No. 20-1605

In the Supreme Court of the United States

JUSTIN TERRELL ATKINS,
Petitioner,

v.

TIMOTHY HOOPER, WARDEN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) Did the Fifth Circuit abuse its discretion by considering the State's forfeited harmless error argument in a habeas case where the error was clearly harmless?

(2) Did the Fifth Circuit misapply the harmless error standard in *Brecht v. Abrahamson*, 507 U.S. 619 (1993)?

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INTRODUCTION

Petitioner Justin Terrell Atkins beat and robbed two of his neighbors. They knew him from before the attack, and so they had no trouble identifying him during the investigation and at Atkins' trial. A jury convicted him; and the state courts denied relief on direct review.

In state post-conviction proceedings, Atkins belatedly claimed that the State violated his Confrontation Clause rights when a police officer, Detective Jeffrey Dowdy, testified at trial that he had investigated Atkins after speaking with Atkins' coconspirator—who did not testify. Because Louisiana law has an explain-the-investigation exception to the hearsay rule, the state courts denied relief. (The Louisiana Supreme Court also denied relief in light of a procedural default: Atkins failed to raise the issue at trial or on direct review).

Atkins then sought collateral review in federal district court. The State forfeited its procedural default and harmless error arguments. But the district court denied relief anyway after concluding Detective Dowdy's statements were not hearsay.

On appeal, the Fifth Circuit ultimately affirmed. It chose to exercise its discretion to consider the State's forfeited harmless error argument. The lower court found "it desirable in most AEDPA cases to consider harmlessness" because ordering relief on a ground that was harmless "is the kind of needless interference with a state-court judgment that AEDPA seeks to avoid." App. 27a. The court ultimately

concluded that any error was harmless under *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

Atkins seeks a petition for certiorari from this Court, arguing (1) by exercising its discretion to consider the State's forfeited harmless error argument, the Fifth Circuit split with numerous other circuits and adopted a new standard for habeas cases incompatible with this Court's precedent; and (2) the lower court misapplied the harmless error standard this Court erected in *Brecht*. Neither contention merits this Court's review.

This Court has stressed again and again that "collateral review is different from direct review." *Brecht*, 507 U.S. at 633. And so, "[a] court of appeals must exercise its discretion in a manner consistent with the objects of [AEDPA]." *Calderon v. Thompson*, 523 U.S. 538, 554 (1998). By exercising its discretion to consider the State's forfeited harmless error argument, the Fifth Circuit acted in accordance with the objects of AEDPA, the jurisprudence of this Court, and the jurisprudence of the lower court's sister circuits.

Atkins accuses the Fifth Circuit of misapplying this Court's *Brecht* standard. But the lower court did not merely perform a sufficiency-of-the-evidence review when considering Atkins' claim under *Brecht*—as Atkins contends. On the contrary, the lower court correctly observed that Detective Dowdy's testimony did not have a substantial, injurious effect in light of the other testimony identifying Atkins as the victims' assailant. *See* App. 31a–32a. Even if the Fifth Circuit

misapplied the *Brecht* standard, granting certiorari would amount to error correction. And this Court is not a court of error correction. *See* Supreme Ct. R. 10. The Court should deny Atkins' petition for a writ of certiorari.

STATEMENT OF THE CASE

1. In early 2009, Howard Bishop accompanied his neighbor, Robert Jones, to a Cracker Barrel, where Jones cashed a check. After obtaining the cash, Bishop and Jones went to Jones' residence in Monroe, Louisiana, and began drinking with another one of their neighbors, Tom Harris.

Earlier that morning, Harris had evicted a tenant from his house, Lawrence Horton. Horton—who was known in the neighborhood as "O"—had lived with Harris for a number of months, but he paid very little rent. Upon learning that Horton had thrown a party at his house while Harris was working, Harris ordered Horton out, and Horton left.

Without housing, Horton had followed Jones and Bishop to the Cracker Barrel. Horton saw Jones cash the check. Horton then met up with another man from the neighborhood, Petitioner Justin Terrell Atkins—who was known to Harris and Bishop as "J. Money." Around midday, Atkins and Horton went to Jones' house—where Jones was still drinking with Bishop and Harris.

Atkins kicked in the door, barged into the home, and demanded money from Jones. Jones refused to give up his cash. Atkins began beating Jones with the

butt of a firearm. Harris tried to intervene, but then Atkins struck Harris with the gun too. Atkins did not attempt to hide his face during the attack. Bishop witnessed these events, and he observed Atkins remove cash from Jones' pocket. Horton lurked at the door of Jones' residence throughout the duration of the robbery.

