

No. ____

IN THE
Supreme Court of the United States

JUSTIN TERRELL ATKINS

Petitioner,

v.

TIMOTHY HOOPER, WARDEN
Elayn Hunt Correctional Center
Respondent.

TABLE OF APPENDICES

	Page(s)
U.S. Court of Appeals, Fifth Circuit, Order denying Atkins' rehearing petition [12/20/2020]	1a
U.S. Court of Appeals, Fifth Circuit, Rehearing Opinion [11/03/2020]	2a
U.S. Court of Appeals, Fifth Circuit, Original Opin- ion [08/07/2020]	45a
U.S. District Court, Western District of Louisiana, Judgment [12/07/2018]	61a
U.S. District Court, Western District of Louisiana, Report and Recommendation [11/19/2018]	63a
Relevant statutory provisions.....	79a

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-30018

JUSTIN TERRELL ATKINS

Petitioner-Appellant,

v.

TIMOTHY HOOPER, Warden, Elayn Hunt Correc-
tional Center,

Respondent-Appellee.

**Appeal from the United States District Court
for the Western District of Louisiana**

ON PETITION FOR REHEARING

Before SOUTHWICK, COSTA, and DUNCAN, *Cir-
cuit Judges.*

Per Curiam:

IT IS ORDERED that the petition for rehear-
ing is DENIED. COSTA, J. would grant.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-30018

JUSTIN TERRELL ATKINS

Petitioner-Appellant,

v.

TIMOTHY HOOPER, Warden, Elayn Hunt Correc-
tional Center,

Respondent-Appellee.

**Appeal from the United States District Court
for the Western District of Louisiana**

ON PETITION FOR REHEARING

Before SOUTHWICK, COSTA, and DUNCAN, Cir-
cuit Judges.

LESLIE H. SOUTHWICK, Circuit Judge:

The previous opinion is withdrawn. See *Atkins v. Hooper*, 969 F.3d 200 (5th Cir. 2020). A Louisiana inmate appeals the district court's denial of *habeas* relief based on a Confrontation Clause violation. We AFFIRM.

FACTS AND PROCEDURAL BACKGROUND

A jury convicted Justin Terrell Atkins of armed robbery and aggravated battery. The conviction was affirmed on appeal, then the Louisiana Supreme Court denied review. *State v. Atkins*, 74 So. 3d 238 (La. Ct. App. 2011), *writ denied*, 82 So. 3d 284 (La. 2012) (mem.). Our factual summary is taken from the Louisiana court of appeal decision. *Id.* at 239. The issue in this appeal concerns the evidence identifying Atkins. For purposes of describing the events, we assume Atkins was one of the participants.

Robert Jones, Howard Bishop, and Tom Harris were drinking alcohol together at Jones's house. Atkins knew that Bishop and Jones had just returned to the house after Jones cashed a check. After kicking in the door to the house, Atkins demanded money, but Jones refused. Atkins began beating Jones with the butt of a firearm. When Harris intervened, Atkins hit him too. Bishop witnessed the incident and saw Atkins take money from Jones's pocket. During the robbery, Lawrence Horton was at the door to Jones's house. Horton had followed Jones and Bishop and saw Jones cash his check.

That night, neither Bishop nor Harris could give the actual names of the men involved in the crime. They were able to inform police, though, of their nicknames and added that the person who hit Harris and Jones had been wearing an orange shirt. Harris within a few days learned Horton's name and informed police. Eight days after the crime, Horton surrendered himself to police. When questioned by

Detective Jeffrey Dowdy, Horton admitted to being one of the offenders but said Atkins was primarily responsible for the crime. Detective Dowdy then obtained an arrest warrant for Atkins. Horton's statements were the first ones to name Atkins and the only ones Detective Dowdy used when obtaining an arrest warrant.

It was almost two weeks after the incident before either Bishop or Harris named Atkins. By that time, Atkins had already been arrested. Harris testified that a neighbor who lived below his apartment provided Harris with a picture of a man holding the neighbor's baby. The man in the photograph was Atkins. Harris believed that this photograph was of the person involved in the crime who had been wearing an orange shirt. He provided it to police.

The officers then asked Bishop to examine a photographic lineup, and Bishop chose the picture of Atkins. Whether Harris had earlier shown the photograph to Bishop is disputed, as we will discuss. This testimony was presented at trial, and a jury convicted Atkins for his role in the crime. The conviction was affirmed on direct appeal.

Atkins filed for state post-conviction relief in which he contended that he was denied his right to confront and cross-examine Horton when hearsay evidence was presented at trial. The claim focuses on the State's opening statement, the testimony of Detective Dowdy, and the State's closing argument.

The prosecutor made these assertions in his opening statement:

Finally, I believe the State will have the testimony of Lawrence Horton. Lawrence Horton is a co-defendant in this case. That he was arrested for this offense as well as the defendant in this case. I believe that he will tell you that he and the defendant met on the morning of January 2nd, 2009. That they went ultimately to 1710 Jackson Street wherein the defendant, Mr. Atkins over here, busted the door in at 1710 and robbed and beat the victims while he himself, Mr. Horton, served as a lookout. And I believe that will – you will anticipate that testimony as well.

Detective Dowdy at trial was allowed to imply, but not directly state, that Horton had told Dowdy that Atkins was his accomplice in the crime:

Q. Okay. And did you in fact speak with Lawrence Horton?

A. Yes, sir, I did.

Q. All right. Was he advised of his rights?

A. Yes, sir, he was.

Q. And did he provide a statement to you?

A. Yes, sir, he did.

Q. Was the statement inculpatory? Did he

—

A. Yes, sir, it was.

Q. Okay. Did he implicate anybody else?

A. Yes, sir, he did.

Q. Okay. As a result of this – well, all right, he implicated someone else. What did you do next with regard to your investigation?

A. Based on the – the information that he provided he was arrested and again,

based on the information that he provided I was able to obtain a warrant.

Q. For whom?

A. Justin Atkins.

Harris and Bishop testified for the State, identifying Atkins but admitting to being intoxicated at the time of the robbery. The State rested without calling Horton after indicating in its opening statement that he would testify. The State's brief here, written by the assistant district attorney handling the trial, said that Horton was interviewed after the opening statement. As a result, "the undersigned counsel felt Mr. Horton was not a credible witness and decided not to call Mr. Horton."

Atkins presented only one witness, Darrell Williams, whose testimony contradicted parts of Harris' and Bishop's recollections of details leading up to the assault and robbery. Williams also testified that a man in an orange shirt had been outside Jones's house just before the attack on Harris and Jones, but he could not identify that man as Atkins. During closing argument, the prosecutor stated that Detective Dowdy "interview[ed] Lawrence Horton, who [was] known as O and then obtain[ed] an arrest warrant for Justin Atkins, the defendant." Detective Dowdy's testimony and the State's effort to make certain by its argument that jurors understood the implications about what Horton really told Detective Dowdy are

the facts underlying the claim before us. Atkins was convicted, and the judgment was affirmed on appeal.

The state district court denied Atkins' application for post-conviction relief. Both the state court of appeal and supreme court denied Atkins' writ applications. Atkins filed a federal *habeas* application, claiming that he was denied his Sixth Amendment right to confrontation. A magistrate judge recommended that Atkins' application be denied. The district court adopted the report, dismissed Atkins' application, and denied Atkins a Certificate of Appealability. Atkins timely appealed. This court granted Atkins the right to appeal his Confrontation Clause claim.

DISCUSSION

Atkins contends the state court's decision denying his Sixth Amendment Confrontation Clause claim was contrary to and involved an unreasonable application of Supreme Court precedent. Atkins also argues the State waived any harmlessness argument and, regardless, the error was harmful. We first, though, consider whether the State waived a defense of procedural default.

I. Waiver of defense of procedural default

The federal district court strongly recommended that the State analyze whether Atkins' request for relief was barred by procedural default and asked the State to address this possible defense. The district court's urging may have been because procedural default was one of the grounds on which the

Louisiana Supreme Court denied state *habeas* relief. *State ex rel. Atkins v. State*, 227 So. 3d 251, 251 (La. 2017). Nevertheless, the State failed to do so at the district court, and Atkins now contends the State waived procedural default because of this failure. In the State's response brief, the State did not attempt to raise procedural default as a defense, and the State did not respond to Atkins' waiver argument. Thus, to bar *habeas* relief based on procedural default, we would have to raise and apply the defense *sua sponte*.

When considering whether we should identify and apply a procedural default in *habeas* review, we consider whether the applicant had notice that the appellate court might consider procedural default and had a reasonable opportunity to respond, and whether the government intentionally waived the possible default. *Smith v. Johnson*, 216 F.3d 521, 524 (5th Cir. 2000). Here, the district court identified a possible defense of procedural default and instructed the State to raise the defense if the State believed it applied. The State thereafter answered Atkins' *habeas* application and explicitly spurned the suggested defense, stating that "it appears [Atkins] has exhausted his state court remedies." That is enough to convince us not to consider the issue of whether Atkins' *habeas* application is procedurally defaulted.

II. Violation of the Confrontation Clause

We review a "district court's findings of fact for clear error and its conclusions of law *de novo*." *Dorsey v. Stephens*, 720 F.3d 309, 314 (5th Cir. 2013). Under the Antiterrorism and Effective Death Penalty Act of

1996 (“AEDPA”), a federal court may not grant *habeas* relief on a claim that a state court has adjudicated on the merits unless that adjudication resulted in a decision that was either (1) “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States” or (2) “based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d).

A. *The last reasoned decision*

A component of our review under AEDPA is how a claim was resolved in the “last related state-court decision” that provides a “relevant rationale.” *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018). If the last state-court decision for the Section 2254 applicant did not provide a relevant rationale for the claim, we “look through” that decision until we find one that does. *Id.* Only then can we consider whether the highest state court to decide the claim resolved it in a manner contrary to or by an unreasonable application of clearly established Supreme Court precedent. *Id.*

Atkins’ *habeas* application in the state district court included the same Confrontation Clause claim he now pursues in federal court, but Atkins’ state application also included claims of ineffective assistance of trial counsel. We have no ineffective-assistance-of-counsel claims before us.

