No. 18-9614

IN THE

SUPREME COURT OF THE UNITED STATES

RICK ALLAN RHOADES,
Petitioner,

v.

LORIE DAVIS,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

THIS IS A CAPITAL CASE

David R. Dow*
Texas Bar No. 06064900
Jeffrey R. Newberry
Texas Bar No. 24060966
University of Houston Law Center
4604 Calhoun Rd.
Houston, Texas 77204-6060
Tel. (713) 743-2171
Fax 713-743-2131

Counsel for Rick Allan Rhoades
*Member of the Supreme Court Bar

Table of Contents

Table of Authorities

Cases

No. 18-9614

IN THE

SUPREME COURT OF THE UNITED STATES

RICK ALLAN RHOADES,
Petitioner,

v.

LORIE DAVIS,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

Petitioner filed his Petition for a Writ of Certiorari ("Pet.") on June 10, 2019. Respondent filed her Brief in Opposition ("BIO") on August 1, 2019. Petitioner now files this Reply.[1]

I. Petitioner's claim is exhausted and not waived.

The exhaustion doctrine requires petitioners to "'fairly presen[t]' federal claims to the state courts in order to give the State the 'opportunity to pass upon and correct alleged violations of its prisoners' federal rights.'" *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (quoting *Picard v. Connor*, 404 U.S. 270, 275 (1971)) (some

[1] Petitioner responds only to those assertions made by Responding he deems merit a response.

internal quotation marks omitted). In his direct appeal brief, Rhoades raised a claim related to the erroneously excluded photographs. ROA.513-14. Specifically, Rhoades claimed that the trial court erred in finding the pictures were not relevant to the issue of whether he constituted a future danger. While perhaps inartfully phrased and lacking citation to specific constitutional provisions, the direct appeal claim, fairly construed, did apprise the state court that Rhoades believed this exclusion constituted a violation of his rights under the federal constitution.[2] Moreover, and in any case, even if the direct appeal claim did not adequately apprise the court Rhoades was alleging a federal constitutional error, Rhoades again alleged error with respect to the trial court's decision to exclude the questions at issue in this proceeding in state habeas proceedings. ROA.8245-72. The first and second claims of Rhoades' state habeas application specifically averred the trial court's decision to exclude the pictures constituted a violation of his rights pursuant to the Eighth Amendment and the Fourteenth Amendment's Due Process Clause. *Id.*

[2] Although the direct appeal claim did not specifically cite the Eighth or Fourteenth Amendment, because it contained the substance of the federal claim, it is proper to view Rhoades' claim as having been exhausted in direct appeal proceedings. *See Picard*, 404 U.S. at 277-78 ("Hence, we do not imply that respondent could have raised the equal protection claim only by citing book and verse on the federal constitution.") (internal quotation marks omitted); *see also Henry*, 513 U.S. at 888 (Stevens, J., dissenting) ("We made it clear, however, that the prisoner need not place the correct label on his claim, or even cite the Federal Constitution, as long as the substance of the federal claim has been fairly presented."). The state habeas court seems to have believed the direct appeal claim to have been sufficient to exhaust Rhoades' federal claim. *See* ROA.9209. In any event, whether through his direct appeal claim or in state habeas proceedings, Rhoades' claim was fairly presented to the state court.

Under this Court's precedent, the trial court's decision to exclude the pictures was constitutional error if the photos were relevant to the questions the jury would have to answer during its sentencing phase deliberations. Consequently, the threshold question for the state habeas court was whether the pictures were in fact relevant. Had the state habeas court determined the photos were relevant, it would then had to have addressed whether the exclusion constituted structural error (in which case no inquiry into prejudice would have been required), or whether the wrongful exclusion was trial error (in which case the court would have had to examine the question of prejudice). However, the habeas court addressed neither of these subsequent issues, because it determined the pictures were not relevant, and therefore concluded the trial court did not err in refusing to admit the pictures. ROA.9210.[3]

Given this disposition in the state court – i.e., the determination the photographs were irrelevant – with the resulting consequence the state court did not address whether the exclusion constituted structural error, Respondent relies on this Court's opinion in *Duncan v. Henry*, 513 U.S. 364 (1995), to suggest Rhoades' claim is unexhausted. Specifically, Respondent argues that, under *Henry*, a claim is unexhausted if the claim, when presented to the federal court, requires that court to make a different assessment regarding harm than that reached by the state courts. BIO at 10-11. But this reading of *Henry* is obviously nonsensical, in

[3] The state court had disposed of the Rhoades' direct appeal claim in the same manner, i.e. it determined the pictures were not relevant and did not address whether Rhoades was prejudiced by any error. ROA.436.

that it would permit a state court to preclude a habeas petitioner from exhausting claims simply by applying an erroneous harm standard.