When police officers arrived at the scene, they found Bishop and Harris covered in blood. Though still intoxicated and disoriented from the beating, Bishop and Harris explained that "O" and "J. Money" were responsible for the robbery. *See* App. 3a, 33a.

Eight days after the robbery, Horton informed authorities that he wanted to speak with police. Horton admitted his part in the robbery to Detective Jeffrey Dowdy—mainly blaming Atkins for the crimes. App. 4a.

About a week after the robbery, some neighbors brought a photo of Atkins to Harris because, as Harris later explained, "he the one hit me in the head." Harris provided a detective with the photo of Atkins. Less than two weeks after the robbery, Bishop easily picked Atkins out of a photo lineup.

2. The State charged Atkins with armed robbery[1] and aggravated battery.[2] A jury unanimously found him guilty of both crimes. The court sentenced Atkins to 35 years of imprisonment for the armed

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[1] La. Rev. Stat. 14:64.

[2] La. Rev. Stat. 14:34.

robbery conviction and 10 years for the aggravated battery conviction. The court ordered Atkins to serve the sentences consecutively.

On direct appeal, Atkins challenged the sufficiency of the evidence, the validity of the photo lineup, and the severity of the sentences. The state intermediate appellate court affirmed Atkins' convictions and sentences. The court rejected Atkins' insufficiency-of-the-evidence claim for a number of reasons. Although Bishop and Harris had been drinking at the time of the crime, "they had no difficulty in identifying Atkins as the armed robber." The attack occurred around midday. "Bishop immediately picked out Atkins in a lineup." Both Harris and Bishop already knew Atkins and Horton and both "identified Atkins in open court, in full view of the jury."

When affirming the validity of the photo lineup, the court concluded that the lineup was "fair and reasonable" because, in part, "Harris, Bishop, and Atkins all ran in the same neighborhood. They were already familiar with one another [at the time of the robbery], even if only by nicknames."

The Louisiana Supreme Court denied Atkins' application for a writ of certiorari. Atkins' convictions and sentences became final after he did not petition this Court for certiorari.

3. Near the end of 2012, Atkins filed an application for post-conviction relief in state district court. For the first time, he claimed (1) he was denied his Sixth Amendment right to confront and cross-

examine witnesses and (2) the trial court erred by allowing a substantial amount of hearsay evidence to prove key elements of the State's case.[3] Atkins' claim focused on the State's opening statement, the testimony of Detective Dowdy, and the State's closing statement.

In his opening statement, the prosecutor implied that Horton was going to testify about the events of day of the attack:

> 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.

See App. 5a. Ultimately, however, the State rested without calling Horton.

At trial, Detective Dowdy implied that Horton had informed Dowdy that Atkins was his accomplice:

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[3] Atkins also made an ineffective-assistance-of-counsel claim.

> 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.

App. 5a–7a. And, 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." *Id.*

On state collateral review, Atkins claimed that Detective Dowdy's testimony about Horton was hearsay because Atkins was unable to cross-examine Horton. The state district court denied Atkins' application for post-conviction relief. The court concluded that, although Detective Dowdy testified at trial about statements between Atkins and Horton, no constitutional violation occurred because the "conversation was used to explain the sequence of events leading up to the arrest of the defendant from the viewpoint of the arresting officers." *See* App. 19a–20a (citing *State v. Calloway*, 324 So. 2d 801, 809 (La. 1975)). And, under Louisiana law, there is an explain-the-investigation exception to the hearsay rule—which allows officers to introduce hearsay evidence to explain their actions. *See id.*

Atkins sought review from the Louisiana Second Circuit Court of Appeal, again raising his Sixth Amendment claims. The appellate court denied relief in a terse order: "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)." *See* App. 12a. The state intermediate appellate court did not explain its reasoning beyond the string citation.

Atkins then sought review from the Louisiana

Supreme Court. That court issued a per curiam decision denying relief because Atkins "inexcusably failed to raise his [Sixth Amendment] claims in the proceedings leading to conviction." *See* App. 11a (citing La. C. Cr. P. art. 930.4(B)). Beyond this procedural default, the court also observed "[i]n addition, [Atkins] fails to satisfy his post-conviction burden of proof." *Id.* (citing La. C. Cr. P. art. 930.2).

