No. 22-7466
CAPITAL CASE

IN THE

Supreme Court of the United States

RICHARD EUGENE GLOSSIP,

Petitioner,

v.

STATE OF OKLAHOMA,

Respondent.

On Writ of Certiorari to the Oklahoma Court of Criminal Appeals

BRIEF OF R. MICHAEL CASSIDY, NORA FREEMAN ENGSTROM, BRUCE A. GREEN, PETER A. JOY, GEOVANNY E. MARTINEZ, VERONICA ROOT MARTINEZ, RICHARD W. PAINTER, W. BRADLEY WENDEL, RONALD F. WRIGHT, AND ELLEN C. YAROSHEFSKY AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

BRUCE A. GREEN
150 West 62nd Street
New York, NY 10023
(212) 636-6851
bgreen@law.fordham.edu

MEAGHAN VERGOW
Counsel of Record
JOSHUA REVESZ
JOHN J. LAPIN
O'MELVENY & MYERS LLP
1625 Eye Street NW
Washington, D.C. 20006
(202) 383-5300
mvergow@omm.com

Attorneys for Amici Curiae

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INTEREST OF *AMICI CURIAE*[1]

Amici are ten legal academics whose scholarship, teaching, and professional service focus on legal ethics and professional responsibility, including the professional norms governing the work of trial lawyers in general and of criminal prosecutors in particular. Collectively, *amici* have authored well-respected and widely cited scholarship on legal ethics. In particular, *amici* have written and/or lectured on the subject of prosecutors' professional duties. They are uniquely well suited to consider prosecutors' professional conduct and how prosecutors should be regulated to promote their compliance with professional obligations.

Amici respectfully submit this brief to address why it is important for this Court to reaffirm prosecutors' constitutional obligation to correct their witnesses' false testimony.

Amici's names and professional affiliations are set forth in the Appendix. *Amici* submit this brief in their individual capacities.

SUMMARY OF ARGUMENT

This death penalty case raises a vital question regarding a prosecutor's constitutional obligation to correct the false testimony of a key witness for the State. The decision of the Oklahoma Court of Criminal Appeals ("OCCA")—holding that due process was not offended by the prosecution's failure to correct its key witness's false testimony on direct examination—

[1] No counsel for any party has authored this brief in whole or in part, and no person other than *amici* or their counsel have made any monetary contribution intended to fund the preparation or submission of this brief.

creates uncertainty about the extent of prosecutors' responsibility in such circumstances. The OCCA decision not only erodes prosecutorial obligations but also creates confusion about the scope of this Court's holding in *Napue v. Illinois*, 360 U.S. 264 (1959), that the Constitution requires prosecutors to rectify their witnesses' false testimony.

The OCCA rejected Richard Eugene Glossip's due process claim notwithstanding the state Attorney General's confession of error. To reach that result, the state court assumed that the prosecution's remedial obligation is limited in several respects and is not implicated when the witness's false testimony may not be deliberate; when the defense might have asked follow-up questions to expose the falsity of the witness's testimony; or when the falsehood may not be outcome-determinative. The state court's legal conclusions—along with its factual assertion that defense counsel should have known of the relevant testimony's falsity—were wrong. The exceptions to a prosecutor's duty of candor created by the OCCA are inconsistent with the truth-seeking function of the trial process and with the constitutional due process principles described in *Napue*.

The decision below countenances a constitutional violation that draws into question the integrity of the verdict in this case. Further, it misdirects prosecutors about their responsibilities under the Constitution and the rules of professional conduct that derive therefrom, to the detriment of fair and reliable verdicts in future cases. This Court should reverse the state court's decision, to clarify that the integrity and fairness of criminal proceedings unequivocally

require prosecutors to rectify false testimony that is relevant to any issue the jury will decide.

