Case No. 20-7341

IN THE SUPREME COURT OF THE UNITED STATES

JAMES CODDINGTON,

***Petitioner*,**

v.

JIM FARRIS, Warden,
Oklahoma State Penitentiary,

***Respondent*.**

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
QUESTION PRESENTED

Should this Court grant certiorari to decide whether a court may apply harmless-error review to a right-to-present-a-defense violation where that issue was neither pressed nor passed upon below?

No. 20-7341

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES CODDINGTON,

***Petitioner*,**

vs.

JIM FARRIS, Warden,
Oklahoma State Penitentiary,

***Respondent*.**

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

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

Respondent respectfully urges this Court to deny Petitioner James Coddington's (hereinafter, "Petitioner") petition for a writ of certiorari to review the published opinion of the United States Court of Appeals for the Tenth Circuit entered in this case on May 12, 2020, affirming the denial of habeas relief. *Coddington v. Sharp*, 959 F.3d 947 (10th Cir. 2020), Pet'r Appx. A.

STATEMENT OF THE CASE

A. Factual Background

On direct appeal, the Oklahoma Court of Criminal Appeals ("OCCA") set forth the facts[1] in its published opinion:

> In early March of 1997, Appellant, a cocaine addict, suffered a relapse and began using cocaine again. He estimated he spent one thousand dollars ($1000.00) a day to support his habit. Within a short time, he was desperate for money and robbed a convenience store on March 5, 1997 to feed his habit. The robbery did not yield enough money, so Coddington went to his friend Al Hale's home to borrow fifty dollars ($50.00).
>
> Hale, then 73 years old, worked with Coddington at a Honda Salvage yard. Hale had previously loaned Coddington money and had also contributed towards Coddington's previous drug treatment. Hale's friends and family knew he kept a large amount of cash at his home. On March 5, 1997, he had over twenty-four thousand dollars ($24,000.00) stashed in his closet.
>
> Coddington went to Hale's home on the afternoon of March 5, 1997 to borrow money, because he had been on a cocaine binge for several days and needed money for more cocaine. Coddington watched television with Hale for an hour or two and then smoked crack cocaine in Hale's bathroom. Hale knew Coddington was using cocaine again. Hale refused to give him money and told him to leave. As he was leaving, Coddington saw a claw hammer in Hale's kitchen, grabbed it, turned around and hit Hale at least three times with the hammer. Coddington believed Hale was dead, so he took five hundred twenty-five dollars ($525.00) from his pocket and left. Following the attack on Hale, Coddington robbed five more convenience stores to get money for cocaine.
>
> Oklahoma City police detectives arrested Coddington on March 7, 1997, outside of his apartment in south Oklahoma City. Coddington told one officer he had been on a cocaine binge. On the way to the police department, Coddington tried to choke himself by wrapping the seat belt around his neck. He also stated he wanted to die. At the police station, during an interview with a robbery detective and a homicide detective,

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[1] Such facts must be presumed correct. *See* 28 U.S.C. § 2254(e)(1).

> Coddington confessed to the convenience store robberies and also to the murder of Mr. Hale. He admitted he struck Mr. Hale in the head with a claw hammer and believed Hale was dead when he left. At trial, Coddington admitted he murdered Hale. He testified he did not go to Hale's house with the intent to do anything except borrow money to buy more cocaine. He said he did not have a weapon with him, did not intend to rob Hale, and did not intend to kill him.
>
> Ron Hale, the victim's son, discovered Hale after the attack on the evening of March 5, 1997. There was blood and blood spatter everywhere. Hale was lying in his bed, soaked in blood, still breathing but unable to speak. Hale was transported first to Midwest City Hospital and then to Presbyterian Hospital. He died approximately twenty-four hours later. An autopsy showed Hale died from blunt force head trauma. The medical examiner testified he sustained at least three separate blows to the left side of his head, consistent with being hit in the head with a claw hammer. He also testified Hale had defensive wounds.
>
> Coddington admitted that he did not call the police when he left Hale's house because he did not want to get caught. He also admitted he had prior felony convictions.

Coddington v. State, 142 P.3d 437, 442-43 (Okla. Crim. App. 2006), *cert. denied*, 549 U.S. 1361 (2007) ("*Coddington I*") (paragraph numbering omitted).

