Case Nos. 26-6095 & 26A661

CAPITAL CASE

In the

SUPREME COURT OF THE UNITED STATES

JAMES DWIGHT PAVATT,
***Petitioner*,**

-vs-

STATE OF OKLAHOMA,
Respondent.

On Petition for Writ of Certiorari
To the Oklahoma Court of Criminal Appeals

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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November 9, 2026

CAPITAL CASE
EXECUTION SET: November 12, 2026, AT 10:00 A.M. CST
Nos. 26-6095 & 26A661

QUESTION PRESENTED

Whether this Court has jurisdiction over a claim that is procedurally defaulted by adequate and independent state law grounds?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The State of Oklahoma respectfully urges this Court to deny Petitioner James Pavatt's Petition for a Writ of Certiorari to review the judgment and opinion of the Oklahoma Court of Criminal Appeals ("OCCA") entered in this case on November 6, 2026. (Pet. App. at 1a-15a).

STATEMENT OF THE CASE

Petitioner has filed this petition for certiorari, and an application for a stay of execution, after the OCCA denied his Subsequent Application for Post-Conviction Relief, which was his third state post-conviction application ("Third Application"). Petitioner is scheduled to be executed on November 12, 2026, for the 2001 murder of Robert Andrew.

The State proved at Petitioner's trial that he and Brenda Andrew murdered Brenda's husband, Robert "Rob" Andrew, on November 20, 2001, using a 16-gauge shotgun in the garage of the family home. The following is a very brief summary of some of the "unusual[ly]" strong evidence supporting Petitioner's conviction. *See Pavatt v. State*, 159 P.3d 272, 285 (Okla. Crim. App. 2007) ("[T]he evidence against Appellant was largely circumstantial, but that is not unusual in any kind of criminal case. What may be unusual was how large a quantity of circumstantial evidence the State was able to present.").

Petitioner met and befriended the Andrews at church and later became Rob's insurance agent with Prudential, selling him an $800,000 life insurance policy. (Tr.

V 1331-32; Tr. VII 1878; Tr. VIII 2046).[1] During the summer of 2001, Petitioner and Brenda began having a sexual relationship, and Petitioner divorced his wife, leaving him heavily in debt. (Tr. XI 2760-67, 2831-32).

The pair was removed from their roles as Sunday school teachers in September 2001 due to the widely known fact of their affair. (Tr. V 1332, 1342-47; Tr. VI 1533-337). Petitioner believed that Rob was involved in his removal and told a witness that he "hated the son of a bitch." (Tr. VI 1538). Later that same month, Brenda forced Rob to move out of their home and, in October, she filed for divorce. (Tr. V 1362-63; Tr. VI 1538-40).

Brenda voiced her hatred of Rob to numerous people and said she wished Rob would die so that she could have his money. (Tr. VI 1467-70, 1627-28; Tr. VII 1831; Tr. X 2570). In October, Petitioner told his daughter, Janna Larson, that Brenda had asked him to kill Rob. (Tr. XI 2838). The first attempt on Rob's life occurred on October 25-26, 2001, when Rob discovered both of his car's front brake lines had been cut. (Tr. VII 1729-35). That same morning, Rob received three phone calls, two from Larson and one from an unknown male using a pay phone near Larson's workplace, telling Rob he needed to travel to a hospital in a nearby city to pick up Brenda. (Tr. VII 1778-1800; Tr. XI 2839-43). Petitioner staged all three calls, (Tr. VII 1793; Tr. XI 2839; Tr. XII 3084-86), presumably intending for Rob to crash his car.

In the ensuing days, Rob tried to remove Brenda as beneficiary from his life insurance policy while Petitioner and Brenda tried to change ownership of the policy

[1] Unless otherwise specified, all references to trial records are to Petitioner's trial. References to Brenda's separate trial are specifically identified as such.

from Rob to Brenda by using a forged change of ownership form. (Tr. VII 1858, 1882-84; Tr. VIII 2047-49, 2071, 2086; Tr. XIII-A 3315-27). This fight for control led to more bad blood, as Petitioner came to believe that Rob was trying to have him fired. (Tr. VII 1857-58; Tr. XI 2848). Petitioner threatened Rob: "If you think that you have problems with Brenda you haven't seen anything until you messed with me." (Tr. VII 1858-60).