Our search for a reasoned decision starts with the highest state-court decision on Atkins’ *habeas*

claims, that of the Louisiana Supreme Court in September 2017. *State ex rel. Atkins v. State*, 227 So. 3d 251 (La. 2017). The court denied relief to Atkins for two reasons. First, it concluded that Atkins' claims were procedurally defaulted because he "failed to raise his claims in the proceedings leading to conviction," relying on Louisiana Code of Criminal Procedure article 930.4(B). *Id.* at 251. That is the procedural default that we do not inject into this appeal. Second, the court held that Atkins "fail[ed] to satisfy his post-conviction burden of proof" under Louisiana Code of Criminal Procedure article 930.2. *Id.* Because Atkins was claiming more than a Confrontation Clause violation, and all claims had already been rejected by that court as procedurally defaulted, this brief reference to the burden of proof does not inform us whether the court was applying that defect to all the claims. Therefore, the Louisiana Supreme Court did not give a decision that was reasoned in AEDPA terms on the Confrontation Clause issue or on harmlessness. *See, e.g., Jackson v. Johnson*, 194 F.3d 641, 651 (5th Cir. 1999). We therefore look through that decision.

The preceding state-court decision was rather concise, issued by the Louisiana Second Circuit Court of Appeal in March 2016:

Applicant Justin Terrell Atkins seeks supervisory review of the trial court's denial of his uniform application for postconviction relief and "Amended Brief in

Support of Application for Petition for Post Conviction Relief.” On the showing made, the writ is denied. La. C. Cr. P. art. 930.2; La. C.E. 801(C); *State v. Lewis*, 47,853 (La. App. 2d Cir. 2/27/13), 110 So. 3d 644, 653, *writ denied*, 2013-0672 (La. 10/25/13), 124 So. 3d 1092; *Woods v. Etherton*, ___U.S.__, 136 S. Ct. 1149 (2016).

The brevity of this decision imperfectly follows a Louisiana Uniform Rule of the Court of Appeal. The Rule provides the following:

- A. [Description of when summary disposition is appropriate.]
- B. The court may dispose of a case by summary disposition with or without oral argument at any time after the case is docketed in the appellate court. . . .
- C. When a summary disposition is issued, it shall contain:
 - (1) a statement describing the nature of the case and

the dispositive issues without a discussion of the facts;

(2) a citation to controlling precedent, if any; and

(3) the judgment of the appellate court and a citation to one or more of the criteria under this rule which supports the judgment, e.g., “Affirmed in accordance with Uniform Court of Appeal Rule 2-16.2.A(1).”

LA. UNIF. R. COURT APP. 2-16.2.

Among other omissions, the court of appeal did not identify a dispositive issue. The State now argues that one dispositive issue was the harmlessness of any error; the state court’s failure to identify any issue blunts the contention. Nonetheless, we are not the supervisors of a state court’s compliance with its own procedural rules: “federal *habeas corpus* relief does not lie for errors of state law.” *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990). We still must find some violation of federal law in the court’s judgment before granting any relief.

The court of appeal first cited Louisiana Code of Criminal Procedure article 930.2, as would the state supreme court, which places the burden of proof on the applicant for relief. The court next cited Louisiana Code of Evidence article 801(c), which defines

hearsay. At most we can discern that the definition of hearsay was relevant, and Atkins had the burden of proof as to any relevant facts and, perhaps, did not carry that burden well.

The first of two court opinions cited was *State v. Lewis*, 110 So. 3d 644 (La. Ct. App. 2013). In *Lewis*, the defendant raised five issues on appeal. *Id.* at 649–55. The court of appeal in Atkins' case gave a pinpoint citation to the page of *Lewis* discussing the right to confrontation. *Id.* at 653. That page refers to testimony similar to what is at issue in our case and avers that a police officer's describing his investigation by restating what he was told is generally not hearsay. *Id.* Still, there is no holding on that page about whether the testimony in *Lewis* contained hearsay. *Id.* On the next page of the opinion, the *Lewis* court held that the police officer's testimony that strongly implied the defendant was the suspect was actually inadmissible hearsay, but the error was harmless because of other substantial evidence of guilt. *Id.* at 654.

The State insists on this appeal that the reference to *Lewis* constitutes a holding on the merits that the testimony in this case was at worst harmless error, even if there were a violation of the Confrontation Clause. Our problem with this position is three-fold. First, there had not been any argument about harmless error in Atkins' case. The briefing in the state district court did not address that possibility, and the district court's opinion did not discuss it. As to Atkins' appeal, the State never filed a brief, an absence consistent with Uniform Rule of the Court of Appeal 2-

16.2(B) that allows the court to enter a decision without responsive briefing. The issue of harmless error, therefore, had not been part of the case. Second, by not identifying any dispositive issue, the court of appeal did not itself indicate that it was relying on harmless error. Finally, the cited page of *Lewis* did not refer to the harmlessness of an error.

In considering the State's new argument that the court of appeal held any error to be harmless, we have two considerations. On the one hand, Congress, by adopting AEDPA, has established rules to prevent federal courts from unnecessarily overturning state-court resolution of post-conviction claims. On the other hand, habeas itself is based on important liberty interests. For us to conclude that the court of appeal decision we just described actually held that the introduction of the officer's testimony was harmless error would create a ruling that the state court did not clearly make. Before giving the exceptional level of deference to a state-court holding that AEDPA requires, we need better support than exists here to conclude that the state court actually made that holding. We thus find that the state court by referring to *Lewis* was deciding on some other basis, perhaps the same that the trial court had used —this testimony was not hearsay at all.

Finally, the court of appeal cited *Woods v. Etherton*, 136 S. Ct. 1149 (2016). Woods dealt only with a claim of ineffective assistance of appellate counsel for failing to raise a Confrontation Clause argument on appeal. *Id.* at 1151–53. As an initial mat-

ter, the court of appeal opinion does not include a pinpoint citation to any portion of the opinion. We consider the case's general holding, which was that the federal circuit court of appeals applied the incorrect standard of review under AEDPA. *Id.* at 1152. When analyzing ineffective-assistance-of-counsel claims under AEDPA, the Supreme Court concluded that "doubly deferential" review is the appropriate standard. *Id.* at 1151 (quoting *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011)).

Atkins argues that the state court of appeal denied his Confrontation Clause claim by incorrectly applying this double deference. Actually, because *Woods* addresses ineffective assistance of counsel, we conclude that the better understanding is that the state court was using that precedent to deny the similar claim that Atkins brought in state court but is not before us. Accordingly, the state court of appeal's use of *Woods* is not relevant to the Confrontation Clause claim before us.

We conclude that the state court of appeal did not make an identifiable, reasoned decision as to the Confrontation Clause. At most, we could say that its citation to *Lewis* could be a ruling that this testimony was not hearsay at all. Because of our uncertainty, we look through that court's opinion and find the state district court's decision.

In February 2016, the state district court denied Atkins' application for post-conviction relief with far more explanation than either appellate court. The court held that Atkins' right to confrontation was not

violated, reasoning that because Detective Dowdy's testimony did not reference the actual statements Horton made during Detective Dowdy's investigation, no hearsay was admitted. The court also found that Detective Dowdy's testimony was "used to explain the sequence of events leading to the arrest of [Atkins] from the viewpoint of the arresting officers," which is permissible under state law. Because the state court determined the relevant statements were not hearsay, there was no Confrontation Clause violation. There was no additional consideration at this point of any harmless effect.

The district court's decision that this testimony was not hearsay is the needed ruling that provides a rationale for Atkins' Confrontation Clause claim. The state court of appeal may also share this rationale. Because we have concluded that no state court considered harmlessness, when we analyze that issue, there is no state-court decision to receive deference.

B. Application of Supreme Court precedent

The state court's determination that we now review was a legal one, namely, that the relevant testimony was not hearsay. Our review, then, is under Section 2254(d)(1) for whether the court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."

The first standard, that the decision be "contrary to . . . clearly established Federal law," is met if "the state court arrives at a conclusion opposite to

that reached by [the Supreme Court] on a question of law or if the state court decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts.” *Williams v. Taylor*, 529 U.S. 362, 413 (2000). The second standard, that the state court made an “unreasonable application of clearly established federal law,” is satisfied when that court “identifies the correct governing legal principle from [the Supreme Court’s] decisions but unreasonably applies that principle to the facts of the prisoner’s case.” *Id.* These alternatives require more than a federal court’s conclusion that the state court erred under clearly established Supreme Court authority. The federal court must also conclude the state court’s error was “unreasonable.” *Id.* at 411.

We restate the key components of the challenged testimony. Detective Dowdy was asked what he was told by Horton, who had admitted to being involved in the offense. The prosecutor prefaced his question by saying that Horton “implicated someone else,” and then asked Detective Dowdy, “What did you do next with regard to your investigation?” The answer was that, based on what Horton told him, Detective Dowdy obtained a warrant for the arrest of Justin Atkins. Jurors surely knew whom Horton implicated.

We now examine the state-court decision. We already explained that the state court of appeal may have decided that the testimony was not hearsay at all when it cited a page from *Lewis*, one of its own opinions. No United States Supreme Court authority was cited on the specific page of *Lewis* that the intermediate court referenced, and we find no Supreme

Court authority about hearsay anywhere in the *Lewis* opinion. See *Lewis*, 110 So. 3d at 653.

The state district court's ruling is the reasoned state-court decision. Two fairly brief paragraphs are the entirety of the hearsay discussion. First, under a caption of "Law," the court made these general statements about hearsay:

A defendant's confrontation right is only implicated when the out-of-court statement is used to prove the truth of the matter asserted. *Tennessee v. Street*, 471 U.S. 409, 414 (1985). According to *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968), the United States Supreme Court held that a defendant's rights under the confrontation clause of the Sixth Amendment to the United States Constitution were violated by the introduction, at a joint criminal trial, of a nontestifying codefendant's confession which named and incriminated the defendant. "Hearsay is a statement, other than one made by the

declarant while testifying at the present trial or hearing, offered in evidence to prove the truth of the matter asserted." La. C.E. art. 801(c).

The next paragraph was captioned "Analysis." There, the court held that the challenged testimony was not hearsay:

Mr. Atkins argues that he was referenced to in the testimony of Detective Dowdy, Mr. Bishop, Mr. Harris, and in the opening and closing statements of the State of Louisiana. However, Mr. Atkins' rights were not violated, as no references were made to the statements made by Mr. Horton and thus hearsay was not evident. Although Detective Dowdy did make statements in reference to the conversation between Atkins and Mr. Horton, this conversation was used to explain the sequence of events leading to the arrest of the defendant from the viewpoint of the arresting officers. *State v.*

Calloway, 324 So. 2d at 809. Thus, Mr. Atkins' claims in this respect are meritless.

