No. ____

IN THE

Supreme Court of the United States

JUSTIN TERRELL ATKINS

Petitioner,

v.

TIMOTHY HOOPER, WARDEN
Elayn Hunt Correctional Center

Respondent.

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

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PETITION FOR A WRIT OF CERTIORARI

Christine M. Calogero
Counsel of Record
Viviana Aldous
BARRASSO USDIN KUPPERMAN
FREEMAN & SARVER, L.L.C.
909 Poydras Street, Suite 2350
New Orleans, Louisiana 70112
Telephone: (504) 589-9700
ccalogero@barrassousdin.com
valdous@barrassousdin.com

Counsel for Petitioner

QUESTIONS PRESENTED

After unanimously concluding that a clearly established violation of the Confrontation Clause warranted habeas relief, the Fifth Circuit panel reversed its own decision to hold, over a powerful dissent, that the constitutional violation was harmless—an issue that the State conceded it forfeited, having not been raised below or properly briefed on appeal. The panel decided the issue of harmlessness in the first instance without consideration of any extraordinary or compelling circumstances that warrant ignoring the well-established preservation rule, a bedrock principle of our adversary system. Even in AEDPA cases, "a federal court does not have *carte blanche* to depart from the principle of party preservation basic to our adversary system" and should do so only "when extraordinary circumstances so warrant." *Wood v. Milyard*, 566 U.S. 463, 466, 472 (2012) (citing *Day v. McDonough*, 547 U.S. 198, 201 (2006)). But the Fifth Circuit, contrary to the precedent of this Court and every other circuit that has considered the issue, adopted a categorical, extratextual rule in favor of forgiving state forfeiture of harmlessness in AEDPA cases. The Fifth Circuit then applied a sufficiency-of-the-evidence standard to this fact-intensive issue, weighing the constitutionally permissible evidence and making credibility determinations, rather than assessing whether the error—the admission of an out-of-court accomplice confession in violation of the Confrontation Clause—"had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637–38 (1993).

The questions presented are:

Whether, as concluded by every circuit that has considered the issue, the preservation rule applies to the State's forfeiture of harmlessness in AEDPA cases absent some threshold finding of extraordinary or compelling circumstances.

Whether the Fifth Circuit misapplied the standard set forth in *Brecht v. Abrahamson*, 507 U.S. 619 (1993), when, performing the fact-intensive harmlessness analysis in the first instance and without the benefit of adversary briefing, the court assessed only the sufficiency of the evidence apart from the violative confession rather than the impact of the Confrontation Clause violation itself.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Justin Atkins respectfully requests a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit Court.

OPINIONS BELOW

The order of the court of appeals denying Mr. Atkins' petition for panel rehearing is reprinted in the Appendix to the Petition ("Pet. App.") at 1a. The opinion of the court of appeals on initial rehearing and Judge Costa's dissent is reported at 979 F.3d 1035 and reprinted at Pet. App. 2a–44a. The original, unanimous opinion of the court of appeals, reversing the district court's denial of habeas relief, is reported at 969 F.3d 200 and reprinted at Pet. App. 45a–60a. The pertinent district court proceedings and orders are not reported but are available at 2018 WL 6440899 and 2018 WL 6440877 and reprinted at Pet. App. 61a–62a and 63a–78a.

JURISDICTION

As permitted by the circuit court, Mr. Atkins filed a petition for panel rehearing on November 17, 2020, which the court denied on December 21, 2020. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291. As required by Supreme Court Rule 13, amended by this Court's March 19, 2020 Order, this petition has been filed within 150 days of the order denying rehearing, and this Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the U.S. Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ."

28 U.S.C. § 2254 is reprinted at Pet. App. 79a–82a.

STATEMENT OF THE CASE

After unanimously concluding that a clearly established violation of the Confrontation Clause warranted habeas relief, the Fifth Circuit panel, on reconsideration, reversed its own decision and held that the constitutional violation was harmless, an issue that the State conceded it forfeited and, consequently, that the panel originally refused to consider. On rehearing, the same panel reached the forfeited issue of harmlessness, which had not been raised at the district court or properly briefed on appeal, without consideration of any extraordinary or compelling justifications that warranted ignoring the well-established preservation rule. In doing so, the panel adopted a new presumption in favor of forgiving State forfeiture of harmlessness in habeas cases—departing from nearly every other circuit's standard for considering waived or forfeited arguments—in order to let a clearly established Confrontation Clause violation stand.

A. State Court Trial, Conviction, and Appellate and Post-Conviction Proceedings

1. Based on questionable eyewitness identifications by two "highly intoxicated"[1] individuals and an untested out-of-court accomplice confession, Justin Atkins was convicted of armed robbery and aggravated battery and sentenced to 45 years in prison in violation of his Sixth Amendment rights. During trial, the jury heard more than once that Lawrence Horton, who became a central figure at trial due to his motive, presence at the scene, and close relationship to the victims, confessed to the crime and implicated Mr. Atkins as his accomplice. During opening statements, the State told the jury about Horton's inculpatory confession and promised the jury that Horton would be called to testify. *See* Trial Transcript, Exh. 3 to State's Ans. and Memo. of Law, *Atkins v. Hooper*, No. 17-1544 (W.D. La), ECF No. 18-3 at 168–69. But after deciding that Horton was "not a credible witness"[2] during the middle of trial, the State never called him. Instead, the State elicited testimony from the investigating officer about Horton's confession. *See id.* at 198–99. The State then referenced the out-of-court accusation again during closing arguments. *Id.* at 18-4 at 123.

