Brown was convicted of murder and sentenced to death. The informant was the actual killer, who testified against Brown in exchange for leniency. After 3 years in prison, Brown was exonerated by the killer's recantation at retrial. *Id.*

- In 1985, Verneal Jimerson was convicted of a double murder in Chicago. His conviction "rested on the testimony of a purported accomplice" who, in exchange for her testimony, "was released from prison, where she was serving 50 years for her supposed role" in the crime. The same informant also falsely testified against two other alleged participants in the crime. All convicted defendants were eventually exonerated after DNA testing of the biological evidence excluded Jimerson, and the real killers confessed. Jimerson had been incarcerated for 11 years. *Id.* at 4.

- In 1988, Dennis Fritz and Ron Williamson were convicted of murder in Pontotoc County, Oklahoma. Fritz was sentenced to life in prison; Williamson was sentenced to death. Fritz was convicted based on the testimony of his jailhouse cellmate who claimed that Fritz confessed, while Williamson was convicted after another informant placed him at the victim's workplace on the night of the murder. After 11 years of imprisonment for crimes they did not commit, Fritz and Williamson were exonerated: DNA testing ruled them out as suspects—and inculpated the state's informant against Williamson. *See* Innocence Project, *Dennis Fritz*, https://tinyurl.com/4fbeh9yn (last visited Apr. 29, 2024).

- In 1993, Steven Manning was convicted of murder and sentenced to death. His conviction rested primarily on the testimony of a jailhouse informant who, in exchange for his testimony, was released after having served only 6 years of a fourteen-

year sentence. Manning was granted a new trial in 1997 based on trial errors, and the charges against him were dropped in 2000. Manning was incarcerated for 10 years. *See The Snitch System*, *supra* note 4, at 10.

- In 1995 and 1997, respectively, Yancy Douglas and Paris Powell were convicted of murder and sentenced to death in Cleveland County, Oklahoma. The key witness at both trials identified Douglas and Powell as the killers. In both cases, Douglas and Powell were exonerated after the key witness recanted and revealed that police offered him a reduced sentence in exchange for naming Douglas and Powell. They were each incarcerated for 14 years. *See* National Registry of Exonerations, *Yancy Douglas* https://tinyurl.com/3n3wxfku, (last updated Nov. 8, 2017).

- In 1996, Dan L. Bright was convicted of murder and sentenced to death. His conviction was based in part on the false testimony of an informant who was promised leniency in exchange for testifying. Bright was exonerated after the disclosure of a suppressed FBI report indicating that someone else had committed the crime. Bright had been incarcerated for 8 years. *See The Snitch System*, *supra* note 4, at 3.

B. The facts of Mr. Glossip's case underscore the substantial risk that Sneed offered false testimony that led the jury to wrongly convict Mr. Glossip and sentence him to death.

There is no dispute that Sneed, a methamphetamine addict, brutally murdered Barry Van Treese. He confessed to the crime only a week after the murder and faced the significant risk of a death sentence. Sneed only avoided that risk by agreeing to endorse the prosecution's theory that Mr. Glossip had masterminded a murder-for-hire scheme.

Sneed's overwhelming incentive to lie to save his own life itself provides a powerful reason to question his reliability. But other significant factors further undermined the reliability of Sneed's trial testimony. To begin, when Sneed was arrested, he did not implicate Mr. Glossip in the murder until *after* police investigators repeatedly mentioned Mr. Glossip's name, told Sneed that Mr. Glossip had implicated him, and stressed that Sneed faced a capital charge if he did not shift responsibility to Mr. Glossip. *See* Reed Smith LLP, *Independent Investigation of* State v. Richard E. Glossip 59, 66, 70 (June 7, 2022), https://tinyurl.com/3hc5wvp8 [hereinafter *Reed Smith Report*]. As an independent report commissioned by a bipartisan group of Oklahoma legislators concluded, the investigators employed several "high risk" investigative techniques that are "contrary to eliciting truthful and reliable evidence." *See id.* at 69. The investigators' suggestive questioning thus contaminated Sneed's trial testimony by feeding him a narrative of the case and signaling that he could only obtain leniency by endorsing it.