We examine the two cited Supreme Court opinions. In *Street*, the Confrontation Clause issue arose from the fact that the confession of an accomplice who incriminated Street was introduced. Its admission was for the "nonhearsay purpose of rebutting [Street's] testimony that his own [later] confession was a coerced 'copy' of" the accomplice's confession." *Street*, 471 U.S. at 417. An instruction was given, informing jurors to consider the accomplice's confession only as rebuttal to Street's claim and not for the confession's truthfulness. *Id.* at 412. The Supreme Court upheld the conviction, concluding that admission of the entire statement with a limiting instruction was necessary and constitutional. *Id.* at 415, 417. "Had the prosecutor been denied the opportunity to present [the accomplice's] confession in rebuttal so as to enable the jury to make the relevant comparison, the jury would have been impeded in its task of evaluating the truth of respondent's testimony and handicapped in weighing the reliability of his confession." *Id.* at 415.

The other Supreme Court decision cited by the state district court involved a joint trial of two defendants; a witness stated that one of the two confessed to him that both had committed the offense. *Bruton*, 391 U.S. at 124. The trial court instructed jurors that they could consider that testimony only as to the defendant who made the statement; the Supreme Court held the

risk was too great that jurors would be unable to restrict their use of the confession. *Id.* at 135–36. The Court reversed the conviction.

The district court in Atkins' *habeas* suit did not reveal how it was applying *Street* and *Bruton*. The State's brief in response to Atkins' application in the state district court contained an explanation of *Street* that was quoted in that court's opinion: "A defendant's confrontation right is only implicated when the out-of-court statement is used to prove the truth of the matter asserted. *Tennessee v. Street*, 471 U.S. 409, 414 (1985)." The State did not otherwise refer to *Street*. To support its substantive analysis, the brief cited *Calloway*, the same precedent the state district court then relied on to dismiss Atkins' claim. The *Calloway* opinion allowed the arresting officer to testify that he stopped the black Cadillac in which the defendants were travelling because of a radio report of suspects being in such a vehicle. *State v. Calloway*, 324 So. 2d 801, 809 (La. 1975). The testimony of what officers heard over the radio was admissible to explain the events leading to the arrest. *Id.*

The state *habeas* court concluded that Detective Dowdy's recounting of his conversation with Horton was not hearsay because "this conversation was used to explain the sequence of events leading to the arrest of the defendant from the viewpoint of the arresting officers." The holding was almost an exact quote from *Calloway*, which in turn had relied on a state-court precedent. *Id.* Regardless of whether that was a fair application of *Calloway*, we need to exam-

ine whether the state district-court decision was “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” § 2254(d)(1).

The first decision, *Street*, involved an unusual set of facts. The Supreme Court held that “there were no alternatives that would have both assured the integrity of the trial’s truth-seeking function and eliminated the risk of the jury’s improper use of evidence.” *Street*, 471 U.S. at 415. As to Atkins, even though showing the sequence of events leading to a suspect’s arrest may help jurors understand the story of the investigation, the testimony was hardly an indispensable component of the prosecution’s case.

As to *Bruton*, the other Supreme Court opinion that the state *habeas* court cited, we do not see that it was even being applied. Perhaps the court cited it as a contrast both to *Street* and to Atkins’ situation. The *Bruton* opinion does demonstrate one clear, but distinguishable, situation in which reversal is required based on the Confrontation Clause. The state court cited these two United States Supreme Court opinions, but its holding was based on the *Calloway* Louisiana Supreme Court opinion, which allowed officers to recount hearsay to explain certain investigatory steps.

We interpret the state court as having made two holdings. First, Detective Dowdy’s testimony was not hearsay because “no references were made to the statements made by Mr. Horton and thus hearsay

was not evident.” We agree to the extent that Detective Dowdy’s testimony did not restate or paraphrase at any length what Horton had told him. Nonetheless, the jurors were given a clear message about a specific piece of information Horton conveyed, namely, that Atkins was his accomplice. We do not see a holding in *Street*, *Bruton*, or any Supreme Court opinion, in which the Court permits a-wink-and-a-nod testimony from a police officer such that jurors are able to understand what has been said about a defendant in an out-of-court statement without the officer’s having to say so explicitly. The second holding was that because “this conversation was used to explain the sequence of events leading to the arrest of the defendant from the viewpoint of the arresting officers,” it was not hearsay. Neither *Street* nor *Bruton* made such a holding. Both decisions recognized that a prosecutor’s professed purpose that the out-of-court statements are not being used for their truth does not automatically foreclose Confrontation Clause concerns.

We conclude that *Street* and *Bruton* do not even address the Confrontation Clause issue raised by Atkins’ claims. To the extent the state district court was applying either opinion, it was an unreasonable application to hold they controlled as to these different facts. A precedent much closer factually and analytically to what occurred here is the decision in *Gray v. Maryland*, 523 U.S. 185 (1998). When a police officer read a codefendant’s confession into evidence at trial, the incriminating statements about the defendant were also read, but the witness said “deleted” or “deletion” instead of the defendant’s name. *Id.* at 188. The Court reasoned that such redacted statements

“obviously refer directly to someone, often obviously the defendant, and . . . involve inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial.” *Id.* at 196. The admission of the codefendant’s confession containing unstated but transparent references to the defendant violated the Confrontation Clause. *Id.* at 195.

Even closer factually is one of this court’s opinions in which a detective testified that he “had a conversation with [the witness] and during this conversation, learned some information,” and from that information, the detective testified he “was able to develop a suspect.” *Taylor v. Cain*, 545 F.3d 327, 331 (5th Cir. 2008). The prosecutor then asked, “as per this end of your investigation, what was the name of your suspect?” *Id.* The detective named the defendant. *Id.* That testimony violated the defendant’s right to confront his accusers. *Id.* at 336.

Our description of one of our own precedents may seem irrelevant, as Section 2254(d)(1) does not permit relief unless a state-court decision is inconsistent with clearly established Supreme Court authority. Nonetheless, the Supreme Court recognizes that a circuit court of appeal, in “accordance with [the] usual law-of-the-circuit procedures, [may] look to circuit precedent to ascertain whether it has already held that the particular point in issue is clearly established by Supreme Court precedent.” *Marshall v. Rodgers*, 569 U.S. 58, 64 (2013). But “it may not canvass circuit decisions to determine whether a particu-

lar rule of law is so widely accepted among the Federal Circuits that it would, if presented to this Court, be accepted as correct.” *Id.*

Similarly, we have described the proper understanding as being that “circuit precedent cannot create clearly-established law” for purposes of Section 2254(d)(1), but a circuit court may properly rely on one of its own decisions if that precedent held that a Supreme Court precedent clearly established a point of law. *Carter v. Stephens*, 805 F.3d 552, 556 (5th Cir. 2015). Our *Taylor v. Cain* opinion concluded that upholding the admission of this evidence was an unreasonable application of the law clearly established in *Ohio v. Roberts*, 448 U.S. 56, 65 (1980). *Taylor*, 545 F.3d at 335–36.

Having gone this far in the analysis of the Confrontation Clause, we go no further. To summarize, we have explained that the state district court did not apply relevant Supreme Court precedent. We identified a different Supreme Court precedent, existing at the time of the state-court decision under review here, that has considerable relevance to the Confrontation Clause issue. Exactly how it applies would need to be analyzed. We also identified a Fifth Circuit precedent on similar facts that purported to apply clearly established authority from the Supreme Court. We would need to consider whether each specific relevant holding in *Taylor* at least stated it was relying on clearly established Supreme Court authority. We leave open these questions because we conclude the answers will

not affect the outcome of the appeal. What does control is the final issue we consider: was any error harmful?

III. Harm from Confrontation Clause error

Confrontation Clause violations are subject to harmless-error analysis. *Horn v. Quarterman*, 508 F.3d 306, 322 n.24 (5th Cir. 2007). The State concedes that it did not raise harmlessness in this case but urges us to consider the possibility anyway. We have held that we have the discretion to reach the issue even *sua sponte*. *Jones v. Cain*, 600 F.3d 527, 541 (5th Cir. 2010). We find it desirable in most AEDPA cases to consider harmlessness. For a federal court to order relief on a ground that was harmless is the kind of needless interference with a state-court judgment that AEDPA seeks to avoid. We will exercise our discretion and consider harmless error.

We first identify the standard we should apply in determining whether the constitutional violation amounted to harm. We reiterate that no state-court decision evaluated harmlessness. Without a reasoned state-court decision on the issue, no deference is due under AEDPA. *Gonzales v. Thaler*, 643 F.3d 425, 430 (5th Cir. 2011).

Generally, when a federal court reviews a state-court judgment of conviction, “a constitutional trial error is not so harmful as to entitle a defendant to *habeas* relief unless there is more than a mere reasonable possibility that it contributed to the verdict.” *Billiot v. Puckett*, 135 F.3d 311, 318 (5th Cir. 1998)

(quoting *Woods v. Johnson*, 75 F.3d 1017, 1026–27 (5th Cir. 1996)). In federal *habeas* review, the error must have “had substantial and injurious effect or influence in determining the jury’s verdict.” *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). “Actual prejudice” must be shown. *Id.* at 637. The *Brecht* standard applies even when, as here, the state court did not analyze the issue. *Fry v. Pliler*, 551 U.S. 112, 121–22 (2007).

We introduced this part of the explanation with a caveat, that *generally* this is the approach. What may be different here is the fact that the State forfeited the issue. In other words, the question is whether the State’s failure to raise harmlessness any earlier in the proceedings changes how we review harmlessness. Whether the State’s silence was an intentional waiver of a recognized potential issue is unclear. “Forfeiture is the failure to make the timely assertion of a right; waiver is the intentional relinquishment of a known right.” *United States v. Rodriguez*, 602 F.3d 346, 351 (5th Cir. 2010) (quoting *United States v. Arviso-Mata*, 442 F.3d 382, 384 (5th Cir. 2006)). Our caselaw states that a “waived” issue, when the term is being used to refer to an issue intentionally not pressed on the court, usually will not be reviewed. *Id.* at 350–51. As we have already indicated, though, we can raise harmlessness *sua sponte*. *Jones*, 600 F.3d at 541. Whatever the cause of the State’s failure, we can reach the issue.

In some situations, failure to raise an issue until the appeal results in review only for plain error.

See *United States v. Castellon-Aragon*, 772 F.3d 1023, 1024 (5th Cir. 2014). Here, though, we are not considering a newly argued error that might justify reversing the district court after every previously raised argument failed to do so. Instead, we are considering a new issue that might allow us to avoid setting aside the lower court’s judgment. Plain error is not the standard.