On November 14, 2001, Petitioner purchased a .22 caliber long rifle revolver, but not ammunition. (Tr. X 2508-09, 2521). Investigators later discovered that Petitioner kept a ledger of all "Weapons and Ammo" he owned, including fifty rounds of .22 Stinger ammunition manufactured by CCI and capable of being fired from the handgun he purchased on November 14. (Tr. IX 2324-25; Tr. X 2545; Tr. XIII-A 3383-84).

On November 20, 2001, Rob was shot twice with his own 16-gauge shotgun in the garage of the Andrew family home when he came to pick up his children for visitation over the Thanksgiving holiday. (Tr. VI 1473, 1486-88, 1551-53, 1555-56; Tr. VII 1849-50, 1924-25; Tr. X 2433-37). Brenda was also shot, but in stark contrast to the extreme violence used against Rob, she sustained a single superficial gunshot wound to the back of her non-dominant arm with a .22. (Tr. IX 2198-2200, 2223-24; Tr. XIII-A 3384-85).

Petitioner borrowed Larson's car to commit the murder and left behind a live .22 caliber round. (Tr. XI 2859-67; Tr. XIII-A 3362). Petitioner warned his daughter

that, if she told anyone that Brenda had asked him to kill Rob, he would kill her. (Tr. XI 2862-65). He also told her to throw away the bullet. (Tr. XI 2866-68).

Evidence of the crime, namely a spent 16-gauge shotgun shell and three live .22 caliber rounds, was found in the home of Brenda's next-door neighbors who were out of town; Brenda had a key to their home. (Tr. X 2576-99, 2626; Tr. XI 2681-90).

In the days following Rob's murder, Petitioner and Brenda fled to Mexico with the Andrew children. (Tr. XI 2778-81). Before they returned to the United States three months later, Petitioner wrote a confession letter in which he absolved Brenda of involvement in Rob's murder but inculpated himself. (Tr. XII 3241-44; Tr. XIII-A 3406).

Petitioner was convicted of First-Degree (Malice Aforethought) Murder and sentenced to death based on the jury's finding of two aggravating circumstances. At his trial, the State employed a blood spatter expert named Tom Bevel. As Mr. Bevel later explained, when he testified as a State's witness in Brenda's subsequent trial, there were two areas on Brenda's jeans he thought might be blood spatter and wanted tested for DNA; only one of the areas was tested. (Brenda Tr. XIV 3284-85). Mr. Bevel believed the one stain that was tested had the highest possibility of being spatter from Rob, but that stain had female DNA. (Brenda Tr. XIV 3294). Thus, Mr. Bevel did not believe he could testify as to Brenda's position when Rob was shot either the first or the second time. (Brenda Tr. XIII 3236).

With no evidence from which to argue that Petitioner or Brenda fired the shots, the State explicitly acknowledged, in both the guilt and sentence stages of Petitioner's

trial, that the evidence did not definitely establish who fired either of the two shots that killed Rob. (Tr. XIV-B 3513 ("Whether or not [Petitioner] actually pulled the trigger of that shotgun or whether or not he just helped [Brenda Andrew] in setting up the chain of events that occurred and then shot her, **I don't know**." (emphasis added)); Tr. XV 3741-42 ("Imagine the fear that Robert Andrew felt after he was shot that first time as **Mr. Pavatt or Brenda Andrew, whichever one of them did it**, reloaded that shotgun[.]") (emphasis added))).

After Petitioner's trial, Brenda provided prosecutors with a report from her own expert, who appears to have identified more areas of potential spatter than Mr. Bevel did. (Brenda Tr. XV 3574-87). Brenda's expert seemed to think Brenda's jeans were struck by blood from the second shot to Rob. (Brenda Tr. XV 3584-88). The defense argued Brenda was a bystander when this shot was fired but the State believed the evidence supported a finding that she pulled the trigger. (Brenda Tr. XIII 3224-25, 3236; Brenda Tr. XIV 3284-92; Brenda Tr. XV 3590-92; Brenda Tr. XVI 3674-76, 3690-97; Brenda Tr. XVII 4004-08, 4022, 4076-87, 4089-90).

