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

REPLY BRIEF OF THE PETITIONER

JOHN T. CARLSON
Counsel of Record
Ridley McGreevy & Winocur
303 16th St., Suite 200
Denver, CO 80202
(303) 629-9700
jtcarlson@gmail.com

and

SETH A. DAY
Hall Estill
100 N. Broadway, Suite 2900
Oklahoma City, OK 73102
(405) 553-2828
Email: sday@hallestill.com

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The State of Oklahoma opposes certiorari. Although its Brief in Opposition draws on many objections familiar to respondents, its actual, stated reasons for denying review don't withstand scrutiny.

I. Waiver

First, summoning waiver, Oklahoma says petitioner Coddington's "present argument . . . was not fairly pressed below." Br. in Opp. 8. The charge is wrong (*see infra*), but it's important to note at the outset what the charge is not. Oklahoma doesn't accuse Coddington of pressing a new or different legal *claim*. It recognizes that, beginning with the direct appeal and continuing through the petition for certiorari, he has consistently assailed the limitations placed on his expert's testimony during trial as denying him the constitutionally guaranteed right to present a complete defense to the first-degree murder count he faced. *Id.* at 5-6.[1]

Instead, Oklahoma argues Coddington has waived the grounds on which his request for certiorari rests by failing to raise what it calls his "present argument" till late in his federal-habeas case, in his reply brief to the Tenth Circuit.

[1] It's worth remembering too that "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 534 (1992).

One problem mars Oklahoma's contention at the threshold. The state occasionally misdescribes Coddington's "present argument" (leave to the side, for now, whether his present argument breaks with his prior argument). Coddington isn't asserting, as Oklahoma puts it, that the OCCA's "materiality finding precludes *Chapman* [*v. California*] harmless-error review." Br. in Opp. 10. Coddington is agnostic about whether such review takes place.

Appellate courts, if they choose, may engage in a harmless-error inquiry after uncovering and identifying an erroneous suppression of material evidence favorable to the defense. *See Kyles v. Whitney*, 514 U.S. 419, 435 (1995). It's the ensuing *determination* of harmlessness about which Coddington is concerned. That determination flowed here from the OCCA's application of the *Chapman* standard to the scenario conjured by *Kyles*. The state court applied *Chapman* to what it held was the erroneous suppression of the defense expert's opinion that Coddington was incapable of forming the *mens rea* needed to sustain his first-degree murder conviction. The expert's proffered but excluded testimony would have been "helpful to the jury and [it was] certainly material," said the OCCA. *Coddington v. State*, 142 P.3d 437, 451 (Okla. Crim. App. 2006).

As this Court in *Kyles* explained, although "there is no need for further harmless-error review" when an appellate court characterizes wrongly suppressed evidence as material, "[a]ssuming, *arguendo*, that a harmless-error

enquiry were to apply," a finding of materiality "necessarily entails the conclusion that the suppression must have had 'substantial and injurious effect or influence in determining the jury's verdict.'" *Id*., quoting *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993). The suppression entails prejudice enough to satisfy both *Chapman* and the standard of harmlessness applied in habeas cases. *Id*. Or phrased differently, where the excluded evidence was favorable to the defense and carried a reasonable probability of producing a different outcome, the result of any harmless-error inquiry is preordained: the improperly omitted evidence cannot be deemed harmless. *That* is Coddington's "present argument."

It's also his prior argument, reflected in his initial habeas petition as well as his opening brief to the Tenth Circuit.[2]

The State of Oklahoma acknowledges that in his habeas petition and opening brief to the Tenth Circuit, Coddington argued it was "contradictory" for the OCCA to rule, on the one hand, "that the excluded evidence could have negated the jury's verdict of guilt on First Degree Murder," and yet, on the other hand, "still uph[o]ld the conviction.'" Br. in Opp. 9, quoting Opening Br. 11. Those words, taken from Coddington's opening brief to the federal court of

[2] Obviously, given the OCCA committed the (mistaken) harmless-error determination in its ruling on direct appeal, Coddington's earlier briefs to the state court lack correspondence to his "present argument," even if his briefs to the OCCA argued he was denied his right to present a defense when the trial judge barred the jury from hearing his expert's opinion.

appeals, represent a fair facsimile of his so-called "present argument," the argument he advances here and which Oklahoma concedes was also advanced in his reply brief to the Tenth Circuit. Both briefs submitted to the court of appeals condemned the OCCA's harmless-error determination as incoherent. The opening brief described it as "contradictory," irreconcilable with the state court's earlier recognition that the wrongly omitted evidence reasonably could have undercut the first-degree murder charge. The reply brief dubbed the OCCA's ruling "a paradox," adding that a finding of materiality "*is* prejudice under the *Brecht* test," a "standard that subsumes the [AEDPA] requirements." *See* Reply Brief 15, 17. (The appellate briefs echoed the habeas petition's claim, made in the district court, that the OCCA decision amounted to a "tortuous exercise of logic." Habeas Pet. 16-17.)[3]

True, the reply brief in the Tenth Circuit narrowed and refined the attack against the OCCA. It sharpened the attack. It even changed the attack in some minor respects. So too did the subsequent oral argument, which further slimmed and explicated the issue. But this evolution is the natural and predictable outgrowth of the adversarial, dialectical process that shapes legal disputes as they move from the district court through the court of appeals to this Court.

