In That Case: *Glossip v. Oklahoma*

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In the Public Interest is excited to continue In That Case, its third annual miniseries examining notable decisions recently issued by the United States Supreme Court. In this episode, host Felicia Ellsworth is joined by Partner and Chair of WilmerHale's Appellate and Supreme Court Litigation Practice Seth Waxman and Counsel Zaki Anwar to discuss *Glossip v. Oklahoma.* The case concerns Richard Glossip, who has been on death row since 1998 on a first-degree murder charge. The team arguing on his behalf in front of Court, which included Waxman and Anwar, successfully argued that Glossip's sentence should be reversed and the state of Oklahoma should be allowed to retry his case.

Waxman and Anwar walk through each step of the case, outlining the complex procedural history that has taken place over the course of nearly thirty years. They emphasize the significance of the case for due process and other capital cases in the future, and what it reflects about the current Court's ideologies when it comes to serious criminal convictions.

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Episode Transcript

Transcript

Felicia Ellsworth: Welcome to *In the Public Interest*, a podcast from WilmerHale. My name is Felicia Ellsworth and I'm a partner at WilmerHale, an international law firm that works at the intersection of government, technology and business. Today's episode is the next installment of our 2025 Supreme Court miniseries, where we dive into the most hotly contested decisions coming out of the Supreme Court this term and discuss the implications of the Court's rulings going forward. Today, we'll be discussing a high-profile case from this term, *Glossip v. Oklahoma*. In this case, the Supreme Court reviewed a denied petition for post-conviction relief that was filed by Richard Glossip, a man who's been on death row since 1998. Given the long and complex history of the case, it presented some challenging facts and legal issues. Joining

me to discuss this case are the two WilmerHale lawyers who argued this case before the Supreme Court. Our first guest, Seth Waxman, is not only the chair of the firm's Appellate and Supreme Court Litigation Practice, but also a former Solicitor General of the United States. Seth presented oral argument to the Court in *Glossip*. Our second guest, Zaki Anwar, is a counsel in our Boston office who second-chaired at the oral argument and led the drafting on the merits brief for the case. Thanks so much for joining us today, Seth and Zaki.

Seth Waxman: Thank you.

Zaki Anwar: Thanks, Felicia.

Felicia Ellsworth: So, for listeners who are not familiar with the case, Zaki, could you give us some background on who Richard Glossip is, how he ended up on death row, and how we arrived at the current case?

Zaki Anwar: Yes, absolutely. There's kind of a long, winding road dating back to 1997: the murder of a man named Barry Van Treese, the owner of a motel in Oklahoma City. In this case, there's no dispute that the murder was actually done by a man named Justin Sneed, a handyman around the motel. The question in the case was whether Sneed acted alone or whether he acted at the direction of another man named Richard Glossip, the manager at the motel, and their client. So, initially, prosecutors charged Glossip with helping conceal Sneed's whereabouts after the murder, but then, in exchange for avoiding the death penalty, Sneed made a deal with prosecutors in which he agreed to testify that he was acting at the direction of Glossip. Thereafter, Glossip is also charged with first-degree murder. There is a first trial in 1998 in which Glossip is convicted. A few years later, in 2001, that conviction is thrown out. There's a second conviction in 2004, and over the past two decades, Glossip has maintained his innocence. He's faced several execution dates. I think, in total, it will be nine execution dates that keep getting pushed back. In 2022, the Oklahoma Legislature commissioned an independent investigation of Glossip's conviction. Their conclusion was that they had grave doubts as to the integrity of Glossip's death penalty sentence. In August, the state then discloses seven boxes of materials from the investigation and the prosecution of Glossip that they had withheld from Glossip's defense. In January of 2023, they released an eighth box that will have the prosecutor notes that indicate that Sneed had actually seen a psychiatrist at the correctional facility he was housed at, and that he had been on lithium for bipolar disorder. At the trial, the state had put him on the stand and elicited testimony that he had never seen a psychiatrist before. So, that ends up being the critical part of this case but there's a whole bunch of misconduct that surrounds it. The attorney general commissions his own independent investigation of the conviction, coming to the same conclusion that there wasn't a fair trial here, and that there needed to be a new trial. That led to a series of filings below in the Oklahoma state courts. The state, at this point, joins on the side of Glossip, saying that the conviction needs to be put aside, which is really extraordinary. So Glossip and AG both come to the state appellate court with a petition for post-conviction relief, saying that a new trial is necessary under the Due Process Clause. The Oklahoma Appeals Court denies that request and denies his relief. Glossip then petitions the Supreme Court of the United States. The

Supreme Court, in May of 2023, just a few weeks before his next execution date, stays his execution. And then, in January, cert is granted. And that brought the case up to the Supreme Court, which is when we got involved.

