No. 20-7341

IN THE

Supreme Court of the United States

JAMES CODDINGTON,

Petitioner,

v.

JAMES FARRIS, WARDEN,
OKLAHOMA STATE PENITENTIARY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR OKLAHOMA CRIMINAL DEFENSE LAWYERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The Oklahoma Criminal Defense Lawyers Association (OCDLA) is a private, nonprofit association that represents more than 500 criminal-defense attorneys in the State of Oklahoma and surrounding states. The OCDLA is dedicated to preserving the rule of law and individual rights guaranteed by the Oklahoma and United States Constitutions, to resisting any efforts to curtail these rights, to furthering legal-educational programs, and to promoting justice and the common good.

The OCDLA submits this brief because the interpretation of "harmless error" in capital sentencing has expanded beyond the bounds permitted by the Constitution. The resulting application of harmless-error review is overly broad and fails to meaningfully distinguish the circumstances that warrant the death penalty when an appellate court finds the error to be "material," thus violating the defendant's constitutional rights. The OCDLA has a strong interest in ensuring that the death penalty is not implemented in an unconstitutional manner.

Coddington explains in his Petition for a Writ of Certiorari that once an error has been found to be material it cannot subsequently be found harmless.

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[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than amicus curiae, its members, and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for the parties received notice of amicus' intent to file this brief at least ten days prior to its due date and consented to the filing of this brief.

Because Coddington directly addresses whether a material error can ever be found harmless, the OCDLA focuses this brief on the underlying flaws in the court's overly broad use of harmless-error review in death penalty cases when the error is deemed to be material.

SUMMARY OF ARGUMENT

The trial court erred in suppressing expert-witness testimony directly relevant to Coddington's inability to form the requisite intent required for malice aforethought murder under Oklahoma law. The appellate courts that considered this case, including the Tenth Circuit Court of Appeals, concluded that the excluded testimony was material and that its exclusion was a constitutional error, but nonetheless found the error harmless. This ruling violated the principles set forth in *Brady v. Maryland* and disregarded this Court's rulings in *United States v. Valenzuela-Bernal* and *Kyles v. Whitley*. This Court should now take the opportunity to answer the question that it declined to address in *Fry v. Pliler* and clarify that the exclusion of material testimony cannot be harmless error.

I. THE TENTH CIRCUIT DISREGARDED *BRADY* AND ITS PROGENY.

Despite the applicability in this case of the due-process principles underlying *Brady v. Maryland*, 373 U.S. 83 (1963), and those decisions of this Court applying *Brady*'s reasoning in the context of other constitutional errors, the Tenth Circuit failed to consider any of the applicable case law when considering Coddington's habeas claims.

A. Under *Brady*, Exclusion of Material Evidence Helpful to the Defense Cannot be Harmless Error

Nearly sixty years ago, this Court held that, "irrespective of the good faith or bad faith of the

prosecution," it violates due process for the State to suppress evidence favorable to a person charged with a crime, "where the evidence is material either to guilt or to punishment[.]" *Brady v. Maryland*, 373 U.S. 83, 87 (1963). "[E]vidence is material within the meaning of Brady when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Smith v. Cain*, 565 U.S. 73, 75 (2012) (internal quotation marks omitted).[2]

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[2] Although this brief will use the "reasonable probability" formulation of the materiality test, first articulated in *United States v. Bagley*, 473 U.S. 667 (1985), it is unclear whether this Court adopted a more lenient standard in *Wearry v. Cain*, when it stated that "[e]vidence qualifies as material when there is any reasonable likelihood it could have affected the judgment of the jury." *Wearry*, 136 S.Ct. 1002, 1006 (2016) (internal quotation marks omitted).