[3] Unlike the opening brief to the Tenth Circuit, the reply brief there was filed by undersigned counsel, appointed after Coddington's lead appellate lawyer accepted a job with the University of Oklahoma.

What matters is that no iteration of Coddington's legal argument abandoned its progenitor. All clung to the central point he invokes in this Court: that once characterized as "material," omitted evidence cannot later be treated as harmless evidence.

And even if Coddington did not properly raise the materiality issue below, nothing bars this Court from reviewing it now. The prior courts addressed it. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 330 (2010) (explaining this Court's practice "permits review of an issue not pressed below so long as it has been passed upon").

II. More Than Error Correction

Next, the Brief in Opposition criticizes Coddington for seeking nothing more than error correction. It faults him for pursuing a petition unworthy of this Court's review. *See* Br. in Opp. at 11-12.

Rule 10 belies Oklahoma's position. Coddington falls neatly inside subsection (c), which includes as a compelling reason for granting certiorari that a state court or a United States court of appeals "has decided an important federal question in a way that conflicts with relevant decisions of this Court." That's what took place here. Both the OCCA and the Tenth Circuit regarded an identified violation of the Constitution—the wrongful exclusion of evidence proffered by a defense expert—as harmless error, even though the two courts

found (the OCAA) or didn't question (the Tenth Circuit) that the omitted evidence was material evidence. For all the reasons outlined in the petition for certiorari, the two decisions conflict with this Court's opinions not only in *Kyles*, discussed above, but also with *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982) and *Brady v. Maryland*, 373 U.S. 83 (1963).

III. Vehicle Concerns

The State of Oklahoma similarly challenges whether this case offers an appropriate vehicle by which to explore the Question Presented. The state offers a single reason for its skepticism; it doesn't believe Coddington has brought a violation of the Constitution to this Court. "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," writes the state. Br. in Opp. 13. To complete its thoughts, Oklahoma observes, correctly, that no federal court has required what its own state courts require, namely, that qualified experts in criminal cases (called by either the prosecution or the defense) can opine on whether the defendant could form the culpable *mens rea*. "In fact," the Brief in Opposition says, again correctly, "Federal Rule of Evidence 704—which federal courts have upheld against due process challenges—expressly *prohibits* such evidence." *Id*. 14.

Oklahoma is missing the proverbial forest for the trees. The constitutional violation of which Coddington complains has little to do with the scope of expert

testimony. He accepts that states may depart from Oklahoma's liberal approach to expert testimony, that they are free instead to adopt the contrary stance expressed in Federal Rule of Evidence 704. He further recognizes that were he tried in federal court, subject to Rule 704, he could never have asked his expert to offer an opinion on his ability to form the culpable *mens rea*, still less could he have lodged error in trial court's refusal to allow such testimony. But these concessions hardly amount to an admission that Coddington's application for habeas corpus lacks a predicating violation of the Constitution.

The relevant constitutional error is the right to present a complete defense. Situated in the Sixth and Fourteenth Amendments, it is a right whose contours this Court has defined in numerous cases, like *Chambers v. Mississippi*, 410 U.S. 284, 292-94 (1973) and *Crane v. Kentucky*, 476 U.S. 683, 689-91 (1986) and *Rock v. Arkansas*, 483 U.S. 44, 55-56 (1987) and *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006). This line of precedent embodies the principle that states cannot deny defendants "the right to put on the stand a witness . . . whose testimony would have been relevant and material to the defense." *Washington v. Texas*, 388 U.S. 14, 23 (1967). The *substance* of the omitted testimony is unimportant; what counts is whether state law authorized its admission into evidence. If so, and if the excluded testimony was favorable to the defense and material, then the exclusion of the testimony violates the Constitution.

That the Constitution doesn't *compel* all states and the federal courts to likewise admit the disputed testimony is beside the point. It's enough to violate the right-to-present-a-defense doctrine that: (1) the controlling law in the jurisdiction allows juries to hear experts state that the defendant lacked the ability to formulate the culpable *mens rea*; and nonetheless (2) a trial judge in a given case excluded the expert's material opinion explaining *this* defendant couldn't formulate the culpable *mens rea*.

So it's undeniably true: Oklahoma could have adopted a rule like Federal Rule 704(b). It also could have concluded that Dr. Smith's expert opinion was immaterial to this case, and justifiably excluded it. But having eschewed Rule 704, and having called Dr. Smith's testimony "certainly material," Oklahoma cannot claim that excluding the evidence was harmless error. Nor, more to the point, can it escape the underlying violation of the federally guaranteed right to present a defense.

