No. 26A661

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 APPLICATION FOR A STAY OF EXECUTION

TO THE HONORABLE NEIL GORSUCH, ASSOCIATE JUSTICE OF THE SUPREME COURT:

Mr. Pavatt's pending petition for a writ of certiorari asks this Court to decide whether the Sixth and Fourteenth Amendments tolerate the State's use of knowingly false information to win a death sentence, and whether, in a capital case where that false information was dispositive to one juror's vote for a death sentence, the Constitution compels an exception to a state's no-impeachment rule. (Pet. at i.) These are serious questions which this Court has jurisdiction to reach and which, for Mr. Pavatt, carry life-or-death consequences.

While the State's opposition to Mr. Pavatt's stay request complains that his

petition arrives at this Court "[m]ere days before his execution" (Response at 1), the **only** reason Mr. Pavatt's claims are before this Court at the eleventh hour is because the State successfully suppressed until now **its** 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[]"). The State 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.").

The State also fails to demonstrate that a stay is unwarranted to permit this Court to consider the merits of the Sixth and Fourteenth Amendment questions that Mr. Pavatt's petition for a writ of certiorari presents. Its opposition is premised on the view that this Court lacks jurisdiction to even consider those constitutional questions because the Oklahoma Court of Criminal Appeals' (OCCA) decision below rests upon an adequate and independent state procedural bar. (Response at 1, 3–4.) But as demonstrated in Mr. Pavatt's contemporaneously filed Reply in Support of Petition for a Writ of Certiorari in No. 26-6095 and herein, this Court has jurisdiction over Mr. Pavatt's federal claims and should exercise it.

## I. This Court has jurisdiction over Mr. Pavatt's Sixth and Fourteenth Amendment claims because the OCCA's procedural bar was neither adequate nor independent, and Mr. Pavatt's federal claims were fairly presented below.

The State argues that the OCCA's application of a procedural bar prevents Mr. Pavatt from demonstrating a reasonable probability either that at least four Members of this Court will find the constitutional claims which his petition presents sufficiently meritorious to warrant a grant of certiorari, or that there is a significant possibility that the decision below will be reversed. (Response at 3–4.) But as Mr. Pavatt's petition and supporting reply show, the procedural bar which the OCCA applied below was neither adequate nor independent to foreclose this Court's jurisdiction over Mr. Pavatt's federal claims. (Pet. at 28–30; Reply at 3.)

To summarize, the OCCA's finding that the factual basis of Mr. Pavatt's claims has been readily discoverable for decades relies 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." (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.) Moreover, the OCCA's application of a "reasonable diligence" test to bar Mr. Pavatt's claims that contradicts its application in *Davison v. State*, 531 P.3d 649, 653–54 (Okla. Crim. App. 2023), renders that procedural bar inadequate as well. *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.").

The State also fails to rebut Mr. Pavatt's showing that 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.

Next, the State argues that Mr. Pavatt "did not press" his Sixth and Fourteenth Amendment claims below which should discourage this Court from reviewing them. (Response at 3–4.) Mr. Pavatt's reply in support of his certiorari petition explains why the State's argument here too misses the mark. (Reply at 3.)

As 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 v. Hofbauer*, 546 U.S. 1 (2005), 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 in its Brief in Opposition (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. at

221 ("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. 43a (citing *Reid*, 53 U.S. at 366) (emphasis added).

Thus, contrary to the State's argument otherwise (Response at 3–4), Mr. Pavatt squarely presented the OCCA with his federal claims. The OCCA's decision not to adjudicate Mr. Pavatt's federal claims does not deprive this Court of jurisdiction to do so.

## II. Mr. Pavatt will be irreparably harmed in the absence of a stay, and the equities favor its issuance.

The State's insistence that Mr. Pavatt will not be irreparably harmed if he is executed in the absence of a stay is premised on its view of his Sixth and Fourteenth Amendment claims as procedurally defaulted and meritless. (Response at 4–5.) It also maintains that "[t]o stay Petitioner's lawful execution based on his procedurally defaulted claim would be against the public interest." (Response at 5.) Those arguments fail for the same reasons that Mr. Pavatt has demonstrated that this Court has jurisdiction to hold that Constitution compels relief from his unconstitutional death sentence (Pet. at 19–30.)

Moreover, just as the public interest is served by ensuring prosecutors honor their constitutional obligations, the public interest is undermined by green lighting

Mr. Pavatt's execution were the State to execute him before he has had a full and fair opportunity to vindicate the Constitution's promise—all because the State successfully suppressed evidence of its misconduct until the eleventh hour before his execution was imminent. *See Storey*, 142 S. Ct. at 2578 (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[]").

Respectfully submitted,

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