No. 26-_____

CAPITAL CASE

** Execution Scheduled for Nov. 12, 2026 at 10 a.m. Central Time **

IN THE

Supreme Court of the United States

JAMES DWIGHT PAVATT, PETITIONER,

v.

STATE OF OKLAHOMA, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

Over two decades ago, notorious Oklahoma County prosecutor Fern Smith won James Pavatt's death sentence by informing the jury over 20 times—without any record support—that he, and he alone, inflicted the fatal shots that killed Rob Andrew. Before jurors retired to deliberate over Mr. Pavatt's punishment, prosecutors impressed upon them that Mr. Pavatt is "a man who can kill, who can execute an innocent victim without mercy and without remorse[,]" and who "needs to be on death row where he can't hurt anyone else." Pet. App. 391a–392a.

Now, just weeks before his scheduled execution, the State of Oklahoma revealed for the first time on September 18, 2026 that the prosecutor's statements to Mr. Pavatt's jury were patently and knowingly false because the State, in fact, actually had no idea who shot and killed Mr. Andrew. In its clemency submission to the Oklahoma Pardon and Parole Board opposing Mr. Pavatt's plea for mercy, the State revealed "three possibilities" as to the identity of Mr. Andrew's killer: (1) Mr. Pavatt fired both shots; (2) Mr. Pavatt fired the first shot and Brenda Andrew (Rob Andrew's estranged wife and Mr. Pavatt's co-defendant) fired the second shot; or (3) Ms. Andrew fired both shots. Pet. App. 297a.

Presented with the State's eleventh-hour disclosure, the foreman for Mr. Pavatt's jury recently attested that the State's insistence—now known to be false—at Mr. Pavatt's sentencing proceeding that he alone inflicted the shots that killed Mr. Andrew was dispositive to his decision to sentence Mr. Pavatt to death. Pet. App. 317a-318a ¶¶ 4–5. Mr. Pavatt timely petitioned the Oklahoma Court of Criminal Appeals ("OCCA") for postconviction relief on the grounds that this new evidence shows that the State won his death sentence in violation of the Sixth and Fourteenth Amendments. Pet. App. 16a. The OCCA held that the State's eleventh-hour concession was "neither new nor evidence" and, in any event, was previously discoverable through diligence. Pet. App. 7a-8a. And it excluded the juror's affidavit under Oklahoma's no-impeachment rule. *Id.* at 9a.

The questions presented are:

1. Whether the Sixth and Fourteenth Amendments require an exception to a state's no-impeachment rule where new evidence demonstrates that trial prosecutors presented a capital jury with knowingly false information that influenced at least one juror's vote for the death penalty.

2. Whether the Sixth and Fourteenth Amendments require resentencing where new evidence reveals that trial prosecutors won a capital defendant's death sentence by presenting the jury with knowingly false information.

PARTIES TO THE PROCEEDING

In the proceedings below, James Dwight Pavatt was the defendant/petitioner and the State of Oklahoma was the plaintiff/respondent.

RELATED PROCEEDINGS

Oklahoma County District Court:

> *State v. Pavatt*, CF-2001-6189, Oklahoma County District Court for the State of Oklahoma. Judgment of conviction and sentence entered October 21, 2003.

Oklahoma Court of Criminal Appeals:

> *Pavatt v. State of Oklahoma*, No. PCD-2004-25 (Okla. Crim. App. Apr. 11, 2008). Judgment entered Apr. 11, 2008 (unpub.)
>
> *Pavatt v. State of Oklahoma*, No. PCD-2009-777 (Okla. Crim. App. Feb. 2, 2010). Judgment entered Feb. 2, 2010 (unpub.)

United States District Court, Western District of Oklahoma:

> *Pavatt v. Trammell*, No. CIV-08-470-R (W.D. Okla. May 1, 2014). Judgment entered May 1, 2014.

United States Court of Appeals for the Tenth Circuit:

> *Pavatt v. Carpenter*, No. 14-6117 (10th Cir. June 27, 2019). Judgment entered June 27, 2019.

United States Supreme Court:

> *Pavatt v. Sharp*, No. 19-697 (U.S. Jan. 27, 2020). Certiorari denied Jan. 27, 2020.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner James Pavatt respectfully petitions for a writ of certiorari to review the judgment of the Oklahoma Court of Criminal Appeals.

INTRODUCTION

At the penalty phase of James Pavatt's 2003 capital trial, the lead prosecutor Fern Smith[1] informed his jury over 20 different times that he deserved to die because he, and he alone, inflicted the fatal shots that snuffed out Rob Andrew's life. Although no evidence whatsoever in the trial record established that Mr. Pavatt, rather than Brenda Andrew (his co-defendant and Mr. Andrew's estranged wife), fired the shots that killed Mr. Andrew, prosecutors nevertheless informed jurors, for example, that:

- "He's murdered, executed an innocent man." Pet. App. 344a.
- "[H]e enjoyed the suffering and the murder that he had committed of Rob Andrew." Pet. App. 344a.
- "He hated Rob Andrew enough to kill Rob Andrew, to murder him and to execute him." Pet. App. 345a.
- "There is no mitigation for what this defendant did to Rob Andrew." Pet. App. 350a.

[1] Smith prosecuted six Oklahoma County capital defendants who have had their death sentences reversed by the state or federal courts. *See Glossip v. Oklahoma*, 604 U.S. 226 (2025); *Cargle v. Mullin*, 317 F.3d 1196 (10th Cir. 2003); *Spunaugle v. State*, 946 P.2d 246 (Okla. Crim. App. 1997); *Jones v. State*, 917 P.2d 976 (Okla. Crim. App. 1995); *Omalza v. State*, 911 P.2d 286 (Okla. Crim. App. 1995) (capital defendants Omalza and Floyd).