B. Procedural Background

A jury found Petitioner guilty of First Degree Malice Aforethought Murder and Robbery with a Dangerous Weapon in the District Court of Oklahoma County, State of Oklahoma, in Case No. CF-1997-1500. Petitioner received a sentence of death for the murder conviction and a sentence of life imprisonment for the robbery. On direct appeal, the OCCA affirmed Petitioner's convictions, affirmed his life sentence for robbery, but vacated his death sentence and remanded for resentencing. *Coddington I*, 142 P.3d at 462.

In 2008, a jury again sentenced Petitioner to death for the murder, finding the following aggravating circumstances: (1) the murder was especially heinous, atrocious, or cruel; (2) the murder was committed to avoid or prevent a lawful arrest or prosecution; (3) Petitioner had previously been convicted of a felony involving the use or threat of violence to the person; and (4) at the present time there existed a probability that Petitioner would commit criminal acts of violence that would constitute a continuing threat to society. *Coddington v. State*, 254 P.3d 684, 717-18 (Okla. Crim. App.), *cert. denied*, 565 U.S. 1040 (2011) ("*Coddington II*"); *see also* Okla. Stat. tit. 21, § 701.12(1), (4), (5), (7).

Petitioner's new death sentence was affirmed on direct appeal by the OCCA. *Coddington II*, 254 P.3d at 717-18. This Court denied certiorari review. *Coddington v. Oklahoma*, 565 U.S. 1040 (2011). The OCCA denied Petitioner's application for state post-conviction relief. *Coddington v. State*, 259 P.3d 833, 835 (Okla. Crim. App. 2011) ("*Coddington III*").

The federal district court denied Petitioner's 28 U.S.C. § 2254 petition in an unpublished memorandum opinion. *Coddington v. Royal*, Case No. CIV-11-1457-HE, slip op. (W.D. Okla. Sept. 15, 2016), Pet'r Appx. B. On appeal, the Tenth Circuit affirmed the denial of habeas relief. *Coddington*, 959 F.3d at 961. The Tenth Circuit also denied panel and *en banc* rehearing. *Coddington v. Sharp*, No. 16-6295, *Order* (10th Cir. Sep. 29, 2020) (unpublished); Pet'r Appx. D. On February 26, 2021, Petitioner filed a petition for writ of certiorari with this Court seeking review of the Tenth Circuit's decision.

REASONS FOR DENYING THE WRIT

Petitioner seeks certiorari review on the question of whether the exclusion of "material" defense evidence can ever be harmless. Pet. at ii. As background, at trial, Petitioner's expert, Dr. John R. Smith, was permitted to testify to Petitioner's cocaine addiction, Petitioner's use of cocaine on the day of the murder, and how this use affected Petitioner's ability to make decisions, control his behavior, and think logically (2003 Tr. V 92-94; 2003 Tr. VI 4[2]). The *only* testimony the trial court excluded was an opinion by Dr. Smith that Petitioner's cocaine use rendered him unable to form the intent of malice aforethought on the day of the murder (2003 Tr. V 37). On direct appeal and in habeas, Petitioner claimed that this single limitation on his expert's testimony violated his right to present a defense. The OCCA found the limitation on Dr. Smith's testimony both to be error under state law and violative of Petitioner's federal constitutional right to present a defense. *Coddington I*, 142 P.3d at 448-51. However, while recognizing that Dr. Smith's omitted opinion was "certainly material . . . *if believed by the jury*," the OCCA concluded its exclusion was harmless beyond a reasonable doubt under *Chapman v. California*, 386 U.S. 18 (1967). *Coddington I*, 142 P.3d at 451 (emphasis added).

Before this Court, the crux of Petitioner's argument is that because the OCCA called Dr. Smith's excluded testimony "material," the OCCA necessarily should have found prejudice and should not have proceeded to apply harmless-error review. Pet. at 11-15. Petitioner contends that this Court in *United States v. Valenzuela-Bernal*,

[2] Citations are to Petitioner's 2003 trial on guilt/innocence. *See* SUP. CT. R. 12.7.

458 U.S. 858 (1982), imported the materiality standard from *Brady v. Maryland*, 373 U.S. 83 (1963), into right-to-present-a-defense cases, while *Kyles v. Whitley*, 514 U.S. 419 (1995), made clear that a materiality finding is necessarily a finding of prejudice. Pet. at 12-15.

This Court should deny Petitioner's request for a writ of certiorari for a number of reasons. For starters, the issue raised by Petitioner—whether a court may apply *Chapman* harmless-error review to a right-to-present-a-defense violation—was neither fairly pressed nor passed upon below. Petitioner did not raise this argument at all in state court, and did not raise it in federal court until his reply brief before the Tenth Circuit. Unsurprisingly, given the Tenth Circuit's well-settled rules on forfeiture and waiver, the Tenth Circuit did not address Petitioner's brand new argument.