4. After the state courts denied collateral relief, Atkins sought federal habeas review. He again raised his Sixth Amendment claims in the Eastern District of Louisiana. The magistrate judge recommended denying relief, observing that "[t]he 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." App. 75a (quoting *Dixon v. Warden, La. State Penitentiary*, No. CIV.A. 11-2100, 2012 WL 6803686, at *8 (W.D. La. Nov. 30, 2012) (collecting cases)). The magistrate concluded that Atkins' Confrontation Clause rights had not been violated because "Detective Dowdy's testimony was not introduced to prove that Atkins committed the crimes"; but rather it "was used to explain Dowdy's course of investigation and what led to his arrest of Atkins." App. 76a. The district court adopted the report and recommendation of the magistrate.

Atkins then sought a certificate of appealability from the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit granted Atkins a COA after observing that the State may have forfeited its procedural default defense and its harmless error

argument in the district court.

A panel of the Fifth Circuit then reversed the district court's denial of habeas relief and remanded the case. The panel first held that the State intentionally waived the procedural default that the Louisiana Supreme Court cited when denying Atkins relief. The panel justified this holding by observing that, in response to Atkins' habeas petition, the State's lawyer said merely, "it appears [Atkins] has exhausted his state court remedies." App. 51a.

The panel then turned to the question of whether Atkins had satisfied his burden under 28 U.S.C. § 2254 to show that the state court adjudication of his confrontation clause claim "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." As an initial matter, the panel determined that, under this Court's decision in *Wilson v. Sellers*, it was obligated to "look through" the Louisiana Supreme Court's decision and the state intermediate appellate court's decision. App. 52a–55a (citing 138 S. Ct. 1188 (2018)).

The panel turned to the state district court's decision. The panel identified two reasons that the district court relied upon when denying relief to Atkins: (1) "because Detective Dowdy's testimony did not reference the actual statements made by Horton during Detective Dowdy's investigation, no hearsay was admitted"; and (2) "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." App. 55a–56a. The panel found that these reasons provided "a relevant rationale" for denying Atkins' Confrontation Clause claim, and so it considered whether the decision "suffices under Section 2254(d)." App. 56a.

The panel began its analysis of the state court's decision by noting that it was "not aware of a Supreme Court opinion with nearly identical facts to those here." *Id.* The panel then acknowledged that the state district court's decision to deny relief to Atkins rested in part on the explain-the-investigation exception to the hearsay rule under Louisiana law. App. 58a (discussing *Calloway*, 324 So. 2d at 809). The panel relied on Fifth Circuit precedent when concluding that the state district court's decision violated clearly established federal law: "*This court's caselaw is clear* that explain-the-investigation exceptions to hearsay cannot not displace the Confrontation Clause." App. 58a (citing *United States v. Kizzee*, 877 F.3d 650, 657 (5th Cir. 2017) (emphasis added)).

The panel finally turned to the question of whether the alleged Confrontation Clause violation error was harmless. App. 60a. The panel observed that the State had failed to raise harmlessness in the district court and that the State asked the panel to address the issue on appeal. The panel said simply "[w]e see no reason for exercising it here." *Id.*

5. The Louisiana Attorney General's office, in conjunction with the District Attorney's office, moved

the Court for rehearing. The State pointed out that circuit precedent cannot count as "clearly established federal law" and this Court has reversed numerous circuit courts merely for consulting their precedent when assessing a habeas claim governed by § 2254. *See, e.g.*, *White v. Woodall*, 572 U.S. 415, 420 n.2 (2014). The State explained that no opinion of this Court had ever clearly established with the requisite particularity that the explain-the-investigation exception to hearsay rule was inconsistent with the Confrontation Clause.

The State further explained that—even assuming Atkins' constitutional rights were violated—the panel's flat refusal to exercise its discretion to consider the State's forfeited harmless error argument was inconsistent with the objects of AEDPA. *See Calderon*, 523 U.S. at 554.

The panel granted rehearing, issued a new opinion, and denied habeas relief. App. 2a. On rehearing, the panel declined to rule on the issue of whether the state court's decision was contrary to or an unreasonable application of clearly established federal law. App. 26a–27a ("We leave open these questions because we conclude the answers will not affect the outcome of the appeal."). Instead, the panel exercised its discretion to address the issue of harmlessness.

The panel found "it desirable in most AEDPA cases to consider harmlessness" because ordering relief on a ground that was harmless "is the kind of needless interference with a state-court judgment that

AEDPA seeks to avoid." App. 27a. The panel found that the *Brecht* standard of review was appropriate, despite the State's forfeiture of the harmlessness issue. App. 30a, 31a ("Whether raised late by the State or even if only noticed by the court *sua sponte*, the same considerations apply as were explained in *Brecht*.").

