No. 26-6095

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The State complains that Mr. Pavatt's petition arrives at this Court "[m]ere days before his execution," thus suggesting that the constitutional questions it presents are raised merely to manufacture delay in the enforcement of an otherwise just death sentence. (Brief in Opposition ("BIO") at 7.) But make no mistake: Mr. Pavatt's constitutional claims are before this Court at the eleventh hour *only* because the State successfully suppressed until now lead prosecutor Fern Smith's use of knowingly false information to win Mr. Pavatt's death sentence. *See Storey v. Lumpkin*, 142 S. Ct. 2576, 2578 (2022) (Sotomayor, J., statement respecting denial of certiorari) (condemning circumstances that "reward[] prosecutors who successfully conceal" misconduct and thus "run out the clock and escape any responsibility for all but the most extreme violations[]").

Smith has prosecuted numerous Oklahoma County capital cases involving fundamentally unfair misconduct, as this Court well knows. *See, e.g.*, *Glossip v. Oklahoma*, 604 U.S. 226 (2025); *Andrew v. White*, 604 U.S. 86 (2025). This case is of that corrupt ilk.

Only on September 18, 2026 did the State finally fulfill its obligation to stop "conceal[ing] significant exculpatory . . . materials" and "set the record straight." *See Banks v. Dretke*, 540 U.S. 668, 675–76 (2004). It cannot now legitimately complain of delay of its own making. *See Sawyer v. Smith*, 497 U.S. 227, 246 (1990) (Marshall, J., dissenting) ("[T]he State has no legitimate interest in the finality of the death

sentence it obtained through intentional misconduct.").

Importantly, the State's Brief in Opposition ("BIO") acknowledges that the trial prosecutors who won Mr. Pavatt's death sentence had "**no evidence from which to argue that Petitioner or Brenda [Andrew] fired the shots**" that snuffed out Rob Andrew's life. (BIO at 4 (emphasis added).) Nor does the State dispute that the record of Mr. Pavatt's sentencing proceeding shows that—despite "no evidence" from which to argue that Mr. Pavatt fired those fatal shots—the trial prosecutors nevertheless told his jury **over 20 times that Mr. Pavatt did fire the shots**, including:

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

- "[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 (emphasis added).

The State nevertheless urges this Court to deny Mr. Pavatt's petition on the grounds that: (1) the OCCA's conclusion that it was "previously discoverable" that the State did not know the identity of Rob Andrew's killer is adequate and independent to remove this Court's jurisdiction over Mr. Pavatt's Sixth and Fourteenth Amendment claims; (2) Mr. Pavatt's Sixth and Fourteenth Amendment claims were not fairly presented below; and (3) Mr. Pavatt's constitutional claims fail to appreciate that Mr. Pavatt "murdered **and killed Rob**, even if Brenda fired both shots." *Id.* (emphasis added). (BIO at 7–16.)

Each argument fails under scrutiny.

ARGUMENT

I. The OCCA's determination that the State's eleventh-hour concession—that it has no idea who actually shot and killed Rob Andrew, contrary to what the State told Mr. Pavatt's jury—was "previously discoverable" is not an adequate or independent jurisdictional bar to this Court's review.

The State's defends the adequacy of the OCCA's finding that the factual basis of Mr. Pavatt's claims have been "readily discoverable for more than twenty years,"

by replicating that court's reliance on a flawed factual premise: "There 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 apparent for more than twenty years." (BIO at 11 (quoting Pet. App. at 9a).)

But the factual basis of Mr. Pavatt's claim is **not** that the State has expressed "ambiguity" as to whether Mrs. Andrew shot her husband, or its "affirmative belief" that she killed him. Rather, the factual basis for Mr. Pavatt's claim is the State's concession—for the first time on September 18, 2026—that **it has no idea who actually shot and killed Rob Andrew** and that there are three scenarios (two of which exclude Mr. Pavatt as the person who inflicted the critical second shot) explaining how Mr. Andrew's life was extinguished, which is *the oppositive* of what trial prosecutors told Mr. Pavatt's jury in order to win his death sentence. (Pet. at 1–6, 11–18.)

The State acknowledges, as it must, that in *Davison v. State*, 531 P.3d 649, 653–54 (Okla. Crim. App. 2023), the OCCA held in a successor postconviction posture that "the factual basis of the claim was not fully discovered before the last of the[] materials [on which it relied] was obtained." (BIO at 14.) However, the State attempts to distinguish the "reasonable diligence" test that the OCCA applied in *Davison* from the contrary rule it applied below to bar Mr. Pavatt's claims, by arguing that "[t]he 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 rule is announced or discovered." (BIO at 13 (citing *Davison*'s discussion of OCCA Rule 9.7(G)(3)).) In other words, according to the State, *Davison* was not applying the "reasonable diligence" standard in Okla. Stat. Ann. tit. 22, § 1089(D)(8).