The Seventh Circuit set rules for reaching a previously unmentioned harmlessness issue when considering the direct appeal of a federal criminal conviction. See *United States v. Giovannetti*, 928 F.2d 225, 227 (7th Cir. 1991).¹ The court determined that for reaching forfeited arguments of harmless error in that context, “the controlling considerations are the length and complexity of the record, whether the harmlessness of the error or errors found is certain or debatable, and whether a reversal will result in protracted, costly, and ultimately futile proceedings in the district court.” *Id.* We conclude that the Seventh Circuit’s opinion, 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] pro-

¹ This court approvingly cited the *Giovannetti* opinion in its discussion of whether we have the “discretion to decide legal issues that are not timely raised,” also doing so in a direct appeal of a federal conviction. See *United States v. Vontsteen*, 950 F.2d 1086, 1091–92 (5th Cir. 1992) (*en banc*). The analysis was not of harmless error.

motes the considerations underlying our habeas jurisprudence.” *Brecht*, 507 U.S. at 623. We do not find *Giovannetti* persuasive for adopting a heightened standard in the *habeas* context from that identified in *Brecht*.

We return to the precedent that identified our discretion to reach a forfeited issue of harmless error. *Jones*, 600 F.3d at 541. There, the State argued for the first time in its surreply in district court that any Confrontation Clause violation, similar to the testimony here, was at worst harmless error. *Id.* at 540–41. This court discussed *Brecht* in some depth, without suggesting that because the issue had not been properly raised by the State, *Brecht* might not apply. *See id.* at 540. For example, the court stated that “the prejudice of constitutional error in a state-court criminal trial is measured by the ‘substantial and injurious effect [or influence in determining the jury’s verdict]’ standard of *Brecht v. Abrahamson*, 507 U.S. 619, 113 S. Ct. 1710, 123 L.Ed.2d 353 (1993).” *Id.* (quoting *Taylor*, 545 F.3d at 336). In *Jones*, the court analyzed the possibility of harmlessness enough to say: “we are convinced that the error here was not harmless” and, accordingly, do not “undertake a full analysis in light of the State’s waiver.” *Id.* at 541.²

² The Seventh Circuit, despite *Giovannetti*, has held that *Brecht* applies in reviewing a state conviction, even if the state forfeited the issue of harmlessness. *See Rhodes v. Dittmann*, 903 F.3d 646, 665 (7th Cir. 2018) (refusing to apply the *Giovannetti* standard of “certainty” as to harmlessness).

Though we interpret *Jones* to have implied that the usual *Brech*t standard applies even when considering a late-brought argument of harmlessness, we see no clear precedential holding in *Jones* to that effect. We so hold now. Whether raised late by the State or even if only noticed by the court *sua sponte*, the same considerations apply as were explained in *Brech*t.

Reaching harmlessness and applying the usual review standard might appear to be giving more lenient treatment to the State's defaults than is given to those of defendants. True, applicants for *habeas* relief are often barred under AEDPA from raising new arguments. We see no inequity, though, in reaching harmless error in this appeal. The prohibition on reprocsecution after an acquittal, *i.e.*, the double jeopardy bar, makes harmless error relevant only to a conviction. If a jury acquits, even multiple trial errors harmful to the prosecution cannot disturb that verdict. On appeal from a conviction, though, reaching harmlessness and applying the usual standard of review even when the issue has not been properly raised avoids reversals and retrials when the violation did not affect the initial proceedings. See *Giovannetti*, 928 F.2d at 227. A more general loosening of the tight AEDPA rules for review of a conviction is for Congress.

We now examine the harm from this potential error. The testimony which is the focus of the Confrontation Clause claim occurred because jurors were effectively informed that Horton told Detective Dowdy that Atkins was the second culprit. Whether

that testimony had a substantial, injurious effect depends largely on the extent of other testimony identifying Atkins. Those with first-hand knowledge of the events were Jones, Bishop, and Harris. All three had been drinking alcohol just prior to the assault. According to a police officer, after the attack, the victims "had some bleeding head wounds." The three men all smelled of alcohol and had slurred speech, and all were "highly intoxicated." Jones died before trial, and the other two testified.

The victims knew Horton prior to the assault. Harris and Horton had been roommates for about six months, and on the morning of the assault and theft, Harris had told Horton to move out of the apartment. Despite these connections, none of the victims could provide officers with more than Horton's nickname on the night of the crime. Harris testified that Atkins, whom he knew as J Money, "had been in the neighborhood a couple of times with" Horton. Bishop similarly testified to knowing Horton and to seeing Atkins a few times prior to the crime. During trial, both Harris and Bishop unequivocally identified Atkins as the assailant whom they had earlier known only as J Money.

There were some challenges made at trial to the identification. In addition to their intoxication, Harris after the assault "had trauma to his head," was bleeding, had bloodshot eyes, slurred his speech, and "had extreme trouble standing up." The defense, by calling Williams, sought to raise doubts about the victims' ability to have perceived the events, then to testify accurately about them, such as whether the door

to the house was open or not, and whether there were other, unidentified people there before the robbery.

We recount the process that led to Atkins being identified as Horton's accomplice. On the night of the offense, Harris and Bishop identified their attackers as J Money and O. Three days later, Detective Dowdy again met with Harris and Jones. Harris for the first time stated that he had learned the actual name of one of the individuals involved in the crime. He discovered Horton's name after finding documents left in their previously shared apartment. It was almost two weeks before either witness identified Atkins. Harris testified at trial that a week after the assault, the couple who lived below his apartment told him that the other offender had been with them at some point, and someone had taken a photograph of him with the baby who lived in the lower-level apartment. This neighbor supposedly "knew what happened" and that is why the neighbor gave Harris the photograph. It was this photograph that Harris provided to officers. Detective Dowdy created a photographic lineup with the neighbor's picture for Bishop to review. Bishop selected Atkins' photograph. This lineup would have been tainted if Harris had earlier shown the photograph to Bishop. At trial, Harris said he showed Bishop the photograph before giving it to police, but Bishop testified that though he knew about the photograph, he had not seen it before the photographic lineup.

The validity of the lineup was challenged on direct appeal. The state court of appeal held that the "lineup was fair and reasonable," and jurors were able to judge the credibility of both Harris and Bishop in

their identifications. *Atkins*, 74 So. 3d at 241. It does not appear the claim was made to that court that Bishop was shown the photograph before the lineup. We do not consider how that omission would affect the deference that otherwise would be owed to the court of appeal on a finding of fact. The court also found that Bishop and Harris “already knew Atkins and his accomplice.” *Id.* (emphasis and footnote removed). This finding of prior knowledge is not an “unreasonable determination of the facts,” 28 U.S.C. § 2254(d)(2), and is owed deference.

In summary, the two witnesses who were victims of the crime had some familiarity with Atkins before the offense. Each positively identified Atkins. On cross-examination, defense counsel did not seriously challenge either witness’s ability to identify the attacker on any grounds, including intoxication. At least one witness, and perhaps both, knew the person’s nickname, J Money. Harris and Bishop were intoxicated, perhaps significantly so. 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. The cross-examination of the two witnesses raised no reasonable questions about the identifications other than the potentially tainted photographic lineup. Harris, though, was not affected by that possibility, only Bishop. We conclude that any error was harmless because it did not have a “substantial and injurious effect or influence in determining the jury’s verdict.” *Kotteakos*, 328 U.S. at 776.

* * *

No judge in active service having requested a poll of the court on the petition for rehearing *en banc*, that petition is DENIED. The petition is converted to one for rehearing by the panel, and that petition is GRANTED. We AFFIRM the district court's denial of relief.

GREGG COSTA, Circuit Judge, dissenting in part:

There are winners and losers in litigation. So the measure of the justice system is not whether the losing party is happy with the result. It's whether that party got a fair shake. And fair treatment depends on the neutral application of procedural rules. That evenhandedness 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.

A neutral justice system cannot apply a double standard for procedural rules such as the one that should resolve this case: "Ordinarily a party may not present a wholly new legal issue in a reviewing court." CHARLES ALAN WRIGHT & ARTHUR R. MILLER, 9C FEDERAL PRACTICE & PROCEDURE § 2588. That rule is a—perhaps the—bedrock principle of appellate review. *See generally Raising New Issues on Appeal*, 64 HARV. L. REV. 652, 652–55 (1951). The preservation requirement is "as old as the common-law system of appellate review." Robert J. Martineau, *Considering New Issues on Appeal: The General Rule and the Gorilla Rule*, 40 VAND. L. REV. 1023, 1061 (1987); see Clements v. Macheboeuf, 92 U.S. 418, 425 (1875); 2 WILLIAM BLACKSTONE, COMMENTARIES *455; Andrey Spektor & Michael A. Zuckerman, *Ferrets and Truffles and Hounds, Oh My: Getting Beyond Waiver*, 18 GREEN BAG 2d 77, 79–81 (2014).

The rule against hearing new issues on appeal comes up so often that it goes by many names. Waiver is the most common term, though forfeiture is more accurate (as we are talking about failing to raise an issue in the trial court, not affirmatively abandoning it). *United States v. Olano*, 507 U.S. 725, 733 (1993).

It's also called the preservation rule. Ian Speir & Nima H. Mohebbi, *Preservation Rules in the Federal Court of Appeals*, 16 J. APP. PRACTICE & PROCESS 281 (2015). Most punchy is "raise-or-lose." *United States v. Roberts*, 119 F.3d 1006, 1013 (1st Cir. 1997); Tory A. Weigand, *Raise or Lose: Appellate Discretion and Principled Decision-Making*, 17 SUFFOLK J. TRIAL & APP. ADVOC. 179 (2012). Regardless of the label used, "[t]he 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).

The state violated this basic preservation requirement when it comes to the harmlessness argument it now so vigorously pushes. There was not a peep about harmlessness in the district court. As a result, the original panel opinion—issued after a full airing of the case, including oral argument—decided not to forgive the state's forfeiture of the issue. *Atkins v. Hooper*, 969 F.3d 200, 210 (5th Cir. 2020). We recognized the discretion we have to do so but saw "no reason for exercising it here." *Id.* I would stand by that sound determination.

The panel majority, however, does a 180 on rehearing. There is nothing wrong with that as a general matter. For more than 99% of cases, the court of appeals is the end of the road. The rehearing stage is usually the last chance to get the case right. Judges thus must guard against the certitude and pride that can get in the way of correcting one's mistakes. Open-

ness to reconsideration is a good thing. But this reversal is not due to any error, factual or legal, that the rehearing petition identified. Instead, the panel majority flips a judgment call on whether to forgive the state's failure to preserve the harmlessness issue. The rehearing petition does not cite any new factors that should influence that decision. The majority cites one thing that has been true of this case from the very beginning: it is a habeas petition. Maj. Op. 18.

