No. 22-7466

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 THE DISTRICT OF COLUMBIA AND THE STATES OF COLORADO, ILLINOIS, MARYLAND, MASSACHUSETTS, MINNESOTA, NEVADA, NEW JERSEY, NEW MEXICO, NEW YORK, AND OREGON AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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QUESTIONS PRESENTED

1. Whether the Oklahoma Court of Criminal Appeals erred in rejecting confessed constitutional errors under *Brady* and *Napue* and giving no weight to the State's considered view that petitioner's trial was infected by serious constitutional error and prosecutorial misconduct.

2. Whether the Oklahoma Court of Criminal Appeals' holding that the Oklahoma Post-Conviction Procedure Act precluded post-conviction relief is an adequate and independent state-law ground for the judgment.

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*

The District of Columbia and the States of Colorado, Illinois, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New York, and Oregon (collectively, the "*Amici* States") file this brief as *amici curiae* in support of neither party. The *Amici* States take no position on whether the judgment below rests on an adequate and independent state-law ground and thus take no position on this Court's ultimate disposition. If the Court concludes that it has jurisdiction, however, the *Amici* States have an interest in this Court's giving appropriate weight to a remarkable aspect of this case: the Oklahoma Attorney General's confession of error. As the *Amici* States can attest, confessions of error by a state's chief law officer in criminal cases are rare—as they should be. Confessing error is a momentous step, one that Attorneys General never take lightly. When they do so, then, courts should give the confession of error great weight. This Court long ago recognized that such deference is owed to confessions of error by the United States. *See Young v. United States*, 315 U.S. 257, 258 (1942). Considered concessions by the states likewise deserve great weight.

That weight should be heaviest when the error confessed turns on a fact-intensive, case-specific analysis. Courts are poorly positioned to conduct such analyses better than the parties themselves. And accepting fact-bound confessions of error has little risk of accidentally distorting the wider law. This case involves quintessential examples of such errors: the suppression of favorable evidence in violation of

Brady v. Maryland, 373 U.S. 83 (1963), and the presentation of false testimony in violation of *Napue v. Illinois*, 360 U.S. 264 (1959). Like Oklahoma, the *Amici* States take their obligations under *Brady* and *Napue* seriously and will, in the rare case where needed, confess error on these points. The coalition of Attorneys General who represent the *Amici* States submit this brief to explain why this Court and others should give such a confession of error by a state Attorney General great deference.

SUMMARY OF ARGUMENT

1. Confessions of error by an Attorney General are rare, and the intersection of three well-established legal principles demonstrates why such a confession should be afforded great deference. *First*, the party presentation principle instructs that courts should generally consider only those issues contested by the parties and should not consider arguments that a party has intelligently waived, particularly on a fact-bound issue. A confession of error is an extra-strength waiver. *Second*, prosecutorial discretion gives the executive wide latitude to decide whom to prosecute, under what statute, and whether to dismiss those charges. Encroachments on this discretion from the judiciary, including compelling the executive to carry out a sentence it believes was obtained unconstitutionally, raise separation-of-powers concerns. Confessions of error are similar to traditional exercises of prosecutorial discretion and thus should be treated with similar respect. *Third*, it is well established that a state's goal in a criminal proceeding is to achieve justice, which includes protecting a defendant's constitutional rights. Every

Attorney General takes an oath to carry out this obligation, and Attorneys General are uniquely situated to represent the public interest of each state's citizens. Accordingly, when a state Attorney General confesses a constitutional error, that confession should be afforded significant deference.

2. A state Attorney General's confession of error respecting a highly fact-intensive issue deserves especially great deference—and doubly so when the confession relates to misconduct by the prosecution. The Attorney General is better positioned than a court to understand and assess the relevant facts, and accepting such a fact-bound confession will ordinarily not have any wider, precedential impact on the law. Constitutional violations under *Brady* and *Napue* are examples of such errors because both involve highly fact-specific inquiries. The "materiality" element of both errors, in particular, requires examining the totality of the evidence submitted at trial—an inquiry better suited to an Attorney General, who has access to the prosecution's files and the trial lawyers, than to an appellate court. Moreover, an Attorney General has an especially strong reason to be careful and thorough before confessing *Brady* and *Napue* errors, given the potential reputational harm to the trial lawyers.

