No. 16-1021

IN THE
Supreme Court of the United States

RON NEAL,
Superintendent, Indiana State Prison,
Petitioner,
v.

WAYNE KUBSCH,
Respondent.

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

REPLY IN SUPPORT OF THE PETITION

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REPLY IN SUPPORT OF THE PETITION

In *Chambers v. Mississippi*, 410 U.S. 284, 302–03 (1973), the Court warned that its holding created "no new principles of constitutional law" nor "signal[ed] any diminution in the respect traditionally accorded to the states in the establishment and implementation of their own criminal trial rules and procedures." The majority below defied that caution and expanded the narrow *Chambers* rule to cases applying ordinary hearsay restrictions, such that "trial courts in Indiana and elsewhere may hesitate to enforce the hearsay bar and other settled evidentiary rules when confronted with potentially exculpatory but plainly inadmissible evidence." Pet. App. 76a (Hamilton, J., dissenting). Like the Seventh Circuit, Kubsch protests that the decision below is "very narrow" and "fact-bound." Brief in Opposition 16. Yet, "that's what the Supreme Court said in *Chambers*, too." Pet. App. 76a (Hamilton, J., dissenting).

If, despite AEDPA deference, the supposedly one-off *Chambers* case requires—beyond debate by "fairminded jurists"—admission of Amanda's hearsay statement, then the decision below will similarly command admission of hearsay in an untold array of cases where ordinary reliability-based barriers would otherwise apply. The Court should review whether that outcome reflects a proper understanding of how it defined the right to present a defense in *Chambers* (and later cases).

I. Kubsch Does Not Refute the Central Rationale for Certiorari: A Deeply Divided Seventh Circuit Applied *Chambers* as No Other Circuit Has

Judge Hamilton chided the majority below because it had not "identified *any* case in *any* American jurisdiction where such an unsworn, *ex parte* witness statement would even be admissible as substantive evidence, let alone that the state courts' exclusion of the statement here violated clearly established constitutional law." App. 64a (Hamilton, J., dissenting). Kubsch also cites no such cases—and indeed dismisses other circuits' contrary applications of *Chambers* only by reference to immaterial factual differences.

A. Minute factual distinctions do not reconcile cases from other circuits that, despite *Chambers,* require defendants to establish reliability before admitting hearsay

The decision below stands alone in applying *Chambers* to protect a right of criminal defendants to use (as substantive evidence) uncorroborated hearsay that fails traditional tests for reliability codified by rules of evidence. Rather than require Kubsch to show the disputed hearsay was reliable—as all other courts have done—the Seventh Circuit shifted the burden to the State to demonstrate the hearsay was *un*reliable. Pet. App. 33a. It thus created a presumption of admissibility for exculpatory hearsay

proffered by defendants. Kubsch points to no cases employing this novel approach to *Chambers*.

Kubsch dismisses cases from other circuits cited in the Petition because "different facts . . . often lead to different results." Brief in Opposition 25–27. He argues, in essence, that cases from other circuits rejecting the Seventh Circuit's understanding of *Chambers* do not count because they did not feature a years-old videotaped interview of a witness who cannot remember at trial that she ever gave a statement. But the lack of such minute factual identity has no bearing on the legal significance of those cases. Contrary to the Seventh Circuit, in each case cited by the State, the circuit accepted the notion that, notwithstanding *Chambers,* ordinary evidence rules may bar hearsay absent a traditional showing of reliability. *Staruh v. Superintendent Cambridge Springs SCI*, 827 F.3d 251, 261 (3d Cir. 2016); *Ayala v. Chappell*, 829 F.3d 1081, 1114 (9th Cir. 2016); *Simmons v. Epps*, 654 F.3d 526, 543 (5th Cir. 2011); *Christian v. Frank*, 595 F.3d 1076, 1084–85 (9th Cir. 2010); *Showalter v. McKune*, 299 Fed. App'x 827, 830 (10th Cir. 2008); *Sinkfeld v. Brigano*, 487 F.3d 1013, 1017–18 (6th Cir. 2007); *United States v. Patrick*, 248 F.3d 11, 23–24 (1st Cir. 2001).

The *precise* traditional showing of reliability that was missing in those cases—whether an assurance of accuracy, a statement truly against interest, availability for cross-examination, or independent corroboration—hardly matters. For if there is no line between the arbitrary "voucher" rule invalidated in *Chambers* and the ordinary, reliability-assuring

requirements for admitting a past recollection recorded, surely there is no line protecting the requirements for admitting a statement against interest or any other hearsay exception.