Petitioner has further failed to identify a compelling issue worthy of this Court's review. Even assuming the OCCA erred in applying *Chapman* harmless-error review despite finding that Dr. Smith's excluded opinion was "material," Petitioner has not shown that this is a recurring problem among lower courts. At bottom, he seeks error-correction review.

Even assuming further Petitioner has identified a compelling issue, his case is a poor vehicle for addressing same because the Tenth Circuit merely assumed, without actually deciding, that Petitioner had shown a violation of his right to present a defense. No case of this Court supports Petitioner's claim that the single limitation on Dr. Smith's testimony—that he could not testify to his opinion that Petitioner was

unable to form malice aforethought due to intoxication—violated Petitioner's right to present a defense. Indeed, such ultimate-issue opinion testimony is expressly prohibited by the federal rules of evidence, and federal courts have upheld the exclusion of such evidence against constitutional challenges. The unresolved question of whether Petitioner's constitutional right to present a defense was even violated makes this case a poor vehicle for consideration of the question presented.

Finally, in any event, Petitioner's arguments fail on their merits. His assertion that the state court found the limitation on Dr. Smith's testimony "material" in the outcome-determinative sense is belied by the totality of the state court's opinion. Moreover, this Court's precedents do not preclude the application of *Chapman* harmless-error review in right-to-present-a-defense cases where there is no government-induced-access-to-evidence issue.

Certiorari review should be denied.

PETITIONER'S QUESTION PRESENTED WAS NOT PRESSED OR PASSED UPON BELOW. IN ANY EVENT, THE ISSUE HE RAISES IS NOT COMPELLING. FURTHER, HIS CASE IS A POOR VEHICLE FOR RESOLUTION OF THE QUESTION PRESENTED. IN ANY EVENT, HIS ARGUMENTS ARE WITHOUT MERIT.

A. The Issue Raised by Petitioner was Neither Fairly Pressed Nor Passed Upon Below.

Petitioner complains that, in affirming the denial of habeas relief, the Tenth Circuit "overlooked the central contradiction" in the OCCA's opinion, as "[i]t never addressed how the erroneous suppression of material evidence favorable to the

defense could ever embody harmless error." Pet. at 11. Specifically, Petitioner complains about the following portion of the OCCA's opinion:

> The trial court clearly erred by limiting the testimony of Dr. Smith on the issue of Coddington's ability to form malice and Coddington's conviction cannot stand unless we find the error was harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Such testimony, while helpful to the jury and certainly material, was not exculpatory in the sense that it would have exonerated the defendant; but, if believed by the jury, the evidence certainly might have reduced the degree of homicide for which Coddington was convicted.

Coddington I, 142 P.3d at 451. There is a good reason the Tenth Circuit did not address the issue of how the exclusion of "material" evidence could ever be harmless—Petitioner's present argument, that the OCCA's materiality finding precluded its harmlessness determination, was not fairly pressed below.

Petitioner did not raise this argument in state court, in federal district court, or in his opening brief to the Tenth Circuit. *See* Docket Sheet for *Coddington v. State* (OCCA Case No. D-2003-887), available at https://www.oscn.net/dockets/GetCaseInformation.aspx?db=appellate&number=D-2003-887&cmid=86186 (reflecting that Petitioner did not move for rehearing after the OCCA rendered the opinion at issue); Petition for Writ of Habeas Corpus by a Person in State Custody Pursuant to Title 28, United States Code, § 2254, *Coddington v. Royal*, Case No. CIV-11-1457-HE (W.D. Okla. Nov. 13, 2012) ("Habeas Pet."); Reply in Support of Petitioner's Petition for Writ of Habeas Corpus, *Coddington v. Royal*, Case No. CIV-11-1457-HE (W.D. Okla. Jan. 28, 2013); Appellant's Opening Brief at 17-26,