ARGUMENT

I. PROSECUTORS HAVE AN UNQUALIFIED ETHICAL AND CONSTITUTIONAL DUTY TO CORRECT FALSE TESTIMONY THAT MAY HAVE AFFECTED THE JURY'S JUDGMENT

Under *Napue v. Illinois*, 360 U.S. 264 (1959), prosecutors have an unqualified duty to correct false testimony that might have affected the jury's judgment. This constitutional rule is itself rooted in centuries-old principles of legal ethics, but the constitutional doctrine set out by this Court now informs the law governing prosecutors and private attorneys alike. Accordingly, the Court's decision in this case will not only determine the constitutional rules governing prosecutorial duties—it will also shape the ethical responsibilities of lawyers throughout the Nation.

A. The ethical rules against the use of perjured testimony have a lengthy historical pedigree.

From the beginning, the "eminent common-law authorities (Blackstone, Coke, Hale, and the like)" recognized the unique threat that convictions based on false testimony present to the rule of law. *Kahler v. Kansas*, 140 S. Ct. 1021, 1027 (2020). Writing in the fifteenth century, Chief Justice John Fortescue called such convictions a "wicked device." John Fortescue, *De Laudibus Legum Angliae* 104 (A. Amos trans. 1825) (1468–71). In his *Institutes*, Coke described perjury as "odious . . . in the eye of the law,"

and explained that "perjury committed in an information exhibited by the kings attorn[e]y, or any other for the king, by any witness produced on the behalf of the king, is punishable" under both common law and statute. 3 Edward Coke, *Institutes of the Laws of England* 163–64 (1681). And Blackstone's *Commentaries* described the "Gothic laws," which punished "the judge, the witnesses, and the prosecutor"—treating the prosecutor as a murderer—in cases where false trial testimony resulted in a conviction. 4 William Blackstone, *Commentaries on the Laws of England* 196 (1769).

The American courts quickly adopted the venerable concept that prosecutors must avoid false convictions. In the key case, *Rush v. Cavenaugh*, 2 Pa. 187 (1845), Chief Justice John Bannister Gibson of Pennsylvania—one of the jurists who "may be said to have laid the foundations of the American common law"—asked whether a private prosecutor could ethically pursue charges against a man he believed to be innocent. Morris R. Cohen, *Law and the Social Order: Essays in Legal Philosophy* 333 (1982); *see* Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 Geo. Wash. L. Rev. 1, 4–21 (2005) (describing and analyzing *Rush*). Speaking for the Supreme Court of Pennsylvania, the chief justice said that the answer was no. He described it as a "gross mistake" to "suppose that a lawyer owes no fidelity to any one except his client," and he explained that a prosecutor violates his "official oath" when he "consciously presses for an unjust judgment: much more so when he presses for the conviction of an innocent man." 2 Pa. at 189.

The first national code of legal ethics incorporated this bedrock principle and made clear that prosecutors should not skew the facts to support a conviction. The American Bar Association's ("ABA") 1908 Canons of Professional Ethics state that "the primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done." ABA, *Canons of Professional Ethics* No. 5 (1908).

Nearly three decades later, in *Berger v. United States*, 295 U.S. 78 (1935), this Court underscored prosecutors' special responsibility to avoid convictions based on fabricated testimony. "The United States Attorney," the Court explained, "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Id.* at 88. "As such," the Court continued, "he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer." *Id.* "[W]hile he may strike hard blows, he is not at liberty to strike foul ones." *Id.* So, the Court concluded, "[i]t is as much his 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." *Id.*

B. This Court has recognized the constitutional dimensions of the rule against the knowing use of false testimony.

The same year it decided *Berger*, the Court held in *Mooney v. Holohan*, 294 U.S. 103 (1935), that the Due

Process Clause prohibits certain improper methods calculated to produce a wrongful conviction. In the decades since, the Court has repeatedly made clear that the Constitution—like the Canons of Professional Ethics—prohibits prosecutors from abusing their special role by eliciting false testimony or allowing false testimony to go uncorrected.