Information that has come to light following Mr. Glossip's trial provides still further reason to doubt Sneed's testimony. Multiple witnesses have now acknowledged that Sneed had a history of violence, exacerbated by his serious methamphetamine addiction,

and that he frequently stole to support his drug habit. *See id.* at 220–24. Stephanie Garcia, a dancer at the strip club neighboring the motel where the murder was committed, reported that Sneed would use other dancers to lure men to motel rooms to rob them. *Id.* at 158, 222. The modus operandi Ms. Garcia described corresponds to other evidence suggesting that Sneed, accompanied by a female accomplice, murdered Van Treese in a robbery gone wrong, *see* JA963–66, and it is a far cry from the prosecution's depiction of Sneed as a pitiful figure who was easily manipulated by Mr. Glossip into committing murder, *see Reed Smith Report*, *supra*, at 208–12.

In addition, multiple witnesses who were incarcerated with Sneed both before and after he testified at Mr. Glossip's trial have reported that Sneed told them accounts of the murder that did not involve Mr. Glossip. One witness, who was housed with Sneed in the county jail after the murder, reported that Sneed said he was afraid of a death sentence and asked for the witness's help to "lay it all on [Mr. Glossip]." *Reed Smith Report*, *supra*, at 253. Another witness, also housed with Sneed in the jail, reported that Sneed recounted a robbery gone wrong; that Sneed never mentioned Mr. Glossip as hiring him to commit a murder; and that Sneed said he was blaming Mr. Glossip because he was "mad" at him. *Id.* at 254. Another witness, who had been Sneed's jail cellmate, reported that Sneed never gave any indication that someone else was involved in the murder and never mentioned Mr. Glossip. *Id.* at 253. A fourth witness reported that Sneed never mentioned Mr. Glossip; never claimed to have been hired to rob or to kill Van Treese; and only recounted a robbery involving his girlfriend

that went wrong. *Id.* Two witnesses later imprisoned with Sneed offered similar accounts, reporting that Sneed acknowledged acting alone and falsely blaming Mr. Glossip for the murder. *Id.* at 254–55. Unlike incarcerated witnesses seeking to obtain a benefit in exchange for their cooperation with the State, these witnesses came forward without any promise of a potential benefit to their own cases.

Additional evidence that the State suppressed at trial provides further reason to doubt Sneed's testimony. Records from the trial prosecutor that were not made available to the defense until August 2022 suggested that prosecutors met with Sneed shortly before he testified at Mr. Glossip's 2004 retrial to address the "big[] problem" caused by a discrepancy between Sneed's testimony at Mr. Glossip's initial trial and the forensic evidence relating to knife wounds that emerged only during the retrial. *See* JA953, JA955. Immediately thereafter, Sneed changed his testimony and claimed that he had stabbed Van Treese with a knife during the murder. JA290, JA319. Other recently disclosed records show that Sneed expressed a desire to recant his testimony before Mr. Glossip's retrial, and shortly thereafter met with prosecutors to discuss his testimony and the possibility of getting a better deal from the prosecution. *See* Petition for a Writ of Certiorari at 7–10, *Glossip* v. *Oklahoma*, No. 22-6500 (U.S. Jan. 3, 2023); Reed Smith LLP, *Independent Investigation of* State v. Richard E. Glossip, *Second Supplemental Report* 1–14 (Aug. 20, 2022), https://tinyurl.com/36hm247b. Although this evidence would have provided powerful grounds for impeachment, none of it was disclosed to the defense.

III. Assessing The Cumulative Effect Of All Suppressed Evidence Is A Fundamental Safeguard Against Wrongful Convictions.

This Court has long held that "the [S]tate's obligation under *Brady*" "to disclose evidence favorable to the defense[] turns on the cumulative effect of all such evidence suppressed by the government." *Kyles*, 514 U.S. at 421. The question, therefore, is whether "the net effect of the evidence withheld by the State … raises a reasonable probability that its disclosure would have produced a different result." *Id.* at 421–22. A "reasonable probability" means "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict," *id.* at 435, even if "the undisclosed information may not have affected the jury's verdict," *Wearry* v. *Cain*, 577 U.S. 385, 392 & n.6 (2016).

The cumulative-effect rule of *Kyles* safeguards against wrongful convictions. Both this Court and lower courts have recognized the rule's centrality to rectifying wrongful convictions. *See Wearry*, 577 U.S. at 392, 394, 396 (overturning conviction based on cumulative effect of suppressed impeachment evidence). A few examples demonstrate *Kyles*' importance to conviction integrity:

- In *Castleberry* v. *Brigano*, the Sixth Circuit reversed Wyman Castleberry's aggravated murder and robbery convictions and life sentence. 349 F.3d 286 (6th Cir. 2003). The prosecution withheld three sets of statements by key state witnesses. The Ohio appellate court assessed the evidence item-by-item and found each to be immaterial. Reversing, the Sixth Circuit held that the Ohio

appellate court "appl[ied] a standard that has been rejected by the Supreme Court [in *Kyles*]," and that the withheld evidence, "evaluated collectively, strongly support[ed] the conclusion that Castleberry's trial did not produce an outcome worthy of confidence." *Id.* at 292.

