No. 20-1605

IN THE

# Supreme Court of the United States

JUSTIN TERRELL ATKINS

*Petitioner*,

v.

TIMOTHY HOOPER, WARDEN
Elayn Hunt Correctional Center

*Respondent.*

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

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## REPLY BRIEF FOR PETITIONER

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## REPLY BRIEF

The State's formulation of, and answer to, the first question presented can be summed up in one sentiment: Habeas is different. Habeas is different, says the State, such that normal rules of preservation and forfeiture do not apply. Habeas is so different, the State contends, that courts may sua sponte excuse violations of enumerated constitutional rights on otherwise-forfeited harmlessness grounds for no other reason than that, well, habeas is different. Where does the State get this idea? Not from this Court's precedent, which makes clear that the preservation rule applies with equal force in habeas cases as in direct appeals. Not from AEDPA's text, which expressly provides the State must affirmatively waive *exhaustion* but makes no such allowance for *harmlessness*. And certainly not from the other circuit courts, which uniformly refuse to forgive the government's failure to argue harmlessness without first considering certain factors to justify eschewing the well-established preservation rule.

The question before the Court is whether the divided Fifth Circuit panel improperly considered the forfeited harmlessness issue (having initially unanimously "see[n] no reason for exercising" its discretion to do so), in contravention of the preservation rule and a long line of cases in ten other circuits that expressly limit a court's discretion to reach a forfeited harmlessness issue in circumstances like those present below. The law makes clear that this question cannot be answered by the panel majority's ex-post conclusion on rehearing that the error was

harmless, a conclusion it reached only by misapplying *Brecht*.

## ARGUMENT IN RESPONSE

The State concedes that it "forfeited its . . . harmless error arguments," Opp. 1, and does not deny that it failed to properly argue the issue before any court, including the Fifth Circuit. The State also does not deny that the Fifth Circuit decided the case on the forfeited issue of harmlessness, without any threshold finding of extraordinary circumstances or other factors that would warrant doing so. The State does not deny that the sole reason given for forgiving forfeiture was that the Fifth Circuit "found it desirable in most AEDPA cases to reach harmlessness." Pet. App. 27a. And the State does not deny that in doing so, the Fifth Circuit departed from *United States v. Giovannetti*, 928 F.2d 225 (7th Cir. 1991) and its progeny, turning the framework adopted by at least ten circuits on its head.

The State justifies this break from circuit consensus the same way the Fifth Circuit did—by focusing myopically on the fact that this is a habeas case. Opp. 14–15. But the State fails to reconcile this Court's binding precedent, holding that the party-presentation rule applies just as forcefully in AEDPA cases and should be disregarded only "when extraordinary circumstances so warrant." *See Wood v. Milyard*, 566 U.S. 463, 471 (2012). Thus, the State is also advocating for a new rule to apply to AEDPA cases, citing no authority from this Court or any circuit supporting such "disparate treatment" of party presentation. Opp. 15.

Without guidance from the parties, the Fifth Circuit grossly misapplied the harmlessness analysis described in *Brecht v. Abrahamson*, 507 U.S. 619 (1993), demonstrating the danger of ignoring the party-presentation rule. As even the State's description confirms, the Fifth Circuit applied a sufficiency-of-the-evidence standard to find the most significant and damaging piece of evidence presented at trial—the out-of-court confession of an alleged accomplice—was harmless. *See* Opp. 13 ("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."). The State doubles down on this approach, ignoring the severely injurious impact of the constitutional violative evidence, downplaying the significance of the out-of-court confession, exaggerating the strength of the remaining evidence, and failing to acknowledge the ways the constitutional error infected the entire trial, including its impact on the judge's decision to foreclose certain trial strategy.

Finally, the State argues that all of this should be ignored because the Fifth Circuit's revised opinion did not explicitly "rule[] on the issue of whether Atkins'[] constitutional rights were violated." Opp. 22. But judicial decisions that turn on harmlessness will rarely include pronouncements about the underlying constitutional violation—the very issue being avoided by the harmlessness determination. Moreover, the State is incorrect in its assessment of the clearly established constitutional violation. Just as the Fifth Circuit originally found, the admission of Horton's out-of-court confession violated clearly estab-

lished Supreme Court precedent, which makes clear that the admission of testimonial statements of non-testifying witnesses violates the Sixth Amendment. *See, e.g.*, *Crawford v. Washington*, 541 U.S. 36 (2004); *Gray v. Maryland*, 523 U.S. 185 (1998); *Ohio v. Roberts*, 448 U.S. 56 (1980); *Bruton v. United States*, 391 U.S. 123 (1968). Louisiana's adoption of an evidentiary exception to hearsay—the "explain-the-investigation exception to the hearsay rule," as the State terms it, Opp. 1—cannot trump a defendant's constitutional rights.