Turning to the merits of the harmlessness determination, the panel considered whether informing the jurors that Horton told Detective Dowdy that Atkins was the second culprit had a substantial, injurious effect or influence on the verdict. App. 31a–32a. Because the two witnesses had some familiarity with Atkins before the attack and because each positively identified Atkins, the Fifth Circuit concluded that the error was harmless. App. 34a.

Atkins petitioned the Fifth Circuit for rehearing, but the court denied relief. App. 1a. Atkins then petitioned this Court for a writ of certiorari.

REASONS FOR DENYING THE PETITION

I. THIS CASE IS A POOR VEHICLE TO CONSIDER ATKINS' FIRST QUESTION.

In his first question, Atkins asks whether "the preservation rule applies to the State's forfeiture of harmlessness in AEDPA cases absent some threshold finding of extraordinary or compelling circumstances." Pet. ii. Even assuming the Court is interested in answering that question, it should wait for a case that presents the issue; the lower court did not discard the preservation rule, as Atkins' question implies.

There is another problem with Atkins' petition. On rehearing, the Fifth Circuit did not rule on the underlying issue of whether Atkins' Confrontation Clause rights were violated in the first place. It would be a fruitless exercise to determine how forfeiture works for harmless error in this habeas case if Atkins' underlying constitutional rights were not violated in the first instance.

1. Atkins contends that the Fifth Circuit "adopted a categorical, extratextual rule in favor of forgiving state forfeiture of harmlessness in AEDPA cases." Pet. i. This overstates the lower court's holding. When deciding whether to exercise its discretion to consider a State's forfeited harmless error argument on collateral review, the Fifth Circuit merely acknowledged that it is "desirable in most AEDPA cases to consider harmlessness." App. 27a. This is not a "blanket presumption" inconsistent with this Court's precedent. Pet. 9–10.

On the contrary, by exercising its discretion to consider the State's forfeited harmlessness argument, the lower court acted consistently with "[t]he principle that collateral review is different from direct review"—which is a principle that "resounds throughout [this Court's] habeas jurisprudence." *Brecht*, 507 U.S. at 633. "Recognizing the distinction between direct and collateral review," this Court often applies "different standards on habeas than would be applied on direct review." *Id.* at 634.

Indeed, this Court has emphasized that, on collateral review, "a court of appeals must exercise its

discretion in a manner consistent with the objects of [AEDPA]." *Calderon*, 523 U.S. at 554. The Court has limited federal habeas courts' discretion to grant relief to petitioners again and again because of "the profound societal costs that attend the exercise of habeas jurisdiction." *Smith v. Murray*, 477 U.S. 527, 539 (1986); *accord Calderon*, 523 U.S. at 554–555 (collecting cases); *see, e.g.*, *McCleskey v. Zant*, 499 U.S. 467, 487 (1991) (limiting "a district court's discretion to entertain abusive petitions"); *Wainwright v. Sykes*, 433 U.S. 72, 90–91 (1977) (limiting courts' discretion to entertain procedurally defaulted claims); *Teague v. Lane*, 489 U.S. 288, 308–310 (1989) (plurality opinion of O'Connor, J.) (limiting courts' discretion to give retroactive application to "new rules" in habeas cases); *Brecht*, 507 U.S. at 637–638 (1993) (limiting courts' discretion to grant habeas relief on the basis of "trial error").

The reason for the disparate treatment is clear: "Federal courts are not forums in which to relitigate state trials." *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983). Habeas corpus is "a guard against *extreme malfunctions* in the state criminal justice systems . . . ." *Harrington v. Richter*, 562 U.S. 86, 102–103 (2011) (emphasis added). But the writ becomes much more than a guard against "extreme malfunctions" if federal courts grant habeas relief even when an error is harmless. *See Brecht*, 507 U.S. at 634 ("Those few who are ultimately successful in obtaining habeas relief are persons whom society has grievously wronged and for whom belated liberation is little enough compensation."(cleaned up)).

Atkins also accuses the Fifth Circuit of grafting an "extratextual" presumption onto AEDPA by factoring the habeas context into the calculus of whether to exercise its discretion to consider the State's forfeited harmlessness argument. Pet. i. Atkins' accusation falls flat in light of this Court's express acknowledgment that it has from time to time "filled the gaps of the habeas corpus statute." *Brecht*, 507 U.S. at 633 (citing *McCleskey*, 499 U.S. at 487; *Wainwright*, 433 U.S. at 81; *Sanders v. United States*, 373 U.S. 1, 15 (1963); *Townsend v. Sain*, 372 U.S. 293, 312–313 (1963)). When defining the scope of the writ, this Court looks "to the considerations underlying [its] habeas jurisprudence" and then determines "whether the proposed rule would advance or inhibit these considerations by weighing the marginal costs and benefits of its application on collateral review." *Id.* The Fifth Circuit got it exactly right when it determined that granting habeas relief despite harmless error would be a "needless interference" with state court judgments that is inconsistent with AEDPA. App. 27a.