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[1] At trial, investigating officers described the two eyewitnesses as "highly intoxicated," with "[s]lurred speech," "blood shot" eyes, and "extreme trouble standing up walking" at the scene of the crime. *See* Trial Transcript, attached as Exhibit 3 to State's Ans. and Memo. of Law, *Atkins v. Hooper*, No. 17-1544 (W.D. La), ECF No. 18-3 at 181–82, 194.

[2] The State admitted this in its Appellee Brief in the Fifth Circuit. Appellee Br. 16, *Atkins v. Hooper,* No. 19-30018 (5th Cir.).

2. Horton's accusatory, out-of-court confession was the most significant evidence presented at trial: the only other direct evidence of guilt was inconsistent eyewitness testimony of two highly intoxicated witnesses. And the State's unfulfilled promise to call Horton to testify infected the entire trial, even prompting the trial court to *explicitly* foreclose certain defense strategy. The trial court, for example, prevented Mr. Atkins' attorney from attacking the credibility of Horton's confession while cross-examining the investigating officer, reasoning: "Well the jury will have Horton to examine and look at and to listen to from the witness stand. They can from [sic] their own opinions and evaluations of him when he's called as a witness[.]" Trial Transcript, Exh. 3 to State's Ans. and Memo. of Law, *Atkins v. Hooper*, No. 17-1544 (W.D. La), ECF No. 18-3 at 216. But Horton was never called to testify.

3. Mr. Atkins appealed his conviction and sentence, which became final when the Louisiana Supreme Court denied his writ of certiorari. *See State v. Atkins*, 74 So. 3d 238 (La. App. 2 Cir. 2011); *State v. Atkins*, 82 So. 3d 284 (La. 2012).

4. Mr. Atkins then filed an application for state post-conviction relief, arguing first in the Fourth Judicial District Court and then in writ applications to the Louisiana Second Circuit Court of Appeal and the Louisiana Supreme Court that his Sixth Amendment right to confront his accuser had been violated by the admission of Horton's out-of-court statements. All three courts denied relief. As the U.S. Fifth Circuit Court of Appeals later found, the last-reasoned state-court decision hinged on an unreasonable application

of Supreme Court precedent to find that Horton's statements were not hearsay. Pet. App. 22a–24a.

B. Federal Habeas Proceeding

1. On November 27, 2017, Mr. Atkins filed his federal habeas petition, pursuant to 28 U.S.C. § 2254, in the United States District Court for the Western District of Louisiana, maintaining that his Sixth Amendment right to confront his accuser had been violated and that the state courts' rejection of his Sixth Amendment claim constituted an unreasonable application of clearly established Supreme Court caselaw, citing *Bruton v. United States*, 391 U.S. 123 (1968), *Crawford v. Washington*, 541 U.S. 36 (2004), and others. Pet. for Writ of Habeas Corpus, *Atkins v. Hooper,* No. 17-1544 (W.D. La.), ECF No. 5.

2. The State answered without citing or discussing a single federal decision, much less responding to clearly established Supreme Court precedent. State's Ans. and Memo. of Law, *Atkins v. Hooper*, No. 17-1544 (W.D. La), ECF No. 18. Instead, referring to Mr. Atkins' argument as one pertaining to "evidentiary errors of state law," and citing state-court decisions pertaining to evidence and hearsay, the State argued that the reference to Horton's out-of-court testimony was not hearsay. *Id.* at 8. The State did not address the issue of harmlessness or argue that the admission of Horton's confession did not prejudice Mr. Atkins.

3. Adopting the magistrate judge's Report and Recommendation, the district court denied Mr. Atkins' petition on December 7, 2018 and dismissed the

case with prejudice. Pet. App. 61a. The court concluded that Horton's testimony was not hearsay. Pet. App. 76a.

4. The Fifth Circuit granted Mr. Atkins' Motion for Certificate of Appealability and appointed pro bono counsel to represent him on appeal.

C. Fifth Circuit Appeal & Decisions

1. Relying on overwhelming United States Supreme Court and Fifth Circuit authority, Mr. Atkins argued that the State violated clearly established Supreme Court Confrontation Clause precedent and that, while the State forfeited its right to argue harmlessness, the violation was not harmless under the standard set forth in *Chapman v. California*¸ 386 U.S. 18 (1967). Appellant Br., *Atkins v. Hooper*, No. 19-30018 (5th Cir.).

2. In response, the State did not address a single United States Supreme Court decision cited by Mr. Atkins and did not discuss AEDPA's deferential standard of review. The State conceded that it waived the issue of harmlessness but then advanced a sufficiency-of-the-evidence argument, asserting that "[t]he State had enough evidence to convict Petitioner without Horton's testimony" and "[s]ubstantial evidence was presented to support Petitioner's conviction." Appellee Br. 7, *Atkins v. Hooper*, No. 19-30018 (5th Cir.). The State did not address the specific legal standard that should apply to harmlessness and did not even mention *Brecht v. Abrahamson*, 507 U.S. 619 (1993), much less discuss its application. As a result of this fundamental breakdown of the adversary process, Mr. Atkins, in turn, had no occasion to address the *Brecht*

harmlessness analysis, which also had not been developed in any lower court.