Coddington v. Royal, Case No. 16-6295 (10th Cir. Nov. 20, 2017) ("Opening Br.").[3] Petitioner's suggestion that he raised the argument in his habeas petition and opening Tenth Circuit brief is incorrect. Pet. at 19-20. These pleadings did not cite *Brady*, *Valenzuela-Bernal*, or *Kyles*. Moreover, while the pleadings did point out the OCCA's materiality finding, Petitioner's argument was entirely different from the one later advanced. In his habeas petition and opening brief to the Tenth Circuit, pointing to the above-quoted paragraph, Petitioner argued it was "contradictory" for the OCCA to find "that the excluded evidence could have negated the jury's verdict of guilt on First Degree Murder, [but] still uph[o]ld the conviction." Opening Br. at 11; Habeas Pet. at 15. In other words, Petitioner complained that the OCCA mistakenly reasoned that Dr. Smith's excluded testimony would not have exonerated Petitioner of *first degree murder*. *See* Opening Br. at 26 ("The OCCA's statement that the excluded evidence would have not exonerated Coddington of first degree murder and in the same sentence acknowledging that it would have reduced the degree of homicide for which he was convicted, first degree murder, is clearly a tortuous exercise of logic."); Habeas Pet. at 16-17 (same). Unsurprisingly, Petitioner has since abandoned this frivolous argument—what the OCCA plainly meant was that the

[3] Petitioner's assertion that there are "no procedural or other impediments" to his question presented because he "exhausted [his] claim in the Oklahoma courts," Pet. at 18, tells only half the story. True, Petitioner exhausted his right-to-present-a-defense *claim* in state court. But it is entirely another matter whether Petitioner has fairly presented the argument, to the state and lower federal courts, that a materiality finding precluded *Chapman* harmless-error review. *See Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2560 (2018) (admonishing the Ninth Circuit for considering arguments not made to the state court).

testimony could not have exonerated him *entirely of any form of homicide*. *See Coddington I*, 142 P.3d at 451.

Petitioner first raised his new and different argument—that a materiality finding precludes *Chapman* harmless-error review—in his Reply Brief in the Tenth Circuit, and he then expanded on it in a Federal Rule of Appellate Procedure 28(j) letter filed five days prior to oral argument before the Tenth Circuit. Reply Brief at 12-15, *Coddington v. Carpenter*, Case No. 16-6295 (10th Cir. Sept. 05, 2018); Letter to the Clerk of the Court Pursuant to Fed. R. App. P. 28(j), *Coddington v. Carpenter*, Case No. 16-6295 (10th Cir. Jan. 19, 2019) ("Rule 28(j) Letter"). Petitioner first cited *Valenzuela-Bernal* in his Reply Brief and first cited *Kyles* in his Rule 28(j) Letter. Responding to Petitioner's Rule 28(j) letter, Respondent asserted that Petitioner's new argument based on these cases was "not raised in state court, district court, or Petitioner's opening brief." Respondent's Response to Rule 28(j) Letter, *Coddington v. Carpenter*, Case No. 16-6295 (10th Cir. Jan. 22, 2019).

This Court does not grant certiorari review to consider questions that were neither pressed nor passed upon below. *See Cutter v. Wilkinson*, 544 U.S. 709, 718 n. 7 (2005) (Supreme Court is "a court of review, not of first view"); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 55-56 (2002) (the Supreme Court does not grant certiorari to address arguments not pressed or passed upon below); *United States v. Williams*, 504 U.S. 36, 41 (1992) (Supreme Court's traditional rule precludes grant of certiorari where "the question presented was not pressed or passed upon below"). Here, where Petitioner did not exhaust his argument in state court, and did not

timely raise it in his federal habeas proceedings, such that it was both waived and forfeited in the Tenth Circuit, it cannot be said he fairly pressed this issue below. *See Grant v. Royal*, 886 F.3d 874, 891, 909, 932 n. 20 (10th Cir. 2018); *Byrd v. Workman*, 645 F.3d 1159, 1167 n. 8 (10th Cir. 2011). Furthermore, given these procedural impediments, the Tenth Circuit did not pass upon the argument. Certiorari review is not appropriate.

B. Petitioner Seeks Error-Correction Review.

Beyond the fact that Petitioner has not properly preserved the question presented for this Court's review, the question itself is not the type of compelling issue worthy of this Court's review. Although not exhaustive, Rule 10 of this Court's rules sets forth examples of grounds for granting a petition for writ of certiorari. These include a conflict among the United States courts of appeals, a conflict between a United States court of appeals and a state court of last resort, a conflict between state courts of last resort, an opinion by a state court or United States court of appeals that decides an important federal question in a way that conflicts with relevant decisions of this Court, and an opinion by a state court or United States court of appeals that decides an important federal question that should be settled by this Court. SUP. CT. R. 10. Petitioner has not made any of these showings.