In *Bagley*, Justice Blackmun authored an opinion stating that the standard for the prejudice prong of a claim of ineffective assistance of counsel announced by this Court in *Strickland v. Washington*, 466 U.S. 668 (1984)—"a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"—is the standard by which materiality should be assessed for *Brady* claims. 472 U.S. at 681 (quoting *Strickland*, 466 U.S. at 694). However, Part III of Justice Blackmun's opinion, from which that statement is drawn, failed to secure a majority. *See id.* at 669. This Court has subsequently used the *Bagley* formulation of "a reasonable probability" rather than the formulation first articulated in *Napue v. Illinois*, 360 U.S. 264, 271 (1959), and subsequently adopted by *Giglio v. United States*, 405 U.S. 150, 154 (1972), of "any reasonable likelihood." *See, e.g.*, *Kyles v. Whitley*, 514 U.S. 419, 434–35 (1995). Then, in 2016, the Court reverted to the latter version. *Wearry*, 136 S. Ct. at 1006.

To prevail on a *Brady* claim, the defendant "need not show that [they] 'more likely than not' would have been acquitted had the new evidence been admitted." *Wearry v. Cain*, 136 S. Ct. 1002, 1006 (2016) (quoting *Smith*, 565 U.S. at 75). Rather, they "must show only that the new evidence is sufficient to 'undermine confidence' in the verdict." *Id.* (quoting *Smith*, 565 U.S. at 75).

Importantly, once a habeas court has concluded that evidence is material under *Brady*, "there is no need for further harmless-error review." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995). This is because a finding of materiality under *Brady* necessarily meets the standard adopted by this Court for habeas review of *Brady* claims in *Brecht v. Abrahamson*, 507 U.S. 619 (1993), discussed in Part III.A below. *Kyles*, 514 U.S. at 435. Simply put, once a court concludes that there has been a *Brady* error, "it cannot subsequently be found harmless[.]" *Id.* at 436.

B. Excluding Material *Brady* Evidence Violates the Compulsory Process Clause of the Sixth Amendment

From the beginning, this Court has grounded the *Brady* rule in terms of due process and the need to ensure that defendants receive a fair trial. *See Brady*, 373 U.S. at 88 (stating that the principle underlying the *Brady* rule is "not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused").[3] Scholars have also

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[3] *See also Bagley*, 473 U.S. at 678 ("[S]uch suppression of evidence amounts to a constitutional violation only if it deprives

argued that the rule should be grounded in the Sixth Amendment. *See, e.g.*, Peter Westen, *The Compulsory Process Clause*, 73 Mich. L. Rev. 71, 121–32 (1974); Elizabeth Napier Dewar, Note, *A Fair Trial Remedy for* Brady *Violations*, 115 Yale L.J. 1450, 1452 (2006). Although this Court has not spoken directly to the question, it has implicitly acknowledged this connection by importing its *Brady* materiality standard for assessing violations of the Compulsory Process Clause and the Counsel Clause. *See United States v. Bagley*, 473 U.S. 667, 681–82 (opinion of Blackmun, J.) (citing *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982) and *Strickland v. Washington*, 466 U.S. 668 (1984), respectively); *see also Strickland*, 466 U.S. at 684–85 ("The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment[.]")[4].

The Court has also held that "[t]he right to offer the testimony of witnesses," as guaranteed by the Sixth Amendment, "is in plain terms the right to present a defense," and noted that the Compulsory Process Clause is, therefore, "a fundamental element

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the defendant of a fair trial."); *Kyles*, 514 U.S. at 434 (noting that the key question in assessing the effect of a Brady violation is whether in the absence of the undisclosed evidence the defendant "received a fair trial").

[4] An additional consideration for the Court is whether the addition of *Brecht* harmless-error review after a finding of materiality impermissibly lowers the standard of proof in a criminal case from proof beyond a reasonable doubt to a clear-and-convincing standard, in violation of due process rights.

of due process of law." *Washington v. Texas*, 388 U.S. 14, 18–19 (1967). Of course, this right is not absolute; defendants "must comply with established rules of procedure and evidence," as must the State, because those rules are "designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). However, when a defendant complies with the "established rules of procedure and evidence" and the trial court then commits some *Chambers* trial error, *Brady* materiality is the appropriate framework for review.