These principles apply with full force here. After a thorough and careful investigation, the Oklahoma Attorney General conceded that the specific facts of Glossip's case constitute clear *Brady* and *Napue* violations. If this Court reaches the merits, it should give that confession of error great deference and reverse the judgment below.

ARGUMENT

I. Courts Should Afford Great Weight To A State Attorney General's Confession Of Error In A Criminal Case.

A state Attorney General's confession that a criminal conviction was the product of reversible error is an extraordinary event. Few if any other acts in our legal system have a similar character. By the same token, few if any deserve greater deference from courts. To be sure, "such a confession does not relieve [a court] of the performance of the judicial function." *Young*, 315 U.S. at 258; *see Sibron v. New York*, 392 U.S. 40, 58 (1968). Yet only in rare circumstances should a court performing that function refuse to vacate a criminal conviction that an Attorney General has determined—and declared—rests on prejudicial error in the proceedings under review, especially when the error is misconduct by the prosecution, not a mistaken decision by the court.

To appreciate fully such a confession of error's extraordinary character, it helps to consider three vital principles of American law: the party presentation principle, prosecutorial discretion, and prosecutors' obligation to seek justice and uphold the Constitution. In combination, these three concepts highlight the breadth of an Attorney General's power to control criminal litigation in the interests of justice. That power includes the power *not* to defend a conviction tainted by error—a choice that courts in our adversarial system should rarely second-guess.

First, start with the party presentation principle. This principle, "so basic to our system of adjudication," *Arizona v. California*, 530 U.S. 392,

413 (2000), provides that courts "rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present," *Greenlaw v. United States*, 554 U.S. 237, 243 (2008). Accordingly, "in both civil and criminal cases, in the first instance and on appeal," courts typically "decide only questions presented by the parties." *Id.* at 243-44 (internal quotation marks omitted); *see, e.g.*, *United States v. Sineneng-Smith*, 590 U.S. 371, 375 (2020) (vacating judgment where the court of appeals "departed so drastically from the principle of party presentation as to constitute an abuse of discretion"). Appellate courts in particular "do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *Nat'l Aeronautics & Space Admin. v. Nelson*, 562 U.S. 134, 147 n.10 (2011) (quoting *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.)); *see also, e.g.*, *Reddell v. Johnson*, 1997 OK 86, ¶ 7, 942 P.2d 200, 202 ("[C]ourts are not free to play the role of advocate, and raise claims or defenses that should be left to the parties to raise.").

The party presentation principle does not, to be clear, prevent a court from forgiving a forfeiture where appropriate. *See United States v. Olano*, 507 U.S. 725, 733 (1993) (defining "forfeiture" as "the failure to make the timely assertion of a right"). That includes forfeitures by the government, in both civil and criminal cases. Courts also have some flexibility to look beyond the parties' arguments "to protect a *pro se* litigant's rights," *Greenlaw*, 554 U.S. at 244, or where adopting a broad rule of law in a precedential opinion risks interfering with the rights of other

parties. But where a counseled party has *waived* a point—that is, intentionally relinquished or abandoned a known right, *see Olano*, 507 U.S. at 733—a court should, absent these or other extraordinary circumstances, accept that waiver.

This Court's decision in *Wood v. Milyard*, 566 U.S. 463 (2012), illustrates the principle. In that federal habeas case, the district court asked the state whether Wood's federal petition was timely. *Id.* at 467. The state answered, twice, that it was "not challenging, but d[id] not concede, the timeliness of the petition." *Id.* After the district court ruled in the state's favor on the merits, Wood appealed. The Tenth Circuit *sua sponte* addressed the petition's timeliness and ruled against Wood on that basis. *Id.* at 467-68. This Court reversed and remanded. The state's "decision not to contest the timeliness of Wood's petition," the Court explained, "did not stem from an 'inadvertent error.'" *Id.* at 474. Instead, "after expressing its clear and accurate understanding of the timeliness issue," the state had "deliberately steered the District Court away from the question and towards the merits." *Id.* This was waiver, not forfeiture, and could not be disregarded by the court of appeals. *Id.*; *see id.* at 471 n.5.