The Fifth Circuit did not lay down any bright line rule requiring panels always to forgive a State's forfeiture of an argument in an AEDPA case. In accordance with this Court's precedent, the lower court simply factored the nature of the collateral proceedings into the calculus of whether to consider the State's forfeited harmlessness argument. And so this petition is a bad vehicle to consider Atkins' first question of whether "the preservation rule applies to the State's forfeiture of harmlessness in AEDPA cases." Pet. i.

2. In any event, this Court should not reach the issue of whether it was permissible for the Fifth Circuit to consider harmlessness because Atkins has failed to demonstrate that his constitutional rights were violated in the first place.[4] As this Court has observed, "it would not matter which harmless error standard is employed if there were no underlying constitutional error." *Fry v. Pliler*, 551 U.S. 112, 121 (2007) (internal quotation marks omitted). It follows, *a fortiori*, that it would not matter which standard was used to determine whether to consider forfeiture of a harmless error argument if there were no underlying constitutional error.

The federal magistrate judge considering Atkins' Confrontation Clause claim below correctly observed that, under Louisiana law, there is an explain-the-investigation exception to the hearsay rule. App. 75a–76a (citing *Calloway*, 324 So. 2d at 809); *see* Joshua P. Clayton, *The Louisiana "Explanatory Exception": Faithfulness to Louisiana's Hearsay Framework or Mere Storytime with the Prosecution?*, 71 La. L. Rev. 1259, 1304 (2011). And, on state post-conviction review, the state district court (as well as the state appellate court) ruled that Officer Dowdy's testimony fit this exception and therefore

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[4] This Court has granted certiorari in *Brown v. Davenport* to consider whether a federal habeas court may grant relief based solely on its conclusion that the *Brecht* test is satisfied without considering whether the state court's decision flunked AEDPA's relitigation bar under 28 U.S.C. § 2254. *Brown v. Davenport*, 20-826 (argued Oct. 5, 2021).

Atkins' Confrontation Clause rights were not violated. *See* App. 19a–21a.

Because the state courts ruled on the merits of Atkins' Sixth Amendment claim, a federal habeas court lacks authority to grant relief unless Atkins can satisfy his burden under § 2254(d). Under this provision of AEDPA, Atkins must show that the state court adjudication "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." § 2254(d).

AEDPA "preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents. It goes no further." *Harrington*, 562 U.S. at 102. "The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007). AEDPA forecloses relief unless a prisoner can show that the state court's error was "well understood and comprehended in existing law *beyond any possibility for fairminded disagreement*." *Shoop v. Hill*, 139 S. Ct. 504, 506 (2019) (emphasis added).

Importantly, when determining the relevant "clearly established" law for the purposes of § 2254(d), lower courts must not "fram[e] [this Court's] precedents at [] a high level of generality." *Lopez v. Smith*, 574 U.S. 1, 6 (2014). Nor may they "refine or

sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that this Court has not announced." *Marshall v. Rodgers*, 569 U.S. 58, 64 (2013) (citing *Parker v. Matthews*, 567 U.S. 37, 47–48 (2012)).

Thus, lower federal court decisions are "irrelevant to the question" of whether a state court decision is reasonable under § 2254(d). *Lopez*, 574 U.S. at 7. Indeed, a circuit court may not even "*consult* its own precedents, rather than those of [the Supreme] Court, in assessing a habeas claim governed by § 2254." *Woodall*, 572 U.S. at 420 n.2 (emphasis added) (cleaned up). This Court routinely reverses circuit courts when they commit such errors. *See, e.g.*, *Lopez*, 574 U.S. at 6–7 ("The Ninth Circuit attempted to evade this barrier by holding that [its precedent] 'faithfully applied the principles enunciated by the Supreme Court.'" (citation omitted)); *Christian v. Dingle*, 577 F.3d 907, 912 (8th Cir. 2009) ("[Circuit] precedent cannot serve as a basis for *any conclusion* . . . about the reasonableness of the [state trial court's] decision under AEDPA." (emphasis added)).