The closest Petitioner comes to identifying the type of issue envisioned by Rule 10 is his complaint that the OCCA's and Tenth Circuit's opinions conflicted with this Court's decisions in *Brady*, *Valenzuela-Bernal*, and *Kyles*. Pet. at 11-16. But even

assuming *arguendo* this is accurate,[4] Petitioner has not shown that this conflict presents an "*important* federal question." SUP. CT. R. 10 (emphasis added). Petitioner does not identify any other cases in which direct-review courts have erroneously applied *Chapman* harmless-error review despite finding materiality under *Brady*/*Bagley*.[5, 6] Thus, Petitioner has not shown this is a recurring problem requiring this Court's intervention. *Cf. Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 232 (1959) ("Since the question is important and recurring we granted certiorari."); *Sanson v. United States*, 467 U.S. 1264, 1265 (1984) (White, J., dissenting from the denial of certiorari) ("Because of the substantial confusion surrounding this frequently recurring issue, I would grant certiorari to resolve the conflict."). At bottom, then, Petitioner seeks error-correction review, which is unworthy of this Court's attention. *Cf. Halbert v. Michigan*, 545 U.S. 605, 605 (2005) (explaining that, on "certiorari review in this Court," "error correction is not" this Court's "prime function").

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[4] It is, in fact, not accurate, as shown below.

[5] This Court did not define "materiality" in *Brady*, instead settling on a final definition only in *United States v. Bagley*, 473 U.S. 667 (1985). *See Strickler v. Greene*, 527 U.S. 263, 298-99 (1999) (Souter, J., concurring).

[6] The amicus brief claims the federal circuit courts are split over whether a habeas court, confronted with a claim under *Brady* and its progeny, can proceed to conducting harmless-error review under *Brecht v. Abrahamson*, 507 U.S. 619 (1993), after determining that the excluded evidence or testimony is material. *See Brief for Oklahoma Criminal Defense Lawyers Association as Amicus Curiae in Support of Petitioner* at 12-15 ("Amicus Br."). However, even assuming this split exists, Petitioner's case is not the appropriate vehicle to resolve it because, first, *Brady* and its progeny do not actually apply in his case, as shown *infra*, **Subpart D**. Second, the Tenth Circuit did not decide that issue one way or another because, as Petitioner himself points out, the Tenth Circuit did not even mention "materiality." Pet. at 10-11. Indeed, the Tenth Circuit did not cite *Brady* or any of its progeny.

C. Petitioner's Case Is a Poor Vehicle for the Question Presented.

This Court should also deny certiorari review because, before this Court can even reach the question of harmless-error review, there remains a thorny, unresolved issue of whether Petitioner's constitutional right to present a defense was even violated in the first place. Below, Respondent argued at length that Petitioner had not shown federal constitutional error in the limitation on Dr. Smith's testimony, Respondent-Appellee's Answer Brief at 15-20, *Coddington v. Royal*, Case No. 16-6295 (10th Cir. Jan. 17, 2018), and the Tenth Circuit expressly declined to decide that issue, *Coddington*, 959 F.3d at 955 ("Because we ultimately conclude that the trial court's error in excluding a portion of Dr. Smith's testimony was harmless, . . . we assume, without deciding, that the error Coddington identifies is of constitutional magnitude." (quotation marks omitted, alterations adopted)).

On appellate review, "[t]he question before an appellate Court is, was the judgment correct, not the ground on which the judgment professes to proceed." *McClung v. Silliman*, 6 [19 U.S.] Wheat. 598, 603 (1821). Thus, this Court decides cases only "in the context of meaningful litigation," and when the challenged issue may not affect the ultimate judgment of the court below, that issue "can await a day when [it] is posed less abstractly." *The Monrosa v. Carbon Black Exp., Inc.*, 359 U.S. 180, 184 (1959). Here, Petitioner's case is a poor vehicle to address the question presented, as it is far from clear that he has shown a *federal constitutional* error.

Petitioner identifies no case from any federal court requiring a state trial judge to allow a defense expert to present an opinion as to whether a criminal defendant

had a mental state or condition that constitutes an element of the crime charged or of a defense. In fact, Federal Rule of Evidence 704—which federal courts have upheld against due process challenges—expressly *prohibits* such evidence: "In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone." Fed. R. Evid. 704(b); *see United States v. Austin*, 981 F.2d 1163, 1165 (10th Cir. 1992) (upholding Rule 704 against a claim that it violated the defendant's due process right to present a defense on grounds that the rule does not exclude any evidence of a defendant's mental disease or defect but instead prohibits only testimony on whether the defendant had the requisite legal intent); *United States v. Blumberg*, 961 F.2d 787, 789 (8th Cir. 1992) (same); *cf. also Diestel v. Hines*, 506 F.3d 1249, 1276 (10th Cir. 2007) (Henry, J., concurring) ("Unlike the Federal Rules of Evidence, Oklahoma law permits experts to testify as to whether a criminal defendant did or did not have the requisite mental state to commit the crime with which he has been charged."). As the Eighth Circuit noted in *Blumberg*, Rule 704(b) "merely forbids both defense and government experts from telling the jury what its finding should be on the ultimate issue in the case." *Blumberg*, 961 F.2d at 789.[7] Many states likewise prohibit expert opinion testimony on whether a defendant had the capacity to form specific criminal

