No. 18-6728

In the Supreme Court of the United States

FRANCISCO R. QUINTANA,
Petitioner,

v.

COLORADO,
Respondent.

On Petition for Writ of Certiorari to
The Colorado Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When a judge in a criminal trial rules that the defense cannot ask a witness a particular question, that ruling—even if erroneous under the law of evidence—does not necessarily violate the defendant's constitutional right to present a defense, and does not necessarily require reversal of a conviction. Violation of the constitutional right, and reversal, are only required if the excluded defense would have been favorable and "material" in ways that are "not merely cumulative" to the testimony that was admitted. *United States v. Valenzuela-Bernal,* 458 U.S. 858, 873 (1982).

Here, Petitioner argued in Colorado's state courts that his claim had satisfied this materiality standard, but he never argued that Colorado was failing to recognize the standard, and did not otherwise argue that Colorado was operating under an incorrect analytical framework. Nonetheless, he now argues—for the first time in his Petition to this Court—that an earlier Colorado decision, *Krutsinger v. People*, 219 P.3d 1054 (Colo. 2009), departed from this Court's standard. Actually, Colorado follows this Court's standard, as do other jurisdictions around the country.

The question presented is therefore as follows:

> Whether this Court should grant review of a proposed certiorari question that Petitioner did not raise in Colorado's courts, especially where Colorado has long followed the applicable standard announced by this Court.

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STATEMENT OF THE CASE

1. ***Background.*** Zachary Rodriguez and Lena Atencio met Petitioner Francisco Quintana after leaving a party, and Petitioner invited them to his house. Tr. 1/29/13, pp. 108–13, 116, 139–40, 152–54; 1/31/13, pp. 51–52, 104–05; Pet. App. at 4a, 7a–8a. There, Atencio and Rodriguez attempted to purchase $100 of drugs from Petitioner, but Petitioner either did not supply a sufficient quantity of drugs or attempted to sell them fake drugs. Tr. 1/29/13, pp. 115–16, 178, 163–64; Pet. App. at 4a, 7a–8a. Ultimately, Rodriguez demanded that Petitioner return the money, and when Petitioner refused, Rodriguez repeatedly challenged Petitioner "to fight for the money" and threatened Petitioner that he would "beat your ass." Petitioner retorted by saying "Oh, yeah?" and retrieving a pre-staged rifle. Pet. App. at 4a. Petitioner then fired at Rodriguez and missed, Rodriguez charged up the stairs towards Petitioner, and Petitioner shot him. *Id.* at 4a–5a.

Throughout this encounter, evidence was consistent that Rodriguez acted aggressively, threateningly, and belligerently, which Petitioner conceded below. *Id.* at 4a–5a, 7a–8a, 13a, 14a n.3, 15a. There was no question that Rodriguez acted otherwise. *Id.* Evidence also established that Petitioner was "high out of his mind." *Id.* at 8a. Importantly, Petitioner never told Rodriguez to leave. *Id.*

2. ***District court proceedings.*** At trial, Petitioner sought to introduce two instances of "other-acts" evidence implicating Rodriguez's aggressive nature. *Id.* at 11a–12a. The first concerned a prior altercation between Rodriguez and one of Petitioner's neighbors, which resulted in police removing Rodriguez from the

neighbor's home. *Id.* at 13a–14a. The second involved an incident earlier on the evening of the shooting, where Rodriguez had an altercation with his mother when she would not provide him with money; Petitioner did not know about this incident. *Id.* at 15a–16a. The court excluded the evidence of both incidents. *Id.* at 11a–12a, 15a–16a.

The jury rejected Petitioner's claim of self-defense and convicted him of first degree assault, menacing, sentencing enhancers related to the shooting, and misdemeanor use of a controlled substance. *Id.* at 4a–5a, 7a–9a.

3. ***Colorado Court of Appeals affirmance.*** The Colorado Court of Appeals affirmed. *Id.* at 3a–4a. It held that the district court erroneously excluded evidence of Rodriguez's altercation with the neighbor, but—as an evidentiary question—the exclusion was harmless. *Id.* at 11a–14a. It also held that the error was harmless under the constitutional standard for interfering with Petitioner's right to present a defense. *Id.* at 14a n.3. As to the exclusion of evidence of Rodriguez's altercation with his mother, the court of appeals "[a]ssum[ed] without deciding" that it was error to exclude but that it was nonetheless harmless.[1] *Id.* at 15a–17a. As to both instances, the court found that the evidence simply would have been cumulative to other admitted evidence concerning Rodriguez's aggressiveness and tendencies towards violence. *Id.* at 11a–17a.

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[1] It is questionable whether this was error at all, as specific instances of a victim's prior acts of violence are relevant only if the defendant had knowledge of the prior acts at the time of the offense. *E.g. People v. Jones*, 675 P.2d 9, 17 (Colo. 1984) (citing FED. R. EVID. 404 & 405 Advisory Committee Notes). Here, it is undisputed Petitioner did not have such knowledge.