Felicia Ellsworth: A tortured history, to put it mildly. So, both the state AG and Mr. Glossip, a death row inmate, are asking the Court to review the case. Obviously, it's an odd procedural posture. Any thoughts on what got the Court interested in this case? I know this is not Mr. Glossip's first time before the Supreme Court, even, which is itself unusual.

Seth Waxman: It is not common for the prosecution to confess error 20-something years after the prosecution has been vigorously obtaining and defending a criminal conviction. And so that in and of itself is unusual and certainly would have caught the justices' attention. I think the fact that this was the elected attorney general of Oklahoma, which is one of the most pro-death penalty states in the United States, and an attorney general who ran on the platform of support for the death penalty and execution of convicted murderers probably also caught the Court's attention. The fact that the Oklahoma Legislature, again, not a hotbed of criminal defense sensitivity, was so concerned about the *Glossip* trial that the legislature itself hired its own independent investigation and concluded that the verdict was not reliable, the trial was not fair. I think the Supreme Court's thought that this was a real act of political courage by the elected attorney general to side with a notorious death row inmate in arguing that his prosecutors had violated the Due Process Clause on multiple grounds. And, so, when the Supreme Court decided to grant review, it appointed an amicus curiae to defend the judgment below, and the Court posed its own question in addition to the questions that Glossip had raised about the constitutionality of his trial of whether the Oklahoma Court of Criminal Appeals decision was justified on "adequate and independent state grounds," which is a doctrine of federal jurisdiction which is very well accepted but the contours of which have not been elaborately explained. And this case provided an opportunity to do that. Almost all of the oral argument in the case was addressed to this adequate and independent state ground question that the Supreme Court itself had posed.

Felicia Ellsworth: So, how did the case come to you, Seth, and to WilmerHale?

Seth Waxman: I've been representing death row inmates as part of my pro bono practice since 1978. And over the course of that time, I have argued a half a dozen or more death cases or murder cases in the Supreme Court. And I think, although Glossip had made four previous trips to the Supreme Court, he wanted to bring in Supreme Court counsel that had trial background and a background in representing death row inmates. And, so, existing counsel called and said would I be willing to be involved, and I said yes, and I then turned to Zaki and said let's put together a team, this is an incredibly interesting and important case.

Felicia Ellsworth: There are obviously a lot of legal issues, strategic issues, et cetera, that you all were dealing with. Can you talk a little bit about some of the strategic decisions that you made about how to present this case?

Zaki Anwar: One thing that was a challenge is we had so many different instances of

prosecutorial misconduct that we wanted to get before the Court but the question of whether it was properly before them was challenging. The only thing that was formally before the Court was what had been disclosed in “Box 8” because of certain rules that Oklahoma state law provides for post-conviction relief. So, we knew that we wanted to hammer in on this memo about Sneed and his psychiatric care and the fact that the state had elicited false testimony, and we knew that was going to be the basis of the decision. But we also didn’t want to lose track of the fact that this really isn’t the only thing that calls this conviction into question. And the question was how to go about doing that. I think the strategy that we employed was to really bake it into the materiality analysis. So, under a couple of Supreme Court cases, *Napue v. Illinois*, and *Brady v. Maryland*, those are the cases that really established that the prosecution has to turn over exculpatory evidence. Once you’ve established that there was exculpatory evidence, you want to make sure it was actually material to the conviction. Usually, this ends up being something that is very difficult for criminal defendants or for petitioners because what the state typically does is say, OK, maybe that was true but look at all this other overwhelming evidence. There’s no way the jury would have changed its mind. In this case, there just wasn’t that much evidence. Sneed’s testimony was the only direct evidence, so, already, we were in an advantageous position. But what this also did was give us an opportunity to say, let’s look at this piece of prosecutorial misconduct in connection with everything else the prosecution has done here, and we have some support for that approach. There was a Supreme Court case called *Kyles v. Whitley* that instructs that you don’t look at the piece of evidence in isolation, you look at everything that has been withheld. And that gave us an opportunity to go back to the first seven boxes to look at the suggestive police interrogation, the destruction of evidence, the fact that there were other pieces of witness statements that undermined some of the testimony at the trial. And when you put it all together, it was really overwhelming. And what we saw on the Supreme Court opinion is that the Court really focused in on the question of psychiatric care, but then when it got to materiality, it did exactly what we had hoped and it surveyed everything that had gone on in the case.