Thus, based at least in part on this new evidence, the prosecutors argued at Brenda's trial that Brenda fired one or both shots. (Brenda Tr. XVII 3871, 3886, 3896, 3909, 4074, 4076-87, 4089-90, 4126). However, they also left open the possibility that Brenda did not fire the shots. (Brenda Tr. XVII 3881 ("Brenda Andrew had to remain in the garage and either reload the shotgun herself or remain there while Mr. Pavatt reloaded the shotgun."), 3882 ("Now what was Brenda Andrew doing if she wasn't doing the shooting and reloading?")). Either way, prosecutors told the jury that

Brenda and Pavatt were equally guilty. (Brenda Tr. XVII 3871, 3886, 3896, 3909, 4074, 4076-87, 4089-90, 4126). *See* (O.R. XI 2031 (a principal is one who commits the offense, or aids and abets in the offense, or advises and encourages the offense; a principal *is "equally guilty*") (emphasis added)).

The OCCA affirmed Petitioner's convictions and sentences on direct appeal, *see Pavatt*, 159 P.3d 272, *cert. denied Pavatt v. Oklahoma*, 552 U.S. 1181 (2008), and then later denied his first two applications for post-conviction relief, *Pavatt v. State*, No. PCD-2004-25 (Okla. Crim. App. Apr. 11, 2008) (unpublished); *Pavatt v. State*, No. PCD-2009-777 (Okla. Crim. App. Feb. 2, 2010) (unpublished). Petitioner then completed one full round of federal habeas review, ultimately obtaining no relief. *Pavatt v. Trammell*, 2015 WL 6621397 (W.D. Okla. May 1, 2014) (unpublished) (federal habeas petition), *Pavatt v. Royal*, 859 F.3d 920 (10th Cir. 2017) (first panel opinion), *amended on denial of reh'g by Pavatt v. Royal*, 894 F.3d 1115 (10th Cir. 2017) (second panel opinion), *reh'g en banc opinion vacated by Pavatt v. Carpenter*, 928 F.3d 906 (10th Cir. 2019) (en banc), *cert. denied*, 589 U.S. 1180 (Jan. 27, 2020).

On August 27, 2026, the OCCA scheduled Petitioner's execution for November 12, 2026. On September 18, 2026, Petitioner received the State's clemency packet which purportedly furnished the factual basis for his claim. Yet, Petitioner waited until October 28, 2026, to file the Third Application that is the subject of the instant Petition. Petitioner raised the following lone proposition: (1) newly discovered evidence proves that the prosecution at Petitioner's trial violated his due process, confrontation, fair trial, and impartial jury rights under the Sixth and Fourteenth

amendments to the United States Constitution "by intentionally bringing prejudicial, false, and extra-record information to the jury's attention, which influenced at least one juror to vote for the death penalty." (Pet. App. at 28a). The supposed new evidence was an affidavit from a juror and the State's acknowledgment, in the clemency packet the State submitted to the Oklahoma Pardon and Parole Board, that it was possible that Petitioner fired both shots, that Brenda fired both shots, or that Petitioner fired the first shot and Brenda fired the second shot. (Pet. App. at 297a).

The OCCA, in denying Petitioner's Third Application, determined that Petitioner's "new" evidence was previously available: "prosecutors argued as early as Brenda Andrew's 2004 jury trial that she, not Petitioner, fired the second shot after reloading the shotgun." (Pet. App. at 8a). "Such arguments by counsel have been readily discoverable for more than twenty years." (Pet. App. at 9a). The court further held that the juror affidavit was improper for it to consider. (Pet. App. at 9a-11a). The OCCA thus found the claim procedurally barred pursuant to a state statute placing strict limits on state collateral review. (Pet. App. at 6a-12a (citing OKLA. STAT. tit. 22, § 1089(D)(8)).

REASONS FOR DENYING THE WRIT

Mere days before his execution, Petitioner asks this Court to reverse his sentence based on an inadmissible juror affidavit and evidence that has been available to him for approximately twenty years. With limited exceptions, the OCCA will not consider claims raised in successive post-conviction applications. OKLA. STAT. tit. 22, § 1089(D)(8) (Supp. 2022). Thus, the OCCA found Petitioner's claim

procedurally barred. (Pet. App. at 6a-12a). This Court does not have jurisdiction over a state court decision denying relief based on an adequate and independent state law ground. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). Accordingly, the Petition should be denied.