In fact, what this Court actually held in *Henry* is that in order to exhaust a claim that an error at trial violated his rights under the federal constitution, a habeas petitioner must inform the state court of that and not merely argue to the state court the err violated his rights under the state's constitution. *Henry*, 513 U.S. at 366. Allowing for the possibility that a federal claim might, in some cases, be subject to exhaustion without reference to the federal constitution, the Court further noted that the federal and state claims in Henry's case were not, in substance, the same, in part because of the different harm standards. *Id.*

In any case, under no plausible interpretation can *Henry* be read to support Respondent's assertion that Rhoades' claim is unexhausted. The state court was presented a claim that the exclusion of the photographs violated Rhoades' rights pursuant to the Eighth and Fourteenth Amendments. Had the court found the trial court erred in excluding photographs, the question of whether Rhoades was then required to demonstrate prejudice, or whether, instead, the exclusion amounted to structural error, is a question that would have turned entirely on this Court's precedent. It is true that the state court did not address this issue – but that failure resulted not from the manner in which Rhoades argued the claim to the state court; instead, it resulted entirely from the state court's determination that the photographs were irrelevant under *Lockett* to the issue of whether death was for Rhoades an appropriate sentence.

The issue of whether *Lockett* error is structural is therefore, as Respondent argues, an issue the state court did not address; but the reason the state court did not address it is because it determined the exclusion of the photographs did not violate Rhoades' right under *Lockett* and its progeny. But Respondent cites no case, and Petitioner is aware of no case, holding a claim is unexhausted if the state court declines to answer the question of whether a petitioner was harmed by an error after erroneously finding there to be no error.

Further, even if the state court had deemed the photographs relevant, and subsequently treated that wrongful exclusion as an error triggering harm analysis, it would have been futile for Rhoades to argue to the state court that *Lockett* error is structural. Under Texas law, an error is structural if this "Court has labeled it as such." *Gray v. State*, 159 S.W.3d 95, 97 (Tex. Crim. App. 2005); *see also Schmutz v. State*, 440 S.W.3d 29, 37-38 (Tex. Crim. App. 2014). Consequently, because this Court has not expressly stated *Lockett* error is structural, the CCA would not have considered the argument even if Rhoades had raised it. Accordingly, even if this Court believes that Rhoades' failure to argue to the state court that trial court's error in excluding the photographs was structural renders his claim unexhausted, the exception to the exhaustion doctrine codified in 28 U.S.C. § 2254(b)(1)(B)(ii) should apply to excuse Rhoades' failure to exhaust. *Rose v. Lundy*, 455 U.S. 509, 516 n.7 (1982) ("the exhaustion doctrine does not bar relief where the state remedies are inadequate or fail to 'afford a full and fair adjudication of the federal contentions raised'").

Respondent's argument that Rhoades waived his argument that *Lockett* error is structural by not raising it before oral argument in the court below is similarly unpersuasive. The crux of Respondent's argument is that she was not given an opportunity to argue *Brecht*'s harm standard should apply to Rhoades' claim. BIO at 13. Respondent, however, did argue in both the district court and the court of appeals that the harmless error analysis should apply and did so citing the same cases – *Skipper* and *Hitchcock* – that she now argues dictate error under *Lockett* is subject to harmless error analysis. BIO at 25-26; ROA.167-68; Resp't-Appellee's Br. at 38. During oral argument, instead of arguing the question of whether *Lockett* error is structural had been waived, consistent with her briefing, Respondent argued that this Court announced in its opinion in *Skipper* that harmless error analysis applies. Oral Argument at 39:00, *Rhoades v. Davis*, 914 F.3d 357 (5th Cir. 2019) (No. 16-70021), http://www.ca5.uscourts.gov/OralArgRecordings/16/16-70021_12-4-2017.mp3. Respondent's present claim that Rhoades argued in the court of appeals that he was prejudiced by the trial court's error is of recent origin. *Compare* BIO at 12-13 ("In fact, Rhoades argued in his merits brief in the court below—echoing the harmless-error standard described by this Court in *Brecht*…) *with* Resp't-Appellee's Br. at 44 n.13 ("Notably, Rhoades makes no effort to demonstrate he was harmed by the exclusion of the photographs."). Most importantly, both the district court and the court of appeals specifically held that the harmless error doctrine applies. ROA.275-76; Pet. App'x at a12-13. None of the

cases cited by Respondent compel a finding that Rhoades' argument has been waived.