Seth Waxman: Let me mention a couple of other things that were, I think, particular challenges here. One was this issue of the adequate and independent state ground. This is an area where the broadest principles are clear, but how it’s applied is unclear. This was far and away the biggest concern that I had in this case, which is whether we could overcome the presumption that when the state court says we’re applying an adequate and independent state procedural bar, that that would nonetheless leave the Court confident that it had federal jurisdiction to decide the question at all. We had a very lengthy three-part oral argument in this case, and a vast majority of it related to the adequate and independent state ground question. The second thing, which was a real overall strategic concern, was what the remedy would be. Mr. Glossip has, to say the least, not fared well in the Oklahoma Court of Criminal Appeals, and, so, what we were aiming for was not just a holding of the Court that the federal question was fairly presented and the Due Process Clause was violated, but to convince the Supreme Court that after all this time, with all this evidence and all these concessions by the state, that the only remedy was out and out reversal, giving the state an opportunity to try the case again. And we did manage to convince the majority of justices in this case that that, in fact, was the correct

remedy. The state is still deciding whether it has enough evidence to retry Mr. Glossip. To me, this is not a close question, but it's up for the state to decide. But he's clearly in a much less disadvantageous position not having a remand to the Court of Appeals, but rather a remand for a new fair trial.

Felicia Ellsworth: Obviously, a great result for Mr. Glossip, and it'll be interesting to see what the state decides to do on whether to retry him. What implications, if any, do you think the Supreme Court's decision in Mr. Glossip's case has for either due process or for capital cases more broadly?

Seth Waxman: One of the things that's been notable, at least during my time arguing in the Supreme Court, is that although the Court in criminal cases where the conviction is very likely to look very, very critically at any argument that is going to provide a new trial, they are willing to call a spade a spade. And it's one of the reasons that we've been so successful in representing death row inmates who have serious constitutional issues. I think there's been a real concern in the defense bar about whether the replacement of Justice Ginsburg and Justice Kennedy and Justice Souter with justices who are considered to be much more conservative, would hold. *Glossip* shows that the Supreme Court is not going to put up with constitutional violations and questionable behavior by prosecutions in obtaining death convictions and probably criminal convictions generally. This is a Court that cares a lot about life, liberty and property, and there's nothing that rings the life and liberty bell like a serious criminal conviction, especially one that leads to the death chamber.

Zaki Anwar: I completely agree with that. Two things that really jumped out of the case for me. One is the question of how *Napue* and *Brady* applied to this case prosecutors' responsibility to turn over exculpatory evidence and the prohibition on eliciting false testimony. So, I think that it's noteworthy going forward that those precedents are really reupped in this case. And they're really as robust as ever on their own terms. The second thing I thought was interesting was a jurisdictional bar analysis and how the Court decided that there was jurisdiction. That's something that has implications not just for criminal defendants, not just for due process cases, but all cases coming from state courts. And really the message that has been the case in the past, and now we know is continually the case, is that state courts can rely on state law and they can't insulate their decisions from the Supreme Court, but in order to do so, they'd be really crystal clear that their analysis is only based on state law and they are not looking to federal law. And what the Court said here was okay, they're relying on state law, they're reciting different state standards, but then they're also talking about *Brady* and *Napue*. And they're citing their *Brady* and *Napue*. And we can't really make heads or tails of this. And there was enough intertwining that we're going to take this case. We're going to make clear that the court below didn't understand what our federal precedence mean. And we're going to require a new trial. So, it's interesting that that was the approach. We didn't know if there was more of a reluctance to try to keep state cases away from the Supreme Court, and it was reassuring to see that the Court took this opportunity to clarify what due process requires.

Felicia Ellsworth: Well, fascinating case, both in its procedural history and length, and also in

the issues in this most recent iteration of it at the Supreme Court. So, thank you both for joining to talk about this important and interesting case and also to demonstrate some of the great results that we can get for clients as a part of our pro bono program. Really appreciate your sharing your time and thoughts with us today on In the Public Interest.

Zaki Anwar: Thank you. Thanks, Felicia.

Felicia Ellsworth: And thank you to our listeners for tuning in to this episode of *In the Public Interest*. We hope you'll join us for our next episode. If you enjoyed this podcast, please take a minute to share with a friend and subscribe, rate and review us wherever you listen to your podcasts. If you have any questions regarding this episode, please e-mail them to us at inthepublicinterest.wilmerhale.com. For all of our WilmerHale alumni in the audience, thank you for listening. We are really proud of our extended community, including alumni in the government, the nonprofit space, academia, other firms and in leadership positions and corporations around the world. If you haven't already, please join our alumni center at alumni@wilmerhale.com so we can stay better connected. Special thank you to the producers of this episode, Matt O'Malley, Vanessa Witheridge and Caroline Estey, sound engineering and editing by Bryan Benenati, marketing by Andy Basford and his team, all under the leadership of executive producers Kaylene Khosla and Jake Brownell. See you next time on *In the Public Interest*.