3. A unanimous Fifth Circuit panel issued an opinion granting habeas relief to Mr. Atkins after finding that the Louisiana state court unreasonably applied decades-old, clearly established Supreme Court Confrontation Clause precedent. Pet. App. 56a–60a. Noting that the State had conceded it forfeited the issue of harmlessness, the panel "s[aw] no reason for exercising" its discretion to reach the issue of harmlessness. Pet. App. 60a. The panel reversed the district court's judgment denying Mr. Atkins habeas relief and remanded the case to the district court to grant relief. Pet. App. 60a.

3. Three months later, the panel reversed itself after the State Attorney General's office filed petitions for en banc and panel rehearing. The court denied the State's petition for en banc rehearing, without a poll, but granted the State's petition for panel rehearing and, doing a "180 on rehearing," Pet. App. 37a, issued a new decision. Pet. App. 35a. Although no facts or circumstances surrounding the State's forfeiture changed, two judges on the panel changed their minds about whether to reach the forfeited issue. With no explanation for the change-of-heart, the new panel opinion reached the forfeited issue of harmlessness without consideration of any circumstances or certainty of harm that would warrant consideration of the admittedly forfeited issue. Rather, the panel forgave the State's forfeiture based simply on the newfound conclusion that "[w]e find it desirable in most AEDPA cases to consider harmlessness." Pet. App. 27a. The court thereby departed from nearly every

other circuit, all of which refuse to forgive government forfeiture of harmlessness without first considering whether certain factors warrant doing so.

After a lengthy discussion of the state courts' misapplication of Supreme Court precedent in rejecting Mr. Atkins' Sixth Amendment claim, the new panel opinion reached, and ultimately turned on, the forfeited issue of harmlessness. The new panel opinion conducted a fact-intensive evaluation of harm purportedly under *Brecht* in the first instance, without the benefit of adversarial argument or full briefing by the parties and without any development by any lower court. Demonstrating the danger of reaching a forfeited issue sua sponte, the panel then misapplied *Brecht*, instead applying a sufficiency-of-the-evidence standard that hinged on the appellate court's weighing the evidence and credibility of two highly intoxicated trial witnesses in the first instance. Pet. App. 34a ("We have no evidence to support, though, that their powers of perception were so affected as to be unable to recognize that someone they had seen at least on a few earlier occasions was attacking them."). Had the panel focused, as it should have, on the constitutionally problematic evidence, rather than the strength and sufficiency of the rest, it would have had to conclude that the constitutionally problematic evidence—the admission of an alleged accomplice's confession, which was the most significant and damaging piece of evidence admitted at trial and which prompted the trial court to explicitly foreclose defense strategy—was far from harmless.

4. Emphasizing the importance of the preservation rule to our adversary system and the neutral application of procedural rules, Judge Costa dissented from the decision on rehearing, explaining that he would stand by the sound determination of the original panel opinion not to forgive the State's forfeiture. As Judge Costa stressed, no new facts were cited on rehearing to warrant the panel's "flip[]." Pet. App. 38a. Instead, the panel majority's decision cited only one justification for the "180," which was true of the case from the beginning: "it is a habeas petition." Pet. App. 37a–38a. Judge Costa outlined three problems with the majority's decision to forgive state forfeiture solely on the grounds that it was a habeas case. First, the opinion creates a new "categorical presumption" in favor of forgiving state forfeiture in AEDPA cases that finds no precedential support. Pet. App. 38a–39a. Second, Judge Costa noted a lack of textual support in AEDPA for this new special leniency, in contrast to AEDPA's explicit provision for leniency for exhaustion. Pet. App. 39a–40a. Third, emphasizing the importance of the "neutral application of procedural rules," Judge Costa highlighted the "double standard" this new rule imposes, unable to find a single decision from the Fifth Circuit excusing a habeas petitioner's failure to preserve. Pet. App. 40a–41a. Judge Costa declined to adopt the majority's new "extratextual presumption for AEDPA cases" and warned against court invention of new barriers to relief that are not found in AEDPA's text. Pet. App. 42a.

REASONS FOR GRANTING THE WRIT

This Court's precedent makes clear that no blanket presumption in favor of forgiving state forfeiture