- "I submit to you that this defendant deserves from you the same sympathy and sentiment that he gave to Rob Andrew when Rob Andrew was executed lying in pain on that garage floor needlessly murdered." Pet. App. 355a.
- "These are all people who knew the Defendant Pavatt when he was a kid, 30 or 32 years before he murdered Rob Andrew." Pet. App. 358a.
- "[The family of Rob Andrew] didn't get to ask Mr. Pavatt to have mercy on their son Rob Andrew. Mr. Pavatt just maliciously, needlessly snuffed out Rob Andrew's life. And Rob Andrew himself didn't get a chance to beg Mr. Pavatt for mercy. He was ambushed and murdered. He was blind[-]sided and murdered. And Mr. Pavatt does not deserve mercy for this needless killing." Pet. App. 359a.
- "James Pavatt was not remorseful on the day that he murdered Rob Andrew. He was not remorseful on the day after he murdered Rob Andrew." Pet. App. 386a.
- "James Pavatt robbed Rob Andrew of his birthdays when he took Rob's life." Pet. App. 387a.
- "[W]e have to deal with what he is today, a man who can kill, who can execute an innocent victim without mercy and without remorse. Submit to you James Pavatt needs to be on death row where he can't hurt anyone else." Pet. App.391a.

- "But you read from that Marriage Beautiful document and that will tell you the kind of man that Rob Andrw was. That's the kind of life that Pavatt snuffed out." Pet. App. 393a.

After deliberating over Mr. Pavatt's punishment for five hours and 19 minutes, during which time jurors requested "a break for smoking and tension" in the jury room (O.R. 2069), jurors voted to sentence him to death.

Only on September 18, 2026, just weeks ahead of Mr. Pavatt's scheduled execution, did the State of Oklahoma reveal for the first time that the trial prosecutors' statements to the jury were false: contrary to what Mr. Pavatt's jurors were told, the State actually had no idea who shot and killed Mr. Andrew. The State's clemency submission to the Oklahoma Pardon and Parole Board opposing clemency for Mr. Pavatt included the eleventh-hour revelation that there are, in fact, "three possibilities" as to the identity of Mr. Andrew's killer: (1) Mr. Pavatt fired both shots; (2) Mr. Pavatt fired the first shot and Mrs. Andrew fired the second shot; or (3) Mrs. Andrew fired both shots. Pet. App. 297a. The jury foreman, presented with evidence of the State's belated revelation, executed a sworn statement attesting to the fact that the State's insistence—now exposed as false—at Mr. Pavatt's sentencing proceeding that he alone inflicted the shots that killed Mr. Andrew was dispositive to his choice of a death over a life sentence for Mr. Pavatt. Pet. App. 318a ¶¶ 10–11.

In the face of this new evidence proving that the State won Mr. Pavatt's death sentence through its presentation at his trial of information it knew to be false, Mr. Pavatt timely petitioned the Oklahoma Court of Criminal Appeals ("OCCA") for

postconviction relief on the grounds that his death sentence violates the Sixth and Fourteenth Amendments. Pet. App. 16a.

The OCCA found, first, that the State's eleventh-hour revelation was "neither new nor evidence." Pet. App. 7a–8a. According to the OCCA, "[b]y outlining the three possible factual scenarios in the State's clemency packet, counsel for the State did not purport to draw from any new or previously unknown facts or evidence but instead drew reasonable inferences from the evidence as presented at Petitioner's and Brenda Andrew's jury trials." Pet. App. 9a. However, the record before the OCCA showed that the State, in fact, drew on *nothing* from which its eleventh-hour revelation could reasonably be inferred:

> There are three possibilities. The first is that Pavatt fired both shots. Pavatt had extensive experience with firearms and he would have had the element of surprise, whereas Rob knew Brenda was in the garage. Pavatt could have been hiding with the guns beside Brenda's van, which was parked in the garage, or beside the house.
>
> The second possibility is that Pavatt fired the first shot and Brenda fired the second shot. Under this scenario, Pavatt took advantage of the element of surprise, then handed the gun to Brenda after the first shot. The second shot was fired from a closer distance than the second. Brenda was seen by Mr. Roggow, shortly before the murder, driving up to the area in which her brother-in-law and another man appeared about to engage in target practice.
>
> The third possibility is that Brenda walked away from Rob, retrieved the shotgun, and fired both shots. But if that was the case, Pavatt was present and was a willing participant. Brenda *did not* shoot herself. (Tr. XII 3190). So Pavatt was standing by, with the gun he had purchased in advance, to shoot Brenda and stage the scene.

Pet. App. 297a.[2] And even if the OCCA were correct that whatever the State relied on for its eleventh-hour revelation isn't "new"—rather is the product of "old" information from Mr. Pavatt's and Mrs. Andrew's jury trials, Pet. App. 7a—that amounts to a determination that anytime inputs are "old," they can never give rise to an output that is "new." In other words, because baking powder, eggs, and sugar are all ingredients in a cake, a cake baked for the first time with those ingredients isn't a new output. That defies common sense.

Yet on these grounds, the OCCA held that "the factual basis for [Mr. Pavatt's] sole claim of error was ascertainable through the exercise of reasonable diligence at the time of direct appeal and prior postconviction proceedings," rendering it barred from review. Pet. App. 8a, 11a–12a. The court also refused to consider the affidavit

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[2] The solitary citation included within the State's "three possibilities" revelation is to a portion of the trial transcript showing that Mrs. Andrew didn't shoot herself. That is a far cry away from constituting proof that "Pavatt was standing by, with the gun he had purchased in advance, to shoot Brenda and stage the scene." Pet. App. 297a.

Moreover, contrary to the OCCA's determination that the State's "three possibilities" concession is based merely on reasonable inferences from the evidence at trial, the second possibility is a particularly new position advanced by the State for the first time on September 18, 2026. The prosecution—at both Mr. Pavatt's and Mrs. Andrew's trials—always maintained this was a single-shooter case. As such, the prosecution never presented jurors with the "scenario" in which "[Mr.] Pavatt fired the first shot and Brenda [Andrew] fired the second shot." Pet. App. 297a. At Mr. Pavatt's capital trial, the prosecution only presented evidence and argument that a single shooter, or perpetrator, killed Rob Andrew with two shotgun blasts in quick succession. (Tr. at 3134, 3178, 3608, 3611, 3777.) And at Mrs. Andrew's trial, the prosecution repeated this single-shooter theory in its evidentiary presentation and argument. (Andrew Tr. at 1917, 3667, 3668, 3871, 4167.) The phrases "one of the shooters," "a shooter," or "the shooters" do not appear even once in the transcripts of either trial.

from Mr. Pavatt's jury foreman under Oklahoma's no-impeachment rule in assessing Mr. Pavatt's Sixth and Fourteenth Amendment claims. Pet. App. 9a–11a.