In the Court of Appeals, Petitioner did not argue that Colorado failed to apply this Court's "materiality" standard. Nor did Petitioner argue that Colorado's materiality standard was different from this Court's standard. And Petitioner did not suggest there was any confusion in any other jurisdiction as to this Court's "materiality" standard for addressing harmless error review. Thus, the court of appeals did not consider any of these arguments.

The Colorado Supreme Court declined to review the Court of Appeals' decision. Petitioner now asks this Court to grant certiorari, raising contentions he did not present below.

REASONS FOR DENYING THE PETITION

There is no compelling reason to grant certiorari in this case.

First, this case is a poor vehicle to address the question presented. The question Petitioner raises—whether evidence need be "material" and what showing is necessary to establish that the erroneous exclusion of evidence violated a defendant's right to present a defense—was never raised, briefed, or addressed in any court below. His ancillary issue, that Colorado applies the wrong standard, likewise was never presented below. And Petitioner never suggested in the courts below that there is a material misunderstanding of how to assess erroneously excluded evidence—certainly not in a way that would implicate this case's facts or suggest that Colorado applies a different standard than this Court has directed.

Second, Petitioner's proposed issue that this Court has never imposed a "materiality" standard is flatly contradicted by long-settled law from this Court. In

those cases, this Court unambiguously affirmed the "materiality" requirement. Colorado follows that standard, see *Krutsinger v. People*, 219 P.3d 1054 (Colo. 2009), *cert. denied sub. nom. Krutsinger v. Colorado*, 559 U.S. 1049 (2010), and followed it here. The evidence here was not material under this Court's precedent, and the Colorado Court of Appeals' opinion was therefore correct.

Third, Petitioner's proposed split of authority is not a split at all. The cases he cites all address either factually inapposite circumstances or simply emphasize different factors than those either at issue or relied upon here. Granting certiorari would not resolve any confusion among lower courts, as there is none. Finally, the excluded evidence was not material, and thus Petitioner's reliance on the purported split in authority between jurisdictions imposing the materiality standard is immaterial.

I. This case is an inappropriate vehicle for addressing the Question Presented.

Petitioner's case is a poor vehicle for considering his Question Presented, because he did not raise it in the lower courts, and the arguments he makes now were therefore not addressed.

A. Petitioner's Question Presented was never presented below.

The Question Presented, as described in the Petition, was not presented by Petitioner in Colorado's courts. Although Petitioner did argue that the error in excluding evidence was not harmless, he did not argue that Colorado applied a standard different from this Court or that Colorado's standard required a greater showing than the "materiality" standard articulated by this Court. Rather, at all

times the parties agreed on the core analytical framework—that of whether the alleged evidentiary exclusion amounted to harmless error or, as a constitutional matter, was harmless beyond a reasonable doubt. In this respect, Petitioner's complaint is solely the application of the case's facts to existing law. At no time did Petitioner suggest the harmless error framework itself was inappropriate. The limited nature of Petitioner's arguments below is reflected in the Court of Appeals' discussion of the issue. That court's opinion resolves Petitioner's claims under the established harmlessness standard, but gives no indication that Petitioner had challenged the standard—because he in fact had not. Pet. App. 10a–17a.

Below, Petitioner relied exclusively on arguing that the error was not harmless under Colorado's settled harmless error framework. He did not suggest that framework was incorrect under this Court's jurisprudence, and he did not contend that the court of appeals misapplied this Court's framework but rather that he disagreed with the court of appeals' determination. Nor did he argue—as he does here—that what he labels as Colorado's "leading" case, *Krutsinger v. People*, 219 P.3d 1054 (Colo. 2009), is out of step with this Court's precedent. At best, he argued in his petition to the Colorado Supreme Court that the court of appeals had misapplied Colorado's harmless error analysis.

At no point did Petitioner suggest in the lower courts that Colorado had not adopted the materiality standard, the materiality standard was inapplicable, or that Colorado's framework was wrong under this Court's pronouncements. Because this avenue for relief was never presented, addressed, or resolved below, asking this

Court to assess these factors without any record or findings below to review makes this case an exceptionally poor vehicle to consider this question. *See Taylor v. Yee*, 136 S. Ct. 929 (2016) (mem.) (Alito, J., concurring in the denial of certiorari) (concurring in the denial of certiorari because the case was a "poor vehicle" for reviewing the question presented).

Even if making this argument would have been futile in the Colorado Court of Appeals, preserving it was required. *Cf. MedImmune, Inc. v. Genetech, Inc.*, 549 U.S. 118, 125 (2007) (holding that a futile argument to overrule precedent was properly preserved for subsequent consideration by developing a "few pages of [petitioner's] appellate brief" to preserve the issue).