II. The excluded pictures were not cumulative of the testimony the jury heard.

Respondent has argued throughout these proceedings that the excluded pictures were different from other punishment-phase evidence and actually cut against the punishment phase testimony the jury was allowed to consider. See ROA.170 ("The childhood photographs proffered at trial by Rhoades, DX 6-16, depicted Rhoades engaging in happy and normal childhood activities, such as fishing and going to a dance. The testimony of Rhoades's birth and adoptive family members, on the other hand, ***exclusively*** portrayed Rhoades's childhood as troubled.") (emphasis added); Resp. Opp'n Appl. COA at 14 (same); Resp't-Appellee's Br. at 40 (same). Respondent has argued that "[n]one of the testimony concerned happy childhood events, much less the specific events depicted in Rhoades's proffered photographs." Resp't-Appellee's Br. at 40. The district court agreed with Respondent's argument. ROA.269 ("Testimony from Rhoades' mother did not explain any events related to, or otherwise describe the significance of, any of the photographs.").

Not until oral argument in the court below (in response to a question from Judge Haynes) did Respondent, for the first time, intimate the excluded photographs might be cumulative of testimony the jury had already heard. Oral Argument at 29:20-30:25, *Rhoades v. Davis*, 914 F.3d 357 (5th Cir. 2019) (No. 16-70021), http://www.ca5.uscourts.gov/OralArgRecordings/16/16-70021_12-4-

2017.mp3. The court of appeals appears not to have been persuaded by Respondent's assertion and instead found that the photographs were so different from the testimony the jury heard that their "portrayal of a positive adoptive childhood risks cutting against other mitigating evidence presented by trial counsel of Rhoades's difficult childhood." Pet. App'x at a13.

The court below was clearly correct to have concluded the excluded pictures were not cumulative of the testimony the jury heard. The jury heard no testimony about Rhoades' socializing with friends in the manner portrayed by the pictures.[4] To be sure, the jury heard he got along with his siblings and was affectionate to others in their house (ROA.7153; ROA.7163), and also heard he had friends (ROA.807). But none of the testimony on any of the pages cited by Respondent gave the jury any reason to believe Rhoades socialized with others in the manner portrayed by the pictures, and those pictures therefore represent critical evidence given the State's argument that Rhoades is someone who suffers from Antisocial Personality Disorder.[5] Both the court of appeals and the district court were correct in finding the pictures to be different than the testimony the jury heard.

---

[4] The entire trial record is contained in the record on appeal. Pages 905-17 of volume 35, some of which are cited by Respondent on page 18 of her Brief in Opposition, are located at ROA.7153-65. Pages 784-85 of volume 34, cited by Respondent on page 18, are located at ROA.7030-31. Page 807 is located at ROA.7053.

[5] It is not clear what testimony on pages 784-85 of volume 34 Respondent believes to be duplicative of pictures showing Rhoades socializing with others. The testimony recorded on these pages is about Rhoades' being prescribed Ritalin from the time he was in first or second grade until he was a teenager and his dropping out of school in the ninth grade due mostly to his hyperactivity. ROA.7030-31.

III. Rhoades' petition merely asks this Court to clarify its prior precedent, not to announce a new rule.

Respondent's assertion that Rhoades' petition asks this Court to announce a new rule, BIO at 19, is flatly wrong. "[A] case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." *Teague v. Lane*, 489 U.S. 288, 301 (1989). Pursuant to this Court's opinions handed down in *Lockett*, *Eddings*, and *Skipper*, the States already have an obligation to ensure capital jurors are not prevented from considering relevant mitigating evidence. *Skipper v. South Carolina*, 476 U.S. 1, 8 (1986); *Eddings v. Oklahoma*, 455 U.S. 104, 113 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). All of these opinions were handed down over a decade before Rhoades' conviction became final. BIO at 20 ("Rhoades's conviction became final in early 1997"). In all of these cases, this Court found the petitioners were entitled to relief without conducting any prejudice analysis, suggesting this type of error is structural in nature. Rhoades' petition merely asks this Court to grant certiorari to clarify whether that is the case.

IV. There is confusion in both the state and federal courts regarding whether this Court's precedent dictates *Lockett* error is structural.