A key question for a federal habeas court considering Atkins' petition is whether Louisiana's explain-the-investigation exception to the Confrontation Clause violated a contemporary precedent of *this* Court that directly addressed the issue. There is no such case. Many lower federal courts have debated the explain-the-investigation exception over the years. *See, e.g.*, *United States v. Wright*, 739 F.3d 1160, 1171 (8th Cir. 2014); *United States v.*

Linwood, 142 F.3d 418, 425 (7th Cir. 1998); *United States v. Bowser*, 941 F.2d 1019, 1021 (10th Cir. 1991); *United States v. Lazcano*, 881 F.2d 402, 407 (7th Cir. 1989); *United States v. Love*, 767 F.2d 1052, 1063 (4th Cir. 1985). Indeed, the Fifth Circuit has flatly rejected the explain-the-investigation exception. *See Kizzee*, 877 F.3d at 656–57 (collecting cases). But *this Court* has never issued a decision directly on point.

In its initial opinion in this case, the Fifth Circuit looked to its *own* precedent when holding that Atkins had satisfied his burden under § 2254(d). App. 58a. After the State moved for rehearing and pointed out that it was error to rely on its own precedent, the panel withdrew its initial opinion and, in its subsequent opinion, simply declined to decide whether Atkins' constitutional rights had been violated. App. 26a. ("Having gone this far in the analysis of the Confrontation Clause, we go no further."). The panel's reticence to rule on the issue appears to stem from the fact that, in a previous AEDPA case—*Taylor v. Cain*—the Fifth Circuit held that Louisiana's explain-the-investigation exception violated this Court's precedents for the purposes of § 2254(d). *See* App. 25a (citing *Taylor v. Cain*, 545 F.3d 327, 331 (5th Cir. 2008)). And this Court has held that a circuit court, 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); App. 25a–26a.

But the Fifth Circuit's opinion in *Taylor* was wrongly decided because this Court has not addressed the constitutionality of the explain-the-investigation exception to the hearsay rule.[5] And, under AEDPA, the state courts adjudicating Atkins' Confrontation Clause claim had no obligation to review the Fifth Circuit's precedent—such as *Taylor*—to ensure that a habeas court had not passed on that issue.

The state intermediate appellate court denying relief to Atkins did, however, identify a case *from this Court* that recognizes there is no clearly established law on point. *See* App. 11a–12a. In *Woods v. Etherton*, this Court considered a habeas petition where the state prosecution introduced testimony of police officers who "described the content of the anonymous tip leading to [the defendant's] arrest." 136 S. Ct. at 1150. The state trial court had "instructed the jury that 'the tip was not evidence,' but was admitted 'only to show why the police did what they did.'" *Id.*

Although this Court was reviewing an ineffective-assistance-of-counsel claim in *Woods*, it noted that "[a] 'fairminded jurist' could conclude that repetition of the tip did not establish that the uncontested facts it conveyed were submitted for their truth." *Id.* at 1152. This Court further observed that

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[5] In *Taylor*, the Fifth Circuit relied on this Court's opinions in *Crawford v. Washington*, 541 U.S. 36 (2004) and *Ohio v. Roberts*, 448 U.S. 56 (1980), when deciding that clearly established law proscribed Louisiana's explain-the-investigation exception to the hearsay rule. But neither holding applies with the requisite level of specificity for the purposes of § 2254(d). *See Lopez*, 574 U.S. at 6.

"*[n]o precedent of this Court clearly forecloses that view*." *Id.* (emphasis added). That alone is sufficient to deny relief in Atkins' case because it is an acknowledgement that reasonable jurists could disagree about the scope of this Court's Confrontation Clause jurisprudence.

At the very least, the Fifth Circuit has not ruled on the issue of whether Atkins' constitutional rights were violated. And in light of this Court's opinion in *Woods*—and the absence of any case of this Court directly on point—Atkins could never make out a constitutional violation sufficient to overcome the relitigation bar § 2254(d). In the absence of any clear indication that Atkins' constitutional rights were violated, this case makes a poor vehicle to determine how the forfeiture rules of harmless error arguments work in habeas cases. *See Fry*, 551 U.S. at 121.

II. THE LOWER COURT DID NOT SPLIT WITH OTHER AUTHORITIES BY EXERCISING ITS DISCRETION TO CONSIDER HARMLESS ERROR ON COLLATERAL REVIEW.