B. This Court denied certiorari in *Krutsinger*, the Colorado case that Petitioner attacks.

Petitioner attacks *Krutsinger v. People*, 219 P.3d 1054 (Colo. 2009). Pet. 9–10, arguing that it is inconsistent with this Court's precedent. This Court declined to grant certiorari in that case. *See Krutsinger v. Colorado*, 559 U.S. 1049 (2010). While a denial of certiorari is of course not a ruling on the merits, *Krutsinger* at least presented the question of the appropriate harmless error framework: that topic was central to that case. *Krutsinger* directly addressed the question of materiality and constitutional harmlessness, by reckoning with this Court's decisions in *Valenzuela-Bernal*, *Strickler*, *Chapman*, and *Crane*.[2] And Mr. Krutsinger petitioned this Court *precisely* on the question of whether the Colorado

[2] *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982); *Strickler v. Greene*, 527 U.S. 263 (1999); *Chapman v. California*, 386 U.S. 18 (1967); *Crane v. Kentucky*, 476 U.S. 683 (1986).

Supreme Court had misinterpreted this Court's materiality requirement in crafting Colorado's harmlessness assessment. This Court denied review. There is no reason this Court should accept review now, in a case in which the materiality question was never presented, where it previously denied review in a case in which the issue had been squarely presented

Petitioner also claims that this Court has not applied a materiality standard in the past. Pet. 3. That claim is contrary to *Washington v. Texas*, 388 U.S. 14 (1967) and *United States v. Valenzuela-Bernal,* 458 U.S. 858 (1982). Revisiting the topic to clarify a question that is already settled is unnecessary. This case does not provide an adequate vehicle for addressing potential alterations to this Court's harmless error and materiality analysis, and it does not provide a compelling reason for doing so.

II. This Court long ago articulated the materiality harmlessness standard for review of constitutional errors.

Contrary to Petitioner's argument, Colorado adheres to the same "materiality" harmlessness standard for review of constitutional errors.

A. Petitioner is incorrect when he suggests this Court has not adopted a materiality standard.

This Court has been clear that reversal for violation of the Compulsory Process or Due Process clauses requires "some showing that the evidence lost would be both *material* and favorable to the defense ... in ways *not merely cumulative* to the testimony of available witnesses." *Valenzuela-Bernal,* 458 U.S. at 873 (emphasis added).

Petitioner claims that lower courts across the country have misinterpreted this Court's holdings in *Washington* and *Valenzuela-Bernal* to impose a "materiality" standard when evaluating constitutional errors for harmlessness. It is Petitioner, however, who has misread these cases, which unambiguously convey such a materiality standard. The materiality requirement is well settled and does not merit this Court's further attention.

In *Chapman v. California*, this Court held that only errors that specifically and directly offend a defendant's constitutional rights are "constitutional" in nature. 386 U.S. 18, 24–25 (1967) (applying a "harmless beyond a reasonable doubt" test for constitutional errors). This Court has repeatedly recognized that constitutional errors can be harmless beyond a reasonable doubt depending on, among other things, the importance of the witness's testimony in the prosecution's case, the presence or absence of corroborating evidence, any evidence contradicting a witness's testimony on material points, the extent of cross-examination permitted, and the cumulative nature of any testimony. *E.g. Olden v. Kentucky*, 488 U.S. 227, 232–33 (1988).

In *Crane v. Kentucky*, 476 U.S. 683, 687, 691 (1986), this Court held that the extent to which an evidentiary ruling prevents a defendant from subjecting a prosecutor's case to meaningful adversarial testing determines whether a defendant's constitutional right to confront witnesses or prevent a defense has been

violated.[3] This Court premised much of its holding in *Crane* on the exclusion of "meaningful adversarial testing" regarding information about the atmosphere of the defendant's interrogation, which the trial court had excluded and which this Court held had "highly relevant" probative considerations for assessing the confession's veracity. *Id.* at 688–69, 691. This Court recognized that special circumstances surrounded confession and suppression claims, particularly regarding evidence "bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence." *Id.* at 690. Nevertheless, it acknowledged that it was "reluctan[t] to impose constitutional constraints on ordinary evidentiary rulings by state trial courts" and that state courts had "'wide latitude' to exclude evidence that is 'repetitive [or] only marginally relevant.'" *Id.* at 689–90 (internal quotations omitted).

In *Washington*, this Court held that excluding "relevant and material" and "vital" evidence can violate a defendant's right to present a defense. 388 U.S. at 19. Relying on *Washington*, in *Valenzuela-Bernal*, this Court reiterated that a violation of the right to compulsory process as guaranteed by the Sixth Amendment required showing more than a "mere absence of testimony," but rather that the "arbitrarily deprived" testimony "would have been *relevant* and *material*, and ... *vital* to the defense." 458 U.S. at 867 (citing *Washington*) (emphasis in original). Thus, reversal for the deprivation of testimony required showing how that testimony "would have been *both material and favorable* to his defense." *Id.* (emphasis added). The

[3] The Colorado Supreme Court cited *Crane* for this principle. *See Krutsinger v. People*, 219 P.3d 1054, 1062 (Colo. 2009) (citing *Crane*, 476 U.S. at 689, 691).

omission must be evaluated "in the context of the entire record." *Id.* at 868, 874 n.10 (citing *United States v. Agurs*, 427 U.S. 97, 112–13 (1976)).

