

## The Supreme Court Hears *Glossip v. Oklahoma*

Thursday, October 17, 2024

Visit our media library at [constitutioncenter.org/medialibrary](https://constitutioncenter.org/medialibrary) to see a list of resources mentioned throughout this program, listen to the episode, and more.

**[00:00:00.0] Jeffrey Rosen:** Last week, the Supreme Court heard oral arguments in *Glossip v. Oklahoma*, a case challenging the constitutionality of Richard Glossip's conviction for a 1997 murder.

**[00:00:14.9] Jeffrey Rosen:** Hello, friends. I'm Jeffrey Rosen, president and CEO of the National Constitution Center. And welcome to We the People, a weekly show of constitutional debate. The National Constitution Center's a nonpartisan, nonprofit, chartered by Congress to increase awareness and understanding of the constitution among the American people. In this episode, we'll recap the oral arguments and debate whether or not Glossip's conviction should stand in light of newly revealed documents that allegedly suggest prosecutorial misconduct. Joining me to discuss this important question are two leading scholars in criminal law. Andrea Miller is the legal director for the Oklahoma Innocence Project at Oklahoma City University School of Law. Before joining the Innocence Project, she served as the Appellate Division chief for the Oklahoma County Public Defender's Office, handling capital, general felony and misdemeanor cases. She's also been an adjunct professor at Oklahoma City University School of Law. Andrea, it is great to welcome you to We the People.

**[00:01:14.1] Andrea Miller:** It's nice to be here. Thank you.

**[00:01:15.5] Jeffrey Rosen:** And Paul G. Cassell is the Ronald N. Boyce Presidential Professor of Criminal Law and the University distinguished Professor of law at the University of Utah's SJ Quinney College of Law. He's a leading researcher on criminal justice issues, and has published many widely cited articles on topics such as crime victims rights, wrongful convictions, interrogation, confessions, and proactive policing. He previously served as US District Judge for the District of Utah from 2002 to 2007. Paul, it is wonderful to welcome you back to We the People.

**[00:01:50.4] Paul Cassell:** Thanks, Jeff. I appreciate you inviting me to discuss this important case.

**[00:01:55.5] Jeffrey Rosen:** Well, let's begin with the facts. Richard Glossip was convicted for a 1997 murder at The Best Budget Inn, in Oklahoma City, where maintenance man, Justin Sneed killed the Inns owner Barry Van Treese. Mr. Sneed struggling with a meth addiction, confessed to the murder. But facing the death penalty, Sneed agreed to testify that Mr. Glossip, the manager at the Inn, had ordered the murder. After two different trials, Mr. Glossip was convicted and sentenced to death. Mr. Glossip has been on death row for the past 25 years, but now after the

discovery of private handwritten notes from the prosecutor's office that may suggest grave prosecutorial misconduct, his case has arrived yet again at the US Supreme Court. Andrea, why don't you introduce the case to our listeners by describing what happened at trial and how did the case get to the Supreme Court this time around?

**[00:02:52.1] Andrea Miller:** So, the State's case is at trial, and Mr. Glossip actually has been through two trials because his case was reversed, the first time after he received ineffective assistance of trial counsel. But the state's case rests primarily on the testimony of Justice Sneed, who, as you mentioned, is an accomplice to the murder. In fact, he is the actual perpetrator of the murder and has always been very open apparently about the fact that in exchange for his testimony against Mr. Glossip, the state took death off the table. So, Mr. Sneed is not under a death sentence at the moment, even despite the fact that he is, there's no question he is the actual perpetrator. Sneed's testimony was critical to the state's case because otherwise there's no physical evidence that connects Mr. Glossip to the crime scene, and it's a pretty physical crime scene or to setting up the murder, if you will.

**[00:03:50.1] Andrea Miller:** And so where the case stands today is that after two rounds of an independent inquiry into issues relating to the prosecution withholding helpful information for the defense, what is known as Brady material after Brady versus Maryland, the Oklahoma Attorney General's office agreed with Mr. Glossip's defense counsel that egregious Brady violations that would've impacted the outcome of the trial, otherwise it would not be considered a Brady violation, had occurred. And therefore, although they don't agree that Mr. Glossip is in fact innocent, they do agree that there is substantial constitutional violation that resulted in his conviction and believe that the conviction itself should be vacated and sent back to another Oklahoma County jury for retrial. So, in pleadings before the Oklahoma Court of Criminal Appeals on post-conviction, the Attorney General's office waived in essence what's called a procedural bar, that could keep Mr. Glossip from having the merits of his claims considered by the court, and conceded the Brady violation arguing that they recognized that the Brady violation had occurred and that it resulted in an unfair conviction for Mr. Glossip.

**[00:05:14.6] Andrea Miller:** The Oklahoma Court of Criminal Appeals, despite the waiver of that procedural bar that would keep the merits from the claims from being considered rejected, the Attorney General's waiver of the procedural bar said that it was not the state of Oklahoma's procedural bar to decide whether or not it applied or not. It was the court's decision decided that the procedural bar did apply, and refused to consider the merits of the claim, although the court also, and this is something I think the court struggled with, also seems to have addressed the merits of the Brady claim, as well as a claim under Napue versus Illinois, which is a due process claim based on the prosecution not correcting false testimony that had come from Justin Sneed.