in AEDPA cases exists. Even when this Court has upheld an appellate court's discretion to reach a forfeited issue, it has circumscribed that discretion, stressing that "appellate courts should reserve that authority for use in exceptional cases." *Wood v. Milyard*, 566 U.S. 463, 473 (2012). "[A] federal court does not have *carte blanche* to depart from the principle of party presentation basic to our adversary system." *Id.* at 472 (citing *Greenlaw v. United States*, 554 U.S. 237, 243–44 (2008)). Following this precedent, nearly every other circuit has likewise held that an appellate court's discretion to reach the forfeited issue of harmlessness is limited, imposing a set of considerations, including whether the harm is certain. *See, e.g.*, *United States v. McLaughlin*, 126 F.3d 130, 135 (3d Cir. 1997); *United States v. Brizuela*, 962 F.3d 784, 799 (4th Cir. 2020); *Gover v. Perry*, 698 F.3d 295, 301 (6th Cir. 2012); *United States v. Giovannetti*, 928 F.2d 225 (7th Cir. 1991) (per curiam); *United States v. Montgomery*, 100 F.3d 1404, 1407 (8th Cir. 1996); *United States v. Rodriguez*, 880 F.3d 1151, 1164 (9th Cir. 2018); *United States v. Holly*, 488 F.3d 1298, 1308 (10th Cir. 2007); *United States v. Pryce*, 938 F.2d 1343, 1347–48 (D.C. Cir. 1991) (plurality opinion); *see also United States v. Rose*, 104 F.3d 1408, 1415 (1st Cir. 1997); *United States v. Adams*, 1 F.3d 1566, 1576 (11th Cir. 1993). In particular, the Seventh Circuit in *Giovannetti* articulated three considerations that may warrant overlooking government forfeiture of harmlessness, and nearly every circuit has adopted those factors. The Fifth Circuit explicitly declined to follow nearly every other circuit based on an incorrect conclusion that *Giovannetti* did not survive this Court's

decision in *Brecht*. But this conclusion mischaracterizes *Giovannetti*, misapplies *Brecht*, and results in a new presumption in favor of forgiving state forfeiture of harmlessness in all habeas cases, contrary to precedent and statutory text. Applying this new presumption, the Fifth Circuit conducted a fact-dependent reweighing of the trial evidence and made credibility determinations in the first instance, without the benefit of lower court findings or adversarial argument, and resulting in an egregious misapplication of *Brecht*, which is so obviously incorrect that summary reversal and remand is appropriate.

A. The Fifth Circuit's Opinion directly contravenes this Court's precedent, which reaffirms the importance of the preservation rule even in AEDPA cases.

1. It is a bedrock principle of appellate review that "[o]rdinarily a party may not present a wholly new legal issue in a reviewing court." Pet. App. 36a (citing 9C Charles Alan Wright & Arthur R. Miller, Fed. Practice & Procedure § 2588 (3d ed.)). This rule, often called the "preservation rule," "is as old as appellate review." Robert J. Martineau, *Considering New Issues on Appeal: The General Rule and the Gorilla Rule*, 40 Vand. L. Rev. 1023, 1061 (1987). "The rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one." *United States v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring); *see also Wood*, 566 U.S. at 470 ("It is hornbook law that theories not

raised squarely in the district court cannot be surfaced for the first time on appeal." (quoting *McCoy v. Mass. Inst. of Tech.*, 950 F.2d 13, 22 (1st Cir. 1991))).

"For good reason, appellate courts ordinarily abstain from entertaining issues that have not been raised and preserved in the court of first instance." *Wood*, 566 U.S. at 473. These reasons, which are squarely implicated here, include concerns of "unfairness to the other party, unfairness to the trial court, failure to punish negligence, [and] prolonging litigation." *See* Raising New Issues on Appeal, 64 Harv. L. Rev. 652, 654–55 (1951) (collecting cases) (internal citations omitted). Adherence to the preservation rule prevents "turning appellate courts into trial courts, for which function they are not equipped, or depriving appellate courts of the benefit of lower court consideration of the new question." *Id.* at 655; *see also Wood*, 566 U.S. at 473–74 ("When a court of appeals raises a procedural impediment to disposition on the merits, and disposes of the case on that ground, the district court's labor is discounted and the appellate court acts not as a court of review but as one of first view.").

2. Cases brought under AEDPA are no exception to the preservation rule. *See Day v. McDonough*, 547 U.S. 198, 213 (2006) (Scalia, J., dissenting) (stressing that application of normal forfeiture rules to the issue of timeliness "does not contradict or undermine any provision of the habeas statute"). This Court has held that while appellate courts have discretion to reach forfeited issues in AEDPA cases, that discretion is not unlimited. *See, e.g.*, *Granberry v. Greer*, 481 U.S. 129, 133 (1987); *Wood*, 566 U.S. at 473. "[A] federal court

does not have *carte blanche* to depart from the principle of party presentation basic to our adversary system." *Wood*, 566 U.S. at 472. In fact, in *Day*, this Court held that "before acting on its own initiative, a court must accord the parties fair notice and an opportunity to present their positions" and "must assure itself that the petition is not significantly prejudiced by the delayed focus" on the forfeited issue. *See Day*, 547 U.S. at 210; *see also Wood*, 566 U.S. at 471 (describing *Day* as "affirm[ing] a federal district court's authority to consider a forfeited habeas defense when extraordinary circumstances so warrant"). The circumscribed discretion described in *Day* and *Wood* applies just as forcefully to an appellate court's consideration of the forfeited issue of harmlessness, which is similar in nature to the affirmative defenses that have been addressed by this Court. *See O'Neal v. McAninch*, 513 U.S. 432, 444 (1995) (comparing harmlessness to an affirmative defense); *see also United States v. Dominguez Benitez*, 542 U.S. 74, 81 n.7 (2004) (noting that Government has the burden of showing that constitutional trial error is harmless on collateral review); *Fry v. Pliler*, 551 U.S. 112, 121 n.3 (2007) (acknowledging that State bears burden of persuasion on harmlessness).