Petitioner proposes that *Valenzuela-Bernal* tied the necessity for such a materiality standard to the specific circumstances created in *Valenzuela-Bernal*, where the government had the obligation to deport potential witnesses, which thereby interfered with the defendant's right to compulsory process and to present a defense. Petitioner further suggests that *Valenzuela-Bernal* would not apply to a court's decision to exclude evidence. *Valenzuela-Bernal* was not so limited to the specific circumstance of deporting witnesses.

Rather, the purpose behind the "materiality" assessment was to assess whether the excluded evidence was relevant, material, and vital. The inaccessibility of deported witnesses merely provided the vehicle by which this Court re-articulated the materiality framework. This is clear based on *Valenzuela-Bernal*'s unequivocal, and repeated, citations to *Washington*, which also articulated the "vital" and "material" standard. *See id.*; *see also State v. McDaniel*, 665 P.2d 70, 76 (Ariz. 1983) ("In *Valenzuela-Bernal*, the United States Supreme Court discussed its holding in *Washington* and re-emphasized that an individual cannot establish a Sixth Amendment violation without some showing that the evidence lost would be both material and favorable to the defense." (internal quotations omitted)).

Petitioner's suggestion that *Valenzuela-Bernal* was limited to its narrow facts concerning evidence excluded due to the government's deportation of witnesses was unequivocally rejected in *United States v. Hoffman*, 832 F.2d 1299, 1303 n.3 (1st

Cir. 1987). *Hoffman* recognized that *Valenzuela-Bernal* had "different trappings," but the "bedrock issue" was the same: whether the state "impermissibly interfered with the [defendant's] right to mount a defense." *Id.* (citing *Valenzuela-Bernal*, 458 U.S. at 871). The deportation was "not of decisive consequence"; rather, what mattered "most for the purposes at hand is that the Court in *Valenzuela-Bernal* highlighted a number of the considerations that enter into the calculus necessary to determine when government's contribution to a defendant's inability to produce a witness runs afoul of the sixth amendment." *Id.* Indeed, *Valenzuela-Bernal* addressed excluded evidence by evaluating whether it was materially relevant.

This Court, and other courts, have extended the "materiality" requirement as to excluded evidence beyond *Valenzuela-Bernal* and applied it in other, similar contexts. *E.g. Strickler v. Greene*, 527 U.S. 263, 281 (1999) (in the context of a habeas proceeding, treating the constitutional materiality test as equivalent with the prejudice inquiry as applied to a prosecution's failure to disclose exculpatory information held by police); *Patton v. Mullin*, 425 F.3d 788, 797–98 (10th Cir. 2005) (applying, in habeas proceeding, the constitutional materiality test to evidence excluded by trial court's restriction on cross-examination).

Petitioner suggests that excluded evidence is "material" and requires reversal of a conviction whenever the excluded evidence was, to some degree, exculpatory. Pet. 2, 12 (citing *Washington*, 388 U.S. at 23). "Materiality" is not so broadly construed. Rather, reversal of a conviction is required only if the excluded evidence is relevant, material, and vital; it cannot be cumulative. *Valenzuela-Bernal*, 458

U.S. at 867–68, 873. And it must be "important." *See Washington*, 388 U.S. at 24 (Harlan, J., concurring). Justice Harlan's concurrence recognizing that the excluded evidence must be "important" signals two key points: (1) that the evidence not merely be cumulative; and (2) that the evidence in some way advances the inquiry. Regardless, both *Washington*, 388 U.S. at 16, 23, and *Valenzuela-Bernal*, 458 U.S. at 866–67, explicitly and repeatedly adopt the materiality standard. Here, the excluded evidence was relevant in the sense that it provided additional context for the shooting and Petitioner's belief of Rodriguez's aggressiveness. But significant evidence in the record already conveyed that aggressiveness, including Petitioner's own testimony and Rodriguez's and Atencio's own concession of his behavior. In this respect, the excluded evidence was simply cumulative and far from vital.

In short, this Court has plainly established that excluded evidence is subject to a materiality requirement, and there is no reason either to doubt the applicability of that requirement or to revisit such a settled issue.