I see three problems with the notion that it is "desirable in most AEDPA cases to consider harmlessness" even when it was not raised in the trial court. *Id.*

First, the discretionary nature of recognizing forfeiture is not unique to AEDPA. A court always has discretion to forgive forfeiture (or even waiver). *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 487 (2008); *Singleton v. Wulff*, 428 U.S. 106, 121 (1976); Weigand, *supra*, at 180–81, 187–97 (chronicling Supreme Court caselaw on discretion to overlook forfeiture); Spektor & Zuckerman, *supra*, at 79, 82. No court says there is some special rule for habeas that requires consideration of harmlessness when the state fails to assert it. See *Jones v. Cain*, 600 F.3d 527, 540–41 (5th Cir. 2010); *Rhodes v. Dittmann*, 903 F.3d 646, 664 (7th Cir. 2018) (recognizing discretion in this area and citing cases from the Fifth, Sixth, and Tenth Circuits holding the same). Nor, until today, has any court created a presumption to forgive a failure to raise harmlessness in AEDPA cases. The traditional default rule is against allowing a party to present an issue for the first time in the appellate court. See, e.g., *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 531 (1st Cir. 1993)

(Boudin, J.) (noting that it “is and should be uncommon” for courts to forgive waived or forfeited issues). As we have said, forfeiture should be forgiven only in “extraordinary circumstances.” *Does 1-7 v. Abbott*, 945 F.3d 307, 312 (5th Cir. 2019) (quotation marks omitted). And like most discretionary decisions, the decision to excuse a forfeiture should be “exercised on the facts of individual cases” rather than dictated by “general rule[s].” *Singleton*, 428 U.S. at 121; *id.* (noting two factbound situations when forgiving forfeiture might be appropriate: “where the proper resolution is beyond any doubt . . . or where ‘injustice might otherwise result’” (quoting *Hormel v. Helvering*, 312 U.S. 552, 557 (1941))). There is no textual or precedential support for a categorical presumption that points in the opposite direction of the general forfeiture rule and excuses the state’s failure to raise harmlessness in AEDPA cases. *See Rhodes*, 903 F.3d at 664 (“Procedural rules apply to the government as well as to defendants.” (quotation marks omitted)).

Second, the lack of textual support for special leniency when it comes to the state’s forfeiture of harmlessness contrasts sharply with AEDPA’s explicit provision for leniency for exhaustion: “A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.” 28 U.S.C. § 2254(b)(3); *see Taylor v. Cain*, 545 F.3d 327, 333 (5th Cir. 2008). In other words, AEDPA says the state cannot forfeit exhaustion, it must affirmatively waive exhaustion. There is nothing like that in the statute for

harmlessness. “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 shown elsewhere in the same statute that it knows how to make such a requirement manifest.” *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 341 (2005).

Lastly, and circling back to my opening point, the leniency the majority affords the government’s forfeiture is hardly, if ever, shown when habeas prisoners fail to raise an issue in the district court. One can look far and wide yet not find a decision from our court excusing a prisoner’s failure to preserve. We routinely apply forfeiture to habeas prisoners, without even contemplating using our discretion to excuse it. *See, e.g., Howard v. Davis*, 959 F.3d 168, 172 (5th Cir. 2000); *Malone v. Wilson*, 791 F. Appx 505, 506 (5th Cir. 2020); *Thompson v. Davis*, 916 F.3d 444, 460 (5th Cir. 2019). We apply the raise-or-lose rule to prisoners so strictly that it was not enough when one facing a life sentence raised an issue “in general” (and cited the right statutory subsection in his opening brief), because his argument was “inconsistent” and unclear. *Poree v. Collins*, 866 F.3d 235, 250 (5th Cir. 2017).

If anything, this double standard—what’s good for the prisoner is not good for the government—has it backwards. Courts have long recognized that parties with liberty interests at stake present the strongest case for excusing forfeiture. *United States v. Atkinson*, 297 U.S. 157, 160 (1936) (stating that “[i]n exceptional circumstances, especially in criminal cases,”

appellate courts could “notice errors to which no exception has been taken”); *Raising New Issues on Appeal, supra*, at 653 (“[R]aising new issues in criminal cases . . . rests on the same considerations as are present in civil cases, but has the additional factor that the result may be so drastic for the defendant and the burden to the state of a new trial so minor that courts tend to be more lenient in hearing a new matter on his behalf.”); *see also* Weigand, *supra*, at 292–93 (noting that there is usually more reluctance to find plain error in civil cases because liberty interests are generally “absent”). What is more, in habeas litigation the state has counsel with subject matter expertise; the prisoner is typically litigating *pro se*. Yet despite our “traditional disposition of leniency toward *pro se* litigants,” *Spotville v. Cain*, 149 F.3d 374, 377 (5th Cir. 1998), we routinely enforce against them AEDPA’s “procedural pitfalls that prevent prisoners from challenging potentially unconstitutional convictions,” *Rhodes*, 903 F.3d at 664. Neutral application of the law requires the same vigilance when it comes to a procedural pitfall of the state’s own making. A presumption that excuses the state, but not *pro se* litigants, for failing to raise an issue in the district court is not consistent with “equal justice under law.” *Cf. Martineau, supra*, 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 bases”); Weigand, *supra*, at 180–81 (recognizing that inconsistent application of forfeiture rules casts doubt on

the courts' legitimacy).

For these reasons, I would stick with the original decision not to excuse the state's unjustified failure to raise harmlessness in the trial court. Applying our prescribed case-by-case discretion rather than an extratextual presumption for AEDPA cases, this does not come close to the "extraordinary circumstances" that would justify forgiving the forfeiture. *Does* 1-7, 945 F.3d at 312 (cleaned up).

The only conceivable justification would be if the Confrontation Clause error were harmless "beyond any doubt."¹ *Singleton*, 428 U.S. at 121. When the outcome of a retrial is "certain," it would be inefficient to waste everyone's time with a redo. *United States v. Giovannetti*, 928 F.2d 225, 227 (7th Cir. 1991) (Posner, J.).² The need for the forfeited harmlessness issue to be "beyond any doubt" or "certain"

¹ Other situations to excuse forfeiture, when a manifest injustice would result or the neglected issue is a pure question of law, do not apply. See *Law Funder, L.L.C. v. Munoz*, 924 F.3d 753, 759 (5th Cir. 2019).

² The majority opinion casts doubt on *Giovannetti* because it was pre-AEDPA. But its certainty standard 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. *Singleton*, 428 U.S. at 121. The 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). That failure to identify a case-specific extraordinary circumstance is the source of my disagreement, not the application of Brecht once there is a valid reason for overlooking forfeiture.

casts the issue in a much different light than the majority's assessment, which gives the state a free pass and considers harmlessness as if the state had followed the rules and raised it from the beginning. Taking the hearsay out of the equation, the state's case depended on the testimony of two eyewitnesses who were drunk when the crime took place and who could not give Atkins's name when first questioned. Maj. Op. 22–23. The prosecution thought the accomplice Horton's identification of Atkins was important enough to its case that it featured it as the coup de grace in opening, introduced it in violation of the Confrontation Clause during trial, and again mentioned it at closing. The state's continued reliance on Horton's out-of-court tying of Atkins to the crime is not surprising—testimony of an accomplice is potent evidence. Indeed, if the Confrontation Clause error were obviously harmless, why didn't the panel recognize that the first time? Because harmlessness is not "beyond any doubt," we should not forgive the state's failure to timely raise it. *Singleton*, 428 U.S. at 121; see also *Giovanetti*, 928 F.2d at 227 (refusing to forgive government's forfeiture of harmlessness in collateral review case because outcome of question was not certain).

Atkins is the rare habeas prisoner who can overcome the numerous statutory obstacles that AEDPA places on those seeking to vacate their convictions based on the violation of important constitutional rights, which confronting one's accusers surely is. Judges, scholars, and commentators criticize AEDPA for erecting too many of those hurdles. *See, e.g.*, *Davis v. Straub*, 430 F.3d 281, 296 (6th Cir. 2005)

(Merritt, J., dissenting); Lincoln Caplan, *The Destruction of Defendants' Rights*, NEW YORKER (June 21, 2015) (arguing that AEDPA “gutted the federal writ of habeas corpus”); Bryan A. Stevenson, *Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*, 41 HARV. C.R.-C.L. REV. 339, 360–62 (2006). But when it comes to the requirements that AEDPA actually imposes, those complaints should be directed at Congress. Stevenson, *supra*, at 360–61 (calling for repeal of the law). What courts should not be doing is inventing new requirements not found in AEDPA’s text (perhaps in its emanations or penumbras?)—like a rule that lets the state off the hook when it forfeits an argument, even though we regularly hold other litigants to what they argue in the trial court.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-30018

JUSTIN TERRELL ATKINS

Petitioner-Appellant,

v.

TIMOTHY HOOPER, Warden, Elayn Hunt Correc-
tional Center,

Respondent-Appellee.

Appeal from the United States District Court

for the Western District of Louisiana

USDC No. 3:17-CV-1544

Before SOUTHWICK, COSTA, and DUNCAN, Cir-
cuit Judges.

LESLIE H. SOUTHWICK, Circuit Judge:

A Louisiana inmate appeals the district court's denial of *habeas* relief based on a Confrontation Clause violation. We REVERSE and REMAND so the district court can grant the relief requested.

Justin Terrell Atkins was convicted by a jury of armed robbery and aggravated battery. The conviction was affirmed on direct appeal, and the Louisiana Supreme Court denied review. *State v. Atkins*, 46,613 (La. App. 2 Cir. 9/21/11); 74 So. 3d 238, *writ denied*, 2011-2287 (La. 2/17/12); 82 So. 3d 284.

Our factual and procedural summaries are taken from the Louisiana Court of Appeal decision. *Atkins*, 74 So. 3d at 239. Robert Jones, Howard Bishop, and Tom Harris were drinking alcohol together at Jones's house. Atkins knew that Bishop and Jones had just returned to Jones's house after Jones had cashed a check. After kicking in the door to the house, Atkins demanded money, but Jones refused. Atkins began beating Jones with the butt of a firearm. When Harris intervened, Atkins hit him too. Bishop witnessed the incident and saw Atkins take money from Jones's pocket.