**[00:06:09.1] Andrea Miller:** And so the case went up to the Supreme Court on a sub petition that was what that was filed by Mr. Glossip and joined by the state of Oklahoma, which puts it in an incredibly unusual position, because the state of Oklahoma has taken the position that this Brady violation has occurred and requires some measure of relief, even though the Court of Criminal Appeals rejected that. So the posture of the case when it went up to the United States Supreme Court was questioning whether or not the Court of Criminal Appeals should have ruled

on the Brady claim and the Napue claim, even though the court refused to, well, lower court refused to rule on those issues. And those were the central issues before the court.

**[00:06:54.0] Jeffrey Rosen:** Thank you so much for setting it up. So well, Paul Cassell, what would you add to the facts of the case, the procedural posture, and then tell us more about the, you're representing the victim's families about the nub of the dispute about whether or not the prosecutor's failure to turn over her notes violated the Constitution or not.

**[00:07:13.6] Paul Cassell:** Yeah. Well, let me just add a little more context. I think Professor Miller has accurately described the landscape out there procedurally, but let me focus a little bit more on some of the substantive issues. I think one of the first things to note is that the Oklahoma Attorney General's office is not conceding that Glossip is innocent. They've simply said, look, there's some procedural questions about the trial that need to be delved into a little bit more. And I think that's important to understand. I don't think they could credibly argue that Glossip is innocent. When you look at the facts of the case here. Just to set a little bit of background about Sneed, Sneed was an 18-year-old high school dropout. According to the evidence introduced at trial. He was "totally dependent" on Glossip.

**[00:08:08.2] Paul Cassell:** Glossip provided him work. Glossip provided him a room, Glossip provided him food. Also according to a lot of the testimony that was introduced, Glossip was the primary mover in their relationship. Sneed had very little mental presence, and according to one witness didn't make a lot of decisions. He had to be told what to do and how to do it because of some of the mental limitations he had. And so then the question begins to revolve around, all right, who was the primary mover in the murder of Barry Van Treese, who had a motive, for example? And Glossip was the manager of the hotel, and let it run into disrepair. Money seemed to have been missing. And so on January 6th, 1997, Barry Van Treese was about to confront Glossip about the mismanagement of the hotel missing money. And according to Glossip, somehow that meeting never happened.

**[00:09:12.1] Paul Cassell:** And then somehow, Barry Van Treese just ended up murdered the next day, and he had nothing to do with it, I guess is the position that Glossip is taking. But Glossip has confessed to helping Sneed cover up the body. Glossip has admitted that very shortly after the murder, he and Sneed ended up splitting some money that Barry Van Treese had. And only Glossip would've known where that money was. So, that was the kind of evidence that the state introduced in two separate trials, one in, shortly after the murder, and then the one that's sort of active right now, the 2004 conviction. After about, gosh, I think we counted, about 10,100 days of litigation, about 20 years roughly is where we are now. The Oklahoma Court of Criminal Appeals, which for your listeners, that's the, like the Oklahoma Supreme Court, the highest court in Oklahoma, at least on criminal issues, they reviewed the issues about this Brady material that was allegedly withheld and unanimously concluded that it didn't provide a basis for overturning the conviction of Mr Glossip.

**[00:10:32.9] Paul Cassell:** If you look for example, at paragraph 25 of the decision of the OCCA, the Oklahoma Court of Criminal Appeals, it says "the state's concession is not based in law or fact." So, they found no basis whatsoever. They also, as Professor Miller mentioned, rejected an attempt by the Oklahoma AG to just say, look, let's, we're gonna take a dive and just

fold the 10 up here and concede error. They said, well, there's an important judicial role that has to be played in evaluating these kinds of issues. We've evaluated that and we can't find any basis here.

**[00:11:09.1] Paul Cassell:** Now at this point then, just to wrap things up, Glossip petitions to the United States Supreme Court asking for review of this issue, remarkably, the Oklahoma Attorney General, flips aside, historically from where the AG had been and supports Glossip. So, they're both on the same side. So I represent the Van Treese family in the matter, and I filed a brief opposing the petition to the Supreme Court. Nonetheless, the Supreme Court granted review, and as you mentioned, held oral argument on the case last week.

**[00:11:41.6] Jeffrey Rosen:** Thank you very much, for all that alpha context. Andrea mentioned the central issue before the court is whether there was a violation of the Brady case, which held that the prosecution has to turn over to a criminal defendant any significant evidence in its possession that suggests the defendant is not guilty. And here the dispute focuses on notes that the prosecutor took, and the question is whether her references to lithium and to Dr. Trumpet suggests that the prosecutor knew that trumpet had prescribed lithium, and that that was a central dispute before the US Supreme Court. Tell us about the prosecutor's notes and how the court debated them.

**[00:12:37.3] Andrea Miller:** So the prosecutor's notes suggest that the prosecutor was aware of a couple of things that the defense was not aware of, the defense for Mr. Glossip was not aware of. I think potentially the record suggests that Mr. Sneed's attorney was aware of it. One of them is the reference to Dr. Trumpet, who turns out to be Dr. Trombka, who was the only psychologist on staff or psychiatrist on staff at the Oklahoma County Jail at the time. The reference to lithium is significant in this case because at trial, and this ties into Sneed's false testimony claim as well, he testified that he saw a doctor, he thought it was Trumpet that put him on lithium and claimed the lithium was given to him because he was having a cold.

**[00:13:28.8] Andrea Miller:** Well, lithium is used to treat bipolar disorder. And so the fact that that's part of the non-disclosure and the false testimony, if he was on lithium, and it now has been documented that he suffers from bipolar disorder, which by the way involves a certain aspect of a thought disorder, which could impact his ability to not only recall, but to really be able to relate without any kind of interference by his mental illness, what actually had happened.