Thus, condoning the Fifth Circuit's new extratextual presumption in favor of reaching the forfeited issue of harmlessness in AEDPA cases and its misapplication of *Brecht* will allow a clearly established constitutional violation to stand and the State of Louisiana to continue violating the Confrontation Clause under the guise of an evidentiary hearsay exception.

## I. The State attempts to minimize the circuit split created by the decision below by confusing the issues and drawing distinctions not material to the first question before the Court.

In its initial opinion, the Fifth Circuit panel saw "no reason for exercising" its discretion to consider harmlessness in light of the State's forfeiture, reversed the district court's judgment, and remanded the case for the district court to grant habeas relief. Pet. App. 60a. On rehearing, that same panel inexplicably backpedaled: It not only considered the forfeited issue of harmlessness, but it also "[found] it desirable in most AEDPA cases to consider harm-

lessness"—regardless of whether the government preserved the issue. Pet. App. 27a. In so finding, the panel split from ten other circuits that refuse to forgive the government's failure to raise harmlessness absent circumstances that warrant ignoring the well-established preservation rule. *See United States v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring) (explaining that the preservation rule "distinguishes our adversary system of justice from the inquisitorial one"); *Wood*, 566 U.S. at 470 (recognizing the preservation rule as "hornbook law"). Contrary to the panel below, those courts recognize that "raising harmless error sua sponte is appropriate in very limited circumstances and courts should proceed cautiously when doing so." *See Gover v. Perry*, 698 F.3d 295, 301 (6th Cir. 2012).

The State contends the Fifth Circuit's departure from those cases did not create a split because the court "did not reject the[] [*Giovannetti*] guidelines or stray from the pack by distinguishing *Giovannetti* in light of the habeas context." Opp. 23. But the panel indeed rejected *Giovannetti* by refusing to apply *Giovannetti* in the habeas context. Pet. App. 29a–30a. In declining to consider the *Giovannetti* factors, the panel erroneously determined that such consideration necessarily required "adopting a heightened standard in the habeas context from that identified in *Brecht*." Pet. App. 30a. Both the State and the panel majority conflate the question of whether a forfeited issue of harmlessness should be considered in the first place with the question of which standard should apply if harmlessness is considered. *Giovannetti* and its progeny answer the first question; *Brecht* answers the second. Mr. Atkins does not dis-

pute that the *Brecht* standard should apply if the court reaches the harmlessness analysis. Instead, Mr. Atkins challenges the panel's consideration of harmlessness altogether.

The State effectively endorses a more forgiving (indeed, an *always* forgiving) application of the preservation rule to the government's forfeited arguments in habeas cases because "collateral review is different from direct review." Opp. 14 (quoting *Brecht*, 507 U.S. at 633). The State, for example, notes that nine of the thirteen cases finding that an appellate court's discretion to reach the forfeited issue of harmlessness is limited are "irrelevant" because they "do not sound in habeas." Opp. 24. But the State fails to explain why that distinction is material in this context. And it cites no case that distinguishes collateral review from direct review in the context of a court's determination of whether to forgive the government's forfeiture of harmlessness.

To the contrary, this Court's precedent makes clear that the preservation rule applies with equal force in habeas cases as in direct appeals. *See, e.g.*, *Wood*, 566 U.S. at 472 (recognizing in AEDPA case that "a federal court does not have *carte blanche* to depart from the principle of party presentation basic to our adversary system"); *Berkemer v. McCarty*, 468 U.S. 420, 443 (1984) (declining in habeas case to consider harmlessness because the issue of harmless error was forfeited and recognizing that, "[t]hough, when reviewing a judgment of a federal court, we have jurisdiction to consider an issue not raised below, we are generally reluctant to do so"). AEDPA's text certainly does not suggest otherwise. *See Day v.*

*McDonough,* 547 U.S. 198, 213 (2006) (Scalia, J., dissenting) (stressing that application of normal forfeiture rules to the issue of timeliness "does not contradict or undermine any provision of the habeas statute").