Certiorari Should Be Denied Because This Court Lacks Jurisdiction over the OCCA's Denial of Relief Pursuant to Adequate and Independent State Law Grounds.

Petitioner asks this Court to stay his execution and review the OCCA's denial of his Sixth and Fourteenth Amendment claim. This Court should deny certiorari because Petitioner's claim is procedurally barred.

A. This Court Lacks Jurisdiction over Claims Denied in State Court Pursuant to Adequate and Independent State Law Grounds.

The OCCA does not consider claims raised in a successive post-conviction application which could have been raised in earlier proceedings. OKLA. STAT. tit. 22, § 1089(D)(8) (the OCCA "may not" grant relief for claims raised in successive post-conviction applications unless: 1) the legal basis therefore was previously unavailable or 2) the factual basis therefore was previously unavailable *and* "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the alleged error, no reasonable fact finder would have found the applicant guilty of the underlying offense or would have rendered the penalty of death"). This procedural bar is both independent and adequate. *Pavatt*, 928 F.3d at 929-30.

State law likewise bars consideration of juror affidavits like that presented by Petitioner:

> Upon an inquiry into the validity of a verdict or indictment, a juror shall not testify as to any matter or statement occurring during the course of the jury's deliberations or as to the effect of anything upon the juror's mind or another juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes during deliberations. A juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. An affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying shall not be received for these purposes.

OKLA. STAT. tit. 12, § 2606(B) (2021). Federal courts recognize a similar prohibition. *See Warger v. Shauers*, 574 U.S. 40, 42 (2014).

The OCCA's application of adequate and independent state law grounds to Petitioner's claim, (Pet. App. at 6a-12a), precludes this Court's review of his question presented:

> 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. This rule applies whether the state law ground is substantive or procedural. In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional. Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory.

Coleman, 501 U.S. at 729 (citations omitted).

B. The OCCA's Ruling Rested on Adequate and Independent State Law Grounds.

In his third post-conviction application, Petitioner raised one proposition of error. Petitioner argued that newly discovered evidence established that his rights to due process, confrontation, a fair trial, and an impartial jury were violated based on the prosecution's alleged injection of false, non-record evidence at trial. The claim relied on "new evidence" contained in the State's clemency packet submission to the Oklahoma Pardon and Parole Board and an affidavit completed by the jury foreman on October 26, 2026. (Pet. App. at 28a-29a, 32a-33a, 36a-53a).

The claim revolves around whether Petitioner or Brenda personally fired the shots that ended Rob Andrew's life, which Petitioner claims could have affected the jury's decision to sentence him to death. Petitioner claimed prosecutors argued during sentencing at his trial that he fired both shots, but that the State admitted in its clemency packet that he may have fired both, neither, or one of the shots. (Pet. App. at 28a-29a, 32a-33a, 36a-37a). The OCCA disagreed, finding that prosecutors *did not* argue at Petitioner's trial that he fired both shots: "Having reviewed the portions of the trial transcript upon which [Petitioner] relies, we respectfully disagree with Petitioner's interpretation of the State's closing argument as casting Petitioner as the lone shooter." (Pet. App. at 8a).

The OCCA was correct. The State told Petitioner's jury it did not know who fired the shots. (Tr. XIV-B 3513; Tr. XV 3741-42). Petitioner points to various assertions by prosecutors that he "killed" or "murdered" Rob Andrew as examples of the prosecutor arguing that "he, and he alone, inflicted the fatal shots that snuffed

out Rob Andrew's life." (Pet. at 1-2, 12-13). Petitioner's argument fails to appreciate the concept of principal liability, under which a person who aids or abets another in committing murder is as guilty as the person who physically causes death. *See* (O.R. XI 2031 (a principal is one who commits the offense, or aids and abets in the offense, or advises and encourages the offense; a principal *is "equally guilty*") (emphasis added)). Petitioner murdered and killed Rob, even if Brenda fired both shots.