**[00:14:04.3] Andrea Miller:** So it's significant, not because he was on the lithium itself, it's significant because what of that information could have then led to, had defense counsel been fully aware of that psychiatric history, and what the consequences of that particular diagnosis could be on his ability to basically be truthful. Because there's no question that Justin Sneed is a liar. Justin Sneed has admitted to being a liar. He admitted to being a liar during the first trial. I believe he admitted to being a liar during the second trial. So but it's it, and in the Brady context, I think it's important to mention that it's not necessarily the information itself that comes out of the prosecutor's file. It is what evidence could then be generated if defense counsel follows up and investigates that information. So in this case, it's not necessarily the reference to Lithium, it is what the information that knowing that he was being treated for bipolar disorder could have developed into.

**[00:15:10.0] Andrea Miller:** I also wanna point out that the issue here does not involve whether, and despite what the Court of Criminal Appeals has said in the order, in the state court, Brady doesn't involve a component of counsel has to go out and find the information, that's a separate issue that potentially is an ineffective assistance of counsel issue. The issue here is specifically whether or not the information is potentially exculpatory being potentially favorable to the defendant, and if so, there is a due process requirement that the prosecution turn it over. So regardless of whether counsel could have gone and found this information is a different question. And that's not a question that is an issue at this point in the litigation. What is a question is if under the Brady line of cases, the prosecution had a duty to turn that specific information over.

**[00:16:09.2] Andrea Miller:** There's also some other information that was developed during the course of the independent investigations in this case, which included the fact that Justin Sneed had never mentioned that in committing the actual murder he stabbed Mr. Van Treese. But during the second trial, after I believe the prosecutors sent a copy of the medical examiner's report to Mr. Sneed through counsel, Justin Sneed suddenly remembered that he had in fact stabbed Mr. Van Treese. So, that's part of, kind of in the mix of this whole Brady violation, Napue violation that's at issue at the Supreme Court.

**[00:16:51.1] Jeffrey Rosen:** Thank you so much for that. Paul Cassell, in your brief of victim family members, you argue that the prosecutors' notes reflect what the defense knew about sneeze lithium usage, not what the prosecutors knew. Tell us more about that and about the other important claims in your brief.

**[00:17:08.7] Paul Cassell:** Yes. Well, Professor Miller, I think, has just accurately described the defense position about what these notes show, but there's a fundamental problem here, which is that the defense version is simply untrue. Glossip's defense was completely aware of the information in those notes, and let me explain in some detail why that's in fact the case. In fact, it was interesting listening to the oral argument in the courtroom. Nobody really made a convincing argument against my notes. And I think three of the justices during the oral argument described the notes as I was mentioning them in my brief. I'm sitting here looking at the notes right now, and I know we're in an oral medium, but if your listeners wanna see what I'm talking about in our show notes we have a copy of my brief for the Van Treese family.

**[00:18:02.3] Paul Cassell:** And at page nine of the brief is those notes. And let me just describe for your listeners what you see in there. You do see lithium? Dr. Trumpet? But immediately adjacent to those references you see before appeal, women have you said investigator or IAM V-E-S-T. Period direct appeal. And so when you look at those other words, you begin to wonder what those mean. And you notice there's a line that then separates another set of notes. There's a reference to two x two times, and, so you have women at the top, butch at the bottom. What becomes clear, if you understand the context of the case, is that the notes are regarding an April 16th, 2001 meeting when Glossip's defense team went and interviewed Sneed. And to be specific that was Wendy Hobbs and Lisa Cooper. So there's no doubt about that. There's no doubt that that meeting took place on April 16th, 2001. And so what Mr. Sneed was telling the prosecutors later when they interviewed him, they asked, Hey, has anybody talked to you? And he said, yeah, there were these two women, one who was a heavy set investigator, one who was involved in the

direct appeal. And they asked me questions about lithium? Which explains why there'd be a question mark there.

**[00:19:30.4] Paul Cassell:** Otherwise, why would you put a question mark down? Dr. Trumpet? So the defense team was raising questions and asking Snead about this very information. And so it's sort of a gobsmackingly bizarre decision by the US Supreme Court to give any credence to this claim from the defense side because what basically has happened is the prosecutors wrote down what the defense team was asking about. And then that gets into the prosecutor's notes and then the defense team turns around and says, oh, we didn't know what was in the prosecutor's notes. I know some of your listeners might think, well, gosh, that's a very strong claim.

**[00:20:15.3] Paul Cassell:** How can you prove that your interpretation of the notes is what you've just said they were, Professor Cassell? I've just referenced Ms. Smotherman's notes, the first prosecutor, but seated right next to her was a second prosecutor, Gary Ackley, who was also taking notes about this interview. Conveniently, the Oklahoma Attorney General did not put these notes into the record and conveniently neither did Mr. Glossip, but there's no dispute that the notes are out there. I was able to get a copy of them. Here's what the first sentence of Ackley's notes says. Which in context would be a witness.

**[00:20:55.2] Paul Cassell:** So witness was visited by two women who said they rep, R-E-P, represent Glossip. Heavy, one investigator and one attorney. So we now have interlocking notes from the second prosecutor sitting next to Ms. Smotherman, both of which make clear that this was a defense interview that is then recorded in the notes. And there you have it. We have just a bizarre case where somehow the defense is telling the United States Supreme Court that they didn't know about notes that are recording a defense interview.