Atkins insists that the Fifth Circuit's ruling breaks with "nearly every other circuit court." Pet. 15. According to Atkins, the lower court's opinion split with 13 cases from 10 circuits because those other authorities "refuse[d] to forgive the government's failure to argue harmlessness without first considering certain factors to justify ignoring the well-established preservation rule." *Id.* Specifically, Atkins contends that the Fifth Circuit split from these authorities by not considering the factors articulated

by the Seventh Circuit in *United States v. Giovannetti*, 928 F.2d 225 (7th Cir. 1991) (adopting the following factors for determining when to address harmlessness if the government failed to raise the argument: (1) the length and complexity of the record; (2) whether the harmlessness of the errors is certain or debatable; and (3) whether a reversal would result in protracted, costly, and futile proceedings).

There is no split. As discussed, Atkins seeks collateral review—which entails different standards than direct review. *Giovannetti* was not a habeas case. Nor are *nine* of the cases Atkins identifies in his 10-way split. Moreover, *Giovannetti* merely lays out some guidelines to direct panels as they exercise their discretion when deciding whether to forgive forfeiture. The Fifth Circuit did not reject these guidelines or stray from the pack by distinguishing *Giovannetti* in light of the habeas context.

1. As already noted, "collateral review is different from direct review." *Brecht*, 507 U.S. at 633. And, again, habeas petitions only "guard against extreme malfunctions" in state court. *Jackson v. Virginia*, 443 U.S. 307, 333 n.5 (1979). *Giovannetti* was decided before Congress passed AEDPA and, in any event, was not a habeas case. Although the *Giovannetti* factors work well outside of the habeas context—and many circuits have adopted them to one degree or another—the factors do not adequately account for the objects and purposes of AEDPA. And this Court has required federal habeas courts to consider those points when exercising their discretion. *See Calderon*, 523 U.S. at 554. The lower court

expressly distinguished *Giovannetti* on these grounds: "We conclude that [*Giovannetti*], which predated *Brecht* by two years and did not involve review of a state conviction, necessarily did not, indeed could not, take into account that the 'application of a less onerous harmless-error standard on habeas [review of a state conviction] promotes the considerations underlying our habeas jurisprudence.'" Pet. 29a–30a (quoting *Brecht*, 507 U.S. at 623).

A distinction is not a split. Nine of the cases Atkins identifies do not sound in habeas and are therefore irrelevant. Pet. 17–18 (citing *United States v. Rose*, 104 F.3d 1408 (1st Cir. 1997); *United States v. McLaughlin*, 126 F.3d 130 (3d. Cir. 1997); *United States v. Brizuela*, 962 F.3d 784 (4th Cir. 2020); *United States v. Montgomery*, 100 F.3d 1404 (8th Cir. 1996); *United States v. Rodriquez*, 880 F.3d 1151 (9th Cir. 2018); *United States v. Holly*, 488 F.3d 1298 (10th Cir. 2007); *United States v. Adams*, 1 F.3d 1566 (11th Cir. 1993); *United States v. Pryce*, 938 F.2d 1343 (D.C. Cir. 1991)).

2. Atkins identifies four cases that rely on the *Giovannetti* factors in habeas cases. But, they do not support Atkins' assertion that a split exists. Two of the cases reached the harmlessness issue despite the State's forfeiture. *See Gover v. Perry*, 698 F.3d 295 (6th Cir. 2012) (considering and finding harmless-error); *Lufkins v. Leapley*, 965 F.2d 1477 (8th Cir. 1992) (considering and finding harmless-error). In *Gover v. Perry*, the Sixth Circuit went out of its way to observe that "the determination is not limited to [the *Giovannetti*] factors alone." 698 F.3d at 301. And

Gover expressly took into account the nature of the habeas proceedings when concluding that it was appropriate to consider harmlessness *sua sponte*. *Id.* ("It is both highly inefficient and costly to burden state courts with duplicative proceedings when there is no doubt as to the ultimate result.").

The last two cases Atkins identified chose not to forgive the State for forfeiting the harmless error argument. But one of them made this determination only after finding the error was plainly harmful. *See Sanders v. Cotton*, 398 F.3d 572, 582 (7th Cir. 2005) ("Even if the [State] had not waived its harmlessness argument, the argument would fail . . . ."). And the final case involved a capital appeal—the importance of which the Tenth Circuit factored into its analysis. *See Mollet v. Mullin*, 348 F.3d 902, 922 (10th Cir. 2003) (declining to reach *sua sponte* the State's forfeited harmless error argument in part in light of the "need for heightened reliability in determining a capital sentence").