The State's argument is difficult to square with *Davison*, where the OCCA specifically cites Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b)(1) in discussing the petitioner's diligence: "The factual basis of a claim is 'unavailable' when the facts 'were not ascertainable through the exercise of reasonable diligence' at the time of filing a prior application." *Davison*, 531 P.3d at 651 (citing "§ 1089(D)(8)(b)(1) and (2)). Separate and apart from the "reasonable diligence" inquiry under § 1089(D)(8)(b)(1), the court in *Davison* discussed Rule 9.7(G)(3) only in assessing the distinct question of whether the petitioner brought his successive claim "within sixty days from the date the previously unavailable factual basis was discovered." *Id.* *Davison* thus does not support the State's suggestion (at BIO at 13–14) that § 1089(D)(8)(b)(1) and Rule 9.7(G)(3) of the OCCA's rules erect different "reasonable diligence" standards. In fact, it reenforces that the OCCA's failure to give Mr. Pavatt the benefit of the rule it there applied renders its preclusion of his constitutional claims inadequate. *See Hathorn v. Lovorn*, 457 U.S. 255, 263 (1982) ("State courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar claims.").

Finally, the OCCA's application of its "reasonable diligence" rule in a manner that contravenes this Court's decision in *Banks v. Dretke*, 540 U.S. 668, 696 (2004), renders that application "interwoven" with Fourteenth Amendment due process questions. *See Michigan v. Long*, 463 U.S. 1032, 1040–41 (1983). After all, state courts are presumed to "know and follow the law." *Woodford v. Viscotti*, 537 U.S. 19, 24 (2002). Hence, the OCCA's determination that Mr. Pavatt had the obligation to suss out the State's misconduct decades ago necessarily required the OCCA to conclude that its interpretation of that rule did not violate the Due Process Clause.

II. Mr. Pavatt preserved Sixth and Fourteenth Amendment challenges, both to Oklahoma's no-impeachment rule and to the due process violations attendant to his death sentence under *Brady, Napue*, and *Donnelly*, below.

The State argues that the OCCA never considered the Sixth and Fourteenth Amendment claims that Mr. Pavatt's petition raises because he failed to alert the court to those issues. (BIO at 12 & n.3.) The State is correct that the OCCA never addressed these issues, but that doesn't end the analysis. "It is too obvious to merit extended discussion that whether the exhaustion requirement . . . has been satisfied cannot turn upon whether a state appellate court chooses to ignore in its opinion a federal constitutional claim squarely raised in petitioner's brief in state court[.]" *Dye v. Hofbauer*, 546 U.S. 1, 6–7 (2005) (quoting *Smith v. Digmon*, 434 U.S. 332, 333 (1978)). So long as a petitioner alerts the state court "to the fact that [they] are asserting claims under the United States Constitution," a federal claim is fairly presented. *Duncan v. Henry*, 513 U.S. 364, 365–66 (1995) (per curiam); *Baldwin v.*

Reese, 541 U.S. 27, 32 (2004) ("A litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state-court petition or brief, for example, by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling the claim 'federal'").

In *Dye*, this Court looked to "the brief petitioner filed in state court" to assess whether it "sets out the federal claim." 546 U.S. at 3. It found that the petitioner's due process claim was preserved under "[t]he fourth argument heading in his brief" where it "[o]utlin[ed] specific allegations of prosecutorial misconduct[,]" "cite[d] the Fifth and Fourteenth Amendments to the Constitution of the United States[,]" and

> further cite[d] the following federal cases, all of which concern alleged violations of federal due process rights in the context of prosecutorial misconduct: *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974); *Berger v. United States*, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935); *United States v. Valentine*, 820 F.2d 565 (C.A.2 1987); *United States v. Burse*, 531 F.2d 1151 (C.A.2 1976).

Id. at 4.

Under the tests set forth in *Dye* and *Baldwin*, a review of Mr. Pavatt's lower court postconviction application demonstrates that he fairly presented to the OCCA the arguments that: (1) the Sixth and Fourteenth Amendments' fair trial and due process guarantees require consideration of the jury foreman's affidavit attesting to the dispositive, prejudicial effect that the trial prosecutors' presentation of knowingly false information had on his decision to sentence Mr. Pavatt to death; and (2) his Sixth and Fourteenth Amendment fair trial and due process rights under *Donnelly*,

Brady, and *Napue* were violated by the State's presentation of knowingly false evidence at the penalty phase of his capital trial.