B. Colorado follows this Court's standard.

Following *Valenzuela-Bernal*, Colorado implemented the materiality standard as to constitutional errors. *People v. Melendez*, 102 P.3d 315, 320–21 (Colo. 2004).[4] In *Melendez*, the Colorado Supreme Court echoed this Court's pronouncements in *Valenzuela-Bernal* and *Washington* that "courts, in determining both prejudice and sanction, consider whether the proffered evidence would be

[4] The court already had determined that the "reasonable doubt standard" of harmlessness was the same as the materiality standard this Court articulated in *Agurs*. *See People v. Roblas*, 568 P.2d 57, 60 (Colo. 1977).

material to the party's case *and* whether it would be unduly cumulative." *Id.* at 321 (emphasis added); *cf. Valenzuela-Bernal*, 458 U.S. at 873 (stating that evidence must be "both *material* and favorable" and "not merely cumulative"). In this respect, Colorado recognized that a court's harmlessness determination must account for whether "'the witnesses' testimony was crucial to [the defendant's] presentation of his case.'" *Id.* (quoting *United States v. Hobbs*, 31 F.3d 918, 923 (9th Cir. 1994)). Thus, the supreme court in *Melendez* recognized that evidence must be both material and favorable. *Id.* at 320 (citing *Valenzuela-Bernal*, 458 U.S. at 867); *accord People v. Chastain*, 733 P.2d 1206, 1212 (Colo. 1987) (recognizing that excluded testimony must have been both "material and favorable" and that the "same materiality standard is applied in a due process analysis").

Petitioner suggests that a subsequent case, *Krutsinger v. People*, 219 P.3d 1054 (Colo. 2009), is the "leading" Colorado case and requires more than "materiality." A simple analysis of *Krutsinger* rejects Petitioner's position.

The supreme court in *Krutsinger* recognized that restricting testimony or defense evidence bearing on a witness's credibility can implicate the defendant's constitutional rights—*if* it prevents a "meaningful opportunity" to present a defense. *Id.* at 1061 (citing *Crane*, 476 U.S. at 690–91). This approach is consistent with this Court's holdings in *Crane* and *Valenzuela-Bernal*, which acknowledged different considerations when a defendant has no means of challenging particular evidence, particularly when that evidence bears on evidentiary credibility central to guilt.

Krutsinger confirmed that constitutional error is universally implicated upon complete denial of a constitutional right—i.e., the "meaningful opportunity" to challenge the evidence—but it did not say that error is harmless beyond a reasonable doubt *only* absent a total denial.[5] *See id.* at 1062 ("It does not follow, of course, that every restriction on a defendant's attempts to challenge the credibility of evidence against him ... amounts to federal constitutional error."); *accord Carsell v. Edwards*, 165 Colo. 335, 343, 439 P.2d 33, 37 (1968) ("[U]nless a restriction of cross-examination is so severe as to constitute a denial of that right, the extent to which cross-examination shall be allowed rests within the sound discretion of the trial court."). Rather, *Krutsinger* settled on the principle that a defendant's right's to present a defense is violated "only where the defendant was denied virtually his *only* means of effectively testing significant prosecution evidence." *Krutsinger*, 219 P.3d at 1062 (emphasis added). Again, this is consistent with this Court's pronouncements in both *Crane* and *Valenzuela-Bernal*. In *Krutsinger*, the defendant was not denied his "only" means of challenging the evidence's credibility, since multiple other avenues existed to test it. Thus, reversal only was required if the error substantially influenced the verdict or affected the proceeding's fairness. *Id.* at

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[5] In doing so, *Krutsinger* addressed the situation in *Crane*, where the credibility of a single witness was "so central to the case against the defendant," that the question of harmlessness was almost "precisely identical with[] the question of whether he has been deprived of a right to meaningfully challenge credibility." *Krutsinger*, 219 P.3d at 1063. Because that was not the case in *Krutsinger*, the question of whether the exclusion of evidence was constitutional was not the same as whether it was material and thus whether the harm was constitutional where, instead, it was essentially cumulative to other "similar inconsistencies" already presented. *Id.*

1063. In other words, the exclusion of that evidence did not implicate the constitutional "materiality" standard.

Krutsinger thus recognized the important distinction inherent in this Court's holdings in both *Crane* and *Valenzuela-Bernal*: that not every restriction on a defendant's attempt to challenge the credibility of evidence implicates federal constitutional error but instead may involve non-constitutional harmless evidentiary error. *Id.* at 1062–63. It is this difference that Petitioner uses to suggest Colorado does not follow the materiality standard, but Petitioner fails to acknowledge that different errors—constitutional or evidentiary—require different analytical frameworks for assessing the error. In this respect, he uses *Krutsinger*'s discussion of *non*-constitutional harmlessness to suggest that *Krutsinger* misapplied the *constitutional* materiality standard.