In any event, even these two courts' decisions not to forgive the State's forfeiture do not create a split. Instead, they show that forfeiture-forgiveness is a discretionary matter that can cut both ways. Ultimately, the one thing that is clear from all 13 of Atkins' cases is that *Giovannetti* establishes guidelines for exercising discretion—not rigid rules. The Fifth Circuit did not break with any court by injecting an extra consideration into *Giovannetti*'s flexible analysis.

III. ATKINS' SECOND QUESTION ASKS THE COURT FOR ERROR CORRECTION.

In his second question, Atkins asks whether the Fifth Circuit misapplied the standard this Court erected in *Brecht v. Abrahamson*, 507 U.S. 619 (1993). There are two reasons why the Court should not address this question. First, the lower court correctly applied *Brecht* and did not commit the error Atkins claims it made. Second, even if the Fifth Circuit got the standard wrong, Atkins' request amounts to mere error correction. And this Court is not a court of error correction.

1. The Fifth Circuit did not misapply the *Brecht* standard. According to Atkins, the lower court "assessed only the sufficiency of the evidence apart from the violative confession rather than the impact of the Confrontation Clause violation itself." Pet. ii. The Fifth Circuit did no such thing.

Under *Brecht*, the question is whether the error "had substantial and injurious effect or influence in determining the jury's verdict." 507 U.S. at 623. "The *Brecht* standard reflects the view that a 'State is not to be put to th[e] arduous task [of retrying a defendant] based on mere speculation that the defendant was prejudiced by trial error; the court must find that the defendant was actually prejudiced by the error.'" *Davis v. Ayala*, 576 U.S. 257, 268 (2015) (quoting *Calderon*, 525 U.S. at 146).

In Atkins' case, the alleged error was informing the jurors that Horton told Detective Dowdy that Atkins was his co-conspirator during the attack. The

Fifth Circuit did not merely perform a sufficiency-of-the-evidence review when considering Atkins' claim under *Brecht*. On the contrary, the lower court correctly observed that "[w]hether [Dowdy's] testimony had a substantial, injurious effect depends largely on the extent of other testimony identifying Atkins." App. 31a–32a. In other words, Detective Dowdy's testimony loses importance—*i.e.*, injurious effect—in light of *the victims'* testimony establishing that Atkins was their assailant.

The Fifth Circuit's approach is consistent with this Court's precedent. *See Kotteakos v. United States*, 328 U.S. 750, 764 (1946) (The analysis "must take account of what the error meant to [the jurors], not singled out and standing alone, but in relation to all else that happened."); *Neder v. United States*, 527 U.S. 1, 18 (1999) ("The harmless-error doctrine, we have said, recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial." (cleaned up)); *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) ("The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." (emphasis omitted)).

As the Fifth Circuit observed, the evidence supporting the victim's identification of Atkins is significant. "The victims knew Horton prior to the assault." App. 32a. "During trial, both Harris and

Bishop unequivocally identified Atkins as the assailant whom they had earlier known only as J Money." *Id.* Harris provided police officers with a photo of Atkins within two weeks of the attack. App. 4a. Bishop identified Atkins in a photographic lineup. *Id.* Although the victims had been drinking prior to the attack, "[o]n cross-examination, defense counsel did not seriously challenge either witness's ability to identify the attacker on any grounds, including intoxication." App. 34a.

In light of these facts, it is unsurprising that the Fifth Circuit harbored no "grave doubt" about whether Detective Dowdy's testimony had a substantial, injurious effect on the jury. *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995). This is especially true considering that, as discussed, this Court has never clearly established that such testimony violates the Confrontation Clause in the first place. *See Fry*, 551 U.S. at 121. The Fifth Circuit performed the *Brecht* analysis exactly right.

2. Even if the Fifth Circuit misapplied the *Brecht* standard as Atkins contends, granting certiorari would amount to error correction. And this Court is "not a court of error correction." *Martin v. Blessing*, 134 S. Ct. 402, 405 (2013) (Statement of Alito, J., respecting the denial of certiorari); *see Cavazos v. Smith*, 565 U.S. 1, 11 (2011) (Ginsburg, J., dissenting) (quoting E. Gressman, K. Geller, S. Shapiro, T. Bishop, & E. Hartnett, Supreme Court Practice § 5.12(c)(3), p. 351 (9th ed. 2007)); Supreme Court Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists

of . . . the misapplication of a properly stated rule of law.").

The *Brecht* standard is clear and Atkins identifies no split of authority regarding the error he alleges the Fifth Circuit committed. The Court should not grant certiorari to consider Atkins' second question.

CONCLUSION

The State of Louisiana respectfully asks the Court to deny Atkins' petition for a writ of certiorari.

Respectfully submitted,

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