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# SCOTUS favors *Napue* over *Brady* in rare death penalty reversal in *Glossip*

**In a surprising turn, the Supreme Court elevates *Napue*'s false testimony standard over *Brady*'s evidence disclosure requirements to overturn Richard Glossip's death sentence.**

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On Feb. 25, 2025, the U.S. Supreme Court issued its long-awaited opinion in *Glossip v. Oklahoma* (Barrett, J. concurring and dissenting in part; Thomas, J. & Alito, J., dissenting; Gorsuch, J., taking no part), overturning Richard Glossip's murder conviction and ordering a new trial because the State violated its constitutional obligation to correct the false testimony of its star witness, Justin Sneed. This was not Glossip's first appearance before the Court. Since his 1998 conviction, Glossip has consistently asserted his innocence, receiving a new trial in 2004, as well as filing several unsuccessful habeas petitions in state and federal court. In 2022, his decades-long efforts drew the attention of the Oklahoma Legislature, which commissioned a report casting "grave doubt as to the integrity of Glossip's murder conviction." That, in turn, prompted the state to disclose improperly withheld evidence from Glossip's trial, including a state prosecutor's handwritten notes indicating she knew Sneed had lied under oath yet failed to correct it. When Glossip filed his latest habeas petition–this time seeking relief under both *Brady v. Maryland*, 373 U.S. 83 (1963) and *Napue v. Illinois*, 360 U.S. 264 (1959)–he had the public support of Oklahoma's attorney and solicitor generals. And his story generated national headlines, as numerous commentators queried how the state could put a man to death when his trial had been plagued by admitted constitutional deficiencies.

Public opinion aside, Glossip did not necessarily face a receptive panel. The prior year, the Court summarily denied a similar request for review from Toforest Johnson, who sought post-conviction relief under *Brady* because the prosecutor failed to disclose that its star witness had received a $5,000 reward for her testimony. That denial followed on the heels of the Court's refusal to review David Brown's and Davel Chinn's convictions, both of whom had also raised *Brady* claims. In Brown's case, the prosecution withheld the co-defendant's confession that he, not Brown, was the one who made the decision to kill the victim; and in Chinn's case, "there [was] no dispute" that the State had suppressed evidence that its key witness had an intellectual disability that could affect his ability to testify accurately. All told, the Court's denial of these applications (among many others) did little more than cement its current reputation for "contentment with capital punishment," and its "assumption that last-minute claims" for death penalty relief are "abusive even if they might succeed on the merits." *See* Stephen Vladeck, The Shadow Docket 149 (2023).

So why did Glossip succeed where so many other petitioners have failed? In our view, that answer may turn, in part, on the strength of Glossip's affirmative prosecutorial misconduct claim under *Napue* and the Court's burgeoning desire to distinguish *Napue* from *Brady*.

For decades, the Court has lumped *Brady* and *Napue* together, given that *Brady* "has its roots in a series of cases dealing with convictions based on the prosecution's knowing use of perjured testimony." *United States v. Bagley*, 473 U.S. 667, 679 n.8 (1985) (citing *Mooney v. Holohan*, 294 U.S. 103 (1935) and *Napue*, 360 U.S. at 269). Indeed, during oral argument, the *Glossip* panel's questioning largely treated the two claims as coexten-

sive. But *Brady* and *Napue* are not identical, and over the years, the Court has quietly declined to treat them as such.

Since deciding *Brady* in 1963, the Court has repeatedly cabined its broad rule prohibiting the suppression of favorable and material evidence during criminal proceedings. For example, it has held that *Brady* does not extend to postconviction proceedings, *District Attorney's Office v. Osborne*, 557 U.S. 52, 68-69 (2009); that defendants bear some affirmative burden in requesting favorable pretrial evidence to sustain a *Brady* claim, *United States v. Agurs*, 427 U.S. 97, 109-10 (1976); and that *Brady*'s materiality standard requires a showing that withheld evidence must, when evaluated in the context of the entire record, have a "reasonable probability" of generating a different result, *see Turner v. United States*, 582 U.S. 313, 324-25 (2017). In many respects, this last alteration is the most important: By heightening *Brady*'s materiality standard, the Court has, effectively, weakened its role as a tool to challenge constitutionally suspect criminal proceedings.

The same cannot be said for *Napue*. Although *Napue* has only infrequently appeared in the Court's jurisprudence, the Court has left in place its narrow directive that the state "may not knowingly use false evidence, including false testimony, to obtain a tainted conviction" and cannot allow such evidence or testimony "to go uncorrected when it appears." 360 U.S. at 269. And critically, the Court has conclusively affirmed that a petitioner can show materiality for *Napue* purposes "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury," *United States v. Agurs*, 427 U.S. 97, 103 (1985) (emphasis added)–a standard that has, in practice, created less openings for the state to brush off misconduct as immaterial. Put simply, while the Court facially "adhere[s] to the principles of *Brady* and *Napue*," *Moore v. Illinois*, 408 U.S. 786, 798 (1972), these two households, both alike in dignity, have long remained divided.

Therefore, it should not come as too much of a surprise that, in a case where even the trial prosecutor attested that he was "horrifie[d]" by the extent of the constitutional violations, Op. at 21, the Court took the opportunity to rectify prosecutorial misconduct. In so doing, the Court explicitly distinguished Glossip's *Napue* claim from his *Brady* claim. Op. at 12 n.5. To that end, the Court focused not on the prosecutor's withheld (and arguably ambiguous) interview notes that formed the basis of the *Brady* claim, but on the prosecutor's knowing failure to correct Sneed's false testimony. Op. at 17. Specifically, when Sneed testified against Glossip at trial, stating that he had been mistakenly prescribed lithium for a cold and had not seen a psychiatrist, that testimony was false. As the prosecution "almost certainly" knew, Sneed had been treated by Dr. Larry Trombka and been prescribed lithium to treat his bipolar disorder. Op. at 17. Given that "Sneed's testimony was the only direct evidence of Glossip's guilt of capital murder," the majority concluded that such evidence undermining Sneed's credibility "was necessarily determinative." Op. at 19.

This result may only have been possible under the less onerous materiality standard of *Napue*. As Justice Thomas's dissent highlights, there were plausible reasons to think that Sneed's challenged testimony would not have changed the jury's verdict (not least because the defense already knew that Sneed suffered from an "atypical mood swing disorder," and chose not to raise it). Dissent at 26. Indeed, this is precisely the line of reasoning that petitioners have challenged–and which this Court has repeatedly declined to disturb–under *Brady*'s "reasonable probability" standard. It is, of course, too early to say whether *Glossip* marks a true shift in the Court's death penalty jurisprudence. But the majority's decision may well reflect a new direction for the Court–one that focuses its attention on the state's clear, affirmative, and knowing misconduct, while narrowing the path for claims that, like *Brady*, increasingly place the burden on the defendant to prove that the particular unfairness was dispositive.

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