Respondent's argument that the Court of Appeals for the Tenth Circuit did not hold, in *Paxton v. Ward*, 199 F.3d 1197 (10th Cir. 1999), that *Lockett* error is structural, BIO at 23, is unpersuasive. Kenneth Paxton's case appears to be similar to Rhoades' case in that it does not appear any state court addressed the issue of whether he was harmed by the exclusion of mitigating evidence (i.e., the results of a

polygraph) because no state court believed the trial court erred in excluding the evidence. *Paxton*, 199 F.3d at 1211; *Paxton v. State*, 867 P.2d 1309, 1323 (Okla. Crim. App. 1993). Notwithstanding, the Tenth Circuit held Paxton was entitled to relief on his *Lockett* claim, and the Court did not conduct any prejudice analysis before arriving at that conclusion. *Paxton*, 199 F.3d at 1216.

Respondent's assertion that the Tenth Circuit, in *Bryson v. Ward*, 187 F.3d 1193 (10th Cir. 1999) (a case that predates *Paxton* by four months), applied harmless-error analysis when evaluating a *Lockett* claim, BIO at 23, is also incorrect. In that case, the state court applied harm analysis to *Lockett* error, and so the question before the Tenth Circuit was whether "the state court's application of a harmless error analysis [was] an unreasonable application of" this Court's principles. *Bryson*, 187 F.3d at 1205. Because this Court has not expressly said *Lockett* error is structural, the court of appeals held the state court's employing a harmless error analysis was not an unreasonable application of federal law. *Id.* That is not the equivalent of the court of appeals finding harmless error analysis should apply to errors under *Lockett*. (Indeed, if the court believed that to be the case, it seems probable it would have conducted a prejudice analysis in *Paxton*, which, again, was decided four months after *Bryson*.)[6]

[6] Had the state court in this case found the exclusion of the photographs to be a violation of *Lockett*, and then applied harm analysis, the question before the federal court in Rhoades' 2254 proceedings would have been precisely the same as the question in *Paxton*: Is there sufficient uncertainty as to whether *Lockett* error is structural such that a state court's use of harm analysis to resolve a *Lockett* violation does not amount to an unreasonable application of federal law?

Additionally, there appears also to be confusion in the state courts on the issue of whether *Lockett* error is structural. For example, the Supreme Court of Florida, in *Harvard v. State*, has held *Lockett* error to be structural. *Harvard v. State*, 486 So.2d 537, 539 (Fla. 1986).

Finally, the case of *McKinney v. Ryan*, on which this Court recently granted certiorari review, demonstrates there is confusion in the state and federal courts on the question presented in Rhoades' petition. During his trial, McKinney's attorneys presented evidence that he suffers from Post-Traumatic Stress Disorder. *McKinney v. Ryan*, 813 F.3d 798, 807-08 (9th Cir. 2015). McKinney was sentenced to death by the trial judge, who gave this evidence no weight as a mitigating factor. *Id.* at 809. On review, the Arizona Supreme Court, whose review of capital sentences is *de novo*, similarly gave no weight to the evidence that McKinney suffers from PTSD in its decision to affirm McKinney's death sentence. *Id.* at 810.

During federal habeas review, the district court denied McKinney relief on his claim that his rights were violated by the trial courts failure to consider evidence of his PTSD. *McKinney v. Ryan*, No. CV 03-774-PHX-DGC, 2009 WL 2432738, at *23 (D. Ariz. 2009). The district court believed there was no indication in the record that either the trial court or the state's supreme court failed to consider this evidence. *Id.*

On appeal, McKinney's case was first considered by a three-judge panel of the Court of Appeals for the Ninth Circuit. Two of the three judges on the panel affirmed the district court's opinion and found that the state courts did, in fact,

consider evidence of McKinney's PTSD. *McKinney v. Ryan*, 730 F.3d 903, 918 (9th Cir. 2013). Judge Wardlaw disagreed, believing the trial court had not considered McKinney's PTSD as mitigating evidence because it did not believe there was a causal link between this diagnosis and the crime for which McKinney was sentenced to death. *Id.* at 925 (Wardlaw, J., dissenting in part). Having found the trial court erred, Judge Wardlaw next addressed the question of whether McKinney had to demonstrate prejudice. *Id.* at 929. Judge Wardlaw noted that until 2012, the rule in the Ninth Circuit was that errors under *Lockett* and *Eddings* were structural. *Id.* Judge Wardlaw believed that the court should continue to recognize these errors as structural, but also believed McKinney was entitled to a new sentencing proceeding even if the harmless error standard applied. *Id.* at 929-30.