As even the State acknowledges (BIO at 6–7), Proposition One in Mr. Pavatt's postconviction application below alleged that:

> Newly discovered evidence proves that the prosecution at James Pavatt's trial violated his rights to due process, confrontation, a fair trial, and an impartial jury under the Sixth and Fourteenth Amendments to the United Stats Constitution and Article II, Sections 7 and 20 of the Oklahoma Constitution by intentionally bringing non-record, misleading, and prejudicial information to the jury's attention, which influenced at least on juror to vote for the death penalty.

Pet. App. 28a. Mr. Pavatt thus explicitly alerted the OCCA to the arguments that the Sixth and Fourteenth Amendments required it to consider statements from one of his jurors in assessing his fair trial, due process, confrontation, and impartial jury claims; and that his federal due process rights were violated by the prosecutor's presentation of false, prejudicial information to the jury. This, standing alone, is sufficient to fairly present these claims to the OCCA. *See Baldwin*, 541 U.S. at 32 (to fairly present a federal claim, a litigant can "simply label[] the claim 'federal'"). But that's not all Mr. Pavatt did.

Under Proposition One, Subsection (B) of his postconviction application to the OCCA, Mr. Pavatt argued that:

> The trial prosecutors violated Mr. Pavatt's rights to due process, confrontation, a fair trial, and an impartial jury by intentionally bringing false, extraneous, and prejudicial information to the jury's attention in the sentencing stage by repeatedly insisting, without evidentiary support, that he fatally shot Rob Andrew.

Pet. App. 40a. Within that subsection, when discussing "The Legal Standard" applicable to his claims, Mr. Pavatt cited *Napue v. Illinois*, 360 U.S. 264, 269 (1959), for the proposition that "'[I]mplicit in any concept of ordered liberty is '[t]he principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction[.]'" Pet. App. 40a. He also cited *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)—where this Court applied *Napue* to a claim of false prosecutorial argument—for the proposition that "a prosecutor's false or misleading statements during closing argument violate due process if they render a capital sentencing fundamentally unfair." Pet. App.40a; *see also* Pet. App.41a (Mr. Pavatt arguing further that "due process guarantees a criminal defendant the right to be tried by an impartial jury[]" and citing *Skilling v. United States*, 561 U.S. 358, 377 (2010)). This was more than sufficient for Mr. Pavatt to alert the OCCA to his Sixth and Fourteenth Amendment claims. *See Duncan*, 513 U.S. at 365–66.

With respect to Mr. Pavatt's claim that the Constitution requires an exception to Oklahoma's no-impeachment rule under the circumstances in his case, he cited this Court's seminal cases on the existence of such an exception in "grave" and "most important cases." *See* Pet. App. 41a-42a (citing *Warger v. Shauers*, 574 U.S. 40, 51 (2015), and *United States v. Reid*, 53 U.S. 361, 366 (1851)); *cf. Baldwin*, 541 U.S. at 33 ("The petition provides no citation of any case that might have alerted the court to the alleged federal nature of the claim."). And *Peña-Rodriguez* addressed the Constitutional question that *Warger* and *Reid* left open. *Peña-Rodriguez*, 580 U.S.

206, 221 (2017) ("Today, however, the Court faces the question that *Reid*, *McDonald [v. Pless*, 238 U.S. 264 (1915)], and *Warger* left open."). Mr. Pavatt also went further than citing *Reid* and *Warger*. He specifically argued to the OCCA that "[t]he underlying principle behind these cases and others involving prejudicial extraneous information or influences brough to the jury's attention is that 'cases may arise in which it would be impossible to refuse [juror testimony] without violating the plainest principles of justice." Pet. App. 42a (citing *Reid*, 53 U.S. at 366).

Mr. Pavatt thus squarely presented the OCCA with his federal claims. There can be no misunderstanding that Mr. Pavatt was raising claims of federal constitutional error. The OCCA's decision not to adjudicate Mr. Pavatt's federal claims does not deprive this Court of jurisdiction to do so.

With respect to Mr. Pavatt's claim that the Sixth and Fourteenth Amendments require an exception to the no-impeachment rule under the "grave" and "most important" circumstances here, *Reid*, 53 U.S. at 366, the Court should reject the State's invitation to limit *Peña-Rodriguez* to its facts. (BIO at 12–13.) While *Peña-Rodriguez*, presented this Court with circumstances that compelled a constitutional exception to Colorado's no-impeachment rule, the State does not credibly dispute that Mr. Pavatt presents this Court with another such case.