Yet, *Krutsinger* recognized that this Court refrained from directing state courts to apply constitutional constraints to applications of evidentiary law. 219 P.3d at 1062 (citing *Crane*, 476 U.S. at 689). It emphasized that constitutional error occurred where excluding the evidence, such as in *Crane*, effectively prevented the defendant from testing the "evidence *central* to establishing his guilt" *at all*: where excluding the evidence prohibited *all inquiry*. *Id.* (internal quotations omitted) (emphasis added). The standard that *Krutsinger* recognized, as derived from this Court, is that an error is constitutional and cannot be harmless beyond a reasonable doubt when exclusion of the evidence prevented all inquiry into evidence central to determination of the guilt. *Id.* In *Krutsinger*, however, the defendant had multiple

other avenues to demonstrate motive or bias from the witness, and defense counsel was able to challenge the witness's credibility by illuminating inconsistencies in her testimony. *Id.* So, too, with Rodriguez's testimony and defense counsel in this case. Multiple parties testified as to Rodriguez's aggressive behavior, including his explicit exhortations to violence and threats to beat up Petitioner.

Petitioner suggests that this Court's review is required because *Krutsinger* requires a "complete denial" of a defendant's ability to challenge prosecution evidence. Pet. at 9–10. But that is not what *Krutsinger* stated. *Krutsinger* determined that deprivation of testimony of a single witness did not "deprive the defendant of a meaningful opportunity to present a complete defense," and thus did not rise to the level of federal constitutional error. 219 P.3d at 1056.

In short, this Court has held that any evidentiary error implicating a defendant's right to present a defense must prevent "meaningful adversarial testing" of that evidence central to the defendant's guilt. *Crane*, 476 U.S. at 691. *Krutsinger* followed that directive. 219 P.3d at 1062 (citing *Crane*, 476 U.S. at 689, 691). Unlike *Crane*, the evidence at issue in *Krutsinger* did not prevent meaningful adversarial testing of the evidence. In that respect, the "materiality" test was not implicated and even if it were, the evidence was not material. But because the evidence was subject to meaningful adversarial testing, the error was evidentiary and the constitutional harmless error standard was inapplicable.

Contrary to Petitioner's position, determining that an error is evidentiary instead of constitutional does not impose a universal requirement that, as a

constitutional matter, the evidence must have denied him virtually the only means of effectively testing significant prosecution evidence. Pet. at 14 (citing *Krutsinger*, 219 P.3d at 219). Rather, that was simply the *Krutsinger* court's recognition that this Court in *Crane* had found errors of constitutional magnitude when excluding the evidence prevented complete "meaningful adversarial testing" of evidence central to the issue of guilt. 219 P.3d at 1062 (citing *Crane*, 476 U.S. at 689, 691). Here, of course, Petitioner had significant means of testing the prosecution's evidence, both through cross-examination of Rodriguez and Atencio—who admitted Rodriguez's threatening, aggressive behavior to Petitioner—and through Petitioner's own testimony, which was corroborated by Petitioner's brother's testimony.

Petitioner suggests that *Krutsinger* requires the focus to remain solely on individual witnesses rather than the trial as a whole. Pet. at 9 n.3 (quoting *Krutsinger*, 219 P.3d at 1061). But this discussion in *Krutsinger* is about assessing the materiality of the *error* itself: "[a]lthough the nature and extent of any ruling limiting the presentation of defense evidence will necessarily determine whether it amounts to constitutional error, just as the nature and extent of the trial court's limitation on cross-examination were determinative in *Van Arsdall*,[6] the focus of

[6] *Delaware v. Van Arsdall*, 475 U.S. 673, 679–80 (1986) (holding that the right to cross-examination may be subject to reasonable limitations and well-established rules of evidence and that any error is prejudicial only where a reasonable jury would have a "significantly different impression"). Citing *Van Arsdall*, *Krutsinger* properly recognized that the "outcome-determinative approach" appropriate for constitutional errors requires review of "the trial as a whole". 219 P.3d at 1059

the inquiry remains on individual witnesses rather than the trial as a whole." *Krutsinger*, 219 P.3d at 1061.

Petitioner suggests that *Krutsinger* focuses the *harmlessness* inquiry of the error solely to the witness, rather than the entire trial itself. This argument misapprehends *Krutsinger*. Petitioner erroneously suggests that analysis is collapsed into one assessment, which focuses solely on the witness. But, as this Court and as Colorado recognized, "meaningful adversarial testimony" considers the trial as a whole—including whether the excluded evidence was cumulative. *Olden*, 488 U.S. at 232–33; *Valenzuela-Bernal*, 458 U.S. at 873; *Krutsinger*, 219 P.3d at 1062–63. Regardless, here the court of appeals *did* look at the whole record—making this argument about *Krutsinger* irrelevant and not cause for this Court to accept review of a wholly different case and issue.

Even post-*Krutsinger*, Colorado's supreme court has emphasized that the harmless error inquiry "requires some outcome-determinative analysis, evaluating the likelihood that the outcome of the proceedings in questions *were affected by the error*." *People v. Novotny*, 320 P.3d 1194, 1201 (Colo. 2014) (citing *Krutsinger*, 219 P.3d at 1063) (emphasis added); *see also People v. Roman*, 398 P.3d 134, 138 (Colo. 2017) (holding that objected-to trial error is harmless where no reasonable possibility exists that it contributed to the defendant's conviction). This framing is fully consistent in all respects with this Court's articulated "materiality" standard.