**[00:21:29.4] Jeffrey Rosen:** Many thanks for that. Andrea, tell us what the defense's response to those arguments are, how they fared before the court. Justice Sotomayor in particular seemed sympathetic to the defense arguments and also to the other defense arguments about potential Brady violations, including the claim that Ms. Smotherman had sent a memo after the medical examiner testified to Mr. Sneed's lawyer saying, we need to get to Justin today. The knife is our biggest problem.

**[00:22:00.8] Andrea Miller:** Well, and I'd like to start with referring back to the sections of the brief that Professor Cassell just talked about. Those are not actually part of the record before the Supreme Court. They're certainly in his brief and were presented in the amicus brief on behalf of the Van Treese family.

**[00:22:21.4] Andrea Miller:** But were not presented in the district court below. What was presented was a previous sworn statement by Mr. Ackley, who was another prosecutor involved in the second trial, who did not mention that particular interpretation. And so that interpretation is that, it is an interpretation, but it is not an interpretation that was actually presented before the court of criminal appeals despite the fact that both of the prosecutors were interviewed by, as far as I know, both of the independent investigators, but certainly the second one that was commissioned by Attorney General Drummond to try to get to the bottom of all of this. I think that, again, the fact that there is a reference in the notes from this alleged interview with the

appellate attorney and her investigator in 2001, does not really answer the Brady question, however, because Mr. Sneed had explained away the lithium by saying it was prescribed to me for a cold I had. So even if that somehow should have triggered something on behalf of defense counsel to follow up, I don't think it answers the Brady question that's actually in front of the Supreme Court.

**[00:23:44.3] Andrea Miller:** I think the court did note the fact that the brief does contain information from these prosecutors. There were certainly some members of the court who referenced several times these particular statements and this argument that's in the amicus brief. However, the court, I think, does not, because it's not a part of the record, the court doesn't necessarily have this information before them and seems inclined to reach the merits of the Brady claim based on what was developed below.

**[00:24:21.2] Andrea Miller:** I do wanna say, though, I do agree with Professor Cassell that there should be some level of judicial discretion and oversight in these cases. I will note that the Court of Criminal Appeals rejected the attorney general's confession of error and rejected their basis for conceding the Brady violation two weeks after the attorney general's office filed their brief without the benefit of any kind of evidentiary hearing. And certainly this information could have been presented had there been an evidentiary hearing granted.

**[00:24:56.3] Andrea Miller:** And both Mr. Glossip and the state of Oklahoma asked for an evidentiary hearing, but the court didn't deem an evidentiary hearing that would give a fact-finding court the opportunity to develop facts necessary. And therefore, the record is simply the record that Mr. Glossip and the state of Oklahoma relied on in raising and then confessing the error and not one based on a fully developed record before a court who could actually find facts.

**[00:25:28.0] Jeffrey Rosen:** Paul Cassell, tell us about the other arguments in your amicus brief, including the claim that information about the knife was not concealed from the defense. Help us understand that dispute. You also say that Glossip himself was well aware of information about the cash and that a prosecutorial confession of error demands judicial scrutiny to maintain public confidence in the criminal justice system and avoid inflicting harm on crime victims.

**[00:25:54.4] Paul Cassell:** Yes, let me turn to the second part of your question first. What level of scrutiny should be applied to these notes and what they really mean? Professor Miller mentions that certain aspects of the notes are not part of the official record, which becomes a really interesting question in the context of this case.

**[00:26:15.2] Paul Cassell:** Let's assume that my interpretation of the notes is correct and that they simply record what the defense investigators were doing and both the defense team and the Oklahoma Attorney General know that, which I think is pretty clear from the record, but then they refuse to put that information into the record. Should the United States Supreme Court decide this important case based on a record that's incomplete where the proponents who are both on the same side of this case, let's recall, are withholding that information? I mean, I think that would be an absurd approach to the case because what that would mean is whenever a prosecutor wants to make a conviction go away, he'll just confess that we withheld evidence and then he won't put into the record the truth of the matter here.

**[00:27:03.3] Paul Cassell:** But when you drill into the notes even a little bit more carefully, the Smotherman notes are in the record and that's the explanation I just provided to your listeners in my earlier remarks. And so it seems to me it's incumbent at that point on the Attorney General and the Glossip defense team to explain why my interpretation of the notes is incorrect. Professor Miller mentioned that Mr. Ackley was interviewed and she said, but in the affidavit he provided, that information that Professor Cassell referred to about it being a defense interview wasn't included in his affidavit. But what I think is important context here is the affidavit was prepared by a defense team working essentially for Mr. Glossip. So of course they wouldn't put that information into the Ackley affidavit. They just put the other information in that was helpful to them.

**[00:27:56.4] Paul Cassell:** Professor Miller mentions that both prosecutors were interviewed. The way Professor Miller described it was the Attorney General was trying to get to the bottom of the matter. With all respect, I just have to strenuously disagree with that characterization of what Attorney General Drummond is doing. There was a first investigation that was anti-death penalty legislators retaining the law firm of Reed Smith, which is a anti-death penalty law firm. And they produced a report that, surprise, surprise, was anti-death penalty and said that the Glossip death penalty should be overturned. But then we get to the second investigation that was commissioned by the Attorney General.

**[00:28:39.1] Paul Cassell:** That was by his lifelong childhood friend, Rex Duncan, who has limited experience in capital cases, was a vociferous supporter of General Drummond during the election. So vociferous, I believe he actually got fired from a job where he was supposed to be more neutral. So Rex Duncan then does a first interview with Connie Smotherman, the prosecutor whose notes are in question here, and doesn't ask her about this aspect of the notes. And then the next day, he calls back Ms. Smotherman for a second interview and says, hey, I'm wondering about lithium and Dr. Trumpet in your notes. And Smotherman says, hey, could I see those notes? Remember, this is an interview that's roughly 20 years. That's two decades later. And she says, hey, can I take a look at those notes so I can tell you what they mean? And then Rex Duncan says, there's no need.