In *Mooney*, the Court established the rule that "the requirement of due process" cannot "be deemed to be satisfied . . . if a state . . . depriv[ed] a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured." *Id.* at 112. That knowing failure to avoid false testimony, the Court explained, "is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation." *Id.* So the Constitution, "in safeguarding the liberty of the citizen against deprivation through the action of the state," prohibits that prosecutorial tactic. *Id.*; *see also In re Michael*, 326 U.S. 224, 227 (1945) ("All perjured relevant testimony is at war with justice, since it may produce a judgment not resting on truth. Therefore it cannot be denied that it tends to defeat the sole ultimate objective of a trial.").

In *Napue*, the Court built on the rule of *Mooney* to hold that constitutional error occurs "when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." 360 U.S. at 269. The determination in *Napue* that the prosecution must correct its witnesses' false testimony was unqualified. Prosecutors must correct their witnesses' false testimony—regardless of its subject—if it is "in any way relevant to the case," including if it bears "upon the

witness' credibility rather than directly upon defendant's guilt." *Id.* at 269–70 (quoting *New York v. Savvides*, 1 N.Y.2d 554, 557 (1956)); *see id.* at 269 ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend."). The Court found it immaterial whether the prosecution intended for the witness to lie, explaining: "[T]hat the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same." *Id.* at 270 (quoting *Savvides*, 1 N.Y.2d at 557).

Subsequent decisions clarify that *Napue* requires a new trial so long as the false testimony *could* have affected the jury's judgment. *Id.* at 271. That standard of review traces its roots to *Mooney*, as the Court explained in *United States v. Agurs*, 427 U.S. 97 (1976):

> [T]he Court has consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony *could have affected* the judgment of the jury. . . . [T]he Court has applied a strict standard of materiality [in a line of prior cases], not just because [those cases] involve prosecutorial misconduct, but more importantly because they involve a corruption of the truth-seeking function of the trial process.

Agurs, 427 U.S. at 103–04 (emphasis added).

Napue violations are thus not further reviewed for harmless error: the finding of constitutional error already entails consideration of the materiality of the false testimony. *See United States v. Bagley*, 473 U.S. 667, 679–80 (1985) ("Although this rule is stated in terms that treat the knowing use of perjured testimony as error subject to harmless-error review, it may as easily be stated as a materiality standard under which the fact that testimony is perjured is considered material unless failure to disclose it would be harmless beyond a reasonable doubt.").[2] And this Court is not bound by the state court's determination in assessing the significance of the constitutional violation, but rather must review the record independently. *Napue*, 360 U.S. at 271–72; *see Bagley*, 473 U.S. at 680.

The rule of *Napue* is closely related to the doctrine recognized in *Brady v. Maryland*, 373 U.S. 83 (1963), prohibiting prosecutors from withholding evidence material to a defendant's innocence. *Id.* at 87. A prosecution that withholds key evidence, like a prosecution that relies on false testimony, "casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice"—even where

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[2] *See also Kyles v. Whitley*, 514 U.S. 419, 435 (1995) ("[O]nce a reviewing court applying *Bagley* has found constitutional error there is no need for further harmless-error review. Assuming, *arguendo*, that a harmless-error enquiry were to apply, a *Bagley* error could not be treated as harmless, since 'a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different,' necessarily entails the conclusion that the [violation] must have had 'substantial and injurious effect or influence in determining the jury's verdict.'" (citations omitted)).

the prosecution's action is not "the result of guile." *Id.* at 87–88 (quotation omitted). The prosecution's mental state is of no matter because the "principle . . . is not punishment . . . for misdeeds of a prosecutor but avoidance of an unfair trial to the accused." *Id.* at 87.