[7] The trial court's ruling here, although apparently in violation of Oklahoma law, was entirely in line with the reasoning in *Austin* and *Blumberg*, as the court stated that its limitation on Dr. Smith's testimony was merely to prevent Dr. Smith from "telling the jury what result to reach" (2003 Tr. V 37 (quotation marks omitted)).

intent. *See Haas v. Abrahamson*, 910 F.2d 384, 397 (7th Cir. 1990) (collecting cases and statutes).

Accordingly, Petitioner has not shown that the limitation on Dr. Smith's testimony resulted in a federal constitutional violation. While Dr. Smith was not permitted to testify that Petitioner's cocaine use rendered him unable to form the intent of malice aforethought on the day of the murder, he was able to testify to Petitioner's cocaine addiction, Petitioner's use of cocaine on the day of the murder, and how this use affected Petitioner's ability to make decisions, control his behavior, and think logically (2003 Tr. V 92-94; 2003 Tr. VI 4). Thus, the trial court's limitation on Dr. Smith's testimony forbade only an ultimate-issue opinion concerning whether Petitioner had the capacity to form the legal intent necessary to be convicted of murder, "leaving that determination for the jury," and did "not exclude evidence." *Austin*, 981 F.2d at 1165. Under the Tenth Circuit's own precedent, the trial court's ruling did not infringe Petitioner's federal constitutional right to present a defense. *See id.* Petitioner is left then only with a violation of Oklahoma law, which cannot form the basis of habeas relief. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991).

Although the OCCA concluded that the limitation on Dr. Smith's testimony violated Petitioner's federal constitutional right to present a defense, *see Coddington I*, 142 P.3d at 450-51, "unlike federal district courts considering habeas writs, state courts are not required to apply only 'clearly established federal law' on direct appeal, rather they apply Supreme Court decisions employing their own interpretation and analysis." *House v. Hatch*, 527 F.3d 1010, 1022 n. 9 (10th Cir. 2008). Even assuming

arguendo the error Petitioner identifies was harmful, he cannot obtain habeas relief simply because the OCCA construed the federal Constitution *more broadly* than federal courts do. *Cf. Estelle*, 502 U.S. at 67-68. In other words, the harmlessness test on habeas review—the test adopted in *Brecht*—presupposes federal constitutional error. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) ("The test . . . is whether the error had substantial and injurious effect or influence in determining the jury's verdict. Under this standard, habeas petitioners may obtain plenary review of their *constitutional* claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in actual prejudice." (emphasis added, quotation marks omitted)).

Petitioner contends his case presents an "extreme malfunction[] in the state criminal justice system." Pet. at 17 (quoting *Harrington v. Richter*, 562 U.S. 86, 102-03 (2011)). To the contrary, Petitioner has not even shown that federal constitutional error occurred at his trial. Indeed, Petitioner received a windfall in state court—the OCCA interpreted the Constitution more broadly than federal courts have; found constitutional error where federal courts would not have, *see, e.g.*, *Austin*, 981 F.2d at 1165; and gave Petitioner the benefit of *Chapman* harmless-error review to which he was not actually entitled.[8]

[8] Below, at the eleventh hour, in his Rule 28(j) letter filed five days prior to oral argument, Petitioner raised the brand new constitutional theory that he was arbitrarily deprived of a state-law right under *Hicks v. Oklahoma*, 447 U.S. 343 (1980). Rule 28(j) Letter. The Tenth Circuit did not address this theory, and clearly it was not fairly pressed or passed upon below. Nor does Petitioner raise that theory before this Court.