A fair if absurd analogy might prove useful. Imagine a state law excusing murder when the moon and the planet Saturn are both in the constellation Capricornus (a rare event, according to Wikipedia). Assume now that a trial judge in the imaginary state excluded an astronomer called by the defense, one prepared to tell the jury that on the day of the murder Saturn and the moon were in the constellation Capricornus. Assume further that the state appellate courts

declined to remedy the error despite the defendant's claim that her constitutional right to present a defense was abridged. It's no reason to deny the defendant habeas relief in federal court later on the ground the Constitution did not force the state to accept the expert's testimony in the first place. The issue is whether the defendant was denied a viable legal defense granted by state law. The wisdom of the state-sanctioned legal defense may be wanting; the Constitution doesn't care. The only question it poses is whether the defendant was denied the opportunity to present material evidence that could have established the defense.

There is something else. This Court can readily avoid deciding that the exclusion of Dr. Smith's opinion rose to constitutional error. It can do what it has done in similar cases. The Court can simply assume it was constitutional error to limit Dr. Smith's testimony in order to reach a more pressing question: whether excluding material evidence can be deemed harmless error? *See, e.g., Davis v. Ayala*, 576 U.S. 257, 267 (2015) ("We assume for the sake of argument that Ayala's federal rights were violated, but that does not necessarily mean that he is entitled to habeas relief. . . . Ayala is entitled to relief only if the error was not harmless."); and *Fry v. Pliler*, 551 U.S. 112, 116 n.1 (2007) (reaching harmless-error issue in right-to-present-a-defense case after noting: "As this case comes to the Court, we assume (without deciding) that the state appellate court's decision

affirming the exclusion of [the witness's] testimony was an unreasonable application of *Chambers v. Mississippi*.").

IV. Merits Concerns

Finally, Oklahoma reprises a position it took before the Tenth Circuit. The argument disparages the merits of Mr. Coddington's claim, insisting he "rests on a faulty premise—that the OCCA found the limitation on Dr. Smith's testimony to be 'material.'" Br. in Opp. 17. Of course, as it must, the Brief in Opposition acknowledges the state court did in fact describe Dr. Smith's omitted testimony as material, but Oklahoma says Coddington is guilty of an "overly constrained reading of the OCCA's opinion." *Id*.

"Clearly," crows the Brief in Opposition, perhaps a signal that disputed text will follow, "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." *Id*. at 18.

It is indeed a disputed pronouncement. When a state court explicitly finds that omitted evidence is "material," there's no cause to rewrite or ignore the finding, even if the court misapprehended its implications. Fortunately, Coddington anticipated the state's "materiality doesn't mean materiality" argument in his cert petition; he need not repeat his position here. *See* Pet. 16-18.

There is one piece to Oklahoma's argument that demands a response. It's the claim that certiorari must be rejected because no prior right-to-present-a-defense decision from this Court specifically arises from limitations placed on a defense expert's testimony. Br. in Opp. 20. The Brief in Opposition even casts doubt on the significance of the OCCA's materiality finding, a finding at the core of the case. It agrees this Court's opinion in *Valenzuela-Bernal* imported the materiality requirement into the right-to-present-a-defense doctrine; still, it insists *Valenzuela-Bernal* presents factual features constitutionally different from those surrounding the exclusion of expert testimony. *Id*. 20-21. Oklahoma makes the classic Warden's mistake.

The statute governing habeas law, the Anti-Terrorism and Effective Death Penalty Act of 1996, recognizes "that even a general standard may be applied in an unreasonable manner." *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007). AEDPA does not "require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied." *Carey v. Musladin*, 549 U.S. 70, 81 (2006) (Kennedy, J., concurring in judgment). Nor does it prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts "different from those of the case in which the principle was announced." *Lockyer v. Andrade*, 538 U.S. 63, 76 (2003).

This Court has long held that denying defendants access to constitutionally guaranteed evidence can implicate the Constitution. *See Valenzuela-Bernal*, 458 U.S. at 866-67. That denial can take many forms. It can involve an exculpatory statement written by a codefendant and concealed by the prosecution, as in *Brady*. It can involve a defense witness deported to Mexico before allowing defense counsel to question the witness, as in *Valenzuela-Bernal*. Or it can involve limitations placed on a defense expert, as here. One denial of access to constitutionally guaranteed evidence implicates the Constitution no less than another.

V. Conclusion

In a recent development, this Court granted certiorari in *Brown v. Davenport* (No. 20-826). The case will address the complicated interplay not just between competing harmless-error standards, *i.e.*, one test for direct appeals, a second for habeas review; it will also examine how AEDPA bears on interpreting harmless-error determinations made in the state courts. The decision to review *Brown v. Davenport* offers additional support for Coddington's petition. Besides the reasons given there and in this brief, one more reason has surfaced to grant certiorari or enter a GVR order: Coddington's case will benefit from further examination under the rule crafted in *Brown v. Davenport*. At minimum, the Court should hold this case until it resolves *Brown v. Davenport*.

Dated this 19th day of May, 2021.

Respectfully Submitted,

By: */s/John T. Carlson*
JOHN T. CARLSON
Counsel of Record
Ridley McGreevy & Winocur
303 16th St., Suite 200
Denver, CO 80202
(303) 629-9700
Email: jtcarlson@gmail.com
and
SETH A. DAY
Hall Estill
100 N. Broadway, Suite 2900
Oklahoma City, OK 73102
(405) 553-2828
Email: sday@hallestill.com