**[00:29:28.6] Paul Cassell:** Thanks for chatting with me and call ends. Whole call takes about three minutes. So that's the extent of the Attorney General's efforts to have determined from Ms. Smotherman, and he doesn't seem to have directly interviewed Mr. Ackley about this. Now, has the Attorney General been asked to even talk to Ms. Smotherman about her notes? Yes, I asked him. I was on a telephone call with my family members who were wondering why is the Attorney General suddenly on the other side of the case?

**[00:29:58.3] Paul Cassell:** And I said, look, General Drummond, you should at least talk to the prosecutors about what their notes mean if you're gonna give a certain interpretation. And I was under the impression he was gonna talk to the prosecutors, but he didn't. And so the next group of people who asked the Attorney General to talk to the prosecutors were the Oklahoma District Attorney's Association. At a meeting where he attended, they said, you can't malign prosecutors like this without at least talking to them. And I think Attorney General Drummond said something like, well, I gotta own that. I guess I made a mistake there.

**[00:30:29.2] Paul Cassell:** And Ms. Smotherman has contacted us, we have the emails in my brief, the Attorney General's office saying, please talk to me about what my notes mean. And so the Attorney General's office has been contacted. They haven't done that. And so then we get to the question of, all right, is that really an Attorney General trying to get to the bottom of something? Or is that an Attorney General who has what I think is a sort of politically popular stance, even in Oklahoma? I wanna investigate this carefully and so forth, even though he's not investigating it carefully.

**[00:31:02.6] Paul Cassell:** And it's interesting. You would think if Attorney General Drummond was investigating this case carefully, he would then be asking the United States Supreme Court for an evidentiary hearing so the truth can come out. But what did the Oklahoma AG argue to the US Supreme Court? No evidentiary hearing. And Glossip does ask that there not be an evidentiary hearing also. Both the prosecutor and the defense told the US Supreme Court, we don't want a hearing on all this. And I think it's clear why they don't want a hearing. If there was a hearing, the truth would come out and the truth would show that no evidence was withheld.

**[00:31:36.0] Jeffrey Rosen:** Andrea, your response to any of those points you think are important to respond to and then maybe really help us understand what it was that led the Oklahoma AG to confess error.

**[00:31:50.7] Andrea Miller:** So I think that the argument that is being proposed as to what the real meaning of these notes are a good argument. I mean, they're a good argument to make in front of a court. You would prefer them to be made in front of a court who can actually find facts, which is neither the Oklahoma Court of Criminal Appeals or the United States Supreme Court.

**[00:32:08.9] Andrea Miller:** And for that reason, I don't believe the Supreme Court will engage in the kind of speculation that they would have to engage in in order to accept that as being the proper interpretation of those notes. I also wanna say, I have the benefit of having practiced in Oklahoma County under the Macy administration and every administration since then. And while it seems like that, and I think the characterization was that Attorney General Drummond was just making a decision that would satisfy the anti-death penalty crowd because it's popular, which if you know about the death penalty in Oklahoma, you know this is not an anti-death penalty state.

**[00:32:55.8] Andrea Miller:** You know, the Oklahoma legislature in no way can be considered anti-death penalty. Neither can, by the way, Attorney General Drummond. So the fact that he is willing to look at this issue the way he has in a unique way, I mean, there's, I cannot tell you another death penalty case in the state of Oklahoma where the Oklahoma Attorney General has hired somebody, a lifelong friend or not, clearly somebody that he trusted to do the job to look into allegations of substantial constitutional violations and taken the steps they've taken to try to ensure that a miscarriage of justice doesn't occur. That's not done in a vacuum. That's done with an understanding of what occurred in Oklahoma County during the timeframe that Mr. Glossip was prosecuted and many other cases were prosecuted, many of which have been reversed because of prosecutorial misconduct that occurred in those high profile capital cases.

**[00:33:57.6] Andrea Miller:** So there's a pattern here and it's more than just the Attorney General deciding that all of a sudden in one case he's gonna be anti-death penalty. This case, this Brady violation isn't really about whether or not Attorney General Drummond or the Oklahoma legislature believes or doesn't believe in the death penalty. This case is about whether or not the state of Oklahoma gets to get away with hiding evidence and misrepresenting evidence to a jury.

**[00:34:25.6] Andrea Miller:** And if they do it long enough, if they get a pass, because essentially that's what the Supreme Court would have to argue. I know there is a concern in the amicus brief on behalf of the Van Treese family that finality has to kick in at some point. Well, it does and it should have kicked in years ago the first time Mr. Glossip alleged there was prosecutorial misconduct, somebody should have done what Attorney General did, that Drummond did in 2023 and taken an independent look at it and make a decision as to whether or not this was a fair trial. That didn't happen because at the time the state of Oklahoma was more concerned about preserving this conviction and preserving the death sentence, whether or not Mr. Glossip's constitutional rights were violated or not, than they were ensuring that a miscarriage of justice didn't happen. And it is as much their duty as prosecutors to ensure that Mr. Glossip's rights are honored and he is not tried and convicted based on a constitutionally bankrupt trial as it is for them to seek convictions. And so I think that the characterization of what happened in Oklahoma in this case is unfair because that's just not what the culture or the environment is here.