C. The law governing lawyers has developed in parallel with this Court's jurisprudence.

This Court's constitutional jurisprudence has in turn informed the professional rules that govern prosecutors. In 1969, ten years after *Napue* and six years after *Brady*, the ABA added a provision requiring that a prosecutor must "make timely disclosure to the defense of available evidence, known to the prosecutor, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment." ABA, *Model Code of Professional Responsibility* EC 7-13 (1969).[3]

Today, with the advent of the Model Rules, the obligation to correct false testimony that is imposed on prosecutors as a matter of constitutional law has also been imposed on *all* lawyers as a matter of professional ethics. ABA, Model Rules of Professional Conduct 3.3; *see, e.g.*, Oklahoma Rule of Professional Conduct 3.3(a)(3) ("A lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer

[3] The ABA has explained that this "rule did not simply codify existing constitutional law but imposed a more demanding disclosure obligation" that went beyond the materiality standard announced in *Brady* and subsequent cases. ABA, Standing Comm. on Ethics & Prof'l Resp., Formal Op. 09-454, at 3 (2009).

comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.").[4] Other states have similar or identical rules derived from Rule 3.3(a)(3) of the ABA Model Rules of Professional Conduct.[5] *See, e.g.*, New York Rule of Professional Conduct 3.3(a)(3); Texas Disciplinary Rule of Professional Conduct 3.03(a)(5). This Court influenced the development of

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[4] Importantly, the reference to "material evidence" in this rule does not incorporate the concept of materiality in the *Brady* line of cases, which hold that a conviction will not be reversed unless exculpatory or impeachment evidence withheld by the prosecution would *likely* have affected the trial's outcome. In contrast to *Brady* contexts, the term here excludes only trivial falsehoods. It has the same meaning in this model professional conduct rule as in others. For example, ABA Model Rule of Professional Conduct 3.3(a)(1) requires a lawyer to "correct a false statement of material fact or law previously made to the tribunal by the lawyer," and Model Rule 4.1(a) forbids a lawyer to "make a false statement of material fact or law to a third person." *See generally* 1 McCormick on Evidence § 185 (8th ed.) ("Materiality concerns the fit between the evidence and the case. It looks to the relation between the proposition that the evidence is offered to prove and the issues in the case. To the extent that the evidence is offered to help prove a proposition that is not a matter in issue, it is immaterial.").

[5] The ABA adopted its current version of Model Rule 3.3(a)(2) in 2002. The ABA's prior version of this rule, adopted in 1983 and in Oklahoma in 1988, provided: "If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures." The ABA's earlier professional code, the Model Code of Professional Responsibility, which had also been adopted in Oklahoma in 1969, had an equivalent provision, Disciplinary Rule 7-102(B)(2), which provided: "A lawyer who receives information clearly establishing that . . . [a] person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal." *Napue* predated both of these.

this ethical requirement when it held that a lawyer behaves competently when he declines to put on testimony that he knows to be false. *Nix v. Whiteside*, 475 U.S. 157, 166 (1986).

While all lawyers must comply with Rule 3.3(a)(3), prosecutors have heightened duties. The rules of professional conduct emphasize this Court's teaching in *Berger*, explaining that prosecutors' unique power "carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons." ABA, Model Rules of Professional Conduct 3.8 cmt. [1]; *see* ABA, Criminal Justice Standards for the Prosecution Function, Standards 3-1.4(a) (4th ed. 2017) ("In light of the prosecutor's public responsibilities, broad authority and discretion, the prosecutor has a heightened duty of candor to the courts and in fulfilling other professional obligations.").

Just as this Court's constitutional rulings are sometimes guided by professional norms,[6] the ABA

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[6] *See, e.g.*, *Nix*, 475 U.S. at 166–71 (referring to "accepted norms of professional conduct" establishing the "special duty of an attorney to prevent and disclose frauds upon the court"); *United States v. Young*, 470 U.S. 1, 7–9 (1985) (referring to ABA professional conduct codes and Criminal Justice Standards in determining prosecutor made improper arguments); *Strickland v. Washington*, 466 U.S. 668, 688 (1984) ("Prevailing norms of practice as reflected in American Bar Association standards and the like, . . . are guides to determining what is reasonable, but they are only guides."); *see generally* Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of*

and state courts, in adopting and interpreting professional conduct rules, are influenced by this Court's constitutional decisions.[7] For example, while some states' professional conduct rules require prosecutors to disclose information "that tends to negate the guilt of the accused" regardless of whether the evidence is "material,"[8] other state supreme courts have incorporated a materiality requirement into their version of the professional conduct rule so that it coincides with prosecutors' due process obligation under *Brady* and its progeny.[9]