(quoting *Van Arsdall*, 475 U.S. at 679). Thus, contrary to Petitioner's suggestion, *Krutsinger* indeed rooted evaluation of the error in context of the trial as a whole.

III. Any divergence among jurisdictions is not a true split; Petitioner is selectively quoting from cases and ignoring the courts' actual rulings.

Referring to *Brady v. Maryland*, 373 U.S. 83 (1963), Petitioner claims that courts are "confused and conflicted" over the proper standard for constitutional claims related to the exclusion of defense evidence, with some courts applying a "*Brady*-style materiality test" and others only considering whether the excluded evidence was "important" to the defense and whether there was a valid justification for its exclusion. Pet. 6–8. But Petitioner is simply misreading the cases.

A. The jurisdictions that Petitioner says "import" a materiality requirement are simply following *Valenzuela-Bernal*.

Petitioner suggests that the majority of jurisdictions—the Second, Third, Sixth, Seventh and Tenth Circuits, as well as the District of Columbia and Illinois—improperly "import" a materiality requirement. Pet. 6–7. Of course, it is not those jurisdictions, but this Court itself, in *Valenzuela-Bernal*, that "imported" the materiality requirement.

A review of these opinions show that their application of the materiality test is thoroughly grounded in this Court's precedent. *See Gov't of Virgin Islands v. Mills*, 956 F.2d 443, 446 (3d Cir. 1992) (citing *Valenzuela-Bernal*); *Harris v. Thompson*, 698 F.3d 609, 627 (7th Cir. 2012) (citing *Valenzuela-Bernal*); *Richmond v. Embry*, 122 F.3d 866, 872 (10th Cir. 1997) (citing *Valenzuela-Bernal*); *United States v. Dowlin*, 408 F.3d 647, 660 (10th Cir. 2005) (citing *Valenzuela-Bernal*); *Heath v. United States*, 26 A.3d 266, n. 30 (D.C. 2011) (citing *Valenzuela-Bernal*); *People v. McLaurin*, 703 N.E.2d 11, 26 (Ill. 1998) (citing *Valenzuela-Bernal*); *see also*

Taylor v. Curry, 708 F.2d 886, 891 (2d Cir. 1983) (not citing the recently-decided *Valenzuela-Bernal*, but citing *Agurs*); *United States v. Blackwell*, 459 F.3d 739, 754-55 (6th Cir. 2006) (a *Brady* case that cites and follows *Brady*).

These jurisdictions are not improperly "importing" some requirement on their own; they are applying and following this Court's case law requiring materiality.

B. Petitioner is misreading the cases he cites from his favored jurisdictions.

Petitioner claims there is a jurisdictional split over the proper harmlessness standard and whether that standard includes a "materiality" component. In support of that claim, Petitioner cites just three cases, from the First, Eighth, and Ninth Circuits. But Petitioner misreads those circuits' application of their harmlessness jurisprudence. Each of those circuits follows this Court's "materiality" jurisprudence, but in the cited cases simply found that the excluded evidence *was* material, and not otherwise cumulative to evidence included in the record, so those defendants were actually harmed by the exclusion of that evidence. In other words, if the jury had heard the excluded evidence, the defendant might have been acquitted.

Start with the First Circuit case, *Pettijohn v. Hall*, 599 F.2d 476 (1st Cir. 1979). *Pettijohn* predated *Valenzuela-Bernal* by three years, so it is difficult to hold the First Circuit accountable for not applying the as-yet-not-endorsed materiality test. Subsequent opinions show the First Circuit follows *Valenzuela-Bernal's* test of materiality. *See, e.g., United States v. Bresil*, 767 F.3d 124 (1st Cir. 2014) (upholding conviction despite government's deportation of defense witnesses

before trial, because there was no "reasonable likelihood" those witnesses' testimony "could have affected the judgment of the trier of fact") (quoting *Valenzuela-Bernal*); *cf. United States v. Bailey*, 834 F.2d 218 (1st Cir. 1987)**Error! Bookmark not defined.** (discussing *Valenzuela-Bernal* and granting limited remand to determine whether excluded defense witnesses possessed "evidence material and helpful to the defense"). So the First Circuit now certainly seems to be applying a test for materiality.