In *Storey v. Lumpkin*, 142 S. Ct. 2576 (2022) (Sotomayor, J., statement respecting the denial of certiorari), Justice Sotomayor condemned circumstances analogous to those here where, until the eleventh hour before an execution, "[p]rosecutors not only failed to disclose [the victim's] parents' unwavering desire that [the petitioner] not be sentenced to death, but also misled the jury in summation to successfully secure a death sentence." *Id.* at 2578. Justice Sotomayor identified the grave concern that Mr. Storey "faces the possibility of execution without resolution of his claims[,]" even as she agreed with this Court's decision to deny the petition for a writ of certiorari given the procedural and vehicle problems attendant to the way Mr. Storey's case arrived at this Court. *Id.* ("The posture of Storey's case renders it a poor fit for this Court's review.").

Those dispositive vehicle problems—which included the fact that the Fifth Circuit denied a certificate of appealability ("COA") over the district court's dismissal of Mr. Storey's Rule 60(b) motion as an improper, unauthorized second or successive habeas petition that contravened 28 U.S.C. § 2244(b)—are absent here. *Compare Storey v. Lumpkin*, 8 F.4th 382, 393 (5th Cir. 2021) ("We decline to issue a COA to appeal the district court's decisions dismissing Storey's purported Rule 60(b) motion . . ."), *with Buck v. Davis*, 580 U.S. 100, 122 (2017) ("We have held that a litigant seeking a COA must demonstrate that a procedural ruling barring relief is itself debatable among jurists of reason; otherwise, the appeal would not 'deserve

encouragement to proceed further[.]'" (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

The Court should grant the petition and reverse.

OPINIONS BELOW

The Oklahoma Court of Criminal Appeals' decision denying Mr. Pavatt's subsequent application for postconviction relief is unreported. Pet. App. 1a.

JURISDICTION

The Oklahoma Court of Criminal Appeals denied Mr. Pavatt's postconviction application raising Sixth and Fourteenth Amendment claims on November 6, 2026. Pet. App. 1a. This petition is timely. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, to be confronted with the witnesses against him . . .

U.S. Const. amend. XIV, § 1:

> . . . nor shall any State deprive any person of life, liberty, or property without due process of law[.]

STATEMENT

I. Legal Background

As long ago as 1851, this Court recognized that the Constitution may demand exceptions to no-impeachment rules in "grave[]" and "most important cases" where "it would be impossible to refuse [juror testimony] without violating the plainest principles of justice." *United States v. Reid*, 53 U.S. 361, 366 (1851), *overruled on other grounds by Rosen v. United States*, 245 U.S. 467, 470 (1918); *McDonald v. Pless*, 238 U.S. 264, 268–69 (1915) (recognizing that "it would not be safe to lay down any inflexible [no-impeachment] rule because there might be instances in which such testimony of the juror could not be excluded without violating the plainest principles of justice" as "might occur in the gravest and most important cases[]" (cleaned up)); *Warger v. Shauers*, 574 U.S. 40, 51 n.3 (2014) (recognizing that the no-impeachment rule may admit exceptions); *see also Parker v. Gladden*, 385 U.S. 363 (1966) (considering juror testimony about prejudicial statements from bailiff in reversing conviction under the Sixth and Fourteenth Amendments).

This Court confronted such a case in *Peña-Rodriguez v. Colorado*, 580 U.S. 206 (2017), where it held that "where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee." 580 U.S. at 225. The Court grounded its holding on the "unique historical, constitutional, and institutional concerns" implicated by racial prejudice, *id.* at 224, even as it recognized that "the no impeachment rule may admit

exceptions" in "extreme cases" not limited to evidence of racism, *id.* at 221 ("In *Warger [v. Shauers*, 574 U.S. 40 (2014)], however, the Court did reiterate that the no-impeachment rule may admit exceptions."); *id.* (referring to "[t]he recognition in *Warger* that there may be extreme cases where the jury trial right requires an exception to the no impeachment rule . . .").

Just as racism implicates "unique historical, constitutional, and institutional concerns" that compel a Sixth Amendment exception to the no-impeachment rule, so too does the State's presentation of knowingly false information to a jury in order to win a death sentence. There is, after all, no room for reasonable debate over whether prosecutors occupy a unique historical, constitutional, and institutional role in the administration of capital punishment in America. They do. This Court summed up the uniqueness of the prosecutor's role—to seek out and defend *the truth*—in *Banks v. Dretke* where it said:

> We have several times underscored the 'special role played by the American prosecutor in the search for truth in criminal trials.' *Strickler*, 527 U.S. at 281, 119 S. Ct. 1936; accord *Kyles*, 514 U.S., at 439–440, 115 S. Ct. 1555; *United States v. Bagley*, 473 U.S. 667, 675, n.6, 105 S. Ct. 3375, 87 L.Ed.2d 481 (1985); *Berger*, 295 U.S., at 88, 55 S. Ct. 629. See also *Olmstead v. United States,* 277 U.S. 438, 484, 48 S. Ct. 564, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting). Courts, litigants, and juries properly anticipate that 'obligations [to refrain from improper methods to secure a conviction] . . . plainly rest[ing] upon the prosecuting attorney, will be faithfully observed." *Berger*, 295 U.S., at 88, 55 S. Ct. 629. Prosecutors' dishonest conduct or unwarranted concealment should attract no judicial approbation. See *Kyles*, 514 U.S., at 440, 115 S. Ct. 1555 ("The prudence of the careful prosecutor should not . . . be discouraged.").

540 U.S. 668, 696 (2004). Where a prosecutor betrays the special role which the Constitution and criminal justice system assign to them by presenting jurors with

knowingly false information calculated to win a death sentence, "the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee." *See Peña-Rodriguez*, 580 U.S. at 225.