**[00:35:41.7] Andrea Miller:** And certainly I don't think Drummond gained any political points in the state of Oklahoma by doing what he's done on the Glossip case and he hasn't done it on any other cases. And so I think that to think that the Supreme Court would go there without there actually being a record developed below on these issues is probably unlikely. Now that I'm not trying to predict what the Supreme Court may or may not do based on oral argument, I think that's a losing proposition. But the fact that this was presented for the first time in front of the United States Supreme Court, I think will not keep them from, should they choose to review the merits of the Brady and the Napue claims, keep them from finding that those have been proven as has been confessed by the state of Oklahoma at this point.

**[00:36:35.5] Jeffrey Rosen:** Thank you for all that. Professor Cassell, your response both to the characterization of why the Oklahoma AG flipped and also the Supreme Court's reception to that fact. We did hear Justice Alito expressing skepticism about Glossip's case, Justice Sotomayor being with Glossip and some of the justices like Justice Thomas and perhaps Justice Jackson seemed open to remanding for further fact finding.

**[00:37:08.7] Paul Cassell:** Yeah, well, I think one thing to point out to the listeners is that there are two issues in front of the Supreme Court on this case. The first issue is a jurisdictional issue. Does the US Supreme Court even have jurisdiction to start figuring out what the notes mean and how the Brady Doctrine might apply? And that jurisdictional issue revolves around whether the Oklahoma Court of Criminal Appeals dismissed Glossip's case based on a state law determination or a federal law determination because of course the United States Supreme Court, the highest federal court in the land can only review federal issues. So I would be frankly surprised if the Supreme Court decides that it has jurisdiction in this case because when you read

through the OCCA's opinion, paragraphs 25, 26, and 27 in particular, they specifically cite the Oklahoma state law that says, look, a death row inmate cannot just keep filing petition after petition. These successive petitions have to show that there's some new evidence that couldn't have been raised earlier and that the new evidence was material to the outcome. And the OCCA unanimously concluded that Mr. Glossip had failed to meet those state law requirements to present his claims.

**[00:38:30.0] Paul Cassell:** So I wouldn't be surprised to see the Supreme Court decide that it doesn't have jurisdiction and simply rule that the conviction should be upheld on that basis. But if they get to the merits of the case it was interesting when Professor Miller mentioned the arguments I made, I think she said they were good ones to be made to a court. And, frankly, one of the things that's been frustrating for me as the attorney for the Van Treese family is I present what I think is a compelling reading of the notes. And candidly, I didn't hear Professor Miller offer a competing version that would square with all the evidence. And I keep presenting my argument. I presented it to Attorney General Drummond.

**[00:39:15.3] Paul Cassell:** I presented it, I'm presenting it to the listeners here. I presented it in, for example, the Volokh Conspiracy, a blog that I write on, and nobody ever says, Hey, professor Cassell, you got it wrong. Let me just show you what this word in the notes means, or this supporting evidence means over there. Everybody says something like, well, those are good arguments, but maybe that's not officially in the record, and maybe there'll be a hearing later on. So why shouldn't, for example, listeners to this program just say, well, professor Cassell's interpretation of the notes is correct, because nobody's offering a counter interpretation. But what I argued to the US Supreme Court in my brief is it's not my job as the pro bono lawyer for the victim's family to figure out where all the notes are buried and pull 'em out of the boxes and then explain what they mean.

**[00:40:04.6] Paul Cassell:** It's Mr. Glossip's job, and I guess he's supported in this case by the Attorney General to explain why his interpretation of the notes is correct. And he basically takes four words on Lithium? Dr. Trumpet? And says, aha, this proves that the prosecutors were deliberately withholding evidence. I think Professor Miller mentioned something about speculation, if you wanna see speculation built on stilts, it's the case that the Glossip attorneys and the Attorney General have presented here spinning out of those four words, some notion of a deliberate conspiracy to conceal evidence by the prosecutors. So I don't really think this is a case of, what was the phrase, a constitutionally bankrupt trial as Professor Miller described it. I think this is a case of a constitutionally bankrupt argument being peddled to the United States Supreme Court by defense attorneys and the Oklahoma Attorney General's office. And so I'm hoping the US Supreme Court gets to the bottom of the facts here and simply concludes that no evidence was withheld from the defense, and the case could be disposed of on that basis.

**[00:41:14.4] Jeffrey Rosen:** Thank you for that. Andrea, in its brief, the Innocence Project argues that Mr. Glossip's case bears other indicia of a wrongful conviction including a police investigation characterized by tunnel vision and the state's failure to collect and preserve important evidence. Tell us about how this case fits into other death penalty cases in Oklahoma, both those raising actual innocence claims and not. Maybe we should note that in the previous

incarnation, the Supreme Court rejected the argument that Oklahoma's method of execution violates the eighth Amendment. But tell us about any broader issues raised by this case.

**[00:41:58.9] Andrea Miller:** Well, I think that first and foremost the issue that is the hallmark of a lot of wrongful convictions. And again Mr. Glossip isn't currently litigating a factual innocence claim, so I'm not trying to equate that to this, although he has always maintained his innocence. It's the lack of any evidence independent of Justin Sneed to connect him to the actual commission of the crime. And that is, there were numerous wrongful convictions and I believe the National Registry of Exonerations lists them out by category. And this falls into one of the categories of accomplices who get themselves a reduced sentence or reduced charge in exchange for being the first one to law enforcement to point the finger at the other guy. This is that case. And it looks a lot like that. What we haven't mentioned is the fact that Mr. Sneed despite the state's theory of the case, and it's a theory because there isn't any really solid evidence to support it, but this theory that Mr. Sneed was dependent on Mr. Glossip, and that Mr. Glossip was controlled with all this.