In this case, it is not disputed that the exclusion of Dr. Smith's testimony was an error under Oklahoma evidentiary rules—indeed, the Oklahoma Court of Criminal Appeals explicitly concluded that "Dr. Smith could have properly testified that, in his opinion and based upon his specialized knowledge, he believed Coddington would have been unable to form the requisite deliberate intent of malice aforethought" and therefore that the "trial court erred and abused its discretion by sustaining the Motion in Limine and so limiting the expert witness' testimony." *Coddington v. State*, 142 P.3d 437, 450 (Okla. Crim. App. 2006). Because the trial court committed a *Chambers* error, the Tenth Circuit should have analyzed Coddington's habeas claim using the *Brady* materiality framework—which it failed to do.

II. THE CIRCUITS ARE DIVIDED ON WHETHER AN ERROR THAT IS MATERIAL UNDER ONE OF THIS COURT'S MATERIALITY STANDARDS CAN EVER BE HARMLESS.

In *Brecht v. Abrahamson*, 507 U.S. 619 (1993), this Court declined to apply the harmless-error standard from *Chapman v. California*, 386 U.S. 18, 24 (1967)—in which a conviction must be set aside unless the constitutional error "was harmless beyond a reasonable doubt"—when considering claims of trial error in the context of a petition for a writ of habeas corpus by a state prisoner. *Brecht*, 507 U.S. at 623. Instead, it adopted the so-called *Kotteakos* standard, see *Kotteakos v. United States*, 328 U.S. 750, 776 (1946), which is based on the federal harmless-error statute, 28 U.S.C. § 2111. The Court reasoned that the "less onerous" *Kotteakos* "substantial and injurious effect or influence" standard should apply because it was "better tailored to the nature and purpose of collateral review[.]" *Brecht*, 507 U.S. at 637, 638.

This Court has also developed several tests for judging whether there was a constitutional error in the first place, and these tests already require a showing of prejudice in the form of a materiality standard. For example, in *Bagley*, this Court explained that a prosecutor suppressing evidence that is favorable to the accused is a constitutional error only if the suppressed evidence is material. 473 U.S. at 682 (opinion of Blackmun, J.); *id.* at 685 (White, J., concurring in part and concurring in the judgment). And evidence is material "only if there is a reasonable

probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 682, 685. As noted above, this Court would later explain that an error that satisfies this materiality standard cannot be found harmless under *Brecht*. *See Kyles*, 514 U.S. at 435.

This Court, however, has not explicitly addressed whether errors that are material under this Court's *other* materiality standards can ever be found harmless. The circuits are now split on the issue. This Court should resolve the split by granting Coddington's Petition for Certiorari and clarifying the relationship between *Brecht* and this Court's materiality standards.

A. This Court has not Explained the Relationship Between Some of its Materiality Standards and *Brecht*.

This Court has developed similar materiality standards for evaluating whether a constitutional error occurred in at least four different contexts.

First, in *Giglio v. United States*, 405 U.S. 150 (1972), this Court held that a prosecutor's use of perjured testimony is a constitutional error only if there is a reasonable likelihood that the false testimony could have affected the judgment of the jury. 405 U.S. at 154. Second, in *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982), this Court held that depriving a defendant of a witness's testimony is a constitutional error "only if there is a reasonable likelihood that the testimony could have affected the judgment of the trier of fact." 458 U.S. at

874. Third, in *Strickland*, this Court held that ineffective assistance of counsel is a constitutional error only if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. Fourth, the *Bagley* Court held that a prosecutor suppressing evidence is a constitutional error "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." 473 U.S. at 682 (opinion of Blackmun, J.).

As discussed above, the *Brecht* Court adopted a standard for determining whether a constitutional error is sufficiently prejudicial to entitle a habeas petitioner to relief. 507 U.S. at 638. In the years following *Brecht*, however, lower courts struggled to apply the *Brecht* standard to errors that already satisfied one of this Court's materiality standards.[5] Litigants argued that the *Brecht* standard was redundant, noting that that these materiality

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[5] I note here that the majority opinion repeatedly speaks of applying the "harmless error" rule to Kyles' *Brady* claims. The majority seems unaware that *Brady's* progeny . . . have their own built-in test of "materiality" to determine whether any *Brady* violation was "harmful" to the defendant . . . I thus see no need to respond to the majority's rather curious claim that any *Brady* violation was harmless under *Brecht v. Abrahamson*.