- In *Boyette* v. *Lefevre*, the Second Circuit reversed Robert Boyette's state convictions for attempted murder and arson. 246 F.3d 76 (2d Cir. 2001). On habeas review, the Second Circuit held that the New York courts misapplied *Kyles*, and that "in the context of this essentially one-witness case," the cumulative non-disclosure of impeachment evidence "seriously undermine[d] confidence in the outcome of the trial." *Id.* at 93 (internal quotation marks and citation omitted).

- In *Floyd* v. *State*, the Supreme Court of Florida vacated James Floyd's murder conviction and death sentence. 902 So. 2d 775 (Fla. 2005). The State's case against Floyd was circumstantial and based substantially on informant testimony. But the prosecution never disclosed a letter written by the jailhouse informant seeking a deal or an eyewitness interview describing other suspects. Lower Florida courts found that the undisclosed evidence was immaterial; the Supreme Court of Florida reversed under *Kyles*, reiterating that "suppressed evidence must be examined 'collectively, not item by item,' to determine whether it prejudiced the defendant." *Id.* at 788 (quoting *Kyles*, 514 U.S. at 436).

In contrast to these cases, the Oklahoma Court of Criminal Appeals did not properly apply *Kyles*. Instead of assessing materiality in light of the cumulative effect of suppressed evidence, the State court did precisely what this Court has prohibited: It "improperly evaluated the materiality of each piece of evidence in isolation rather than cumulatively." *Wearry*, 577 U.S. at 394. It bypassed the reasonable probability inquiry and instead imported a sufficiency of the evidence standard, requiring Mr. Glossip to show "by clear and convincing evidence that, but for the alleged error, no reasonable fact finder would have found [him] guilty." JA990.

The State's conceded *Brady* and *Napue* violations—along with other suppressed evidence of Sneed's inconsistencies, desire to recant, and meetings with prosecutor—would have provided powerful grounds to impeach the State's indispensable witness. Collectively, the suppressed evidence creates a reasonable probability that the defense would have been able to "destroy[] confidence in [Sneed's] story," on which the verdict hinged. *Kyles*, 514 U.S. at 443. And without question, there is a reasonable likelihood that the jury was affected by the false testimony. *See Napue*, 360 U.S. at 269 ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence"). Yet none of it was disclosed to the defense.

IV. Wrongful Convictions Often Result From Overlapping Factors, Rather Than Any Single Problem.

Although the *Brady* and *Napue* claims at issue here are troubling, they are not the only indicia of a wrongful conviction in this case.

Wrongful convictions are almost never the result of a single factor. In looking at 3,512 exonerations, the National Registry of Exonerations found that the following factors contributed to wrongful convictions:[5] 60% involved official misconduct; 64% involved perjury or false accusation; 13% involved false confession; 27% involved false or misleading forensic evidence; and 27% involved mistaken witness identification. These numbers add up to more than 100% because virtually all wrongful convictions are the result of multiple factors. This is even more striking in homicide cases. In those cases, 72% involved perjury or a false accusation, and 74% involved official misconduct, both factors present here.[6]

A. In many cases, wrongful convictions result from an inadequate police investigation characterized by "tunnel vision"—*i.e.*, reaching a premature conclusion about a suspect's guilt, followed by a failure to examine evidence that might discredit that theory. Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 Wis. L. Rev. 291, 292–93 (2006). This sort of investigative failure can "be most damaging" in the "initial stages" of a criminal case, "because all later stages of the process feed off the information generated in the police investigation." *Id.* at 295.

Independent investigators have made a convincing showing that Mr. Glossip was the victim of this very sort of tunnel vision. *See Reed Smith Report*, *supra*, at 12–13.

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[5] *See* National Registry of Exonerations, *% Exonerations By Contributing Factor and Type of Crime*, https://tinyurl.com/2s3utjcb (last visited Apr. 29, 2024).