Because these ethical obligations are moored to constitutional anchors, an erosion of the constitutional standard of candor risks impairing the ethical one. Consequently, clear and definite guidance from this Court is important to ensure that prosecutors

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Excellence, 23 CRIM. JUST. 10 (Winter 2009) (discussing the relevance of the ABA Criminal Justice Standards).

[7] The ABA amended its Prosecution Function Standards to accord with this Court's decision in *Jones v. Barnes*, 463 U.S. 745 (1983), which held that, in a criminal case, an appellate lawyer was not obligated to make every nonfrivolous argument that the client requested. Likewise, the ABA amended its Model Rules of Professional Conduct to accord with this Court's decision in *Nix*.

[8] *See* ABA, Model Rules of Professional Conduct 3.8(d), and state rules derived from it; *see also* ABA, Standing Comm. on Ethics & Prof'l Resp., Formal Op. 09-454 (2009).

[9] Oklahoma is one such State. *Oklahoma ex rel. Okla. Bar Ass'n v. Ward*, 353 P.3d 509 (Okla. 2015) (holding that a prosecutor's professional duty to disclose exculpatory or mitigating evidence or information is co-extensive with *Brady*); *see also, e.g.*, *Matter of Kurtzrock*, 192 A.D.3d 197, 209–10 (N.Y. App. Div. 2020) (reviewing conflicting views of whether state rules derived from ABA Model Rule 3.8(d) are coextensive with or codify *Brady*, or whether the rules impose distinct obligations on prosecutors).

satisfy their ethical obligations in criminal proceedings across the country.

II. THE OCCA DECISION IS AT ODDS WITH *NAPUE* AND THE LAW GOVERNING LAWYERS.

In the decision below, the OCCA badly misconstrued *Napue*. None of the four reasons that the court gave to disregard Richard Glossip's constitutional claim can be reconciled with this Court's due process doctrine. And the OCCA's decision further misapprehends fundamental ethical rules and norms.

A. *Napue* applies regardless of whether a witness intends to give false testimony.

The OCCA rejected Glossip's claim in part because it surmised that Justin Sneed was "more than likely in denial of his mental health disorders" than intentionally lying about them. Pet. App. 17a.

This distinction makes no constitutional or ethical difference. The *Napue* inquiry is whether the prosecution has allowed false evidence "to go uncorrected when it appears." *Napue*, 360 U.S. at 269. That obligation applies regardless of whether the witness intentionally lied or gave false evidence for another reason. *See* Stephen A. Saltzburg, *Perjury and False Testimony: Should the Difference Matter So Much?*, 68 Fordham L. Rev. 1537, 1560 (2000) ("It is evident that no Justice believed it was necessary to determine whether Napue proved all elements of perjury or whether Hamer believed he was testifying falsely when he assisted the government in the Napue prosecution.").

This Court's decision in *Alcorta v. Texas*, 355 U.S. 28 (1957), illustrates the point. In that case, the witness's testimony was not even literally false. *Id.* at 31. Rather, the prosecution instructed the witness to withhold a key fact—that the witness had engaged in sexual relations with the murder victim—unless "specifically asked." *Id.* That withholding, the Court unanimously held, "gave the jury [a] false impression." *Id.* And so, "[u]nder the general principles laid down by this Court . . . petitioner was not accorded due process of law"—even though the witness had not intended to lie and indeed had not even testified falsely. *Id.*