Kyles v. Whitley, 5 F.3d 806, 832 n.41 (5th Cir. 1993), *rev'd*, 514 U.S. 419 (King, J., dissenting).

standards already had a built-in prejudice component.

The *Kyles* Court would later clarify the relationship between *some* of these materiality standards and *Brecht*. Regarding the *Bagley* standard, this Court held that "once a reviewing court applying *Bagley* has found constitutional error there is no need for further harmless-error review." *Kyles*, 514 U.S. at 435. Regarding the *Strickland* standard, this Court cited to an Eighth Circuit case, which held that it is unnecessary to conduct a separate harmless-error analysis once a constitutional error has been found under that standard. *Id.* at 436 n.9 (citing *Hill v. Lockhart*, 28 F.3d 832, 839 (8th Cir. 1994)).

The *Kyles* Court, however, did not specifically address whether an error that is material under one of this Court's other materiality standards, such as the *Valenzuela-Bernal* and *Giglio* standards, can ever be found harmless under *Brecht*. As a result, the "[c]ircuits are split on the question." *Haskell v. Superintendent Greene SCI*, 866 F.3d 139, 150 (3d Cir. 2017). Some circuits have held that when this Court has declared a materiality standard there is no need to conduct a separate harmless error analysis.[6] In these circumstances, simply finding a constitutional violation necessarily means that the error was *not* harmless. Other circuits—including the Tenth Circuit, in Coddington's case—have held that these

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[6] *See, e.g.*, *Hayes v. Brown*, 399 F.3d 972, 984 (9th Cir. 2005).

types of constitutional errors can subsequently be found harmless under *Brecht*.

B. The Tenth Circuit's Decision Exacerbates an Important and Entrenched Circuit Conflict.

The Tenth Circuit has consistently held that a trial court excluding a witness's testimony is a constitutional error only if the excluded testimony is material under *Valenzuela-Bernal*.[7] In Coddington's case, instead of assessing whether Dr. Smith's excluded testimony was material to the extent that its exclusion amounted to a constitutional error, the Tenth Circuit simply assumed that it was. *Coddington v. Sharp*, 959 F.3d 947, 955 (10th Cir. 2020). After making this assumption, the Tenth Circuit then proceeded to apply *Brecht* and ultimately found that this constitutional error was harmless. *Id.* at 958. Thus, the Tenth Circuit found that a constitutional error under *Valenzuela-Bernal* can be found harmless under *Brecht*.

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[7] [T]o establish constitutional error Naylor *must* also show the evidence was material to the extent its exclusion violated his right to present a defense. . . . To determine materiality, we examine the record as a whole and inquire "as to whether the evidence was of such an exculpatory nature that its exclusion affected the trial's outcome."

United States v. Dowlin, 408 F.3d 647, 660 (10th Cir. 2005) (quoting *Richmond v. Embry*, 122 F.3d 866, 874 (10th Cir. 1997)) (emphasis added).

This holding by the Tenth Circuit is in direct conflict with holdings of other circuits. The Ninth Circuit has long applied the correct rule that whenever this "Court has declared a materiality standard, as it has for this type of constitutional error, there is no need to conduct a separate harmless error analysis." *Hayes v. Brown*, 399 F.3d 972, 984 (9th Cir. 2005). The "required finding of materiality necessarily compels the conclusion that the error was not harmless." *Id*. Thus, the determination that there was a constitutional error necessarily forecloses a *Brecht* harmless error analysis. *Id*.

Similarly, the Seventh Circuit has held that when an excluded-testimony error is material enough to be a constitutional error under *Valenzuela-Bernal*, the error cannot be found harmless under *Brecht*. *Caffey v. Butler*, 802 F.3d 884, 898 (7th Cir. 2015). In *Caffey v. Butler*, the Seventh Circuit analyzed *Chambers v. Mississippi*, 410 U.S. 284 (1973), where this Court held that a state can commit constitutional error by excluding evidence that is "critical" to the defense. *See Chambers*, 410 U.S. at 302. According to the Seventh Circuit, an "evidentiary ruling that unconstitutionally excludes critical evidence under *Chambers* is *necessarily* harmful under *Brecht*." *Caffey*, 802 F.3d at 898 n.1 (emphasis added). Further, the "*Valenzuela–Bernal* standard defines 'critical' for purposes of *Chambers* analysis." *Id*. at 897. It therefore follows that excluding evidence that is material under *Valenzuela-Bernal* is necessarily harmful under *Brecht*.