Disregarding a confession of error by a state's chief legal officer is an even more extreme departure from the principle of party presentation. Such a confession is not simply a deliberate, knowing choice not to pursue an argument, as in *Wood*. It is an express concession at the highest level of the state prosecutorial system—an admission that the criminal judgment is tainted by error. And disregarding a

state's confession of error in a criminal case obviously cannot be justified as "protect[ing] a *pro se* litigant's rights." *Greenlaw*, 554 U.S. at 244. In our adversarial system, then, a confession of error by the state's chief legal officer should almost always be dispositive—especially when, as here, the error concerns misconduct by the state's own prosecutors.

Second, consider the breadth of criminal prosecutorial discretion. "Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion." *United States v. Batchelder*, 442 U.S. 114, 124 (1979); *accord, e.g.*, *Carpenter v. State*, 1996 OK CR 56, ¶ 23, 929 P.2d 988, 995 ("[T]he decision whether to prosecute and what charge to file is within the discretion of the prosecutor."). Indeed, a prosecutor's discretion to not file charges is generally "absolute." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) ("[A]n agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion."); *see, e.g.*, *Interstate Com. Comm'n v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 283 (1987) ("[I]t is entirely clear that the refusal to prosecute cannot be the subject of judicial review.").

Notably, prosecutorial discretion persists even after charges have been filed. "[D]ecisions to dismiss pending criminal charges—no less than decisions to initiate charges and to identify which charges to bring—lie squarely within the ken of prosecutorial discretion." *United States v. Fokker Servs. B.V.*, 818 F.3d 733, 742 (D.C. Cir. 2016). To be sure, under federal law and that of many states, a prosecutor's

discretion to dismiss pending charges is not absolute. *See, e.g.*, Fed. R. Crim. P. 48(a); Okla. Stat. tit. 22, § 815. But the role of courts remains "a narrow one," *Fokker Servs.*, 818 F.3d at 742, focused on "protect[ing] a defendant against prosecutorial harassment, *e.g.*, charging, dismissing, and recharging, when the Government moves to dismiss an indictment over the defendant's objection," *Rinaldi v. United States*, 434 U.S. 22, 29 n.15 (1977). When there is no suggestion of prosecutorial harassment and the government has instead concluded that continued prosecution would be unjust, courts should freely allow dismissal. Indeed, they should do so even after a judgment of conviction has been entered. *See, e.g.*, *id.* at 23-32 (authorizing post-judgment dismissal of the indictment where the government acknowledged that the prosecution contravened well-settled Department of Justice policy); *Petite v. United States*, 361 U.S. 529, 529-31 (1960) (same).

The underpinning of prosecutorial discretion is the separation of powers. *See, e.g.*, *In re Aiken County*, 725 F.3d 255, 262-64 (D.C. Cir. 2013) (Kavanaugh, J.). "The Executive Branch—not the Judiciary—makes arrests and prosecutes offenses," and therefore "judicial review of the Executive Branch's arrest and prosecution policies" would be improper. *United States v. Texas*, 599 U.S. 670, 679 (2023). States, including Oklahoma, likewise recognize this principle. *See, e.g.*, *Woodward v. Morrissey*, 1999 OK CR 43, ¶ 13, 991 P.2d 1042, 1046 ("The separation of powers principle specifically prevents judicial interference with the prosecutor's discretion."); *Tweedy v. Okla. Bar Ass'n*, 1981 OK 12, 624 P.2d 1049, 1054 n.12 ("Within the Anglo-American legal

system, the decision to prosecute has always belonged to the crown (executive), not the judiciary.").

An Attorney General's confession of error in a criminal case is akin (albeit not identical) to traditional exercises of prosecutorial discretion, especially when the error is fact intensive. And a court's disregard of such a confession implicates the same separation-of-powers concerns: the court effectively compels the state's executive branch to continue allocating resources to a prosecution that the Attorney General has determined to be tainted. This concern is at its maximum in a capital case, where enforcing the judgment entails extensive efforts by executive branch agencies. When the state's chief law-enforcement officer has determined that those efforts are not appropriate, the judiciary generally should not second-guess that determination.