In any event, as the State concedes, four appellate courts have recognized the applicability of the preservation rule and adopted the *Giovannetti* factors before considering the government's forfeited harmlessness issue *in the habeas context*. *See Gover*, 698 F.3d 295; *Sanders v. Cotton*, 398 F.3d 572, 582 (7th Cir. 2005); *Lufkins v. Leapley*, 965 F.2d 1477, 1481 (8th Cir. 1992); *Mollett v. Mullin*, 348 F.3d 902, 920 (10th Cir. 2003). That two of those courts reached harmlessness despite the State's forfeiture after considering the *Giovannetti* factors only demonstrates the *Giovannetti* framework's ability to serve the important considerations underlying AEDPA relief. In both of those cases, the courts considered the forfeited harmlessness argument because they found the harmlessness to be certain. *Gover*, 698 F.3d at 302 (exercising its discretion to raise harmless-error sua sponte because there was "no doubt" the error was harmless); *Lufkins*, 965 F.2d at 1482 (considering harmlessness sua sponte because "we think it clear that the finding of harmlessness is beyond reasonable argument").

And, contrary to the Fifth Circuit's characterization of the Seventh Circuit's decision in *Rhodes v. Dittmann*, Pet. App. 30a n.2, the Seventh Circuit itself has expressly endorsed *Giovannetti* in the habeas context. *See Rhodes v. Dittmann*, 903 F.3d 646, 665 (7th Cir. 2018) ("The district court should have

applied *Giovannetti* and *Sanders* [in the habeas case] and asked whether the error was certainly harmless.").

The harmlessness here is not "certain," *Giovannetti*, 928 F.2d at 227, or "beyond reasonable argument," *Lufkins*, 965 F.2d at 1482,[1] and the Fifth Circuit did not find that it was. Tellingly, the same Fifth Circuit panel initially unanimously "[found] no reason for exercising" its discretion to consider the State's forfeited harmlessness argument and reversed the district court's judgment denying Mr. Atkins habeas relief. Pet. App. 60a.

The Fifth Circuit's unwarranted consideration of the forfeited issue of harmlessness cannot be justified by the panel's conclusion, without the benefit of adversarial argument, that the error was harmless, as the Opposition suggests repeatedly. If otherwise, the unguided determination of whether an error is harmless would always swallow the determination of whether to forgive the forfeiture in the first place, entirely undermining the party-presentation rule and eliminating any incentive the government would have to preserve harmlessness.

## II. After improperly reaching the forfeited issue, the Fifth Circuit applied the wrong legal standard to the harmlessness inquiry.

The Fifth Circuit's harmlessness analysis demonstrates the danger of reaching a forfeited issue that has not been fully briefed or argued by the parties.

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[1] Indeed, the error was not harmless at all. *See infra* Part II.

Without the benefit of party presentation, the Fifth Circuit grossly misapplied the *Brecht* standard to find that the admission of the most significant and damaging evidence at trial—the out-of-court confession of an alleged accomplice, who was later deemed "not a credible witness" by the State—was harmless.

Even the State's most generous description makes clear the Fifth Circuit employed a sufficiency-of-the-evidence standard. Opp. 13 ("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."). The State focuses *exclusively* on the perceived sufficiency of the other evidence presented at trial, as the Fifth Circuit also did, failing to even address the significance of the constitutionally problematic evidence. Indeed, throughout the Opposition, the State downplays Horton's out-of-court confession and ignores entirely the injurious effect it clearly had, including its role as the basis for the judge's decision to foreclose certain trial strategy. The State also exaggerates the strength of the other evidence, failing to mention, for instance, that the two witnesses were "highly intoxicated" and presented conflicting testimony. The State mentions that one of the witnesses identified Mr. Atkins in a photographic lineup but omits that he was shown Mr. Atkins' photograph before the lineup.

While the error here was glaring, this is not simply routine "error correction," as the State suggests. Opp. 28–29. Rather, the Fifth Circuit's flawed harmlessness analysis was a direct product of its newly adopted presumption in favor of forgiving

state forfeiture in AEDPA cases. By ignoring the party-presentation rule, the Fifth Circuit decided an issue that had not been briefed by the parties, marking an extreme breakdown of the adversarial process and the formalization of a double-standard, which the State fails to address.