During the robbery, Lawrence Horton was at the door to Jones's house. Horton had followed Jones and Bishop and observed Jones cash his check at a store. Eight days after the robbery, Horton approached law enforcement and, upon questioning by Detective Jeffrey Dowdy, Horton admitted he had a role in the robbery, but he said Atkins was primarily responsible for the crime. Detective Dowdy then obtained an arrest warrant for Atkins. Separately, Harris gave a photo of Atkins to law enforcement and said it was of the person who hit him and who robbed and beat Jones.

Atkins filed for state post-conviction relief in which he contended that he was denied his right to confront and cross-examine Horton when alleged hearsay evidence was presented at trial. The claim focuses on the State's opening statement before the jury, the testimony of Detective Dowdy, and the State's closing statement.

In the State's opening statement, the prosecutor stated:

Finally, I believe the State will have the testimony of Lawrence Horton. Lawrence Horton is a co-defendant in this case. That he was arrested for this offense as well as the defendant in this case. I believe that he will tell you that he and the defendant met on the morning of January 2nd, 2009. That they went ultimately to 1710 Jackson Street wherein the defendant, Mr. Atkins over here, busted the door in at 1710 and robbed and beat the victims while he himself, Mr. Horton, served as a lookout. And I believe that will — you will anticipate that testimony as well.

During the trial, the following exchange occurred between the prosecutor and Detective Dowdy:

Q. Okay. And did you in fact speak with Lawrence Horton?

A. Yes, sir, I did.

Q. All right. Was he advised of his rights?

A. Yes, sir, he was.

Q. And did he provide a statement to you?

A. Yes, sir, he did.

Q. Was the statement inculpatory? Did he –

A. Yes, sir, it was.

Q. Okay. Did he implicate anybody else?

A. Yes, sir, he did.

Q. Okay. As a result of this – well, all right, he implicated someone else. What did you do next with regard to your investigation?

A. Based on the – the information that he provided he was arrested and again, based on the information that he provided I was able to obtain a warrant.

Q. For whom?

A. Justin Atkins.

The State rested without calling Horton to testify. Finally, the prosecutor stated in closing argument: Detective Dowdy “interviews Lawrence Horton, who is known as O and then obtains an arrest warrant for Justin Atkins, the defendant.” This testimony and closing argument are the facts underlying the claim before us.

The state trial court denied Atkins’ application for post-conviction relief. The court of appeal and the Louisiana Supreme Court denied Atkins’ writ applications. Atkins filed a federal habeas application under 28 U.S.C. § 2254 claiming that he was denied his Sixth Amendment right to confrontation. The magistrate judge issued a report and recommended that Atkins’ application be denied. The district court adopted the report, dismissed Atkins’ Section 2254 application, and denied Atkins a Certificate of Appealability (“COA”). Atkins timely appealed. This court granted Atkins’ application for a COA on August 9, 2019.

DISCUSSION

Atkins contends the state court's decision denying his Sixth Amendment Confrontation Clause claim was contrary to and involved an unreasonable application of Supreme Court precedent. Atkins also argues the State waived any harmlessness argument, and Atkins alternatively argues the error was harmful. We consider Atkins' arguments in that order, but first we address whether the State waived a defense of procedural default.

I. Whether the State waived a defense of procedural default

Atkins contends the State waived a defense of procedural default because the State failed to raise the defense in the district court. In the State's response brief, the State does not attempt to raise procedural default as a defense and the State does not respond to Atkins' waiver argument. Thus, to bar *habeas* relief based on procedural default, we would have to raise and apply the defense *sua sponte*.

When considering whether we should identify and apply a procedural default in *habeas* review, we consider (1) whether the applicant has had a reasonable opportunity to argue against the application of the bar, and (2) whether the government intentionally waived the procedural defense. *Smith v. Johnson*, 216 F.3d 521, 523–24 (5th Cir. 2000); *see United States v. Willis*, 273 F.3d 592, 596 (5th Cir. 2001) (extending this reasoning to Section 2255 review). We begin and end this analysis with the second consideration.

Here, the district court explicitly identified a possible defense of procedural default and instructed the State to raise the defense if the State believed any of Atkins' *habeas* claims were procedurally defaulted. The State thereafter answered Atkins' *habeas* application and explicitly abandoned the defense, stating that "it appears [Atkins] has exhausted his state court remedies." This chronology confirms that the State intentionally waived the defense. We will not inject the issue into this appeal of whether Atkins' *habeas* application is procedurally defaulted.

II. Whether Atkins is entitled to habeas relief

We review a "district court's findings of fact for clear error and its conclusions of law *de novo*." *Dorsey v. Stephens*, 720 F.3d 309, 314 (5th Cir. 2013). Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), federal courts may not grant *habeas* relief on a claim that the state courts have adjudicated on the merits unless that adjudication resulted in a decision that was either (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

The first standard, that the decision be "contrary to . . . clearly established Federal law," is met when "the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case differently

than [the Supreme Court] has on a set of materially indistinguishable facts.” *Williams v. Taylor*, 529 U.S. 362, 413 (2000). The second standard that would justify relief, which is that the state court made an “unreasonable application of clearly established federal law,” is satisfied when that court “identifies the correct governing legal principle from [the Supreme Court’s] decisions but unreasonably applies that principle to the facts of the prisoner’s case.” *Id.* These alternatives require more than a federal court’s conclusion that the state court erred. The federal court must also conclude the state court’s decision was “unreasonable.” *Id.* at 411.

A. *The last reasoned decision*

The first task for us in reviewing a claim governed by the AEDPA is to identify the relevant state-court decision. § 2254(d). To that end, the Supreme Court says that we must examine closely the “last related state-court decision” that provides a “relevant rationale” for a particular claim. *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018). If the last related state-court decision does not provide a relevant rationale for the relevant claim, we must “look through” that decision and find one that does. *Id.* Only then can we consider whether the highest state court to decide the claim resolved it in a manner contrary to or with an unreasonable application of clearly established Supreme Court precedent. *Id.*

Before identifying the appropriate state-court decision, we review Atkins’ application for state post-conviction relief. Atkins’ state application included

the same Confrontation Clause claim he brought in his federal application under Section 2254, but Atkins' state application also included claims of ineffective assistance of trial counsel. The allegations included claims about deficient pretrial preparation and about later failures in cross-examining witnesses, objecting to jury instructions, and failing to move for mistrial based on a Confrontation Clause violation. None of those allegations were raised in Atkins' federal application. The highest state-court decision for us to identify is the one resolving the Confrontation Clause claim.

The Louisiana Supreme Court denied relief to Atkins for two reasons. First, the court concluded that Atkins' claims were procedurally defaulted because he "failed to raise his claims in the proceedings leading to the conviction," relying on Louisiana Code of Criminal Procedure article 930.4(B). That is the procedural default that we have already explained we will not inject into this appeal. Second, the court held that Atkins failed to "satisfy his postconviction burden of proof" under Louisiana Code of Criminal Procedure article 930.2. Because the Louisiana Supreme Court could have been applying article 930.2 to the ineffective assistance claims alone, we cannot evaluate whether the court's decision was contrary to or an unreasonable application of clearly established United States Supreme Court precedent. § 2254(d).

We therefore look through the Louisiana Supreme Court's decision.¹

The next decision is that of the Louisiana Second Circuit Court of Appeal. The court of appeal provided only a string-cite of authority, without explanation. First, the court cited Louisiana Code of Criminal Procedure article 930.2, which provides that an applicant for post-conviction relief bears the burden of proof. Second, the court cited Louisiana Code of Evidence article 801(c), which defines hearsay. Third, the court cited *State v. Lewis*, 47,853 (La. App. 2 Cir. 2/27/13), 110 So. 3d 644, 653, *writ denied*, 2013-0672 (La. 10/25/13), 124 So. 3d 1092. In *Lewis*, a criminal defendant raised five issues on direct appeal. 110 So. 3d at 649–55. In resolving Atkins' appeal, the court of appeal cited the page of *Lewis* discussing the right to confrontation, the only issue that was relevant to Atkins' state application. *Id.* at 653. On that issue, the *Lewis* Court held that certain testimony connecting the defendant to the crime was inadmissible hearsay, but the error was harmless because of substantial evidence of guilt before the jury. *Id.*

Finally, the court of appeal cited *Woods v. Etherton*, 136 S. Ct. 1149, 1151 (2016). *Woods* dealt only with a claim of ineffective assistance of appellate counsel for failing to raise a Confrontation Clause argument on appeal. *Id.* at 1151–53. The *Atkins* court of

¹ Atkins argues we should “look through” the state high court’s decision and review the court of appeal decision. The State does not take a position on which decision to review.

appeal decision cited the portion of *Woods* discussing the procedural history of the case and setting forth the “doubly deferential” standard for claims of ineffective counsel in habeas review. *Id.* at 1151. Atkins argues that the state court of appeal denied his Confrontation Clause claim by incorrectly applying this double deference. We cannot reliably interpret the reference to *Woods*. The state court of appeal might have been applying double deference to the Confrontation Clause claim, which would have been error, but it also might have been using double deference merely to reject the claims for ineffective counsel. As to *Lewis*, the state court of appeal could have determined there was no Confrontation Clause violation; or alternatively that there was a Confrontation Clause violation, but the error was harmless.

The state court of appeal’s reasoning falls short of what is needed to consider whether that court’s decision was contrary to or an unreasonable application of clearly established United States Supreme Court precedent. § 2254(d).

Thus, we look through a second opinion. In doing so, we now see the state district court’s decision. That court denied Atkins’ application for postconviction relief with far more explanation than the state appellate court or state supreme court used. The state district court held that Atkins’ right to confrontation was not violated, reasoning that because Detective Dowdy’s testimony did not reference the actual statements made by Horton during Detective Dowdy’s investigation, no hearsay was admitted. The court also found that Detective Dowdy’s testimony was “used to

explain the sequence of events leading to the arrest of [Atkins] from the viewpoint of the arresting officers,” which is permissible under state law.

This decision is the needed state-court ruling that provides a relevant rationale for Atkins’ Confrontation Clause claim. Applying our deferential review, we consider whether it suffices under Section 2254(d).

B. Unreasonable application of Supreme Court precedent

We are not aware of a Supreme Court opinion with nearly identical facts to those here, so we consider whether “the state court misapplied the relevant legal principles to the facts.” *Taylor v. Cain*, 545 F.3d 327, 334 (5th Cir. 2008).