The court further held that, even if it agreed with Petitioner as to the State's theory at his trial, "he still fails to demonstrate the factual basis upon which he bases his claim—*i.e.*, the State's acknowledgement [in its clemency packet] of a different possible shooting scenario—was not previously discoverable through the exercise of reasonable diligence." (Pet. App. at 8a). "Indeed, prosecutors argued as early as Brenda Andrew's 2004 jury trial that she, not Petitioner, fired the second shot after reloading the shotgun."[2] (Pet. App. at 8a). Thus, the OCCA said of the State's clemency packet, "[t]here is nothing new in counsel for the State expressing ambiguity as to whether Brenda Andrew shot her husband, or even affirmative beliefs that she did. Such arguments by counsel [for the State] have been readily discoverable for more than twenty years." (Pet. App. at 9a).

The OCCA likewise found no cause for relief with respect to the juror affidavit: "We cannot consider the affidavit as it constitutes an improper intrusion into the

[2] Petitioner claims the State's theory at both trials was "that a single shooter killed Rob Andrew[.]" Pet. at 11. However, he then acknowledges that the State argued, at Brenda's trial, "that she fired *the second shot* that killed her husband." Pet. at 11 n.3 (emphasis added); *see* Pet. at 14 (quoting Brenda's trial in which the prosecutor argued that Rob looked up after the first shot and "***this time***, *[be]cause the blood spatter shows you*, he saw [Brenda's] face over the barrel of a shotgun." (first emphasis added)).

jury's mental processes during deliberation." (Pet. App. at 9a (citing OKLA. STAT. tit. 12, § 2606(B) (2021))). The court refused to consider the affidavit, rejecting Petitioner's argument that the affidavit concerned evidence that the jury was exposed to extraneous information: "closing arguments given by counsel *during jury trial proceedings* cannot reasonably be construed as extraneous information or an outside influence improper for the jury's consideration." (Pet. App. at 11a) (emphasis adopted).

Petitioner asks this Court to consider whether an exception to the so-called "no-impeachment rule" should be made in his case. Pet. at 19-24. But he did not ask the OCCA to make any such exception. Instead, Petitioner argued the juror's affidavit falls within an exception carved out in § 2606(B) as to extraneous information. (Pet. App. at 41a-43a, 47a-48a). This Court generally does not decide questions that were not pressed or passed on below.[3] *United States v. Williams*, 504 U.S. 36, 41 (1992).

It should not do so here, in a case in which it lacks jurisdiction, for a claim that is based on a false factual premise (that the prosecutor argued Petitioner was the only shooter). To be sure, this Court in *Pena-Rodriguez v. Colorado*, 580 U.S. 206, 227 (2017), recognized a narrow Sixth Amendment exception to no-impeachment rules that are ubiquitous across state and federal courts: "When jurors disclose an instance of racial bias as serious as the one involved in this case, the law must not wholly disregard its occurrence." But *Pena-Rodriguez* came to this Court on direct review. *See Pena-Rodriguez*, 580 U.S. at 214. Petitioner, in contrast, raised his claim on third

[3] Petitioner also raises claims under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Napue v. Illinois*, 360 U.S. 264 (1959). Pet. at 26-28. These claims were not raised below.

post-conviction, and the OCCA barred the claim pursuant to § 1089(D)(8)(b)(1). Even assuming this Court were inclined to expand the exception carved out in *Pena-Rodriguez*,[4] this case is not an appropriate vehicle given that this Court has no jurisdiction to consider Petitioner's claim that was barred under state law.

Moreover, the OCCA's application of § 2606(B) is not necessary to the court's judgment. The juror's affidavit does not bear on when the factual basis for Petitioner's claim became available. As found by the OCCA, Petitioner's claim has been "readily discoverable for more than twenty years." (Pet. App. at 9a). Petitioner could have asked this juror whether the State's arguments at Brenda's trial would have affected his verdict. Thus, even if the affidavit were not barred by § 2606(B), Petitioner's claim would remain barred under § 1089(D)(8)(b)(1), and a decision by this Court on the no-impeachment question could not affect the judgment.

Petitioner further argues that application of § 1089(D)(8)(b)(1) to his case was not adequate. A state procedural rule is adequate if it is "firmly established and regularly followed." *Beard v. Kindler*, 558 U.S. 53, 60 (2009) (quotation marks omitted). The Tenth Circuit has repeatedly held that § 1089(D)(8) is adequate. *Pavatt*, 928 F.3d at 929-30.

Petitioner nonetheless claims the bar is inadequate because, in one case, the OCCA held that "the controlling date for newly discovered evidence under Okla. Stat.