"A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955); *see also Duncan v. Louisiana*, 391 U.S. 145, 148–149 (1968) (holding that the Sixth Amendment's jury trial guarantee is applicable to the states via the Fourteenth Amendment). A prosecutor upends the Constitution's fair trial and due process guarantees where s/he presents a jury with false information—whether through evidence or argument—that renders a criminal trial fundamentally unfair. *See Donnelly v. DeChristoforo*, 416 U.S. 637, 645–46 (1974) (applying the Court's "long series of decisions" that "established the proposition that the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence[,]" to false prosecutorial argument); *id.* at n.22 (citing *Mooney v. Holohan*, 294 U.S. 103 (1935), *Napue v. Illinois*, 360 U.S. 264 (1959)). Justice Douglas, in his *Donnelly* dissent, summed up well the unique threat that a prosecutor's presentation of false information poses to the bedrock fair trial guarantee:

> The prosecutor is not a witness; and he should not be permitted to add to the record either by subtle or gross improprieties. Those who have experienced the full thrust of the power of government when leveled against them know that the only protection the citizen has is the requirement of a fair trial. . . . Prosecutors are often eager to take almost any shortcut to win, yet as I have said they represent not an ordinary party but We the People. As I have noted, their 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. . . .
>
> . . .It is, I submit, quite improper for a prosecutor to insinuate to the jury the existence of evidence not in the record and which could not be introduce without the privilege of cross-examination.

Id. at 650–51 (Douglas, J., dissenting) (cleaned up). A conviction, or death sentence, won through a prosecutor's deliberate corruption of the truth-seeking process "must fall under the Fourteenth Amendment." *Napue*, 360 U.S. at 269.

II. Factual Background

A. Trial Proceedings

The State took the position through evidence and argument at Mr. Pavatt's 2003 capital trial that a single shooter killed Rob Andrew with two shotgun blasts in quick succession. (Tr. at 3134, 3178, 3608, 3611.) It maintained that single-shooter position at the 2004 death penalty trial of Mr. Pavatt's co-defendant Brenda Andrew, who was Rob Andrew's estranged wife and, by all accounts, wanted him dead.[3] (Andrew Tr. at 1917, 3667-68, 3871, 4167.)

To win Mr. Pavatt's conviction at the first stage of the trial, the State insisted that the jury did not need to decide whether Mr. Pavatt or Mrs. Andrew fired the shots that killed Mr. Andrew. (*See e.g.*, Tr. at 3512 (prosecutor telling jurors that Mr.

[3] At Mrs. Andrew's subsequent death penalty trial, the State maintained that blood spatter evidence from her clothing—never disclosed to Mr. Pavatt's jury by the prosecution nor put into evidence by defense counsel—showed that she fired the second shot that killed her husband. *See Andrew v. State*, 2007 OK CR 23, ¶ 102, 164 P.3d 176, 199, *as corrected* (July 9, 2007), *opinion corrected on denial of reh'g*, 2007 OK CR 36, 168 P.3d 1150, *and overruled by Williamson v. State*, 2018 OK CR 15, ¶ 102, 422 P.3d 752 (noting that trial prosecutors "argu[ed] that she received this spatter by firing the second shot and getting blow back blood spatter from Rob[]").

Pavatt "didn't have to pull the trigger[]"); 3570, 3600, 3604, 3614 (prosecutor telling jurors "[i]t doesn't matter which one of them did it[]"); *see also* O.R. 665 (amended information charging Mr. Pavatt and Mrs. Andrew with first-degree murder by acting conjointly). However, the State completely flipped that script at the penalty phase to win Mr. Pavatt's death sentence. Trial prosecutors impressed upon jurors *more than 20 different times* that Mr. Pavatt, and Mr. Pavatt alone, pulled the trigger that extinguished Mr. Andrew's life, stating for example:

- "He's murdered, executed an innocent man." Pet. App. 344a.
- "[H]e enjoyed the suffering and the murder that he had committed of Rob Andrew." Pet. App. 344a.
- "He hated Rob Andrew enough to kill Rob Andrew, to murder him and to execute him." Pet. App.345a.
- "There is no mitigation for what this defendant did to Rob Andrew." Pet. App. 350a.
- "I submit to you that this defendant deserves from you the same sympathy and sentiment that he gave to Rob Andrew when Rob Andrew was executed lying in pain on that garage floor needlessly murdered." Pet. App. 355a.
- "These are all people who knew the Defendant Pavatt when he was a kid, 30 or 32 years before he murdered Rob Andrew." Pet. App. 358a.
- "[The family of Rob Andrew] didn't get to ask Mr. Pavatt to have mercy on their son Rob Andrew. Mr. Pavatt just maliciously, needlessly snuffed

out Rob Andrew's life. And Rob Andrew himself didn't get a chance to beg Mr. Pavatt for mercy. He was ambushed and murdered. He was blind[-]sided and murdered. And Mr. Pavatt does not deserve mercy for this needless killing." Pet. App. 359a.

- "James Pavatt was not remorseful on the day that he murdered Rob Andrew. He was not remorseful on the day after he murdered Rob Andrew." Pet. App. 386a.
- "James Pavatt robbed Rob Andrew of his birthdays when he took Rob's life." Pet. App. 387a.
- "[W]e have to deal with what he is today, a man who can kill, who can execute an innocent victim without mercy and without remorse. Submit to you James Pavatt needs to be on death row where he can't hurt anyone else." Pet. App. 391a.
- "But you read from that Marriage Beautiful document and that will tell you the kind of man that Rob Andrw was. That's the kind of life that Pavatt snuffed out." Pet. App. 393a.

The prosecutors framed the circumstances surrounding the infliction of the second, fatal shot—which required reloading the shotgun as Mr. Andrew lay suffering—as the *key* reason Mr. Pavatt deserved the death penalty:

> [It] [t]akes a special kind of person to look at another human being lying, suffering and dying on the floor, defenseless and then reloading a shotgun, aiming and executing that person from 3 inches away. That special kind of person deserves that special punishment that's reserved for people just like James Pavatt and Brenda Andrew. And that

> appropriate punishment, the one reserved for special people is death. Rob Andrew didn't deserve to die. James Pavatt does.