**[00:43:09.1] Andrea Miller:** Justin Sneed had committed previous robberies that had nothing to do with Mr. Glossip. And so this is not a case where Mr. Sneed, who is the admitted killer, wasn't capable of committing a crime on his own. So that's the first thing. The lack of physical evidence, it's a little trickier, but you would still expect there to be some paper trail or something that the two of them were hatching this scheme. And so I think those are, in this case, those are the two major hallmarks. Tunnel vision by law enforcement and tunnel vision by the prosecution, which actually relates to the Brady violation or Brady violations as they occur in these types of cases is a significant factor because it impacts both the investigators and the prosecutor's ability to understand what might be relevant and might be exculpatory to a defendant.

**[00:44:05.3] Andrea Miller:** And what I mean by that is that if they get so focused on their theory of the case, they're not likely to recognize that some bit of evidence could potentially be favorable to a defendant. They still have the duty to turn things over, which is why real open discovery is so important to try to derail Brady violations. And I don't think anybody's suggesting that violating Brady is okay in any context. I think that nobody also disputes the fact that Brady violations are a tremendous factor in wrongful convictions. And in a lot of the death penalty cases out of Oklahoma that have been reversed on Brady have been reversed by Brady in federal court because capital defendants in Oklahoma still have the right, or still have the assistance of counsel and habeas. These are issues that don't get litigated very well in front of the Oklahoma Court of Criminal Appeals just like this one. But Brady violations have been found to be a tremendously important factor, both in wrongful convictions and in capital cases, specifically in Oklahoma. And I will narrow it down specifically to Oklahoma County, which is where Mr. Glossip was convicted. So those are generally the, I think, the issues that relate to those concerns about wrongful convictions and kind of the hallmarks of wrongful convictions.

**[00:45:39.9] Jeffrey Rosen:** Thank you so much. And Paul Cassell you're an important advocate for victims' rights. Tell us about the broader issues that you think are raised by this case and how they might be resolved by the Supreme Court.

**[00:45:55.4] Paul Cassell:** Well, I think one of the things we're seeing in the death penalty to debate more broadly is that those who are opposed to the death penalty have often lost the argument on the merits. In Oklahoma, for example, as Professor Miller mentions the death penalty is one of the prescribed penalties available if the proof is there. And so, what a lot of anti-death penalty advocates are doing, abolitionists are trying to create what is, in my view, at least in some cases, the illusion that a possibly innocent person is being executed. Because, of course, that kind of an argument will resonate more broadly with the public. So, I mean, let's use Glossip, the case we've obviously been talking about as an illustration of what's going on. Glossip maintains his innocence, I guess, technically, but he confessed to the police that he was an accessory after the fact, helping Sneed hide the body of Barry Van Treese.

**[00:46:51.6] Paul Cassell:** So he is at least an accessory to murder. But there are very compelling pieces of evidence apart from Sneed that I think are important to look at here if you're trying to decide whether or not this might be some kind of a wrongful conviction. Professor Miller mentioned there's a lack of physical evidence connecting Glossip to the crime, but of course, that's exactly why Glossip got Sneed to do the job. So his fingerprints wouldn't be on the murder. Professor Miller said, well, there should be a paper trail. This was an 18-year-old high school dropout with some mental issues that Sneed was pressuring to commit the murder. The idea there's gonna be a paper trail, I think really is not the standard we should be looking for. What we should be looking at is the evidence that exists.

**[00:47:41.4] Paul Cassell:** And let me just, now I'm gonna be quoting from the OCCA opinion, which rejected Glossip's claim unanimously. The OCCA highlighted the prosecutor's "compelling case" that Sneed "was totally dependent on the petitioner." I mean, Sneed had depended on Glossip for his job, his room, his food. Both Glossip and Sneed were arrested in possession of large amounts of unexplained cash. Glossip never explained what was going on with that. Sneed had no independent knowledge, according to the OCCA, that Van Treese kept hotel proceeds under the front seat of his car. And so immediately after the murder of Barry Van Treese, the two of them split the money. Again, this is according to the OCCA based on the trial transcript. And finally, if you're trying to figure out, look, was Sneed credible or not? Here we are 20 years later debating that.

**[00:48:46.8] Paul Cassell:** And I suppose, professor Miller kind of has her take on things and I kind of obviously have my take from on from the victim's perspective. So what would an independent person say about Sneed's credibility? Well, we need look no further than the trial court judge in the case who said, I'd heard all this stuff about Sneed, confessing to escape the death penalty and so forth. But I have to say, said the trial court judge, that Sneed was very, very credible. So I don't think this case has traditional hallmarks of a wrongful conviction. To the contrary, I think this has the hallmarks of a defense team conjuring up claims of innocence that are bogus precisely because they can then use that, not only to help their client, but to discredit the death penalty more broadly.

**[00:49:37.1] Jeffrey Rosen:** Thank you so much. Well, it's time for closing arguments in this important and illuminating discussion. And Andrea, the first one is to you why do you believe that Mr. Glossip's constitutional rights were violated and the Supreme Court should hold?