D. Petitioner's Issue Fails on the Merits.

Even setting aside the above problems, this Court should deny certiorari review because the issue pressed by Petitioner is without merit. For starters, Petitioner's entire question presented rests on a faulty premise—that the OCCA found the limitation on Dr. Smith's testimony to be "material" in the *Brady*/*Bagley* sense.[9] Petitioner argues essentially that, under the Antiterrorism and Effective Death Penalty Act's ("AEDPA") deferential standards, federal courts, including this one, must defer to the OCCA's finding that the limitation on Dr. Smith's testimony was "material." Pet. at 16-18. Petitioner's overly constrained reading of the OCCA's opinion ignores the totality of what that court said. It is Petitioner, and not Respondent, who disregards the deferential and forgiving lens of the AEDPA.

In denying relief on Petitioner's right-to-present-a-defense claim, the OCCA discussed it at considerable length. *See Coddington I*, 142 P.3d at 448-51. An examination of the relevant portions of this discussion demonstrates what the OCCA meant by "material":

> Coddington contends the trial court's limitation of Dr. Smith's testimony violated his fundamental right to present a defense, was prejudicial, and warrants reversal of his conviction. The State responds that Coddington's intoxication defense was "meritless," would not have been affected by the proposed testimony, and the limitation on Dr. Smith's testimony was harmless beyond a reasonable doubt. We disagree with the State's position that Coddington's jury was "erroneously instructed" on the defense of voluntary intoxication. The trial court found sufficient evidence of intoxication and also noted the

[9] Petitioner notes that Respondent raised this argument in opposing his petition for panel and/or en banc rehearing in the Tenth Circuit. Pet. at 16. That is correct. As Petitioner did not raise his present argument, that a materiality finding precludes harmless-error review, until his Tenth Circuit reply brief, Respondent's first—and, until now, only—opportunity to brief that argument was in Respondent's response to Petitioner's rehearing petition.

> State itself had suggested it. *The question is whether the proposed, excluded, testimony would have made a difference; we believe it would not. . . .*
>
> To determine whether Coddington was denied this fundamental right, we must first determine whether the trial court erred in excluding the testimony. Then, to establish constitutional error, *Coddington must show the evidence was material to the extent its exclusion violated his right to present a defense. Dowlin, id. To determine materiality, we examine the entire record and must ask "whether the evidence was of such an exculpatory nature that its exclusion affected the trial's outcome."* (citations omitted) *Id.*
>
> The trial court clearly erred by limiting the testimony of Dr. Smith on the issue of Coddington's ability to form malice and Coddington's conviction cannot stand unless we find the error was harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). *Such testimony, while helpful to the jury and certainly material, was not exculpatory in the sense that it would have exonerated the defendant; but, if believed by the jury, the evidence certainly might have reduced the degree of homicide for which Coddington was convicted.*
>
> The exclusion of Dr. Smith's expert opinion testimony relating to Coddington's specific ability to form the requisite intent for malice murder did not prevent Coddington from putting forth significant evidence relating to cocaine intoxication. Dr. Smith testified extensively about the effects of cocaine addiction and intoxication on the brain, on decision-making and behavior. *The evidence in this case was overwhelming, and we find, beyond a reasonable doubt, that Dr. Smith's expert opinion on the ultimate issue of whether Coddington could form the requisite malice would not have made a difference in the jury's determination of guilt. We find the error was harmless beyond a reasonable doubt. Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967).

Coddington I, 142 P.3d at 450-51 (emphases added, paragraph numbering omitted).

Clearly, when the OCCA said the excluded testimony was "certainly material," it did not mean material in the *Brady*/*Bagley* sense, *i.e.*, that there was a reasonable probability that the excluded testimony affected the outcome of the trial. *See United*

States v. Bagley, 473 U.S. 667, 682 (1985) ("The 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. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."). Although the OCCA's opinion was admittedly not a model of clarity, the OCCA repeatedly emphasized that it did not believe there was any chance the excluded testimony affected the outcome of the trial, stating, for example, "The question is whether the proposed, excluded, testimony would have made a difference; we believe it would not"; "we find, beyond a reasonable doubt, that Dr. Smith's expert opinion on the ultimate issue of whether Coddington could form the requisite malice would not have made a difference in the jury's determination of guilt"; and "We find the error was harmless beyond a reasonable doubt." *Coddington I*, 142 P.3d at 450-51.