The Confrontation Clause provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. CONST. amend. VI. That provision bars the admission of “testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.” *Crawford v. Washington*, 541 U.S. 36, 53–54 (2004). We know that “testimony” is the “solemn declaration or affirmation made for the purpose of establishing or proving some fact.” *Id.* at 51 (citation omitted). Testimonial statements can be used without constitutional barrier “for purposes other than establishing the truth of the matter asserted.” *Id.* at 59 n.9.

We consider the state district court's initial reason that Atkins' right to confrontation was not violated: there was no hearsay admitted because Detective Dowdy did not recite the actual statements made by Horton during Detective Dowdy's investigation. We compare that reasoning to the Supreme Court's holding in *Gray v. Maryland*, 523 U.S. 185 (1998). In *Gray*, the Court held that a defendant's Confrontation Clause rights were violated by the admission of a codefendant's confession; the confession was redacted by replacing the defendant's name with blank spaces and, when the blanks were read into evidence by a police detective at trial, the word "deleted" or "deletion" was used instead. *Id.* at 188. Although the police detective did not repeat the mention of the defendant's name, the Court reasoned that such redacted statements "obviously refer directly to someone, often obviously the defendant, and which involve inferences that a jury could ordinarily make immediately, even were the confession the very first item introduced at trial." *Id.* at 196. So too here. Detective Dowdy may not have used Atkins' name, but surely there was no doubt in jurors' minds that Horton had implicated Atkins. This was clear because Dowdy testified that based on what Horton said, Dowdy obtained an arrest warrant for Atkins. The state district court's first reason to deny Atkins' Confrontation Clause claim was an unreasonable application of *Gray*.

The state district court decision we are reviewing also concluded that Detective Dowdy's testimony was introduced for a purpose other than establishing the truth of the matter asserted. Instead, this testi-

mony was introduced only to explain the course of Detective Dowdy's investigation leading to Atkins' arrest. The state district court based that conclusion on *State v. Calloway*, 324 So. 2d 801, 809 (La. 1975), in which the state supreme court held that statements made "to explain the sequence of events leading to the arrest of the defendants from the viewpoint of the arresting officers" are not hearsay. Thus, according to the state district court, Detective Dowdy's testimony was not hearsay under state law, and therefore there was no violation of Atkins' confrontation rights.

This court's caselaw is clear that explain-the-investigation exceptions to hearsay cannot not displace the Confrontation Clause. For example, "police testimony about the content of statements given to them by witnesses are testimonial," and "officers cannot refer to the substance of statements made by a nontestifying witness when they inculpate the defendant." *United States v. Kizzee*, 877 F.3d 650, 657 (5th Cir. 2017) (collecting decisions).²

We return to *Taylor v. Cain*, as the questioned testimony there is quite similar to what occurred here. There, the detective stated that he "had a conversation with [the witness] and during this conversation, learned some information," and from that in-

² Although the AEDPA requires us to look at clearly established law from the Supreme Court, our decisions discussed here that interpret Supreme Court precedent are binding in this circuit on what that Court has clearly established.

formation the detective testified he “was able to develop a suspect.” *Taylor*, 545 F.3d at 331. The prosecutor immediately asked, “per this end of your investigation, what was the name of your suspect?” *Id.* The detective gave the defendant’s name. *Id.* We held that the detective’s testimony that a nontestifying witness implicated the defendant’s guilt and the prosecution’s references to that testimony in closing argument were hearsay. *Id.* at 336. Introducing that hearsay testimony violated the defendant’s confrontation rights under *Ohio v. Roberts*, 448 U.S. 56, 65 (1980), and the state court’s contrary decision constituted an unreasonable application of Supreme Court precedent. *Id.* Under Supreme Court Confrontation Clause jurisprudence, law enforcement “officers cannot, through their trial testimony, refer to the substance of statements given to them by nontestifying witnesses in the course of their investigation, when those statements inculpate the defendant.” *Id.* at 335.

Like *Taylor*, Detective Dowdy testified that Horton, a nontestifying witness, implicated Atkins and the prosecution likewise referenced that testimony in its closing argument. Such testimony violates the Confrontation Clause. If a state court decides otherwise, the decision is an unreasonable application of

Supreme Court precedent.³ Accordingly, unless the state court's error was harmless, relief is warranted.

III. Whether the state district court's error was harmless

Confrontation Clause violations are subject to harmless error analysis. *Horn v. Quarterman*, 508 F.3d 306, 322 n.24 (5th Cir. 2007). The State concedes that it did not raise harmlessness in this case but urges us to consider the possibility *sua sponte*. We have the discretion to do so. *Jones v. Cain*, 600 F.3d 527, 541 (5th Cir. 2010). We see no reason for exercising it here.

* * *

The state district court's decision that no Confrontation Clause violation occurred through the handling of Detective Dowdy's testimony constitutes an

³ In *Taylor*, we relied on the Supreme Court's *Ohio v. Roberts* opinion. Some of the analysis of that opinion was overruled before Atkins' trial by *Crawford v. Washington*, 541 U.S. 36, 53–54 (2004). *Crawford*'s rejection of some parts of *Ohio v. Roberts*, though, does not affect the issue before us. *Crawford* expanded the Sixth Amendment's Confrontation Clause right by rejecting the "reliability" justification set forth in *Ohio v. Roberts* that saved some out-of-court statements from Sixth Amendment scrutiny. *Id.* at 67–68. *Crawford* did nothing to undermine the longstanding recognition that the type of statement here — the inculpatory out-of-court statement of an eyewitness — implicates the Confrontation Clause. *Taylor* still controls.

unreasonable application of Supreme Court precedent, and the State waived harmlessness. We REVERSE the district court's judgment denying Atkins *habeas* relief and the case is REMANDED for the district court to grant relief consistent with this opinion.

62a

TERRY A DOUGHTY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

JUSTIN TERRELL ATKINS LA DOC #465731	CIVIL ACTION NO. 17- 1544
VERSUS	JUDGE TERRY A. DOUGHTY
TIMOTHY HOOPER	MAG. JUDGE KAREN L. HAYES

REPORT AND RECOMMENDATION

Petitioner Justin Atkins, an inmate in the custody of Louisiana's Department of Corrections, filed the instant petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 on November 27, 2017. [docs. # 1, 5].¹ Atkins attacks his 2010 convictions for armed robbery and aggravated battery, as well as the 45-year sentence imposed by Louisiana's 4th Judicial District Court, Ouachita Parish. This matter has been referred to the undersigned for review, report, and recommendation in accordance with the provisions of 28 U.S.C. § 636 and the standing orders of the Court.

¹ Atkins resubmitted his petition on January 5, 2018 because he failed to complete the petition on approved forms. [docs. # 4, 5].

BACKGROUND

The underlying facts in this case have been set forth by the Louisiana Second Circuit Court of Appeal as follows:

On January 2, 2009, Robert Jones, Howard Bishop, and Tom Harris were drinking together at Jones' modest residence on Jackson Street in Monroe. All three men lived in the neighborhood. Bishop and Jones had just returned to the residence after cashing Jones' VA check. Atkins knew of the transaction.

Atkins kicked in the door, barged into the home, and demanded money from Jones, who refused. Atkins began beating Jones with the butt of a firearm. Harris intervened and was also struck with the firearm. Bishop witnessed all of this, even observing Atkins take the money from Jones' pocket.

Lurking at the door during the robbery was a man

named Lawrence Horton, known in the neighborhood only as "O." Horton had been living with Harris for a few months. That morning, however, Harris ordered him to leave. Harris had known Horton for about a year.

A few days after the robbery, Harris later found some correspondence at the residence which bore O's real name: Lawrence Horton.

Eight days after the robbery, Horton sent word that he wanted to speak with the police. When Detective Jeffrey Dowdy questioned him, Horton admitted his part in the robbery. He blamed mainly Atkins for this crime.

After an arrest warrant was secured, Atkins was arrested.

Harris later obtained a photo of the robber, whom he identified as "J. Money."

Harris gave the photo to the detective, claiming that it depicted the person who beat him, and who had beaten and robbed Jones.

State v. Atkins, 46,613 (La. App. 2 Cir. 9/21/11), 74 So. 3d 238, 239.

On June 18, 2010, a jury found Atkins guilty of armed robbery, a violation of La. R.S. 14:64, and aggravated battery, a violation of La. R.S. 14:34. He was subsequently sentenced to 35 years at hard labor for the armed robbery, and a consecutive 10-year hard labor term for the aggravated battery. *Id.*

Atkins filed a direct appeal in the Second Circuit Court of Appeal, raising three issues: (1) insufficient evidence; (2) a tainted lineup identification; and (3) excessive sentence. On September 21, 2011, the Second Circuit affirmed Atkins' convictions and sentences. *Id.* On February 17, 2012, the Louisiana Supreme Court denied Atkins' subsequent application for writ of certiorari and/or review. *State v. Atkins*, 2011-2287 (La. 2/17/12), 82 So. 3d 284. Atkins did not file a petition for certiorari in the United States Supreme Court. [doc. # 5 ¶ 9(h)].

On December 6, 2012, Atkins filed an application for post-conviction relief in the state district court, alleging: (1) denial of his Sixth Amendment right to confront and cross-examine the witnesses against him; (2) the trial court erred in allowing a sub-

stantial amount of hearsay evidence to prove key elements of the state's case; and (3) counsel was ineffective in trial and pre-trial proceedings. [doc. # 14-1]. On July 27, 2015, Atkins filed an "Amended Brief in Support of Application for Post-Conviction Relief," [doc. # 14-3], which the court denied. [doc. # 14-4]. The Second Circuit Court of Appeal denied his application on April 28, 2016. [doc. # 14-6]. Atkins sought a supervisory and/or remedial writ, which the Louisiana Supreme Court denied on September 29, 2017. *State ex rel. Atkins v. State*, 2016-1082 (La. 9/29/17), 227 So. 3d 251. In its per curiam opinion, the Louisiana Supreme Court found that Atkins had fully litigated his application for post-conviction relief in state court and exhausted his right to state collateral review. *Id.*

On November 27, 2017, Atkins filed the instant federal habeas corpus petition, arguing he was denied his right to confrontation, in violation of the Sixth Amendment to the United States Constitution, when the State introduced testimony from his co-defendant without providing Atkins with the opportunity for cross-examination. (Memorandum in Support ("Mem."), [doc. # 1-2]). The State filed its response on June 22, 2018. [doc. # 18]. Atkins filed a reply on July 30, 2018. [doc. # 19].² This matter is ripe.