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[4] *Cf. United States v. Nucera*, 67 F.4th 146, 151 (3d Cir. 2023) (*Pena-Rodriguez* "is narrow and specific: it requires a clear statement that a juror voted for conviction based on racial animus toward, or stereotypes about, *the defendant*.") (emphasis adopted); *Young v. Davis*, 860 F.3d 318, 334 (5th Cir. 2017) ("We decline the invitation to extend further the reach of *Pena-Rodriguez*, one antithetical to the privacy of jury deliberations—a principle whose loss would be attended by such high costs as to explain its veneration.").

Ann. Tit. 22, § 1089(D)(8)(b)(1) is the date 'the factual particulars' of the current claim were 'fully discovered.'" Pet. at 28 (quoting *Davison v. State*, 531 P.3d 649, 653-54 (Okla. Crim. App. 2023)). Petitioner is wrong. The court in *Davison* was addressing a different state procedural rule that requires any subsequent post-conviction application to be "filed within sixty (60) days from the date the previously unavailable legal or factual basis serving as the basis for a new issue is announced or discovered." *Davison*, 531 P.3d at 653-54 ("Since the factual basis of the claim was not fully discovered before the last of these materials was obtained in late September 2022, Petitioner's filing of the claim, on November 28, 2022, was within sixty days of its factual discovery, as required by Rule 9.7(G)(3)."); *see* Rule 9.7(G)(3), *Rules of the Oklahoma Court of Criminal Appeals*, OKLA. STAT. tit. 22, Ch. 18, App. Petitioner cites no case in which the OCCA failed to apply § 1089(D)(8). Section 1089(D)(8) is adequate.

Petitioner also argues the bar is not independent because it is "'intertwined with questions of federal law.'" Pet. at 29 (quoting *Glossip v. Oklahoma*, 604 U.S. 226, 242 (2025)). A state procedural bar is not independent if it "fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Coleman*, 501 U.S. at 735 (quotation marks omitted). The Tenth Circuit has repeatedly held that § 1089(D)(8) is independent. *Pavatt*, 928 F.3d at 929-30.

In *Glossip*, the State confessed error and waived procedural defenses. 604 U.S. at 243. The OCCA rejected the State's waiver and confession based on its "conclu[sion] that the underlying evidence 'd[id] not create a *Napue* error.'" *Id*. (quoting *Glossip v. State*, 529 P.3d 218, 226 (Okla. Crim. App. 2023) (second alteration adopted)).

In Petitioner's case, the OCCA did not address the merits of Petitioner's claim. (Pet. App. at 6a-12a). The court rested its decision solely on its finding that "the factual basis for Petitioner's sole claim of error was ascertainable through the exercise of reasonable diligence at the time of direct appeal and prior post-conviction proceedings." (Pet. App. at 6a-12a). The court did not at all discuss Petitioner's argument that the prosecutor's statements at his trial rendered his trial unfair. (Pet. App. at 5a-12a). The OCCA did disagree with Petitioner's characterization of the State's arguments at his trial. (Pet. App. at 8a). But this factual finding, unaccompanied by any legal reasoning, does not amount to an adjudication of Petitioner's federal claim. Moreover, even if it did, the OCCA further held that "even if we were to take Petitioner's view of the arguments, he still fails to demonstrate the factual basis" for the claim "was not previously discoverable through the exercise of reasonable diligence." (Pet. App. at 8a). Assuming *arguendo* the OCCA found Petitioner's federal claim lacked merit, it did so alternatively and, thus, its decision was independent. *See Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989) ("a state court need not fear reaching the merits of a federal claim in an *alternative* holding") (emphasis adopted).

Finally, Petitioner claims the OCCA's decision was not independent because it contravened this Court's holding that "[a] rule thus declaring prosecutor may hide, defendant must seek, is not tenable in a system constitutionally bound to accord defendants due process." Pet. at 29 (citing *Banks v. Dretke*, 540 U.S. 668, 696 (2004) (quotation marks omitted)). Petitioner does not explain how the OCCA's alleged conflict with *Banks* renders its decision *dependent on* federal law. The OCCA denied Petitioner's claim under § 1089(D)(8)(b) without reference to federal law. Its decision is independent and this Court lacks jurisdiction.

Respondent respectfully asks this Court to deny the Petition.

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

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