The Third Circuit has held that when a perjured-testimony error is material enough to be a constitutional error under *Giglio*, the error cannot be found harmless under *Brecht*. *Haskell*, 866 F.3d at 152. After acknowledging that its "sister Circuits are split on the question," *id*. at 150, the *Haskell* court ultimately held that "the actual-prejudice standard of *Brecht* does not apply to claims on habeas that the state has knowingly presented or knowingly failed to correct perjured testimony. A reasonable likelihood that the perjured testimony affected the judgment of the jury is all that is required." *Id*. at 152.

The Eleventh Circuit has held that when an excluded-testimony error is material enough to be a constitutional error under *Valenzuela-Bernal*, the error cannot be found harmless under *Brecht*. *Taylor v. Singletary*, 122 F.3d 1390, 1391 (11th Cir. 1997). However, the Eleventh Circuit has also held that when a perjured-testimony error is material enough to be a constitutional error under *Giglio*, the error *can* be found harmless under *Brecht*. *Trepal v. Sec'y, Fla. Dep't of Corr.*, 684 F.3d 1088, 1113 (11th Cir. 2012).

Like the Eleventh Circuit, the First, Sixth, Eighth, and Tenth Circuits have all held that when a perjured-testimony error is material enough to be a constitutional error under *Giglio*, the error can be found harmless under *Brecht*.[8] In addition, the Fifth Circuit has "assume[d], without deciding, that it is

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[8] *See Gilday v. Callahan*, 59 F.3d 257, 268 (1st Cir. 1995); *Rosencrantz v. Lafler*, 568 F.3d 577, 587–90 (6th Cir. 2009); *United States v. Clay*, 720 F.3d 1021, 1026–27 (8th Cir. 2013); *Douglas v. Workman*, 560 F.3d 1156, 1173 n.12 (10th Cir. 2009).

appropriate to conduct a *Brecht* harmless-error analysis in such a circumstance." *Barrientes v. Johnson*, 221 F.3d 741, 756 (5th Cir. 2000).

To summarize, some circuits have held that an error that is material under one of this Court's constitutional materiality standards cannot be found harmless under *Brecht*. Others—including the Tenth Circuit in Coddington's case—have held the opposite. This Court should resolve this circuit split by granting Coddington's Petition for Certiorari and clarifying the relationship between *Brecht* and all of this Court's materiality standards.

III. THE TENTH CIRCUIT DISREGARDED *VALENZUELA-BERNAL* AND *KYLES*.

The Tenth Circuit's decision conflicts not only with the decisions of its sister circuits but also with this Court's holdings in *Valenzuela-Bernal* and *Kyles*. When read together, these cases show that excluding a witness's testimony can never be both a constitutional error and a harmless error. Yet the Tenth Circuit found that the exclusion of Dr. Smith's testimony was both.

A. *Valenzuela-Bernal* and *Kyles* Make Clear that Excluding a Witness's Testimony can Never be Both a Constitutional Error and a Harmless Error.

This Court has long recognized that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." *Taylor v. Illinois*, 484 U.S. 400, 408 (1988). Thus, a trial court's

evidentiary ruling that deprives the defendant of a witness's testimony can, in some circumstances, be severe enough to constitute a constitutional error. *Chambers*, 410 U.S. at 302. This Court has sometimes referred to this type of error as a "*Chambers* error." *See, e.g.*, *Fry*, 551 U.S. 112, 124 (2007) (Stevens, J., concurring in part and dissenting in part).

In *Valenzuela-Bernal*, this Court explained that to establish that the trial court committed constitutional error by excluding a witness's testimony, a criminal defendant must show that the testimony would have been material to his defense. *Valenzuela-Bernal*, 458 U.S. at 867. And testimony is material "only if there is a reasonable likelihood that the testimony could have affected the judgment of the trier of fact." *Id*. at 874.