² Petitioner's reply is not timely. According to this court's Memorandum Order dated May 21, 2018, Petitioner had twenty days following the filing of the State's memorandum to file a reply. [doc. # 15 at 4]. The deadline for Petitioner to submit a reply was July 12, 2018.

STANDARD OF REVIEW

The Antiterrorism and Effective Death Penalty Act (“AEDPA”) of 1996, 28 U.S.C. § 2254, governs habeas corpus relief of a state prisoner. The AEDPA limits how a federal court may consider habeas claims. After a state court has adjudicated a prisoner’s claims on the merits, federal review “is limited to the record that was before the state court.” *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). An application for a writ of habeas corpus should be granted if the petitioner shows that the adjudication of the claim in state court:

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1)-(2).

A decision is “contrary to” clearly established Federal law “if the state court arrives at a conclusion opposite to that reached by . . . [the Supreme Court]

on a question of law or if the state court decides a case differently than . . . [the Supreme Court] has on a set of materially indistinguishable facts.” *Dowthitt v. Johnson*, 230 F.3d 733, 740-41 (5th Cir. 2000) (quoting *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000)). “The ‘contrary to’ requirement refers to holdings, as opposed to the dicta, of . . . [the Supreme Court’s] decisions as of the time of the relevant state-court decision.” *Id.* at 740 (citations and internal quotations omitted). “[U]nder the ‘unreasonable application’ clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from . . . [the Supreme Court’s] decisions but unreasonably applies the principle to the facts of the prisoner’s case.” *Id.* at 741 (quoting *Williams*, 529 U.S. at 413).

Section 2254(d)(2) speaks to factual determinations made by the state courts. Federal courts presume such determinations to be correct; however, a petitioner can rebut this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). AEDPA has put into place a deferential standard of review, and a federal court must defer to a state court adjudication on the merits. *Valdez v. Cockrell*, 274 F.3d 941, 950 (5th Cir. 2001). “As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court’s ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

DISCUSSION

I. Claim

Atkins argues that he is entitled to habeas corpus relief because his Sixth Amendment right of confrontation was violated by the introduction of inadmissible hearsay evidence. (Mem. at 7). His claim centers around the prosecution's opening statements before the jury and the testimony of Detective Jeffrey Dowdy. In its opening statement, the prosecution stated, in relevant part:

Finally, I believe the State will have the testimony of Lawrence Horton. Lawrence Horton is a co-defendant in this case. That he was arrested for this offense as well as the defendant in this case. I believe that he will tell you that he and defendant met on the morning of January 2nd, 2009. That they went ultimately to 1710 Jackson Street wherein the defendant, Mr. Atkins over here, busted the door in at 1710 and robbed and beat the victims while he himself, Mr. Horton, served as a lookout. And I believe that

will – you will anticipate that testimony as well.

[doc. # 18-3 at 764-65].

During the trial, the following exchange occurred between the prosecution and Detective Dowdy:

Prosecutor: What happened next with regard to your investigation?

Det. Dowdy: The next thing that I did occurred on January the 10th, 2009.

Prosecutor: Okay. And what – what happened on that date?

Det. Dowdy: I was contacted by Monroe Police Department, Sergeant Isaac Gayden, who stated that Lawrence Horton wanted to speak with me regarding this – this case.

Prosecutor: Okay. And did you in fact speak with Lawrence Horton?

Det. Dowdy: Yes, sir, I did.

Prosecutor: All right. Was he advised of his rights?

Det. Dowdy: Yes, sir, he was.

Prosecutor: And did he provide a statement to you?

Det. Dowdy: Yes, sir, he did.

Prosecutor: Was that statement inculpatory? Did he –

Det. Dowdy: Yes, sir, it was.

Prosecutor: Okay. Did he implicate anybody else?

Det. Dowdy: Yes, sir, he did.

Prosecutor: Okay. As a result of this – well, all right, he implicated someone else. What did you do next with regard to your investigation?

Det. Dowdy: Based on the – the information that he provided he was arrested

and again, based on the information that he provided I was able to obtain a warrant.

Prosecutor: For whom?

Det. Dowdy: Justin Atkins.

Prosecutor: Okay. And why was he, you know, never mind. You obtained a warrant for Justin Atkins and that warrant was signed by a Judge?

Det. Dowdy: Yes, sir.

Prosecutor: Okay. And ultimately Mr. Atkins was arrested on that warrant?

Det. Dowdy: Yes, sir, that's correct.

(*Id.* at 793-94).

Despite the prosecution's opening statement, Horton did not testify at Atkins' trial. Atkins claims that Detective Dowdy's testimony regarding Horton is hearsay, and because Atkins was unable to cross-examine Horton, the admission of Dowdy's testimony violated the Confrontation Clause. (Mem.)

The State responds that Detective Dowdy's statement is not hearsay, and therefore, Atkins' right to confrontation was not violated. [doc. # 18 at 10-11]. The State also claims there was sufficient evidence to convict Atkins without Horton's testimony, which is why the State decided not to present Horton's testimony. (*Id.* at 12).

II. Law

Federal courts do not "review the admissibility of evidence under state law unless erroneous evidentiary rulings were so extreme as to result in a denial of a constitutionally fair proceeding." *Jackson v. Johnson*, 194 F.3d 641, 656 (5th Cir. 1999). Indeed, "the erroneous admission of prejudicial testimony does not justify habeas relief unless the evidence played a 'crucial, critical, and highly significant' role in the jury's determination." *Id.* (citations omitted). Therefore, to obtain relief on his claim that the state court permitted inadmissible hearsay testimony at trial, Atkins must prove that the erroneous admission was so prejudicial as to deny him of a constitutionally fair proceeding. See *Dixon v. Warden, Louisiana State Penitentiary*, No. CIV.A. 11-2100, 2012 WL 6803686, at *7 (W.D. La. Nov. 30, 2012).

The Sixth Amendment guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. This right applies to the states through the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 403 (1965). In general, the Confrontation Clause "bars witnesses from reporting the

out-of-court statements of nontestifying declarants.” *Taylor v. Cain*, 545 F.3d 327, 335 (5th Cir. 2008) (citing *Crawford v. Washington*, 541 U.S. 36, 54-56 (2004)). For example, the United States Supreme Court has held that the admission of a non-testifying co-defendant’s confession at a joint criminal trial violated the defendant’s “right of cross-examination secured by the Confrontation Clause of the Sixth Amendment.” *Bruton v. United States*, 391 U.S. 123, 126 (1968). Similarly, the Supreme Court has excluded the confession of a co-defendant who had been tried separately and found guilty because the defendant had no opportunity for cross-examination. *Douglas v. State of Ala.*, 380 U.S. 415, 419 (1965). Further, “[p]olice officers cannot, through their trial testimony, refer to the substance of statements given to them by nontestifying witnesses in the course of their investigation, when those statements inculpate the defendant.” *Taylor*, 545 F.3d at 335.

However, the Confrontation Clause is only implicated when the out-of-court statement is hearsay. *Tennessee v. Street*, 471 U.S. 409, 414 (1985). Hearsay is “a statement, other than one made by the declarant while testifying at the present trial or hearing, offered in evidence to prove the truth of the matter asserted.” La. Code Evid. art. 801(c). “The Louisiana Supreme Court has repeatedly held that a Police Officer, in explaining his own actions, may refer to statements made by other persons involved in the case.” Dixon, 2012 WL 6803686, at *8 (collecting cases). As set forth in *State v. Calloway*, 324 So. 2d 801, 809 (La. 1975), statements made “to explain the sequence of events

leading to the arrest of the defendants from the viewpoint of the arresting officers" are not hearsay.

III. Analysis

Atkins has failed to demonstrate that the trial court's admission of the testimony denied him the right to a constitutionally fair proceeding or even that the admission of Detective Dowdy's testimony was erroneous.

The state court found that Detective Dowdy's statements were not hearsay. The court reasoned that although Detective Dowdy made statements "in reference to the conversation between Atkins and Mr. Horton, this conversation was used to explain the sequence of events leading to the arrest of the defendant from the viewpoint of the arresting officers" and was not offered to prove the truth of the matter asserted. [doc. # 14-4].

Upon review of the trial transcript and the state court's opinion, the undersigned finds that Atkins' claim lacks merit. The record reflects that Detective Dowdy's testimony was not introduced to prove that Atkins committed the crimes. Rather, the testimony was used to explain Dowdy's course of investigation and what led to his arrest of Atkins. Further, Detective Dowdy did not provide the substance of any of Horton's statements. Therefore, Detective Dowdy's testimony is not hearsay, and Atkins' Sixth Amendment confrontation rights have not been violated.

Accordingly, Atkins' claim should be DISMISSED.

CONCLUSION

Based on the foregoing, IT IS RECOMMENDED that the petition for habeas corpus filed by Petitioner Justin Atkins [docs. # 1, 5] be DENIED.

Under the provisions of 28 U.S.C. § 636(b)(1)(C) and Rule 72(b), parties aggrieved by this Report and Recommendation have fourteen (14) days from service of this Report and Recommendation to file specific, written objections with the Clerk of Court. A party may respond to another party's objections within fourteen (14) days after being served with a copy of any objections or response to the District Judge at the time of filing. A courtesy copy of any objection or response or request for extension of time shall be furnished to the District Judge at the time of filing. Timely objections will be considered by the District Judge before the Judge makes a final ruling.

A PARTY'S FAILURE TO FILE WRITTEN OBJECTIONS TO THE PROPOSED FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS CONTAINED IN THIS REPORT WITHIN FOURTEEN (14) DAYS FROM THE DATE OF ITS SERVICE SHALL BAR AN AGGRIEVED PARTY, EXCEPT ON GROUNDS OF PLAIN ERROR, FROM ATTACKING ON APPEAL THE UNOBJECTED-TO PROPOSED FACTUAL FINDINGS AND LEGAL CONCLUSIONS ACCEPTED BY THE DISTRICT

JUDGE. Pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts, this Court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Unless a Circuit Justice or District Judge issues a certificate of appealability, an appeal may not be taken to the court of appeals. Within fourteen (14) days from service of this Report and Recommendation, the parties may file a memorandum setting forth arguments on whether a certificate of appealability should issue. See 28 U.S.C. § 2253(c)(2). A courtesy copy of the memorandum shall be provided to the District Judge at the time of filing.

In Chambers, Monroe, Louisiana, this 19th day of November 2018.

KAREN L. HAYES
UNITED STATES MAGISTRATE
JUDGE

RELEVANT STATUTORY PROVISIONS

28 U.S.C.A. § 2254

Effective: April 24, 1996

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the

record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.