Thus, "as lower courts have noted" in applying this Court's due process cases, "it matters not whether the witness giving false testimony is mistaken or intentionally lying." 6 Wayne R. LaFave et al., *Criminal Procedure* § 24.3(d) (4th ed.) (citing *Alcorta* and collecting cases); *see, e.g.*, *United States v. Freeman*, 650 F.3d 673, 680 (7th Cir. 2011); *United States v. Rivera Pedin*, 861 F.2d 1522, 1530 n.14 (11th Cir. 1988); *United States v. Harris*, 498 F.2d 1164, 1169 (3d Cir. 1974); *Gomez v. Comm'r of Corr.*, 243 A.3d 1163, 1168, 1174–76 (Conn. 2020); *People v. Wiese*, 389 N.W.2d 866, 869 (Mich. 1986). With its misguided focus on the witness's *mens rea*, the OCCA's decision contravenes this long line of authority.

The OCCA's decision is also impracticable. A prosecutor may not know, in the heat of the trial, the motivations of a witness. For this reason, the ethical rules on this topic have never turned on the *witness's* belief about the testimony's truth or falsity. Instead, the standard turns on what the *lawyer* knows. *See*

supra at 9-11. This Court's due process doctrine is no different.

B. *Napue* does not turn on the defense's strategic decisions.

The OCCA separately faulted Glossip's counsel for not "inquir[ing] further" about Sneed's lithium prescription. Pet. App. 17a. But nothing about *Napue* depends on whether the defense asks the follow-up questions that a reviewing court thinks worthwhile.

The premise of *Napue* and *Mooney* is that a defendant has a right not to be convicted based on material testimony that the prosecution knows to be false. *See supra* at 6-8. It would be perverse to qualify that right by demanding that defense counsel ask questions designed to uncover whether a witness's statement is false.

For this reason, this Court has rejected the OCCA's follow-up-inquiry requirement. A rule "declaring 'prosecutor may hide, defendant must seek,'" the Court explained in the *Brady* context, "is not tenable in a system constitutionally bound to accord defendants due process." *Banks v. Dretke*, 540 U.S. 668, 696 (2004). Accordingly, the fact that the "potential existence of a prosecutorial misconduct claim might have been detected" through defense activities is immaterial. *Id.*

Lower courts, applying *Napue* and *Brady*, similarly reject the argument that "information obtained from a government-certified liar can[] substitute for information obtained from the government itself." *In re Sealed Case*, 185 F.3d 887, 897 (D.C. Cir. 1999) (Garland, J.); *see, e.g.*, *United States v. Foster,* 874

F.2d 491, 495 (8th Cir. 1988) ("The fact that defense counsel . . . failed to correct the prosecutor's misrepresentation is of no consequence. This did not relieve the prosecutor of her overriding duty of candor to the court, and to seek justice rather than convictions."); *see also* 6 LaFave, *Criminal Procedure* § 24.3(b) (collecting cases).

Finally, the OCCA's proposed limitation on *Napue* is plainly at odds with the relevant ethical rules. Pursuant to Rule 3.3(a), a lawyer's ethical responsibilities do not depend on the competence of her adversary. Nor does Rule 3.3(a) excuse a lawyer's misconduct because of another lawyer's tactical choices. If anything, the prosecutor's responsibility to see "that justice shall be done," *Berger*, 295 U.S. at 88, is heightened—not weakened—where defense counsel is not zealously defending the case.

C. *Napue* does not require a showing that "the proceeding would have been different" absent the witness's false testimony.

Another of the OCCA's statements—that there was no *Napue* error because Glossip failed to show that the proceeding "would" have been different had Oklahoma corrected Sneed's testimony—is directly contrary to *Napue* and its progeny. Pet. App. 17a.