3. Yet, contrary to this Court's authority, and ignoring the bedrock principle of preservation, the Fifth Circuit's opinion adopts a new presumption in favor of forgiving state forfeiture of harmlessness in all habeas cases. Despite unanimously finding "no reason" to exercise its discretion to reach the forfeited issue of harmlessness initially, Pet. App. 59a–60a, the court did a "180" on rehearing, inexplicably reversing its

original grant of habeas relief, and decided the case based on the issue of harmlessness under *Brecht*, which had not been presented to the district court or even briefed by the State on appeal.[3] The court does so without citing any new facts, compelling reasons, or justifications for its decision. Instead, the court forgives the State's forfeiture based on the simple fact that this is a habeas case, finding it "desirable in most AEDPA cases to consider harmlessness." Pet. App. 27a.

This unfettered discretion to reach forfeited issues in habeas cases violates this Court's precedent. *See Granberry v. Greer*, 481 U.S. 129, 136 (1987) (reversing court of appeals' decision that nonexhaustion could not be waived without any determination of whether interests of justice would be better served by addressing the merits).[4]

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[3] The first time the State referenced *Brecht* was in its petition for rehearing. But even then, the State's focus was on whether the panel had the authority to forego the issue of harmlessness.

[4] The Fifth Circuit's new presumption also finds no basis in the text of AEDPA, which does not obligate the court to excuse the state's forfeiture of harmlessness or raise it sua sponte. As Judge Costa points out, the lack of textual support for special leniency for harmlessness "contrasts sharply" with AEDPA's explicit provision for leniency for exhaustion. Pet. App. 39a. Whereas AEDPA expressly provides the State must affirmatively waive exhaustion, 28 U.S.C. § 2254(b)(3), there is no such provision in the statute for harmlessness. The absence of any such provision suggests that Congress did not intend to apply special leniency to the state's forfeiture of other issues and arguments. *See Jama v. Immig. & Customs Enf't*, 543 U.S. 335, 341 (2005) ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has

B. The Fifth Circuit's Opinion breaks with ten circuits that refuse to overlook forfeiture of harmlessness without satisfying factors that warrant doing so.

1. In addition to violating this Court's precedent, the Fifth Circuit's decision departs from nearly every other circuit court, all of which refuse to forgive the government's failure to argue harmlessness without first considering certain factors to justify ignoring the well-established preservation rule. Nearly all of those circuits have adopted three factors first articulated by the Seventh Circuit in *United States v. Giovannetti*, 928 F.2d 225 (7th Cir. 1991) (per curiam). Instead of following suit—and after first declining to exercise discretion to consider the forfeited harmlessness issue—the Fifth Circuit on rehearing did the opposite and forgave the State's forfeiture, while refusing to apply the *Giovannetti* factors or consider any others that warranted doing so. The decision results in a double-standard that imposes the well-established preservation rule on habeas petitioners but not on the government, places a costly burden on courts to scour the record for evidence of harm when the government fails to raise the issue, and creates perverse incen-

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shown elsewhere in the same statute that it knows how to make such a requirement manifest."); *Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (citation omitted)).

tives and invites questionable tactics by the government to strategically forfeit or waive harmlessness. This Court should resolve this newly created circuit split.

2. In *Giovannetti*, the Seventh Circuit held that harmlessness can be waived, rejecting the suggestion that "even if the government does not argue harmless error, we must search the record—without any help from the parties—to determine that the errors we find are prejudicial, before we can reverse." 928 F.2d at 226. The court found the government's position that harmless error is not waivable "troublesome" for two reasons. *Id.* "First, it would place a heavy burden on the reviewing court, deprived as it would be of the guidance of the parties on the question whether particular errors were harmless." *Id.* "Second, it would invite salami tactics," giving the government perverse incentives to wait strategically to raise harmlessness only if, and after, it loses on the issue of whether there was error at all. *Id.*

But the court recognized that "reversal may be an excessive sanction for the government's having failed to argue harmless error, at least if the harmlessness of the error is readily discernible without an elaborate search of the record" and therefore concluded that it has "discretion to overlook a failure to argue harmlessness." *Id.* at 227. Balancing the need to "protect[] third-party interests including such systemic interests as the avoidance of unnecessary court delay" with the need to avoid the burden on the reviewing court "to scour a lengthy record on our own, with no guidance from the parties, for indications of harmlessness," the Seventh Circuit reached a middle-ground:

"in deciding whether to exercise that discretion the controlling considerations are [1] the length and complexity of the record, [2] whether the harmlessness of the error or errors found is certain or debatable, and [3] whether a reversal will result in protracted, costly, and ultimately futile proceedings in the district court." *Id.* at 226–27.

3. Since *Giovannetti*, nearly every circuit court of appeals has adopted those same factors when determining whether to consider harmlessness sua sponte. *See, e.g.*, *United States v. McLaughlin*, 126 F.3d 130, 135 (3d Cir. 1997) (adopting *Giovannetti* factors "[i]n deciding whether to exercise that discretion" to consider harmlessness sua sponte); *United States v. Brizuela*, 962 F.3d 784, 799 (4th Cir. 2020) ("declin[ing] to find the error was harmless on our own initiative" after applying the *Giovannetti* factors); *Gover v. Perry*, 698 F.3d 295, 301 (6th Cir. 2012) ("[W]e hold that a district court may exercise discretion to review constitutional errors for harmlessness sua sponte when reviewing a § 2254 petition and when a court determines whether to do so, it should utilize the *Giovannetti* factors among other relevant considerations."); *United States v. Montgomery*, 100 F.3d 1404, 1407 (8th Cir. 1996) ("We have discretion to overlook the waiver [of harmlessness], however, after taking into consideration the length and complexity of the record, the certainty of the harmlessness finding, and whether a reversal would result in protracted, costly, and futile proceedings in district court."); *United States v. Rodriguez*, 880 F.3d 1151, 1164 (9th Cir. 2018) ("[W]hen we decide whether to consider harm-