Pet App. 386a. The jury sentenced Mr. Pavatt to death. (Tr. at 3793; O.R. 2062.)

Nine months later, the State flipped the script yet again at Brenda Andrew's death penalty trial where they homed in on blood spatter evidence to insist that *she* was the sole shooter:

> [A]s [Rob Andrew] is on the floor realizing what is happening to him and realizing that all the people are right, he turns to look at [Brenda] one last time. And this time, *[be]cause the blood spatter shows you*, he saw her face over the barrel of a shotgun.

Pet. App. 401a–402a (emphasis added). The same trial prosecutors who had won Mr. Pavatt's death sentence by insisting to his jury that *he* was the actual shooter, displayed for Mrs. Andrew's jury a picture of the blood-spattered jeans she wore on the night of the crime which they maintained put the gun that fired the fatal shots in her hands:

> Here is why she had the gun . . . It's from Mr. Andrew's left to right and she's right here and she shoots him. [The] [s]patter . . . comes in a straight line, back spatter right onto these pants. And the evidence in this case tells you who pulled the trigger.

Pet. App. 398a; Pet. App. at 399a–400a (prosecutor telling Mrs. Andrew's jury that the "spatter on her left leg" shows that she "sho[t] him the second time[]"); *see also* *Forensic Files*, "Sunday School Ambush," Season 10, Episode 32 [14:52], https://www.youtube.com/watch?v=S9puzLIaCIM&t=485s (last visited Nov. 8, 2026) (trial prosecutor Gayland Gieger discussing the importance of blood spatter on Mrs. Andrew's jeans, stating "The back spatter on the pants, I think that gave us that one bit of evidence we needed in order to put that gun in Mrs. Andrew's hand").

In urging jurors to sentence Mrs. Andrew to death, the State underscored her role as the actual and only killer of her estranged husband:

> And it takes a special kind of person to look at another human being lying suffering and dying on the floor defenseless and then reloading a shotgun, aiming it, and executing that person from less than 3 feet away. And that special person deserves that special punishment that's reserved for people just like her. . . .

Pet App. 406a. Prosecutors insisted that Mrs. Andrew deserved the death penalty because:

> [Y]ou are looking at a woman sitting right over here who can intentionally pull the trigger and watch the father of her children suffer and die without remorse. And what does that tell you about her? She's different. She's a cold-blooded, heartless killer. She's different and she deserves that different kind of punishment that's reserved for people exactly like her.

Pet. App. 407a. Thus, at both Mr. Pavatt's and Mrs. Andrew's separate death penalty trials, the State blamed a different person for inflicting the fatal shots that snuffed out Rob Andrew's life.

B. 2026 Executive Clemency Proceedings

On September 18, 2026, the State conceded for the first time in its clemency submission to the Oklahoma Pardon and Parole Board that, contrary to what trial prosecutors told Mr. Pavatt's jurors, "[t]here are three possibilities" as to the identity of the person who shot and killed Rob Andrew: (1) "The first is that Pavatt fired both shots[]"; (2) "The second possibility is that Pavatt fired the first shot and Brenda [Andrew] fired the second shot[]"; (3) "The third possibility is that Brenda walked away from Rob, retrieved the shotgun, and fired both shots." Pet. App. 297a.

Presented with the State's eleventh-hour concession, Mr. Pavatt's jury foreman, Mark Haydon, executed an affidavit in which he attested that:

> . . . I voted for death because of the prosecutors' argument that Mr. Pavatt took the first shot and then had to break open the shotgun, reload, stand over Rob Andrew at point blank range with a shotgun and take another shot. Particularly, as Mr. Andrew has already been shot once by a single shot, 16-gauge shotgun, his shooter had to purposely crack the shotgun open, remove the spent shell casing, put in another shell, close the shotgun, point down, and shoot him while he was dying. It was a wicked act that was enough for me to vote for death. I felt firmly that the circumstances of the second shot meant that Mr. Pavatt deserved the death penalty.
>
> The prosecutor's argument that Mr. Pavatt fired both shots was very convincing. I was sure based on what the prosecution argued that their scenario as to who was the fatal shooter was correct. I also recall that the prosecution argued at Mr. Pavatt's trial that there was only one shooter of Rob Andrew.
>
> . . . during sentencing deliberations, four or five jurors had initially expressed that they did not want to impose the death penalty. As the jury foreman, I reminded jurors that we knew from the prosecutor's arguments to us that Mr. Pavatt was the shooter. I also explained to them how a single-shot shotgun operates as I described above. My explanation and reasoning influenced the other jurors, and we ultimately vote to sentence Mr. Pavatt to death.

Pet. App. 317a ¶¶ 3–5. Mr. Haydon also attested to the effects of the State's eleventh-hour concession:

> . . . the [clemency] packet from the Attorney General's Office called into question for the first time who I thought fired the fatal shot. The Attorney General's packet argued multiple possibilities . . . I am confident that the prosecution did not make either of these arguments at Mr. Pavatt's trial as **they kept emphasizing that, because he fired both shots, he deserved the death penalty**. Indeed, I recall both prosecutors being so certain about that when they asked the jury to sentence Mr. Pavatt to death.

> . . . I based my decision to vote for death on the prosecution telling me that Mr. Pavatt fired the second fatal shot, but after reading the Attorney General's packet, I no longer know the answer to that question.
>
> I took my responsibilities as a juror seriously, particularly as the foreman during our sentencing deliberations. I recognize that, as jury foreman, my statements during deliberations helped persuade other jurors to vote for the death penalty, and I accept the seriousness of that responsibility. . . . **after reading the State's clemency submission, the prosecution had been focused on securing a conviction and death sentence regardless of the truth and, in my view, had used us the jurors to achieve that objective**. . . .
>
> To be clear, if the prosecution had argued at Mr. Pavatt's trial that Brenda Andrew fired the second shot, I would not have voted for a death sentence. . . . I voted for death based on the circumstances of the second, wicked shot.
>
> . . . even if the prosecution had not argued at Mr. Pavatt's trial that Brenda Andrew fired both shots but had said the shooter was uncertain, I would not have voted for a death sentence. **It was the prosecution's claim that Mr. Pavatt fired the second shot that sealed the death decision for me**; had they argued any other scenario at Mr. Pavatt's trial—like those multiple possibilities the Attorney General's Office detailed in their clemency packet—I would not have voted for death.