In *Bagley*, this Court would clarify that the materiality standard it had articulated in *Valenzuela-Bernal* is the same as the materiality standard it first articulated in *United States v. Agurs*, 427 U.S. 97 (1976).[9] *Bagley*, 473 U.S. at 681–82 (opinion of

[9] In *Agurs*, this Court considered the materiality standard that applies when a prosecutor secures a conviction by knowingly using perjured testimony and concluding that "a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Agurs*, 427 U.S. at 103. The *Bagley* Court subsequently restated the perjured-testimony rule "as a materiality standard under which the fact that testimony is perjured is considered material unless failure to disclose it would be harmless beyond a reasonable doubt," *Bagley*, 473 U.S.

Blackmun, J) ("The Court has relied on and reformulated the *Agurs* standard for the materiality of undisclosed evidence in two subsequent cases arising outside the Brady context.").

Finally, in *Kyles*, this Court explained that the *Agurs* materiality standard recognizes constitutional

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at 679, which is notable considering the *Wearry* Court's use of the "reasonable likelihood" formulation discussed above.

In addition to the perjured-testimony situation, *Agurs* also considered the materiality standard that applies when prosecutors fail to turn over evidence in response to either (i) a specific request for particular information or (ii) a general request for any exculpatory information. 427 U.S. 104–07. The opinion did not articulate the appropriate standard to apply to the former but concluded that the latter must be a higher burden than a harmless-beyond-a-reasonable-doubt standard but less onerous than the newly-discovered-evidence standard. *Id.* at 111–12; *see also Bagley*, 473 U.S. 680–81 (opinion of Blackmun, J.). According to Justice Blackmun, it was this standard, which he referred to as the "*Agurs* standard for the materiality of undisclosed evidence," that the Court had "relied on and reformulated" when deciding *Valenzuela-Bernal* and *Strickland*. *Bagley*, 473 U.S. 681.

Ultimately, Justice Blackmun concluded that all three situations considered in *Agurs* should be collapsed and considered under *Strickland*'s "reasonable probability" standard. *Id.* at 682. Although that portion of the opinion did not garner a majority, see *id.* at 669, Justice White stated in a concurrence, in which Chief Justice Burger and Justice Rehnquist joined, that Justice Blackmun had "correctly observe[d]" that the *Strickland* standard was "sufficiently flexible to cover all instances of prosecutorial failure to disclose evidence favorable to the accused." *Id.* at 685 (internal quotation marks omitted). Thereafter, rather than referring to an *Agurs* standard as such, the Court will usually refer to a *Bagley* standard.

error only when the harm to the defendant is greater than the harm sufficient for reversal under *Brecht*:

> [W]e held in *Brecht* that the standard of harmlessness generally to be applied in habeas cases is the *Kotteakos* formulation . . . *Agurs*, however, had previously rejected *Kotteakos* . . . reasoning that "the constitutional standard of materiality must impose a higher burden on the defendant." *Agurs* thus opted for its formulation of materiality . . . only after expressly noting that this standard would recognize reversible constitutional error only when the harm to the defendant was greater than the harm sufficient for reversal under *Kotteakos*.

Kyles, 514 U.S. at 436. If *Brecht* adopted the *Kotteakos* formulation, and if the *Agurs* standard only recognizes constitutional error when the harm to the defendant is greater than the harm sufficient for reversal under *Kotteakos*, it follows that any error found material under the *Agurs* standard cannot be found harmless under *Brecht*.

In sum, three rules can be distilled from these cases. First, depriving a defendant of a witness's testimony can be a constitutional error only if the testimony is material under *Valenzuela-Bernal*. Second, the materiality standard articulated in *Valenzuela-Bernal* is the same as the *Agurs* materiality standard. Third, the *Agurs* materiality

standard recognizes constitutional error only when the harm to the defendant is greater than the harm sufficient for reversal under *Kotteakos*, which is the standard adopted by *Brecht*.