As explained, a *Napue* error arises whenever there is "any reasonable likelihood that the false testimony *could have affected* the judgment of the jury." *Agurs*, 427 U.S. at 103 (emphasis added); *see supra* at 7-8. The Court set this materiality standard because cases raising *Napue* errors "involve a corruption of the

truth-seeking function of the trial process." *Agurs*, 427 U.S. at 104. Recognizing the seriousness of that corruption, the Court has declined to engraft further harmless-error or materiality requirements onto the *Napue* analysis. *See Kyles*, 514 U.S. at 435; *Bagley*, 473 U.S. at 680. Whenever the uncorrected use of perjured testimony *could*—not would—have made a difference, the due process clause is violated.[10]

That standard is readily met here, as Glossip and Oklahoma both agree. *See United States v. Butler*, 955 F.3d 1052, 1058 (D.C. Cir. 2020) (describing the materiality standard as "quite easily satisfied" and a "veritable hair trigger for setting aside the conviction" (quotation omitted)). The evidence at issue created doubt about Sneed's credibility and thus the veracity of his testimony, as well as the plausibility of the State's theory of the case: "[w]hat reason above and beyond the reasons of Richard Glossip did Justin Sneed have to kill Barry Van Treese?" J.A. 446. It provided an alternative explanation for the murder: that Sneed's conduct was caused by his own mental

[10] Of course, on collateral review, a constitutional violation alone does not always entitle an individual to relief. Here, however, the OCCA imposed no procedural bar that is analytically distinct from the court's misunderstanding of *Napue*. This Court's adequacy-and-independence cases have asked "whether the plaintiff has been accorded due process in the primary sense—whether [he] has had an opportunity to present [his] case and be heard in its support." *Brinkerhoff-Faris Tr. & Sav. Co. v. Hill*, 281 U.S. 673, 681 (1930) (Brandeis, J.). And the nature of Glossip's *Napue* claim—that Oklahoma knew a material statement was false and concealed that falsity—gave him no opportunity to present his case until Oklahoma belatedly disclosed the false testimony. The OCCA's contrary conclusion is intertwined with, not independent of, its faulty *Napue* analysis.

illness, not Glossip. Given the evidence that methamphetamine use can cause manic episodes, paranoia, and even violent behavior in an individual with bipolar disorder, Pet. App. 104a, the correction of Sneed's false testimony would have permitted the jury to conclude that Sneed's bipolar disorder and methamphetamine use triggered the attack. The OCCA seriously erred in summarily concluding the jury would have been unmoved by that truth.

As a robust body of professional ethics literature explains, a higher standard like the one imposed by OCCA would not advance the interests of justice. Jurists and advocates often believe in hindsight that additional evidence would not have changed a trial's outcome. *See, e.g.*, Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 Wis. L. Rev. 291, 351. As then-professor Stephanos Bibas put the point, "the inevitability hindsight bias cloud[s] case-by-case, post hoc review." Stephanos Bibas, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel*, 2004 Utah L. Rev. 1, 11; *see also* Stephanos Bibas, *The Story of* Brady v. Maryland*: From Adversarial Gamesmanship Toward the Search for Innocence?* 13, in *Criminal Procedure Stories* (Carol Steiker ed. 2006) ("Psychologically, it is easier to discount the new piece of evidence than to upset the entire factual premise and solemn verdict of the trial."). So a reinterpretation of *Napue* that raised the harmlessness standard from could-have-made-a-difference to would-have-made-a-difference will fail to adequately protect the due process right.

D. Defense counsel had no basis to know that Sneed's testimony was false.

Finally, the OCCA surmised that Glossip's *Napue* claims should fail because "[d]efense counsel was aware or should have been aware that Sneed was taking lithium at the time of trial." Pet. App. 17a. This statement misapprehends the facts of the case at hand.

The critical inquiry in this litigation is not whether Sneed was "taking lithium"—a fact he admitted on the stand. Pet. App. 267a. It was whether Sneed had been prescribed lithium *by a psychiatrist*, rather than (as Sneed claimed) by a jailhouse doctor following a "cold." *Id.* There is no dispute that the prosecution knew that a psychiatrist prescribed Sneed lithium, and that Sneed's testimony was accordingly false. And there is no dispute that the defense did not know the circumstances under which Sneed was prescribed the lithium. Thus, the OCCA had no basis to posit that defense counsel should have known of the key statement's falsity.[11] And so the court's judgment cannot be defended on that score.