Pet. App. 318a–320a ¶¶ 10–17 (emphasis added).

C. The Proceedings Below

On October 28, 2026, Mr. Pavatt instituted subsequent state postconviction proceedings below based on this new evidence demonstrating that: (1) the State in fact had no idea who shot and killed Rob Andrew, and hence lied to jurors at Mr. Pavatt's penalty phase proceeding to win his death sentence by insisting he fired the fatal shots; and (2) the State won Mr. Pavatt's death sentence by presenting jurors with knowingly false information. Pet. App. 16a. He argued that this new evidence demonstrated that the State obtained his death sentence in violation of his Sixth and

Fourteenth Amendment rights. Pet. App. 43a–56a. Mr. Pavatt also asked the court to order evidentiary development over any disputed, material issue of fact. Pet. App. 321a; Pet. App. 328a.

On November 6, 2026, the OCCA denied Mr. Pavatt's postconviction petition finding that the State's eleventh-hour revelation was "neither new nor evidence[,]" Pet. App. 7a–8a; that the State's "three possibilities" concession as to the identity of Mr. Andrew's killer "did not purport to draw from any new or previously unknown facts or evidence but instead drew reasonable inferences from the evidence as presented at Petitioner's and Brenda Andrew's jury trials[]"; and, on these grounds, that "the factual basis for [Mr. Pavatt's] sole claim of error was ascertainable through the exercise of reasonable diligence at the time of direct appeal and prior postconviction proceedings," rendering it precluded under Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b)(1). Pet. App. 8a, 11a–12a. The court also refused to consider the new affidavit from Mr. Pavatt's jury foreman under Oklahoma's no-impeachment rule. Pet. App. 9a–11a.

This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

I. Just as the Sixth Amendment requires an exception to the no-impeachment rule given the unique threat that racism poses to the fair administration of criminal justice, it likewise compels an exception to that rule given the unique threat that a prosecutor's use of knowingly false information to win a death sentence poses to the administration of capital punishment.

"Whatever its imperfections in a particular case, the jury is a necessary check on government power[]" and "is a central foundation of our justice system and our democracy." *Peña-Rodriguez v. Colorado*, 580 U.S. 206, 210 (2017). To protect the sanctity of the jury's role as a "fundamental safeguard of individual liberty[,]" a no-impeachment rule "has evolved to give substantial protection to verdict finality" by prohibiting a verdict from "be[ing] called into question based on the comments or conclusions [jurors] expressed during deliberations." *Id.* at 211. Yet this Court has recognized that exceptions to this rule may lie in cases where "it would be impossible to refuse juror testimony without violating the plainest principles of justice." *Id.* at 216 (quoting *United States v. Reid*, 53 U.S. 361, 366 (1851)) (cleaned up); *McDonald v. Pless*, 238 U.S. 264, 268–69 (1915) (recognizing that "it would not be safe to lay down any inflexible [no-impeachment] rule because there might be instances in which such testimony of the juror could not be excluded without violating the plainest principles of justice" as "might occur in the gravest and most important cases[]" (cleaned up)); *Warger v. Shauers*, 574 U.S. 40, 51 n.3 (2014) (recognizing that the no-impeachment rule may admit exceptions).

Peña-Rodriguez was one such exceptional case. There, this Court grappled with whether the Sixth Amendment compelled an exception to Colorado's no-

impeachment rule "when a juror's statements indicate that racial animus was a significant motivating factor in his or her finding of guilt." 580 U.S. at 221. It held that it does. *Id.* at 225 ("[T]he Court now holds that where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.").

This Court reached that result by identifying, first, the unique threat that racism poses to "the equal dignity of all persons[,]" *id.* at 221; second, the constitutional "imperative to purge racial prejudice from the administration of justice" in America. *Id.* at 221–22 ("[T]he central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States" (quoting *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964)); and third, the "particular threat both to the promise of the [Fourteenth] Amendment and to the integrity of the jury trial" posed by "racial discrimination in the jury system[.]" *Id.* at 222.

The Court distinguished racial bias from the circumstances in prior cases where it insulated the no-impeachment rule from constitutional attack. *Id.* at 223–24. It reasoned that unlike the quotient verdict in *McDonald*, the drug and alcohol abuse in *Tanner v. United States*, 483 U.S. 107 (1987), and the pro-defendant bias in *Warger*, racism is "a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice." *Id.* at 224. This Court also found

that "racial bias implicates unique historical, constitutional, and institutional concerns." *Id.* On these grounds the Court held that the exception to the no-impeachment rule compelled by the Sixth Amendment "is necessary to prevent a systemic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right." *Id.* at 225.

Like *Peña-Rodriguez*, Mr. Pavatt presents this Court with a "grave[] and most important case[]" that compels a Sixth Amendment exception to Oklahoma's no-impeachment rule when a juror's statements reveal that the State's presentation of knowingly false information at the penalty phase of a capital trial was dispositive to at least one juror's vote for a death sentence. *See McDonald*, 238 U.S. at 268–69.

First, just as racism poses a special threat to "the equal dignity of all persons[,]" *Peña-Rodriguez*, 580 U.S. at 221, so too does a prosecutor who abuses their unique position as a minister of justice—to seek out and defend *the truth*—by presenting knowingly false information to a capital jury in order to win a death sentence. *Banks*, 540 U.S. at 696; *see also Donnelly*, 416 U.S. at 650–51 (Douglas, J., dissenting) ("The prosecutor is not a witness; and he should not be permitted to add to the record either by subtle or gross improprieties."). Such a prosecutor degrades the dignity (and duty) of their office, runs roughshod over the fundamental fair trial and due process rights of the criminally accused, and harms the jurors whom their deception successfully misled. *Cf. Strickler v. Greene*, 527 U.S. 263, 281 (1999) (reaffirming "the special role played by the American prosecutor in the search for truth in criminal trials[]").