Third, as this Court and others have long recognized, criminal prosecution is a unique category of litigation where achieving evenhanded justice must be paramount. A prosecutor "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." *Berger v. United States*, 295 U.S. 78, 88 (1935); *accord, e.g.*, *McCarty v. State*, 1988 OK CR 271, ¶ 17, 765 P.2d 1215, 1221-22. A prosecutor's duty is as much "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*, 295 U.S. at 88. By extension, when a prosecutor later

discovers that "improper methods" in fact "produce[d] a wrongful conviction," it is only proper that they alert the court and seek to rectify the error. *Id.*; *see Young*, 315 U.S. at 258 ("The public trust reposed in the law enforcement officers of the Government requires that they be quick to confess error when, in their opinion, a miscarriage of justice may result from their remaining silent.").

When a conviction is wrongful under the federal Constitution, there is a further impetus for corrective action: the prosecutor's oath. "[A]ll executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution." U.S. Const. art. VI, cl. 3. Every Attorney General thus swears to support the Constitution, as do many state prosecutors. Asking a court to set aside a constitutionally infirm conviction is a vital and solemn act of fulfilling that oath.

Within a state, the obligation "that justice shall be done" rests ultimately and most heavily with the Attorney General. They are the state's chief law officer and in that "unique position in state government" serve as "the principal legal representative of the public interest for all citizens." Nat'l Ass'n of Att'ys Gen., *State Attorneys General Powers and Responsibilities* 46 (Emily Myers ed., 4th ed. 2018); *see, e.g.*, Okla. Stat. tit. 74, § 18b; *State, ex rel., Pruitt v. Steidley*, 2015 OK CR 6, ¶ 16, 349 P.3d 554, 558 (recognizing the Oklahoma Attorney General's authority to "take and assume control of [a] prosecution"). An Attorney General takes a statewide view of the law, and the Attorney General's litigating

positions and legal pronouncements have statewide significance. Accordingly, when an Attorney General exercises state-law authority to confess error in a criminal case, that confession deserves special weight. *Cf. Sibron*, 392 U.S. at 58-59 (affording less deference to a confession of error "made, not by a state official, but by the elected legal officer of one political subdivision within the State").

* * *

In sum, several strands of jurisprudence intertwine to give a state Attorney General's confession of error great strength. The confession is a deliberate choice within our adversarial litigation system, which privileges the parties' decisions about which arguments to present and pursue. It is a legal judgment akin to prosecutorial discretion and implicates the separation-of-powers concerns that undergird that doctrine. And it embodies the touchstone obligation of criminal prosecutors to ensure that, rather than simply win cases, they do justice and support the Constitution.

II. Confessions Of *Brady* Or *Napue* Errors Deserve Especially Great Weight.

For the reasons explained in Part I, courts should always give "great weight" to a state Attorney General's confession of error, just as this Court does with confessions by the Solicitor General. *See Young*, 315 U.S. at 258 ("The considered judgment of the law enforcement officers that reversible error has been committed is entitled to great weight . . . ."). Yet precisely *how* great the weight need not be the same in every case. Among other things, it will depend on the character of the error confessed.

At one end of the spectrum, where the weight is relatively less, lie errors concerning purely legal questions. In *Young*, for instance, the error concerned a pure question of statutory interpretation: whether the term "dispensing physicians" in a criminal statute included "physicians administering to patients whom they personally attend." *Id.* at 259. A general question of statutory meaning like this does not turn on the specific facts or history of the case and thus does not implicate the parties' greater knowledge of those details as compared to the court's. An appellate court is relatively well positioned to decide whether the error confessed was indeed an error. Moreover, the court's disposition of such an issue might establish precedent that could affect other cases. It was for this reason—"our judgments are precedents"—that this Court "examine[d] independently" the Solicitor General's concession in *Young* that the statute did not reach the relevant category of doctors. *Id.* at 258-59.

At the other end of the spectrum, where the "great weight" should be its greatest, are confessed errors that are highly fact-bound or case-specific. Extra deference is fitting in such a case because the court is unlikely to understand the details of the case better than the parties. *See Greenlaw*, 554 U.S. at 244 ("Counsel almost always know a great deal more about their cases than we do . . . ." (internal quotation marks omitted)). And accepting a confession of fact-intensive error can have little if any broader impact on the law. For example, this Court readily accepted the Solicitor General's confession of error in a Fourth Amendment case that required "conflicting views as to the facts . . . and the inferences to be

drawn from them . . . to be resolved." *Casey v. United States*, 343 U.S. 808, 808 (1952) (per curiam). Accepting a confession of error in these circumstances, the Court recognized, "would not involve the establishment of any precedent." *Id.*

The constitutional errors at issue in this case—violations of *Brady* and *Napue*—fall squarely at this latter end of the spectrum. Indeed, they are at the far end of this end of the spectrum, as they involve not only fact-intensive inquiry, but misconduct by the state's own officers. When a state Attorney General confesses that either type of error has tainted a criminal conviction, courts should afford that confession especially great deference.