In short, if the right to present a defense includes using hearsay that does not meet the usual reliability standards, no other court is aware of it. None has even contemplated the possibility that reliability might be demonstrated through other means (such as the Wright & Graham distillation employed below), much less has shifted the burden to the State to *disprove* reliability.

B. Questions of relevance and materiality provide no basis for distinguishing cases from other circuits

Kubsch argues that four of the circuit-conflict cases cited in the Petition are distinguishable because "the defendant had not shown the excluded evidence was material." Brief in Opposition 25–26 (citing *Soto v. Lefevre*, 651 F. Supp. 588, 597 (S.D.N.Y. 1986), *aff'd*, 812 F.2d 713 (2d Cir. 1987); *United States v. John*, 597 F.3d 263, 277 (5th Cir. 2010); *West v. Bell*, 550 F.3d 542, 560 (6th Cir. 2008); *Taylor v. Sec'y, Fla. Dep't of Corr.*, 760 F.3d 1284, 1297 (11th Cir. 2014)).

In *Taylor*, to be sure, the court rejected the defendant's evidentiary submission as irrelevant. 760 F.3d at 1289. But as a case enforcing state rules barring irrelevant evidence, *see id.* at 1295, *Taylor* only underscores the Seventh Circuit's departure from the norm of respecting facially reasonable state

rules of evidence in the application of *Chambers*. According to the reasoning of the Seventh Circuit, federal courts are authorized (and perhaps required) to employ their own tests for materiality as a predicate for evaluating whether the relevance standard of the rules of evidence is "disproportionate." Pet. App. 29a, 33a. So, if, say, the excluded evidence is the best the defendant has, a federal court may deem that evidence "material" and proceed to override (as "disproportionate") a state law relevance standard requiring exclusion. *Taylor* shows that the Eleventh Circuit sees things to the contrary.

As for the other three cases, the absence of any materiality analysis demonstrates that those courts neither questioned materiality nor, contrary to the Seventh Circuit, understood *Chambers* to provide special leverage for defendants regarding "vital" evidence. In each, the court was content with the proposition that *Chambers* did not require the extraordinary remedy of overriding ordinary hearsay rules, period. *See Soto*, 651 F. Supp. at 597 (applying "long-standing and well-warranted respect accorded to the hearsay rule"); *John*, 597 F.3d at 277 (refusing to apply *Chambers* to the rule against hearsay); *West*, 550 F.3d at 560 (upholding state court's refusal to unseat the hearsay rule per *Chambers* where the declarant was unavailable and "there [was] the question of corroboration and reliability," *State v. West*, 767 S.W.2d 387, 396 (Tenn. 1989)). Perhaps most notably, the Sixth Circuit in *West* did not resort to its own alternative reliability test when rejecting the *Chambers* claim, *contra* the decision below. *See West*, 550 F.3d at 560.

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Based on these cases, the Seventh Circuit's outlier status on the meaning of *Chambers* is both meaningful and entrenched. Given how long ago *Chambers* was decided, that singularity signals not simple chance, but a fundamental disagreement over the law. Plenary review is warranted so the Court can address whether, notwithstanding other circuits' tolerance for traditional evidentiary rules, the Seventh Circuit is correct that *Chambers* can require those rules to be suspended when the evidence is "vital" to a capital defendant.

II. The "Arbitrary/Disproportionate" Rule Was Misapplied by the Seventh Circuit and Is Too General To Be "Clearly Established" Anyway

Kubsch says that the Seventh Circuit applied "clearly established" federal law as declared by this Court when it concluded that Indiana courts unreasonably failed to treat Indiana Rule of Evidence 803(5) as arbitrary or disproportionate. Brief in Opposition 16. That assertion is both inaccurate on its own terms and contrary to any useful understanding of the term "clearly established."

1. First, in asserting the existence of the "arbitrary" or "disproportionate" rule, Kubsch misunderstands what *Chambers* decided and how subsequent cases have applied its holding.