lessness, despite the government's waiver, we consider three factors: (1) the length and complexity of the record, (2) whether the harmlessness of an error is certain or debatable, and (3) the futility and costliness of reversal and further litigation." (internal quotation marks omitted)); *United States v. Holly*, 488 F.3d 1298, 1308 (10th Cir. 2007) ("In deciding whether to exercise its discretion to address harmlessness, this court considers (1) the length and complexity of the record; (2) whether the harmlessness of the errors is certain or debatable; and (3) whether a reversal would result in protracted, costly, and futile proceedings in the district court." (internal quotation marks omitted)); *United States v. Pryce*, 938 F.2d 1343, 1347–48 (D.C. Cir. 1991) (plurality opinion) (endorsing *Giovannetti* factors when considering whether to exercise discretion "to proceed with the harmless error analysis despite the government's failure to raise the issue"); *see also United States v. Rose*, 104 F.3d 1408, 1415 (1st Cir. 1997) (finding the *Giovannetti* factors helpful when determining whether to undertake the harmless error analysis sua sponte); *United States v. Adams*, 1 F.3d 1566, 1576 (11th Cir.1993) (relying on the reasoning in *Giovannetti* and emphasizing that the court may address the harmless error issue sua sponte when the harmlessness is "patently obvious").

4. Here, the Fifth Circuit departed from this overwhelming authority after creating a false and immaterial distinction between the case at hand and *Giovannetti*—namely, that *Giovannetti* did not involve collateral review and predated this Court's decision in *Brecht v. Abrahamson*, 507 U.S. 619 (1993):

> We conclude that the Seventh Circuit's opinion [in *Giovannetti*], which predated *Brecht* by two years and did not involve review of a state conviction, necessarily did not, indeed could not, take into account that the "application of a less onerous harmless-error standard on habeas [review of a state conviction] promotes the considerations underlying our habeas jurisprudence." We do not find *Giovannetti* persuasive for adopting a heightened standard in the habeas context from that identified in *Brecht*.

Pet. App. 29a–30a (second alteration in original) (quoting *Brecht*, 507 U.S. at 623). In *Brecht*, this Court adopted the *Kotteakos* standard for harmlessness on habeas review of a constitutional error: whether the error "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 637–38 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). Rather than consider any factors that might warrant the court's overlooking the State's forfeiture of harmlessness, and after initially *declining* to consider harmlessness because of that forfeiture, Pet. App. 60a, the Fifth Circuit announced that it "find[s] it desirable in most AEDPA cases to consider harmlessness," singing a different tune on panel rehearing than that sung just three months prior. Pet. App. 27a.

No court has made the distinction that the Fifth Circuit made here. To the contrary, at least four circuits have adopted the *Giovannetti* analysis on habeas review of state convictions—three of them well

after *Brecht*. *See Gover v. Perry*, 698 F.3d 295, 301 (6th Cir. 2012) ("[W]e hold that a district court may exercise discretion to review constitutional errors for harmlessness sua sponte when reviewing a § 2254 petition and when a court determines whether to do so, it should utilize the *Giovannetti* factors among other relevant considerations."); *Sanders v. Cotton*, 398 F.3d 572, 582 (7th Cir. 2005) (applying *Giovannetti* when the state failed to raise harmless error during a habeas proceeding governed by AEDPA)[5]; *Lufkins v. Leapley*, 965 F.2d 1477, 1481 (8th Cir. 1992) (applying *Giovannetti* factors in habeas case); *Mollett v. Mullin*, 348 F.3d 902, 920 (10th Cir. 2003) (same).

This consensus accumulated for good reason: *Giovannetti* does not contravene *Brecht*. *Brecht* provides the test to determine on habeas review whether a constitutional error is harmless. 507 U.S. at 637–38. *Giovannetti* provides the "controlling considerations" in deciding whether to overlook the government's *failure* to argue harmlessness in the first place. 928 F.2d at 226–27. If application of the *Giovannetti* factors demonstrates that a court should exercise its discretion to consider harmlessness after forfeited by the government, the court should apply the *Brecht* standard to determine whether the error was in fact harmless. *See e.g.*, *Gover*, 698 F.3d at 301–03. And the

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[5] Contrary to the Fifth Circuit's characterization of the Seventh Circuit's decision in *Rhodes v. Dittmann*, *see* Pet. App. 30a n.2, the Seventh Circuit has expressly endorsed the *Giovannetti* analysis on habeas review of state convictions. *See Rhodes v. Dittmann*, 903 F.3d 646, 665 (7th Cir. 2018) ("The district court should have applied *Giovannetti* and *Sanders* and asked whether the error was certainly harmless.").