The opinion from the three-judge panel was subsequently withdrawn and the case was considered by the en banc court. *McKinney v. Ryan*, 813 F.3d 798, 802 (9th Cir. 2015). The en banc court agreed with Judge Wardlaw that the Arizona state courts had not considered evidence of McKinney's PTSD and further agreed that this constituted violation of clearly established federal law. *Id.* at 821. The Court then turned to whether the error was structural and held it was not. *Id.* However, the en banc court agreed with Judge Wardlaw that the trial court's error was not harmless. *Id.* at 822-23. The en banc court remanded McKinney's case to the district court with instructions to grant the writ unless the State corrected the error. *Id.* at 827.

As McKinney's petition for certiorari explains, the State then moved for independent review of McKinney's sentence by the Arizona Supreme Court. That court then considered the PTSD evidence, which neither it nor the trial court had previously considered, and subsequently affirmed McKinney's death sentence.

McKinney then sought review from this Court. The second of two questions presented by his petition is "[w]hether the correction of error under *Eddings v. Oklahoma*, 455 U.S. 104 (1982), requires resentencing." In other words, McKinney's second question presented asks whether a reviewing court can weigh the effect of a trial court's error in not considering mitigating evidence or whether the error is one where prejudice must be presumed and a resentencing trial is mandated. Other than that in Rhoades' case, the sentencing decision was made by the jury, not the trial court, the question presented by Rhoades' case is indistinguishable in any meaningful manner from the question presented by *McKinney*.

V. The exclusion of relevant mitigating evidence is not amenable to harmless-error review.

Respondent suggests this Court's opinion in *Wiggins v. Smith*, 539 U.S. 510 (2003), supports her argument that *Lockett* error is amenable to harmless-error review. BIO at 31. This argument fails to acknowledge a critical difference between the error committed by the trial court in Rhoades' case and the error alleged in a claim raised pursuant to *Wiggins*. Specifically, Rhoades' claim addresses an error that actually occurred at his trial: his attorney attempted to introduce evidence and the trial court wrongfully withheld this evidence from the jury. When raising a *Wiggins* claim, a habeas petitioner asserts his trial attorney should have developed

and presented mitigating evidence that he neither developed nor presented at trial. In other words, a habeas petitioner who raises a *Wiggins* claim is attempting to relitigate his trial. Equating the error in Rhoades' case to the error alleged in a *Wiggins* claim ignores what this Court has repeatedly stated, which is "[a] criminal trial is the 'main event' at which a defendant's rights are to be determined." *McFarland v. Scott*, 512 U.S. 849, 859 (1994); *see also Davila v. Davis*, 137 S. Ct. 2058, 2066 (2017); *Freytag v. Commissioner*, 501 U.S. 868, 895 (1991) (Scalia, J. concurring in part and concurring in judgment) ("a trial on the merits … is the 'main event,' and not simply a 'tryout on the road' to appellate review"). In Rhoades' case, at the main event, the lawyer did exactly what he was supposed to do; the error was committed by the trial court.

Of course, most errors that occur at trial are not structural. In cases where the effect of the error is identifiable from the record and its impact can therefore be assessed by a reviewing court, error is not structural and is instead subject to harmless-error review. *Satterwhite v. Texas*, 486 U.S. 249, 256-57 (1988). On this point, Respondent seems to assert that the photographs that were wrongfully excluded from Rhoades' trial were going to be admitted without any testimony. BIO at 24 n.17 ("Indeed, without any context, the photographs of Rhoades…."). The record does not support that assertion. Rhoades' trial attorney had planned to introduce the photographs through the testimony of Rhoades' adopted parents. ROA.6982. This would have necessarily included some amount of testimony about the photos from the parents to properly authenticate the pictures. We cannot know

what that testimony would have been. In cases where the scope of the error cannot be identified from the record and "any inquiry into its effect on the outcome of the case would be purely speculative," this Court has found the error to be structural. *Satterwhite*, 486 U.S. at 256. The trial court's error resulted in not only the pictures (which are contained in the record) to be wrongfully excluded from the jury's consideration, it also prevented Rhoades' jury from hearing testimony about the pictures from his adoptive parents (which is not contained in the record). Accordingly, any inquiry to the effect of the outcome on the case would be purely speculative.

Conclusion and Prayer for Relief

Petitioner requests this Court grant certiorari and schedule the case for briefing and oral argument.

DATE: August 12, 2019

Respectfully submitted,

/s/ David R. Dow

David R. Dow*
Texas Bar No. 06064900
Jeffrey R. Newberry
Texas Bar No. 24060966
University of Houston Law Center
4604 Calhoun Rd.
Houston, Texas 77204-6060
Tel. (713) 743-2171
Fax (713) 743-2131

Counsel for Rick Allan Rhoades
*Member of the Supreme Court Bar