The rationale underlying *Peña-Rodriguez* is whether applying the no-impeachment rule "would risk systemic injury to the administration of justice." *Peña-Rodriguez*, 580 U.S. at 224. That rationale applies here too. "As applied to a criminal

trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice." *Lisenba v. California,* 314 U.S. 219, 236 (1941). State action violates due process where 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Patterson v. New York*, 432 U.S. 197, 201–02 (1977) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

This Court has not hesitated to find fundamental injustice where the state knowingly misrepresents evidence, *Miller v. Pate,* 386 U.S. 1 (1967); presents false or misleading testimony, *Mooney v. Holohan,* 294 U.S. 103 (1935); fails to correct false testimony, *Napue*, 360 U.S. 264; or withholds material evidence, including in a capital sentencing proceeding, *Brady v. Maryland*, 373 U.S. 83 (1963). In each of these cases, the trial prosecutor did something to subvert the very foundation of the Constitution's fair trial guarantee and prevented the factfinder from making a fair, reliable, and fully informed decision. In each case, the prosecutor's actions violated the promise that the Constitution's due process and fair trial guarantees stand as a bulwark for "[t]hose who have [ ] the full thrust of the power of government [] leveled against them[.]" *Donnelly*, 416 U.S. at 650–51 (Douglas, J., dissenting).

This Court should give Mr. Pavatt the benefit of these straightforward constitutional principles—which the prosecutors here abandoned to win his death sentence—by granting his petition. Just like the no-impeachment rule has no place when it comes to evidence of racial bias—with its attendant unique historical,

constitutional, and institutional concerns, *Peña-Rodriguez*, 580 U.S. at 224—the no-impeachment rule must also give way to evidence of prosecutorial misconduct that allowed the State to win a death sentence by violating bedrock principles of fundamental fairness, offending deeply-rooted notions of justice, and betraying their unique role as ministers of justice whose duty "is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 87 (1935).

III. The State, like the OCCA below, ignores the record demonstrating that trial prosecutors repeatedly told Mr. Pavatt's jury that he "killed," "executed," and "snuffed out" Rob Andrew's life.

The State insists that Mr. Pavatt's constitutional claims are premised on his "fail[ure] 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." (BIO at 11.) Hence, so goes the State's argument, "[t]he OCCA was correct" to reject his claims because he "murdered **and killed Rob**, even if Brenda fired both shots." *Id.* (emphasis added). The problem with the State's argument—like the OCCA's decision below—is that it runs headfirst into the record and this Court's decision in *Henderson v. Morgan*, 426 U.S. 637 (1976), where it recognized the (obvious) distinction between the act of "killing" and culpability for "murder" under the legal definition of that term.

The record here shows that prosecutors told Mr. Pavatt's jury in the guilt/innocence stage that he committed "murder" as a principal under the legal definition. (BIO at 10 (citing Tr. at 3513).) But then during the sentencing stage, to

win Mr. Pavatt's death sentence, prosecutor Smith shifted course, telling jurors over and again that Mr. Pavatt "kill[ed]," "executed," and "snuffed out" Rob Andrew's life. Pet. App.345a; Pet. App. 344a; Pet. App. 355a; Pet. App. 359a. And not only that, Smith also told jurors that Mr. Pavatt "enjoyed the suffering" that he inflicted on Mr. Andrew. Pet. App. 344a. While the State cherry-picks **the one instance** from the trial prosecutor's otherwise lengthy penalty phase closing argument, which spans 37 transcript pages, referring to "Mr. Pavatt or Brenda Andrew, whichever one of them did it" (BIO at 5), it ignores the **more than 20 other instances** in which the prosecution clearly and unequivocally told the jurors that Mr. Pavatt "kill[ed]," "executed" and "snuffed out" Rob Andrew's life. Pet. App. 345a; Pet. App. 344a; Pet. App. 355a; Pet. App. 359a. The State's assertion that these terms just reflect "principal liability" (BIO at 11) strains credulity; certainly Mr. Pavatt's jury foreman plainly understood the prosecution to be basing its case for death on Mr. Pavatt being the actual shooter. Pet. App. 317a-320a.

In *Henderson*, this Court identified the important distinction between an act of killing and legal liability for murder—a distinction which both the State and the OCCA's decision below elide. (BIO at 11.) This Court found that where the respondent, who concededly killed his victim in a knife attack, pled guilty to second-degree murder without being advised that "an intent to cause the death of his victim was an element of the offense . . . this judgment finding respondent guilty of second-degree murder was defective." 426 U.S. at 643–44. It went on to say, in no uncertain

terms, that "an admission by respondent that he killed [the victim] does not necessarily also admit that he was guilty of second-degree murder." *Id.* at 646. Yet here, in a death penalty case no less, the State asks this Court to deem this a distinction without a difference. (BIO at 11 ("Petitioner . . . killed Rob, even if Brenda fired both shots."). It should reject that invitation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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