Here, Mr. Pavatt's jury foreman, Mark Haydon, attests to feeling "used" by prosecutors into returning a death sentence through their insistence at the sentencing phase—now exposed as false—that Mr. Pavatt, and Mr. Pavatt alone, inflicted the fatal shots that snuffed out Rob Andrew's life. Pet App. 319a ¶ 13. The harm stemming from the prosecutors' lies is especially acute for Mr. Haydon:

> [D]uring sentencing deliberations, four or five jurors had initially expressed that they did not want to impose the death penalty. As the jury foreman, I reminded the jurors that we knew from the prosecutors' arguments to us that Mr. Pavatt was the shooter. I also explained to them how a single-shot shotgun operates as I described above. My explanation and reasoning influenced the other jurors, and we ultimately voted to sentence Mr. Pavatt to death.

Pet. App. 317a-318a ¶ 5. Now aware that the prosecution's assurances that Mr. Pavatt was the shooter were false, Mr. Haydon "do[es] not like that the prosecution put that on my soul." Pet. App. 319a ¶ 13.

Second, just as this Court has found that purging racism from the criminal justice system rises to the level of a constitutional imperative, *Peña-Rodriguez*, 580 U.S. at 221–22, so too have "[a] long series of decisions of this Court[ ] . . . established the proposition that the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence" by representatives of the State. *Donnelly*, 416 U.S. at 645–46 (applying this proposition to knowingly false prosecutorial arguments). Nearly a century ago, this Court condemned as "inconsistent with the rudimentary demands of justice" the state's "contriv[ance] [of] a conviction through the pretense of a trial in which truth is but used as a means of

depriving a defendant of liberty through a deliberate deception of court and jury[.]" *Mooney v. Holohan*, 294 U.S. 103, 112 (1935).

Third, a prosecutor's use of knowingly false information to win a death sentence, like racism, poses a "particular threat to the promise of the [Fourteenth] Amendment and to the integrity of the jury trial." *Peña-Rodriguez*, 580 U.S. at 222. That is especially so because a prosecutor is not "the representative of an ordinary party to a controversy, but of a sovereignty . . . 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, 87 (1935). As such, "the prosecutor's opinion carries the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." *United States v. Young*, 470 U.S. 1, 18–19 (1985). And a prosecutor's statements "can covey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury[.]" *Compare id.* at 18, *with* Pet. App. 317a ¶ 3 (Juror Haydon attesting that, "I voted for death because of the prosecutors' argument that Mr. Pavatt took the first shot and then had to break open the shotgun, reload, stand over Rob Andrew at point blank range with a shotgun and take another shot[]").

Finally, the irrevocability of a death sentence combined with the unique threat posed by a prosecutor's knowing use of false information to the "confidence that is a central premise of the Sixth Amendment trial right[,]" call for a constitutional rule

that, in capital cases, such conduct "must be addressed—including, in some instances, after a verdict has been entered." *Peña-Rodriguez*, 580 U.S. at 225.

II. The State's presentation of knowingly false information at Mr. Pavatt's sentencing proceeding which influenced at least one juror's vote for a death sentence violated Mr. Pavatt's Sixth and Fourteenth Amendment rights.

In *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974), this Court applied to a claim of knowingly false prosecutorial argument its "long series of decisions" establishing the now-familiar rule that "the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence." 416 U.S. at 646 (citing *Mooney*, 294 U.S. 103 (1935), and *Napue v. Illinois*, 360 U.S. 264 (1959)) (cleaned up). The respondent there alleged that statements made by the trial prosecutor "during the course of his rather lengthy closing argument to the jury[,]" and which had no basis in evidence, violated his due process and fair trial rights. *Id.* at 640. The first remark involved the prosecutor's "personal opinion as to guilt," and the second "was directed at respondent's motives in standing trial[.]" *Id.* (footnote omitted). This Court considered whether these remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.* at 643. The Court held they did not.

At the threshold, the Court pointed out that the prosecutor's remark on respondent's motives for standing trial had generated "[c]onflicting inferences" among the lower courts rendering it "by no means clear" that it had a prejudicial effect on the jury. *Id.* at 643–44. The ambiguous nature of the prosecutor's remark and its isolated occurrence in an otherwise lengthy trial led this Court to reject "that

this incident made respondent's trial so fundamentally unfair as to deny him due process." *Id.* at 645. The Court also rejected the contention that the prosecutor's remarks compelled relief under *Brady v. Maryland*, 373 U.S. 83 (1963), since "there was neither the introduction of specific misleading evidence important to the prosecution's case in chief nor the nondisclosure of specific evidence valuable to the accused's defense." *Donnelly*, 416 U.S. at 647.

Whereas this Court deemed the prosecutor's baseless statement in *Donnelly* harmless because of its ambiguity, here, the State's insistence—now revealed as knowingly false, *see* Statement, Section II, *supra*—that Mr. Pavatt, and Mr. Pavatt alone, shot and killed Rob Andrew was unequivocal, repeated, and prejudicial under either subjective or objective tests. As discussed *supra*, Statement, Section II, the prosecution insisted throughout Mr. Pavatt's penalty phase that he inflicted Rob Andrew's fatal shotgun wounds and, for that reason, deserved to die. Before Mr. Pavatt's jurors retired to deliberate over his punishment, prosecutors urged them to remember:

- "He's murdered, executed an innocent man." Pet. App. 344a.
- "He hated Rob Andrew enough to kill Rob Andrew, to murder him and to execute him." Pet. App. 345a.
- "James Pavatt robbed Rob Andrew of his birthdays when he took Rob's life." Pet. App. 387a.
- "[W]e have to deal with what he is today, a man who can kill, who can execute an innocent victim without mercy and without remorse. Submit to you James

Pavatt needs to be on death row where he can't hurt anyone else." Pet. App. 391a-392a.

- "But you read from that Marriage Beautiful document and that will tell you the kind of man that Rob Andrw was. That's the kind of life that Pavatt snuffed out." Pet. App. 393a.