In *Chambers*, the Court assessed whether a state court's application of the "voucher" rule, *not* the rule

against hearsay, was arbitrary. It was uncontested that the general bar against hearsay served legitimate and important purposes "based on experience and grounded in the notion that untrustworthy evidence should not be presented to the triers of fact." *Chambers*, 410 U.S. at 298. In fact, the hearsay rule would not have barred use of the sworn confession to impeach McDonald. Rather, it was the arbitrary "voucher" rule that barred the defense from calling McDonald and then impeaching him, notwithstanding satisfaction of traditional evidence rules. *Id.* at 291–92.

No case from this Court has applied *Chambers* to invalidate a "disproportionate" evidentiary barrier. The Court has mentioned in passing the idea that an exclusion of evidence could be invalid if "disproportionate" to the reason for the rule. *See, e.g.*, *Rock v. Arkansas*, 483 U.S. 44, 56 (1987). But it has never overridden a state evidentiary rule on that basis.

Rather, since *Chambers*, the Court has invalidated rules requiring exclusion of evidence only where "arbitrary," *Rock*, 483 U.S. at 61, unsupported by "any valid state justification," *Crane v. Kentucky*, 476 U.S. 683, 690 (1986), or unjustified by "any legitimate interests," *Holmes v. South Carolina*, 547 U.S. 319, 325 (2006). Even in *Green v. Georgia*, where the Court invalidated an application of Georgia's hearsay rule, the problem was not "disproportionality" in requiring assurances of reliability, but an arbitrary lack of parity in the rules, which permitted admission of a co-conspirator's confession for the prosecution in

one case but not for the defense in another. 442 U.S. 95, 96–97 (1979).

The Seventh Circuit *nowhere* said that Rule 803(5), either facially or as applied here, constituted an "arbitrary" barrier to admission of evidence. Kubsch asserts that the Seventh Circuit "did indicate that the state court's application of the accuracy requirement in section 805(5)(C) [sic], was arbitrary and served no legitimate purpose under the specific facts of this case." Brief in Opposition 30 (citing Pet. App. 36). Not true. The court merely deemed "troublesome" some perceived inconsistencies in application of that rule in *other* cases, but conceded that the record here "does not show a lack of parity in the application of Rule 803(5) within Kubsch's own trial." Pet. App. 36a.

More to the point, the decision below in no way suggested Rule 803(5)'s requirement that the declarant attest to the accuracy of a prior recorded statement "served no legitimate purpose." Brief in Opposition 30. It merely concluded that the Seventh Circuit's own test for reliability—derived from Wright & Graham rather than actual rules of evidence—was superior. Pet. App. 33a.

Indeed, the Seventh Circuit never even actually said that applying Rule 803(5) was "disproportionate" in this case. It said the test for admissibility could not be whether the tape was "100% reliable," Pet. App. 35a—whatever that means—but Rule 803(5) nowhere purports to require that. It *does* require a traditional, time-tested substitute for cross-examination, namely

attestation that the statement accurately reflected the declarant's knowledge at the time. But no decision from this Court even remotely suggests that such a traditional barrier to admission of hearsay—particularly for use as substantive evidence—could be fatally "disproportionate" just because alternative tests for reliability might exist and just because the defendant has no better evidence to use. *Cf. United States v. Scheffer*, 523 U.S. 303, 308 (1998) ("[S]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials.").

2. Second, as Judge Hamilton stressed, particularly given the "broad latitude" mentioned in *Scheffer*, general notions of "disproportionality" and the "right to present a defense" are insufficiently specific to provide a rule of decision in particular cases, let alone to evidence "clearly established" law overriding universal tests for hearsay reliability. Pet. App. 63a–64a. The problem is only accentuated by the lack of any cases from this Court actually applying the "disproportionality" principle.

In addition, the majority's (unconvincing) protest that few cases will be affected by this supposed "clearly established rule" because it requires careful balancing of manifold case-specific factors "is a red flag signaling conflict with § 2254(d)(1)." Pet. App. 63a (Hamilton, J., dissenting). If careful case-by-case scrutiny is required, the rule cannot be all that clear. Indeed, as demonstrated by both the three-judge dissent below and the lack of any similar decisions from other circuits, fair-minded judges *do* reasonably

disagree over how to apply *Chambers* and later cases on the subject. Accordingly, the Seventh Circuit transgressed the limits of § 2254(d)(1), and its decision warrants review.

III. The Decision Below Cannot Be Justified by the So-Called *Chambers* Factors

Even as an exercise in case mapping, the decision below fails. Nothing here matches the actual factors the Court used in *Chambers* to invalidate the Mississippi "voucher" rule.