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[11] There is accordingly no need for this Court to resolve a split in the courts below about how *Napue* applies in circumstances where defense counsel knew of the relevant testimony's falsity. *See* 6 LaFave, *Criminal Law* § 24.3(d) (collecting cases); *see also, e.g.*, *Long v. Pfister*, 874 F.3d 544, 548–49 (7th Cir. 2017) (holding these applications had not been clearly established by the Court for purposes of collateral review). If the Court reaches the question, however, *amici* contend that *Napue* should apply regardless of defense counsel's knowledge, because—unless the prosecution concedes that a statement is false and corrects it—

* * *

Reaffirming prosecutors' unqualified obligation to correct their witnesses' false testimony is a matter of national importance. Given the premium this Court places on the integrity of criminal proceedings, the critical role of prosecutors in ensuring fairness in those proceedings, and the influence that this Court's constitutional decisions exert on prosecutors' and courts' understanding of the related professional norms, this case will affect not only Richard Glossip—a man whose capital conviction did not accord with the Constitution—but future criminal defendants throughout the United States. In particular, embracing the OCCA's decision would erode the current bright-line rule requiring attorneys to correct their witnesses' false statements. The OCCA's ruling, if given force nationwide, would invite prosecutors—and potentially other lawyers—to engage in fine-grained calculations about whether their witnesses' false testimony is intentionally false; whether the opposing party's counsel could have exposed the falsity through better questions; and whether the false testimony would likely affect the as-yet-unknown verdict. In adopting that ruling, the Court would give prosecutors and other attorneys free rein to make decisions, on which the integrity of judicial proceedings will turn, that attorneys cannot be expected to make objectively and reliably. The result will be to increase the problem of false testimony in judicial proceedings—and, consequently, to erode public confidence in the courts' commitment to judicial integrity, fair

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the factfinder may improperly rely on that statement, despite whatever actions the defense may take.

process, and accuracy in adjudication.

The Court should not travel down that path. The constitutional principles embodied in *Napue* are crucial to ensuring that individuals charged with crimes receive a fair and reliable process for adjudicating guilt or innocence. Reaffirming these principles is imperative not only to prevent erroneous denials of liberty but also, as this case reflects, to prevent accused individuals from being unfairly deprived of their lives.

CONCLUSION

This Court should reverse the judgment below.

Respectfully submitted,

BRUCE A. GREEN
150 West 62nd Street
New York, NY 10023
(212) 636-6851
bgreen@law.fordham.edu

MEAGHAN VERGOW
Counsel of Record
JOSHUA REVESZ
JOHN J. LAPIN
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300
mvergow@omm.com

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LIST OF *AMICI CURIAE*[1]

R. Michael Cassidy
Professor of Law
Boston College Law School

Nora Freeman Engstrom
Ernest W. McFarland Professor of Law
Co-Director, Deborah L. Rhode Center on the Legal Profession
Stanford Law School

Bruce A. Green
Louis Stein Chair of Law
Director, Stein Center for Law and Ethics
Fordham University School of Law

Peter A. Joy
Henry Hitchcock Professor of Law
Washington University in St. Louis School of Law

Geovanny E. Martinez
Senior Lecturing Fellow
Executive Director for the Center on Law, Race and Policy
Duke Law School

[1] Institutional affiliations are provided for identification purposes only. The views expressed in this brief do not reflect the views of the institutions with which *amici* are affiliated.

Veronica Root Martinez
Professor of Law
Duke Law School

Richard W. Painter
S. Walter Richey Professor of Corporate Law
University of Minnesota School of Law

W. Bradley Wendel
Edwin H. Woodruff Professor of Law
Cornell Law School

Ronald F. Wright
Needham Y. Gulley Professor of Criminal Law
Wake Forest University School of Law

Ellen C. Yaroshefsky
Howard Lichtenstein Professor of Legal Ethics
Maurice A. Deane School of Law, Hofstra University