Giovannetti's consideration of the "certainty" of harmlessness "is the same 'beyond any doubt' standard that the Supreme Court has recognized as one of the extraordinary circumstances that, as a general matter, may excuse forfeiture." Pet. App. 42a n.2 (Costa, J., dissenting) (quoting *Singleton v. Wulff*, 428 U.S. 106, 121 (1976)).[6]

6. The Fifth Circuit's decision below contravenes the overwhelming authority that enforces the preservation rule when the government fails to raise the issue of harmlessness. Had the State chosen the same strategy in any number of other circuits, the State's forfeiture would not have been forgiven after scrutiny, and Mr. Atkins would have been afforded habeas relief. This decision has created circuit conflict on a matter of great significance that will not be resolved without this Court's review.

C. The Fifth Circuit's new presumption in favor of forgiving state forfeiture will have significant implications for habeas cases.

1. The Fifth Circuit's decision has significant implications for habeas cases and turns the well-established preservation rule on its head. Given the importance of this bedrock principle, this Court has

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[6] As noted by Judge Costa in his dissent, "[t]he majority opinion skips over the need for an extraordinary circumstance to justify looking past forfeiture (unless it's saying that there is always an extraordinary circumstance in an AEDPA case)." Pet. App. 42a n.2 (Costa, J., dissenting). "That failure to identify a case-specific extraordinary circumstance" was the source of Judge Costa's disagreement, "not the application of *Brecht* once there is a valid reason for overlooking forfeiture." *Id.*

made clear that courts' discretion to consider a forfeited argument is not unbridled. *See Singleton v. Wulff*, 428 U.S. 106, 121 (1976). The overwhelming majority of circuits have adopted the *Giovannetti* factors to provide a roadmap for courts to decide whether to exercise that discretion to forgive the government's failure to argue harmlessness. The Fifth Circuit's refusal to apply *Giovannetti* in the habeas context, and its failure to consider whether any other extraordinary circumstances warranted forgiving the State's forfeiture of harmlessness, creates a new rule against enforcing the preservation rule in habeas cases. The decision essentially renders the government's obligation to argue harmless error a nullity. As a result, the government will have no reason to raise or preserve harmlessness—let alone factually develop harmlessness before the trial court—and may instead assume a reviewing court will save its skin. In other words, this decision invites the "salami tactics" of which the *Giovannetti* court warned:

> In its main brief and at oral argument the government would argue that there was no error, hoping to get us to endorse its view of the law. If it failed in that endeavor it would file a petition for rehearing, arguing as it does in this case that it should win anyway because the error was harmless.

Giovannetti, 928 F.2d at 226. And "where the case is at all close, defense counsel's lack of opportunity to answer potential harmless error arguments may lead the court to miss an angle that would have shown the error to have been prejudicial." *United States v.*

Pryce, 938 F.2d 1343, 1347 (D.C. Cir. 1991). This rule also results in a "drain on judicial resources [that] inevitably causes delay for parties in other cases" because it requires the reviewing court to "assume[] burdens normally shouldered by government and defense counsel." *Id.*

2. The rule adopted by the court below not only undermines judicial efficiency but also formalizes a double-standard, "afford[ing] the government's forfeiture [leniency that] is hardly, if ever, shown when habeas prisoners fail to raise an issue in the district court." Pet. App. 40a (Costa, J., dissenting). *Compare* Pet App. 31a, *with Johnson v. Puckett*, 176 F.3d 809, 814 (5th Cir. 1999) ("[A] contention not raised by a habeas petitioner in the district court cannot be considered for the first time on appeal from that court's denial of habeas relief."). The Fifth Circuit's new presumption in favor of forgiving state forfeiture thus undermines the "neutral application of procedural rules," which is "part of what is meant by the 'rule of law' or 'equal justice under law,' ideals that are guiding lights of our justice system." Pet. App. 36a. As Judge Costa emphasized, "[o]ne can look far and wide yet not find a decision from our court excusing a prisoner's failure to preserve." Pet. App. 40a. Rather, the Fifth Circuit routinely enforces forfeiture to habeas prisoners, *even in death penalty cases,* without even contemplating the use of discretion to excuse it. *See, e.g.*, *Lucio v. Lumpkin*, 987 F.3d 451, 478, (5th Cir. 2021) ("Because [death-row inmate] Lucio failed to raise this argument before the original panel, we hold that it is forfeited."); *Howard v. Davis*, 959 F.3d 168,

174 (5th Cir. 2020) (refusing to grant certificate of appealability to death-row inmate "on an argument the district court had no chance to address"); *Malone v. Wilson*, 791 F. App'x 505, 506 (5th Cir. 2020) (declining to address argument raised by pro se prisoner because "he did not raise that argument in the district court and we decline to consider for the first time on appeal"); *Thompson v. Davis*, 916 F.3d 444, 460 (5th Cir. 2019) (finding death-row inmate's argument waived where it did "not appear to have been raised in the district court"); *Wilson v. Roy*, 643 F.3d 433, 435 n.1 (5th Cir. 2011) (declining to consider argument made by pro se prisoner because "he makes this argument for the first time on appeal"). In fact, the Fifth Circuit enforces forfeiture against habeas petitioners so strictly that even arguments raised "in general" and referenced "only once" have been found insufficient to save them from abandonment. *See Poree v. Collins*, 866 F.3d 235, 250 (5th Cir. 2017).