Moreover, when the OCCA called the excluded testimony "material," it was plainly looking at the evidence in a vacuum: "Such testimony, while helpful to the jury and certainly *material*, was not exculpatory in the sense that it would have exonerated the defendant; but, *if believed by the jury*, the evidence certainly might have reduced the degree of homicide for which Coddington was convicted." *Id.* at 451 (emphasis added). In other words, more artfully phrased, the OCCA meant that, *assuming the jury believed* Dr. Smith's ultimate opinion on Petitioner's state of mind, it might have convicted Petitioner of second degree murder instead of first degree murder. But, as the OCCA properly recognized, Dr. Smith's excluded testimony needed to be weighed against the rest of the evidence to determine its potential effect

on the outcome, and the "overwhelming evidence" showing malice aforethought overcame his opinion beyond a reasonable doubt. *See Milton v. Wainwright*, 407 U.S. 371, 372-73 (1972) (including, as element of harmless error analysis, whether evidence was "overwhelming").

Not only is Petitioner's interpretation of the OCCA's opinion incorrect based on the court's overall language, but his focus on a single word of the OCCA's opinion, out of context, is inconsistent with the nature of habeas review. *See Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (state court opinions must be given the benefit of the doubt). Petitioner's argument that the OCCA found the excluded testimony to be material in the *Brady*/*Bagley* sense—the lynchpin of his entire certiorari petition—must be rejected.

Petitioner's issue is further without merit because no precedent of this Court forbade the OCCA, or the Tenth Circuit, from conducting harmless-error review in this case. *See Coddington I*, 142 P.3d at 451 (applying *Chapman*); *Coddington*, 959 F.3d at 953-54 (applying *Brecht*); *see also* 28 U.S.C. § 2254(d) (precluding habeas relief except where a state court's decision, *inter alia*, ran afoul of clearly established Supreme Court law). In other words, the flaw in Petitioner's syllogism is that, under this Court's precedent, not *all* right-to-present-a-defense claims are subject to the *Brady* test. Pet. at 14.

True, *Valenzuela-Bernal* is a right-to-present-a-defense case in which this Court applied a materiality requirement, as Petitioner points out. Pet. at 11-12. *See Valenzuela-Bernal*, 458 U.S. at 860-61, 867-68. However, the government deported a

defense witness in *Valenzuela-Bernal*, and this Court therefore turned to other cases in "the area of constitutionally guaranteed access to evidence" in imposing a materiality requirement. *Id.* at 866-67. In contrast, no case from this Court holds this materiality requirement applies outside the context of government-induced-access-to-evidence cases. *See Krutsinger v. People*, 219 P.3d 1054, 1059, 1061 (Colo. 2009) (*en banc*) (observing that, aside from structural errors, the Supreme Court has designated only two types of errors as having a built-in prejudice component: ineffective assistance and "governmental denial of access to favorable evidence").

Indeed, in *Crane v. Kentucky*, 476 U.S. 683, 691 (1986), this Court held that a right-to-present-a-defense violation was subject to harmless error review. More recently, in *United States v. Scheffer*, 523 U.S. 303, 308 (1998)—a right-to-present-a-defense case based on the exclusion of expert testimony—this Court held that the exclusion of evidence must "infringe[] upon a weighty interest of the accused" or "undermine[] fundamental elements of the defendant's defense" to violate his right to present a defense. This Court made no mention of a materiality requirement. Clearly, Petitioner's claim, regarding a limitation on his expert's testimony, falls squarely within the *Crane/Scheffer* line of cases, not the government-induced-access-to-evidence line of cases that includes *Brady*, *Valenzuela-Bernal*, and *Kyles*.[10] No

[10] Indeed, tacitly conceding the difference between his case and *Brady* and its progeny, Petitioner repeatedly refers to Dr. Smith's testimony as having been *suppressed*. Pet. at ii, 3-4, 11, 14-15. But of course Dr. Smith's expert opinion was not suppressed, as the government did not in any way keep the evidence from Petitioner or prevent his access to same. *Cf. Hooks v. Workman*, 689 F.3d 1148, 1179-80 (10th Cir. 2012) ("Evidence is not suppressed within the meaning of *Brady* if it is made known and available to the defense prior to trial." (quotation marks omitted)). Rather, the opinion was *excluded* by the trial court

precedent of this Court precluded the lower courts in this case from applying harmless-error review, and the conflict alleged by Petitioner is illusory.[11]

CONCLUSION

For the reasons set forth above, Respondent respectfully requests this Court deny the Petition for Writ of Certiorari.

based on a misinterpretation of Oklahoma law. No government-induced-access-to-evidence issue occurred in this case.

[11] The arguments of the amicus brief fail for the same reasons. The amicus brief's arguments all rest on the assumption that *Brady* and its progeny are applicable to Petitioner's claim. *See* Amicus Br. at 3-22. This is incorrect, as Petitioner's claim does not involve the denial of access to evidence by the State.