B. The Tenth Circuit Held that Even if the Exclusion of Dr. Smith's Testimony was a Constitutional Error, this Error was Harmless.

In Coddington's case, the Tenth Circuit assumed that the exclusion of Dr. Smith's testimony was a constitutional error. *Coddington*, 959 F.3d at 955. It then incorrectly proceeded to apply *Brecht* and ultimately held that this error was harmless. *Id*. at 958.

This decision by the Tenth Circuit cannot be reconciled with *Valenzuela-Bernal* and *Kyles*. Excluding Dr. Smith's testimony could be a constitutional error only if the testimony was material under *Valenzuela-Bernal*, i.e., the *Agurs* standard. And since the *Agurs* standard recognizes reversible constitutional error only when the harm to the defendant is greater than the harm sufficient for reversal under *Brecht*, it is impossible for the exclusion of Dr. Smith's testimony to be both a constitutional error and a harmless error.

The Tenth Circuit should have stopped its analysis once it assumed that excluding Dr. Smith's testimony was a constitutional error. Any excluded-testimony error that rises to the level of a constitutional error "is by nature prejudicial." *Fry*, 551 U.S. at 124 (Stevens, J., concurring in part and

dissenting in part). Simply put, if a trial court's exclusion of a witness's testimony rises to the level of a constitutional error, which the Tenth Circuit assumed here, then it necessarily follows that this constitutional error was harmful under *Brecht*. *Cf. Kyles*, 514 U.S. at 435. The Tenth Circuit's contrary conclusion cannot be reconciled with *Valenzuela-Bernal* and *Kyles*.

IV. THE *FRY* COURT LEFT OPEN THE QUESTION PRESENTED IN THIS CASE.

The question presented by Coddington—whether the exclusion of testimony that amounts to a constitutional error can ever be harmless under the *Brecht* standard—was left open by this Court in *Fry v. Pliler*, 551 U.S. 112 (2007). In that case, the Ninth Circuit assumed that the exclusion of a certain witness's testimony was a constitutional error but held that this error was harmless under the *Brecht* standard, rather than the *Chapman v. California* harmless-error standard, and this Court granted certiorari to determine which standard should apply. *Fry*, 551 U.S. at 120.

The *Fry* Court determined that the Ninth Circuit was correct in applying the *Brecht* standard but declined to decide whether it had applied that standard correctly—that is, whether the Ninth Circuit had correctly determined that the exclusion of the witness's testimony in that case was harmless. *Id.* at 121 ("[W]e read the question presented to avoid these tangential and factbound questions, and limit our review to the question whether *Chapman* or *Brecht* provides the governing standard.").

Although the Court did not reach this question in *Fry*, four justices stated that when the exclusion of a witness's testimony amounts to a constitutional error, such error can *never* be found harmless under *Brecht*. As Justice Stevens explained, these types of errors are "by nature prejudicial." *Id.* at 124 (Stevens, J., concurring in part and dissenting in part). This is because a constitutional error does not occur every time a trial court excludes a witness's testimony. Rather, a constitutional error occurs only when the exclusion of the testimony "undermines fundamental elements of the defendant's defense." *Id*. "Hence, as a matter of law and logical inference, it is well-nigh impossible for a reviewing court to conclude that such error did not influence the jury, or had but very slight effect on its verdict." *Id*. (internal quotation marks omitted).[10]

Like the Ninth Circuit in *Fry*, the Tenth Circuit in this case assumed that the exclusion of Dr. Smith's testimony was a constitutional error but that it was harmless under *Brecht*. This Court should grant Coddington's Petition for Certiorari to answer the question that the Court left unanswered in *Fry*.

CONCLUSION

The Court should hear this case to not only remedy the Tenth Circuit's failure to apply *Brady* and its progeny, but also to resolve a split amongst the circuits as to whether a material error can be

[10] *See also Fry*, 551 U.S. at 126 (Breyer, J., concurring in part and dissenting in part) ("I agree with Justice STEVENS . . . that '*Chambers* error is by nature prejudicial.'").

harmless under this Court's decisions. For these reasons, the Petition for a Writ of Certiorari should be granted.

April 5, 2020

Respectfully Submitted,

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