The Fifth Circuit's blatant, and now formalized, double-standard applies leniency to repeat institutional state attorneys, while imposing harsher rules on often pro se criminal defendants whose liberty interests and constitutional protections are at stake. *Cf. United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (noting that departure from the party presentation rule is usually only warranted to protect a pro se litigant). As Judge Costa stressed, a presumption that excuses only the state for failing to preserve and present issues is inconsistent with "equal justice under law." *Cf.* Martineau, 40 Vand. L. Rev. at 1061 (arguing that "inconsistency" in applying forfeiture "is destructive of the adversary system, causes

substantial harm to the interests that the general rule is designed to protect, and is an open invitation to the appellate judges to 'do justice' on ad hoc rather than principled basis); Tory A. Weigand, *Raise or Lose: Appellate Discretion and Principled Decision-Making*, 17 Suffolk J. Trial & App. Advoc. 179, 180–81 (2012) (recognizing that inconsistent application of forfeiture rules casts doubt on the court's legitimacy).

D. Reaching the issue of harmlessness in the first instance and without the benefit of adversary argument, the Fifth Circuit misapplied *Brecht*.

1. The Fifth Circuit blatantly misapplied *Brecht* below, demonstrating the dangers of reaching a forfeited issue that was not even appropriately briefed on appeal. The State's alarmingly deficient advocacy at multiple stages of the proceeding deprived Mr. Atkins of the opportunity to address *Brecht* and demonstrate the substantial and injurious effect of the Confrontation Clause violation. Because the State did not raise or argue harmlessness in the district court, the Fifth Circuit was left with an underdeveloped record on which to consider the fact-intensive question of harmlessness in the first instance. Even in its Appellee Brief, the State did not appropriately argue the issue. The State did not even cite this Court's decision in *Brecht*, much less discuss it or argue for its application. Rather, after conceding forfeiture, the State simply argued that it "had enough evidence to convict Petitioner without Horton's testimony." Appellee Br. 18, *Atkins v. Hooper*, No. 19-30018 (5th Cir.).

2. The Fifth Circuit followed suit, applying a sufficiency-of-the-evidence analysis to conclude the error

was harmless, ultimately hinging on the Fifth Circuit's credibility assessment of two "highly intoxicated" witnesses it never had occasion to meet. *See* Pet. App. 32a–34a (considering "the extent of other testimony identifying Atkins" and concluding "[w]e have no evidence to support, though, that their powers of perception were so affected as to be unable to recognize that someone they had seen at least on a few earlier occasions was attacking them."). But the Fifth Circuit's highly-fact-bound inquiry and weighing of the tenuous evidence against Mr. Atkins completely misapplied the *Brecht* standard, under which "[t]he inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error." *Kotteakos v. United States*, 328 U.S. 750, 765 (1946). Instead, the focus must be on "the error itself" and the possible impact it had on the jury. *Id.*

Focusing on the constitutionally problematic evidence, rather than the sufficiency of the rest, there is no question, or at the *very least* there is "grave doubt," *see O'Neal v. McAninch*, 513 U.S. 432, 435 (1995), that Lawrence Horton's out-of-court confession—the most significant and damaging piece of evidence admitted at trial—had a substantial and injurious effect on the jury. This unconstitutional hearsay evidence was not just a fleeting reference to some immaterial out-of-court statement; rather, it was the repeated admission of an alleged *accomplice's inculpatory out-of-court confession*, where that accomplice became a central figure at trial, was clearly connected to the crime, and had motive and opportunity to shift blame. This

Court has described this *exact* type of out-of-court accomplice confession as "*devastating* to the defendant," the very "threat[] to a fair trial that the Confrontation Clause was directed." *Bruton v. United States*, 391 U.S. 123, 136 (1968) (emphasis added). What's more, the "inevitably suspect" credibility of such evidence was explicitly confirmed by the State, which *admitted* in its appellate brief that Horton, whose credibility was never tested before the jury, was not credible. *See* Appellee Br. 16, *Atkins v. Hooper,* No. 19-30018 (5th Cir.). Yet the jury was allowed to hear about Horton's incredible alleged confession multiple times. This error infected the entire trial, even leading the trial judge to *explicitly foreclose certain defense strategy* because he believed, as the State had promised, that Horton was going to be called to testify. *See* Trial Transcript, attached as Exhibit 3 to State's Ans. and Memo. of Law, *Atkins v. Hooper*, No. 17-1544 (W.D. La), ECF No. 18-3 at 216. In the words of this Court, the threat to a fair trial created by this admission "is a hazard we cannot ignore." *Bruton*, 391 U.S. at 137 (holding that even a limiting instruction to the jury cannot cure the violation). And even if, despite all indication that this evidence was significant, the Fifth Circuit remained "uncertain" as to harmlessness, this Court *requires* a presumption of harm. *See O'Neal*, 513 U.S. at 435.

The Fifth Circuit's misguided, and unguided, application of *Brecht* was so improper that summary reversal and remand is appropriate.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Christine M. Calogero
Counsel of Record
Viviana Aldous
Barrasso Usdin Kupperman Freeman & Sarver, L.L.C.
909 Poydras Street, Suite 2350
New Orleans, Louisiana 70112
Telephone: (504) 589-9700
ccalogero@barrassousdin.com
valdous@barrassousdin.com

Counsel for Petitioner