First, Kubsch says Amanda was available for cross examination, just as Gable McDonald was available in *Chambers*. Brief in Opposition 23. Yet even the Seventh Circuit said "we accept that Mandy was not available to be cross-examined" because Amanda did not remember her prior statement to Sergeant Reihl when she testified at Kubsch's second trial. Pet. App. 37a. In contrast, there was no suggestion in *Chambers* that McDonald had no memory of his multiple prior confessions.

Second, there was no meaningful corroboration of Amanda's statement that she saw Rick and Aaron on the Friday rather than the Thursday. The Seventh Circuit said Monica corroborated the statement, Pet. App. 37a, but Monica recanted, Pet. App. 15a, and Kubsch never offered her statement (which would have been inadmissible as corroboration in any event). Moreover, because Monica went to the bank the day Amanda saw Rick and Aaron, Pet. App. 94a, Kubsch could have submitted evidence of her

transaction if its time stamp corroborated Amanda's statement, but he did not do so. Kubsch even alleged ineffective assistance of trial counsel for not corroborating Amanda's statement with the bank slip, but *still* did not submit it—or any other corroborating evidence. Pet. App. 178a. Kubsch quibbles over the details of Amanda's recantation, but cannot avoid the reality that neither Amanda nor Monica stands by the recorded statement. Both have expressly disavowed that they saw Rick and Aaron on Friday. Pet. App. 15a, 315a (Indiana Supreme Court opinion) (observing that Amanda testified at trial that she "probably didn't see [Aaron]," which "directly contradicts her statement to the police.").

Even so, the Seventh Circuit faulted the State for not *disproving* corroboration. Pet. App. 37a. That doctrinal ju-jitsu is troubling on its own, but is even more remarkable given how the court purported to follow *Chambers* when deploying it. As Kubsch recounts, the Seventh Circuit understood *Chambers* to require admission of excluded evidence when: (1) the evidence is material and favorable to the defense; (2) the evidence is reliable and trustworthy; and (3) exclusion in the particular case is arbitrary or disproportionate to the underlying reason for exclusion. Brief in Opposition 18. In *Chambers*, the Court applied those factors with ease because no rationale supporting the Mississippi "voucher" rule stood in tension with the first two factors (materiality of another's confession being obvious and reliability being ensured by availability for cross-examination, as required by hearsay rules). Such tension exists, however, where the reason for the rule requiring

exclusion goes either to materiality or (as here) to reliability. Then, whether the predicates of materiality and reliability to be measured by the valid rule of evidence at stake, or by some other yardstick, becomes the pertinent question.

The Court's solicitude for traditional state evidentiary rules, even in the wake of *Chambers,* suggests such rules should control. *Scheffer*, 523 U.S. at 308; *see also Nevada v. Jackson*, 133 S. Ct. 1990, 1992 (2013) ("Only rarely have we held that the right to present a complete defense was violated by the exclusion of defense evidence under a state rule of evidence."). Yet the Seventh Circuit understood *Chambers* to permit it to invent its own test for reliability—namely, the Wright & Graham test—as a predicate for grading the "proportionality" of the test for reliability codified by the Indiana Rules of Evidence. In short, because the court found Amanda's video statement "reliable" by its own lights, Indiana's rule to the contrary violated due process.

Neither this Court nor any other circuit has understood *Chambers* to impose (or even authorize) such a general substitute test for reliability. In *Green*, the Court merely required parity and held Georgia courts to their own prior conclusion that *the exact same evidence* was reliable. 442 U.S. at 98. And much like *Chambers* itself, both *Crane*, 476 U.S. at 691, and *Holmes*, 547 U.S. at 328–31, invalidated use of idiosyncratic rules targeting particular types of disfavored evidence that were otherwise material and reliable under ordinary rules of evidence. Those cases provide no warrant for a federal court to substitute its

own preferred standards for reliability as a predicate for evaluating whether state law standards of reliability are "disproportionate."

For the Seventh Circuit to call out the Indiana state courts for an "unreasonable application" of Supreme Court precedent, it had to understand *Chambers* to "clearly establish" a due process standard of hearsay reliability wholly independent of state (and federal) rules of evidence. Neither *Chambers* nor its progeny provides any such thing. Certiorari is warranted so that the Court can safeguard the "broad latitude" of traditional state evidentiary rules it has repeatedly recognized.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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