**[00:50:00.8] Andrea Miller:** And I guess I should, for in a moment of cell phone, say, I meant paper trail figuratively and not literally. But the reason why I think the United States Supreme Court should rule in Mr. Glossip's favor is the fact that there really isn't, despite argument, there's a difference between argument and evidence, which is something I remind my students of all the time. We have all these arguments, and I'm not gonna address what defense teams may or may not engage in, in order to try to save their clients' lives. But what I can engage in is what is actual evidence in this case and what is actual theory in this case? A lot of the state's theory is based on information given to them by Mr. Sneed, who had everything to gain and nothing to lose by telling them whatever they wanted him to tell them in order to get their conviction of Mr. Glossip.

**[00:50:54.9] Andrea Miller:** We know that he is a liar. We know that he is self-serving. This is all, I mean, I don't think that's much of an argument that he's not a liar at this point. So the question then becomes, did this jury convict Mr. Glossip and sentence him to death based on false testimony, based on information that was undisclosed, that could have further elucidated how unreliable the state's really only indispensable witness was and were they under the impression that this witness was more truthful than he actually is? If the answer to that is yes, and if the answer to did the prosecution withhold information that indicates the answer to the first question is yes, then the Supreme Court should rule on the merits of the claims that Brady and Napue were violated. Therefore, Mr. Glossip's conviction was in violation of the due process clause, which isn't the end of the story.

**[00:52:02.9] Andrea Miller:** I mean, the, at most, even if the Supreme Court rules on the merits of the Brady claim, if they get past the procedural bar that Professor Cassell referenced, that is something they're gonna have to decide before they reach the merits. They, in most of this case, are gonna go back for a new trial. So this isn't even a question of does Mr. Glossip get executed or does he go free? The question is, are we secure enough in believing that his conviction is free of substantial constitutional error to execute him, or do we wanna purge any potential taint of constitutional error by giving him a new trial? And that's really what's at issue in this case.

**[00:52:47.6] Jeffrey Rosen:** Many thanks for that. Paul, last word is to you, why do you believe that Mr. Glossip's constitutional rights were not violated and the Supreme Court should hold?

**[00:52:55.4] Paul Cassell:** Well, I think I'll borrow a phrase here from Professor Miller who helpfully reminded us that there's a difference between argument and evidence. And I think the defense team here has argued that somehow Mr. Glossip's rights have been violated. But when you drill into the evidence as I've tried to draw in this program and in my brief, there is no evidence that the prosecutors withheld evidence or information from the defense team. So I guess my closing argument in this program will be the same closing argument that's already been given twice to juries in Oklahoma. Juries heard all the evidence twice and both times convicted of Glossip and determined that the death penalty was appropriate. Those decisions have been reviewed. The second decision since 2004, now that's 20 years ago, has been reviewed multiple times. I believe there have been five separate petitions by Glossip for review to the OCCA.

**[00:54:00.4] Paul Cassell:** And the OCCA has rejected all five of them. And so are we secure enough in moving forward with the sentence in this particular case? That's obviously a decision

for the people of Oklahoma, but the people of Oklahoma have set up a court process with the OCCA at the top. They've set up a parole board that also has an opportunity to review all of this. And so if those processes all determine that Glossip is properly convicted and properly sentenced to death, then we should move forward with that. Or to be more precise, the people of Oklahoma should move forward with that. And so the end of my closing argument will be this. I think at this point, by my count, we're at about 10,139 days since Barry Van Treese has been murdered, and my clients, the Van Treese family, are not out there clamoring in the media or on podcasts like this for a death sentence or something like that. All they ask for is that the decision that two juries in Oklahoma have rendered be carried out. And I hope that that will be done soon.

**[00:55:06.9] Jeffrey Rosen:** Thank you so much. Andrea Miller and Paul Cassell for a vigorous civil and important discussion of the Glossip case. Andrea Paul, thank you so much for joining.

**[00:55:18.1] Andrea Miller:** Thank you.

**[00:55:19.1] Paul Cassell:** Thanks.

**[00:55:24.0] Jeffrey Rosen:** Today's episode was produced by Lana Ulrich, Samson Mostashari and Bill Pollock. It was engineered by Bill Pollock. Research was provided by Samson Mostashari, Cooper Smith, Gyuha Lee, Matthew Spero, and Yara Daraiseh. Friends, I am thrilled to share that the NCC has launched our new Constitution 101 class with Khan Academy. I've talked about it, and if you haven't checked it out, you must. It's on the Khan website. We launched it on Constitution Day, and we brought together the leading constitutional scholars and historians in America of different perspectives to teach the Constitution for free. It's pegged for high school students. I promise that you will find it meaningful and rewarding as a lifelong learner regardless of how far you are from high school. So check it out. It's [khanacademy.org/constitution101](https://khanacademy.org/constitution101). Take the quiz. I found it challenging. I know you will too. And if you got a hundred percent, email me to let me know.

**[00:56:22.9] Jeffrey Rosen:** Just to see if anyone will take up the Khan Academy Challenge. Sign up for the newsletter always at [constitutioncenter.org/connect](https://constitutioncenter.org/connect). We've got a great First Amendment summit coming up next week on October 22nd in Philly. So if you can make it in person, please do and always remember in your waking and sleeping moments that the National Constitution Center is a private nonprofit. We rely on the generosity, passion, and engagement of people from across the country, inspired by our urgently important mission of learning about the Constitution and the Declaration of Independence, and the American Idea. Support the mission by becoming a member at [constitutioncenter.org/membership](https://constitutioncenter.org/membership), or give a donation of any amount to support our work, including the podcast at [constitutioncenter.org/donate](https://constitutioncenter.org/donate). On behalf of the National Constitution Center, I'm Jeffrey Rosen.