Both types of error, which each have three elements, are intensely factual. A *Brady* violation requires showing (1) evidence favorable to the accused because it is exculpatory or impeaching; (2) that this evidence was suppressed by the government, either willfully or inadvertently; and (3) that "the government's evidentiary suppression undermines confidence in the outcome of the trial." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (internal quotation marks omitted); *see Strickler v. Greene*, 527 U.S. 263, 280-82 (1999). Similarly, a *Napue* violation requires showing that (1) the government introduced or allowed to go uncorrected trial testimony that was false; (2) the government knew or should have known that it was false; and (3) there is a reasonable likelihood that the false testimony could have affected the judgment of the jury. *See, e.g.*, *United States v. Ausby*, 916 F.3d 1089, 1092 (D.C. Cir. 2019).

Although *every* element of a *Brady* or *Napue* error tends to be fact-bound and case-specific, the third element—frequently shorthanded as "materiality"—deserves special attention. The materiality of suppressed evidence or false testimony "must be evaluated in the context of the entire record." *United States v. Agurs*, 427 U.S. 97, 112 (1976). This means both that the suppressed or false evidence must be "considered collectively, not item by item," but also that it must be weighed against the totality of the evidence of guilt. *Kyles*, 514 U.S. at 436; *see Agurs*, 427 U.S. at 112-13 ("If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial."). Necessarily, then, the materiality inquiry is exceedingly "fact-intensive." *Turner v. United States*, 582 U.S. 313, 316 (2017) (analyzing *Brady* materiality); *see, e.g.*, *Juniper v. Davis*, 74 F.4th 196 (4th Cir. 2023) (60-page opinion analyzing *Brady* and *Napue* materiality).

When the government concedes that a material *Brady* or *Napue* error occurred, courts should give that concession the utmost deference. With its unique access to the prosecution, such as its case files and the trial lawyers themselves, the government is far better positioned than a court—especially an appellate court—to make the holistic evaluation justifying such a concession. Absent evidence of bad faith or a facially egregious misanalysis, courts should readily accept confessions of *Brady* or *Napue* errors. Doing so need not set any precedent affecting the resolution of other cases, since even the smallest factual distinctions matter under *Brady* and *Napue*. *See, e.g.*, *United States v. Brumfield*, 89 F.4th 506, 513-19 (5th Cir.

2023) (same evidence was material under *Brady* as to one codefendant but not another).

What is more, courts can have confidence that the government will confess *Brady* and *Napue* errors only after the most careful analysis. Violations of *Brady* and *Napue* are not just errors—they are prosecutorial misconduct. Such misconduct can expose the individual prosecutors to professional discipline. *See, e.g.*, *In re Dobbie*, 305 A.3d 780 (D.C. 2023) (disciplining prosecutors for *Brady* violation). Even without formal discipline, responsibility for such misconduct may harm the professional reputations of the prosecutors involved. By contrast, no similar opprobrium is involved when, for example, the government reconsiders the scope of a criminal statute or concedes that a defendant received ineffective assistance of counsel. Attorneys General therefore have an especially strong reason to be careful, cautious, and thorough in deciding to confess a *Brady* or *Napue* error.

The foregoing principles apply squarely to the Oklahoma Attorney General's confession of error in this case. As detailed in Oklahoma's brief, that confession of *Brady* and *Napue* error was the product of multiple rounds of lengthy, careful review of Glossip's case, including by an independent counsel. Not a shred of evidence suggests that Attorney General Drummond has acted in bad faith or with an ulterior motive in confessing error. And far from being dubious on its face, Oklahoma's analysis of the errors in question is compelling. Thus, if this Court concludes that it has jurisdiction and reaches the merits of this case, it should give Oklahoma's

confession of error the utmost deference and reverse the judgment of the Court of Criminal Appeals.

CONCLUSION

If the Court concludes that it has jurisdiction, it should reverse the judgment below.

Respectfully submitted,

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