Moreover, the State incorrectly suggests that this Court cannot correct this blatant error, as it has done in "countless cases," when appropriate. *See United States v. Young*, 470 U.S. 1, 31 (1985) (Brennan, J., concurring); *see also, e.g.*, *Flowers v. Mississippi*, 139 S. Ct. 2228, 2251 (2019) (reversing decision of state court after finding "clear error" in its application of *Batson*); *Davis v. Ayala*, 576 U.S. 257, 260 (2015) (granting certiorari to correct "misapplication of basic rules regarding harmless error"); *see also Kyles v. Whitley*, 514 U.S. 419, 455 (1995) (Stevens, J., concurring) ("Our duty to administer justice occasionally requires busy judges to engage in a detailed review of the particular facts of a case, even though our labors may not provide posterity with a newly minted rule of law.").

## III. The state courts' decisions violate this Court's clearly established precedent.

The distressing impact of the Fifth Circuit's opinion is that a clearly established Confrontation Clause violation goes uncorrected due to the Fifth Circuit's faulty harmlessness analysis. The State now argues that the Fifth Circuit's departure from other circuits, rejection of the party-presentation rule, and misapplication of *Brecht* should be ignored because the revised panel opinion stops just short of declaring a clearly established constitutional viola-

tion. Opp. 14, 22. But the State's novel argument ignores the reality that every decision that turns on harmlessness will likely forego an analysis of the underlying constitutional issue. Under the State's reasoning, this Court should not resolve a circuit split or correct a habeas decision unless there has been a clear pronouncement of a constitutional violation, protecting countless errors that prevent consideration of the constitutional issue in the first place.

Remarkably though, here we *do* have a finding, by the *same* panel, that Mr. Atkins' Sixth Amendment rights were clearly violated. The Fifth Circuit's unanimous, original decision on this point is correct, and the revised decision does not state otherwise. *See* Pet. App. 56a–60a. Further, as the State admits, the original opinion correctly followed this Court's precedent, consulting its own precedent on clearly established Supreme Court law. Opp. 20 (citing *Marshall v. Rodgers*, 569 U.S. 58 (2013)); *see also* Pet. App. 58a-59a. Thus, the State's argument about the weakness of Mr. Atkins' constitutional claim requires overturning Fifth Circuit precedent, Opp. 21, and replacing it with a distinguishable *per curiam* decision from this Court, which involved evaluation of a doubly-deferential ineffective-assistance-of-counsel claim, an anonymous tip *that was not disputed*, and a limiting instruction to the jury, all of which were crucial in that case but not present here. Opp. 21 (citing *Woods v. Etherton*, 578 U.S. 113 (2016)).

But the State's argument confuses the proper analysis, as well as the rules of evidence and the Constitution. The question is not whether a state-

made "explain-the-investigation exception to hearsay" has been specifically addressed by this Court. Opp. 19. The question is whether the admission of Horton's out-of-court confession inculpating Mr. Atkins multiple times during the trial, and the condonation by the state court, violated clearly established Confrontation Clause precedent from this Court. It did. *See, e.g.*, *Crawford*, 541 U.S. at 59 ("Testimonial statements of witnesses absent from trial [can be] admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine."); *Bruton*, 391 U.S. at 135–36 (holding that introduction at trial of nontestifying codefendant's confession implicating defendant violates the Confrontation Clause); *Gray*, 523 U.S. at 196 (extending *Bruton* to redacted confession inculpating defendant). As these cases clearly establish, the "'powerfully incriminating extrajudicial statements of a codefendant'—those naming another defendant—considered as a class, are so prejudicial," "devastating," and yet "unreliab[le]," that their introduction cannot be allowed. *Gray*, 523 U.S. at 192, 197; *Bruton*, 391 U.S. at 136–37.

The State's argument only confirms the need for federal court intervention. According to the State, Louisiana has adopted a rule of evidence—an exception to hearsay—that would routinely violate defendants' Sixth Amendment rights.[2] Opp. 17. This is the exact type of "extreme malfunctions in the state criminal justice systems" that AEDPA is de-

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[2] When testimonial evidence is involved, States are not afforded the same "flexibility in their development of hearsay law." *Crawford*, 541 U.S. at 68.

signed to address. Opp. 15 (quoting *Harrington v. Richter*, 562 U.S. 86, 102–03 (2011)).

## CONCLUSION

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

Respectfully submitted,

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