Mr. Pavatt's jury foreman, Mark Haydon, has attested to the dispositive effect that the prosecutors' false argument had on his decision to sentence Mr. Pavatt to death. Pet. App. 317a–320a. And even if this Court refuses to consider Mr. Haydon's affidavit, the unequivocal, pervasive, and prejudicial nature of the prosecutors' statements are objectively apparent. *Cf. Donnelly*, 416 U.S. at 645 (finding prosecutor's remark harmless not only because it was "admittedly an ambiguous one" but also because it "was but one moment in an extended trial and was followed by specific disapproving instructions[]").

Moreover, unlike the prosecutor's ambiguous and isolated remarks in *Donnelly*, the prosecutor's knowingly false statements to Mr. Pavatt's penalty phase jury compel relief under *Brady* and *Napue*. "There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler*, 527 U.S. at 281–82. All three elements are satisfied here: (1) evidence that the State, in fact, had no idea who actually shot and killed Rob Andrew was information patently favorable to Mr. Pavatt's defense at the penalty phase of

his trial, *see Kyles v. Whitley*, 514 U.S. 419, 432 (1995) (*Brady* material includes that which is "material either to guilt *or to punishment*[]" (emphasis added)); (2) the State suppressed this information at Mr. Pavatt's trial, only revealing it on September 18, 2026 on the eve of his execution, *see* Statement, Section II, *supra*; and (3) the State's suppression prejudiced Mr. Pavatt's penalty phase defense since an actual member of the jury has attested that he would have, and a reasonable probability exists that at least one objective juror would likewise have, voted for a life sentence had the State not deprived Mr. Pavatt's defense of the ability to rebut the key fact on which the State hinged his deservingness of the death penalty, *see* Statement, Section II, *supra*.

For the same reasons that the information suppressed by the State gives rise to a reasonable probability of a different sentencing result that should undermine this Court's confidence in Mr. Pavatt's death sentence, *Kyles*, 514 U.S. at 434, the State cannot carry its burden to prove beyond a reasonable doubt that its knowing presentation of false information to Mr. Pavatt's jury about the identify of Rob Andrew's actual killer was harmless. *Glossip v. Oklahoma*, 604 U.S. 226, 246, 251 (2025) (holding that *Napue*'s "materiality standard requires the beneficiary of the constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained" (quoting *Bagley*, 473 U.S. at 680, n.9, and *Chapman v. California*, 386 U.S. 18, 24 (1967)); *Chapman*, 386 U.S. at 24 ("There is little, if any, difference between . . . whether there is a reasonable possibility that the evidence complained of might have contributed to a conviction and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error

complained of did not contribute to the verdict obtained." (internal quotation marks omitted)).

III. This Court has jurisdiction to reach the Constitutional questions squarely presented which, for Mr. Pavatt, carry life-or-death consequences.

"This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). Here, the Court has jurisdiction over Mr. Pavatt's Constitutional claims because the OCCA's "previously discoverable" finding, Pet. App. 8a-9a, is neither an adequate nor independent procedural bar.

A state procedural ground in only "adequate" if it is consistently and regularly applied. *Johnson v. Mississippi*, 486 U.S. 586, 587 (1988). "State courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar claims." *Hathorn v. Lovorn*, 457 U.S. 255, 263 (1982). Yet this is precisely what the court below did to avoid adjudicating Mr. Pavatt's federal claims.

In *State v. Davison,* 531 P.3d 649 (Okla. Crim. App. 2023), the OCCA held that the controlling date for newly discovered evidence under Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b)(1) is the date "the factual particulars" of the current claim were "fully discovered." *Id.* at 653–54. The *Davison* Court specifically noted that there were documents "plainly available at the time of the initial post-conviction application." *Id.* at 653. But the Court still found the subsequent application to be timely because

it was also based on additional, "more recent" reports and affidavits. *Id.* The OCCA held that "the factual basis of the claim was not fully discovered before the last of these materials was obtained," *id.* at 653–54, and went on to assess the merits of Davison's ineffective assistance of counsel claim. *Id.* at 654–55. The same is true here: it is the State's September 18, 2026, tripartite concession that it now has no idea who shot Mr. Andrew—contrary to what Mr. Pavatt's jurors were told—along with the jury foreman's affidavit in response to that eleventh-hour concession that are the "factual particulars" that were just "fully discovered" and not otherwise available previously. The OCCA's failure to apply its "not previously discoverable" rule evenhandedly to Mr. Pavatt's similar claim makes its procedural ruling inadequate to bar this Court's review of Mr. Pavatt's Sixth and Fourteenth Amendment claims.

Nor is the OCCA's procedural ruling an "independent" jurisdictional bar to this Court's review because it is "intertwined with questions of federal law." *Glossip*, 604 U.S. at 242. For starters, the OCCA's "previously discoverable" finding contravenes this Court's holding in *Banks* that the Fourteenth Amendment does not require the defense to "seek" what the prosecution chooses to "hide" until an execution is imminent. *See Banks*, 540 U.S. at 696. Here, the State's eleventh-hour concession that it has no idea who actually shot and killed Rob Andrew proves that the prosecution won Mr. Pavatt's death sentence by presenting his jury with knowingly false information that he, and he alone, inflicted the fatal shots that snuffed out Rob Andrew's life. Just as no evidence in the trial record supported this assertion—

resulting in at least one of Mr. Pavatt's jurors crediting the word of the prosecutors alone to establish this dispositive fact in assessing Mr. Pavatt's punishment—the State relies on nothing other than its sovereign knowledge to support its eleventh-hour concession today that the identity of Mr. Andrew's killer is, in fact, unknown. *See Young*, 470 U.S. at 18 (recognizing that a prosecutor's statements "can convey the impression that evidence not presented . . . but known to the prosecutor, supports the charges against the defendant"). The Due Process Clause does not require Mr. Pavatt to be clairvoyant.

And finally, as discussed *supra*, Reasons for Granting the Petition, Section I, the OCCA's enforcement of Oklahoma's no-impeachment rule under the circumstances here violates the Sixth and Fourteenth Amendments.

This Court has jurisdiction over Mr. Pavatt's constitutional claims and should exercise it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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