[6] *Id.*

When police detectives interviewed Sneed for the first time just a week after the murder, they had already settled on Mr. Glossip as their suspect and used suggestive interview techniques that risked generating false statements by Sneed. *See id.* at 9–10. The police thereafter failed to investigate potential leads that might have discredited the narrative they had adopted in those first days after the murder. *See id.* at 88. For example, the police failed to identify relevant witnesses from the multiple other guests who stayed at the motel the night of the murder, *id.* at 89; they failed to investigate witnesses' inconsistent statements about how much money Van Treese had picked up from the motel the day before he was murdered, *id.* at 95–97; and they failed to review the motel's financial records, *id.*

B. This case also involves multiple failures by the State to collect and preserve forensic evidence, another factor that demonstrably contributes to wrongful convictions.

Independent investigators have cataloged a plethora of examples where police failed to properly collect physical evidence following Van Treese's murder. For example, the police "lost a surveillance video tape showing the night of the murder" from the gas station next to the motel. *See Reed Smith Report*, *supra*, at 75. They failed to collect the motel's financial records and daily reports. *Id.* at 77. The police did not process fingerprints from the van parked next to Van Treese's vehicle, *id.*, or from the interior of Van Treese's vehicle, *id.* at 76. They did collect fingerprints from a drinking glass in the vehicle but never processed them. *Id.* They did not fully photograph the money or envelopes found in the vehicle, *id.*; *see also*

id. at 92, or investigate the source of the money, *id.* at 93. And the police failed to identify or process for fingerprinting and DNA analysis an envelope that Sneed claimed contained money he and Mr. Glossip had taken from the vehicle. *Id.* at 76.

In November 1999—after Mr. Glossip's initial trial but before his retrial—police destroyed ten items of "key physical evidence" and "potentially exculpatory financial" records at the direction of the Oklahoma County District Attorney's Office. *See Reed Smith Report*, *supra*, at 7. That unexplained departure from the District Attorney's "long-standing agreement" to indefinitely preserve and "never" destroy evidence in capital cases, *id.*, deprived Mr. Glossip of evidence he might have used to demonstrate his innocence at his retrial, and it adds yet another troubling red flag undermining the reliability of his capital conviction.

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Wrongful convictions strike at the core of our system of criminal justice, allowing the guilty to escape while inflicting severe punishment—potentially death—on the innocent. *See United States* v. *Agurs*, 427 U.S. 97, 110–11 (1976). Given the stakes inherent in any criminal prosecution, "[i]t is as much [the State's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger* v. *United States*, 295 U.S. 78, 88 (1935). To its credit, the State has acknowledged that it breached its due process obligations by obtaining a capital conviction from a trial so plagued by prosecuto-

rial misconduct and cumulative error that its constitutionality cannot be defended. *See, e.g.*, Respondent's Br. at 1–2, 21–22, 31–34, 52.

Under these circumstances, the State is correct that Mr. Glossip's conviction is "constitutionally unsupportable." *Id.* at 38–39, 43–44. This Court should reverse the Oklahoma Court of Criminal Appeals' erroneous decision and prevent the grave miscarriage of justice that would occur if Mr. Glossip were to be executed based on the result of a flawed trial that the State does not—and cannot—defend. *See Moore* v. *Texas*, 139 S. Ct. 666, 670, 672 (2019) (summarily reversing state court's determination that the petitioner was not intellectually disabled, where prosecutor agreed with the petitioner's submission that he was intellectually disabled and thus ineligible for the death penalty); *Escobar* v. *Texas*, 143 S. Ct. 557 (2023) (granting certiorari, vacating judgment, and remanding for further consideration in light of Texas's "confession of error" on *Brady* claim); *cf. Calcutt* v. *FDIC*, 598 U.S. 623, 628–30 (2023) (per curiam) (summarily reversing Sixth Circuit's decision in response to Solicitor General's confession of error).

CONCLUSION

This Court should reverse the decision of the Oklahoma Court of Criminal Appeals and remand with instructions to vacate Mr. Glossip's conviction.

April 30, 2024

Respectfully submitted,

/s/ Andrianna D. Kastanek

ANDRIANNA D. KASTANEK
Counsel of Record
JUSTIN J. GILLETTE
JOHNATHAN T. HALL
ANDREW L. OSBORNE
JENNER & BLOCK LLP
353 North Clark Street
Chicago, IL 60654
(312) 222-9350
akastanek@jenner.com

VANESSA POTKIN
M. CHRIS FABRICANT
INNOCENCE PROJECT, INC.
40 Worth Street, Suite 701
New York, NY 10013
(212) 364-5340

Counsel for Amicus Curiae