And in any event, in *Pettijohn* the excluded evidence implicated full-on innocence claims by implicating an alternate suspect—evidence that had no other avenue for admission. *Id.* at 477–78. In *Pettijohn*, a witness to a robbery initially identified a suspect different than the defendant, but the trial court excluded that evidence as improper impeachment. *Id.* The First Circuit found it error to focus solely on impeachment as the evidentiary question because evidence of the alternate identification carried affirmative evidence probative against the defendant's guilt. *Id.* at 478–79. The court thus found "such exculpatory evidence" was relevant and material to Pettijohn's defense because "he could support his version of the event in no other way." *Id.* at 479–80. It fully recognized that the evidence was "critical" and not cumulative. *Id.* at 480–81. Finally, it determined that because the excluded evidence was not cumulative, because there was "no other way" to challenge the identification of the defendant, and because identification of the robber was "the key issue," the evidence was not harmless beyond a reasonable doubt. *Id.* at 482 (citing *Chapman*, 386 U.S. at 21).

Here, by contrast, in Petitioner's case the excluded evidence was the definition of cumulative, and both excluded incidents were temporally removed from the facts of Petitioner's altercation with Rodriguez. There existed other ways to establish Rodriguez's violent temperament, and those other ways were pursued and Rodriguez's aggressiveness so established. Thus, the excluded evidence here was neither "critical" nor "material."

Petitioner also cites *United States v. Turning Bear*, in which the Eighth Circuit addressed a sexual assault where the government's case hinged on the victims' credibility and the defendant did not testify. 357 F.3d 730, 733 (8th Cir. 2004). The excluded evidence would have called into question the truthfulness of one of the victims, and the Eighth Circuit therefore evaluated whether this excluded evidence was "both material and favorable." *Id.* (citing *Valenzuela-Bernal*, 458 U.S. at 867). The Eighth Circuit recognized that state courts could exclude evidence under state rules of evidence, but it determined that the state court in that case had not relied on *any* "cognizable evidentiary rule" in excluding the evidence. *Id.* On the contrary, the court recognized that a victim's character of untruthfulness was admissible. *Id.* at 734 (citing FED. R. EVID. 608(a) & 701). It also found that the excluded evidence was the *only* way to challenge the victim's credibility. *Id.* at 734–35. In this respect, the excluded evidence was "clearly not needlessly cumulative." *Id.* at 735. In short, the Eighth Circuit simply found that that particular evidence was, in fact, material, and its exclusion wholly prevented probing that aspect of the evidence against Turning Bear. *Id.*

By contrast, in Petitioner's Colorado case, the issue of "untruthfulness" was never implicated and significant evidence of Rodriguez's aggressive behavior and direct threats was introduced, so evidence of Rodriguez's dangerousness was squarely presented to the jury.

Finally, Petitioner cites *United States v. Lopez-Alvarez*, 970 F.2d 583 (9th Cir. 1992), but that case is essentially a mirror image of *Krutsinger*: it held that a trial court's evidentiary error in precluding cross-examination of a witness on a limited topic did not violate the defendant's constitutional rights of confrontation or to present a defense because the evidence otherwise "revealed sufficient information with which the jury could appraise [the witness]'s reliability." *Id.* at 587. And the information sought to be elicited did not otherwise undermine the credibility of existing evidence "in any substantial way" and "not in a manner different than that accomplished by evidence which was introduced." *Id.* Nor would the jury's perception of the witness "have been significantly altered by the introduction of the additional testimony." *Id.*

The Ninth Circuit recognized, like *Krutsinger*, that "not every hearsay error amounts to a constitutional violation," and it found that the excluded evidence would "not have added substantially to the knowledge the jury gained during the course of the trial." *Id.* at 588. And, like *Krutsinger*, because the court's "erroneous ruling did not violate the defendant's constitutional rights," the court "d[id] not test the error against the stringent 'beyond a reasonable doubt' harmless error standard,

but rather against the non-constitutional harmless standard of Federal Rule of Criminal Procedure 52(a). *Id.* (citing *Chapman*, 386 U.S. at 21).

Here, too, Rodriguez's credibility and evidence of his threats and aggression would not have been "significantly altered" by the introduction of the other-acts evidence. The other-acts evidence would not have undermined other existing evidence demonstrating Rodriguez's aggressiveness or behavior, and it certainly would not have further diminished his credibility. Finally, the jury's perception of Rodriguez would not have been altered in any substantial way, certainly not when weighed against "the knowledge the jury gained during the course of the trial." *Cf. id.* In this respect, the "jurors were thus aware" that Rodriguez was violent, aggressive, and threatening Petitioner. *Accord id.* Here, too, then, review was appropriate under the non-constitutional harmless error standard.

In short, none of the cases support Petitioner's claim that the First, Eighth, and Ninth Circuits apply a standard more lenient than this Court's materiality standard. Nor do they advance his argument that the excluded evidence here would have yielded a material or substantial difference in the jury's perception of the incident or Rodriguez as an aggressive instigator.

At trial, Petitioner's defense included significant evidence of Rodriguez's aggressive behavior and Petitioner's stated intimidation of Rodriguez, as well as a full evidentiary assessment of the shooting itself. His proffered additional evidence was cumulative and not of constitutional materiality. Petitioner's call for a grant of certiorari and summary reversal has no basis and should be rejected.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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