No. 23-5038

In the Supreme Court of the United States

KURT MICHAELS,

Petitioner,

v.

RON DAVIS, WARDEN, ET AL.,

Respondent.

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

BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTION PRESENTED

Whether the court of appeals properly applied the harmlessness standard of *Brecht v. Abrahamson*, 507 U.S. 619 (1993), to the facts of this case.

DIRECTLY RELATED PROCEEDINGS

United States Supreme Court:

Michaels v. California, No. 02-8767 (order denying petition for certiorari entered May 27, 2003).

United States Court of Appeals for the Ninth Circuit:

Michaels v. Davis, No. 15-99005 (opinion issued October 18, 2022; petition for rehearing denied February 1, 2023) (this case below).

United States District Court for the Southern District of California:

Michaels v. Davis, No. 04-cv-0122 (judgment entered February 11, 2015; motion to alter judgment denied March 12, 2015) (this case below).

California Supreme Court:

People v. Michaels, No. S016924, July 18, 2002 (judgment entered July 18, 2022; rehearing denied September 18, 2002).

In re Michaels, No. S071265, December 23, 2003 (habeas petition denied December 23, 2005).

In re Michaels, No. S147647, August 19, 2009 (habeas petition denied August 19, 2009).

Superior Court of San Diego County:

People v. Michaels, No. CRN 14859 (judgment entered July 13, 1990).

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STATEMENT

1. Petitioner was convicted and sentenced to death for murdering his girlfriend's mother, JoAnne Clemons.

Trial evidence showed that, in the fall of 1988, petitioner was dating Clemons's 16-year-old daughter, Christina. Pet. App. 9. Christina told petitioner that her mother physically and sexually abused her. *Id.* at 9-10. On September 29, Christina told petitioner she wanted Clemons killed. *Id.* at 10. Petitioner responded that they could "'knock off the old lady,'" to which Christina added, "'[a]nd then we can get the money.'" *Id.* Christina gave petitioner a key to Clemons's apartment, located in Escondido, California. *Id.* at 9-10.

The next night, petitioner got a roommate, Mark Hebert, to agree to go to Escondido to do a "tax"—a term they used for collecting debts by force or intimidation. Pet. App. 10. Although Hebert later backed out, petitioner persuaded another roommate, Darren Popik, to participate by telling him that Christina would inherit the proceeds of Clemons's $100,000 life insurance policy and promising Popik up to $5,000 plus whatever was in Clemons's apartment. *Id.* at 10-11.

On the night of October 1, petitioner and Popik left their apartment, telling roommate Velinda Davis that they were going to "tax" someone. Pet. App. 11. When they left, Davis noticed that a kitchen knife was missing. *Id.*

Petitioner and Popik got a ride to Clemons's apartment complex, where they waited outside until Clemons fell asleep. Pet. App. 11. Just after

midnight, petitioner and Popik entered the apartment using Christina's key and went to Clemons's bedroom. *Id.* at 11-12. When Clemons woke up, Popik began hitting her in the face while petitioner stabbed her until his knife broke. *Id.* Popik retrieved another knife from Clemons's kitchen, and petitioner used it to slash Clemons's throat. *Id.*

Neighbors heard the struggle and called the police. Pet. App. 12. Officers entered the apartment and found Clemons's dead body. *Id.* Popik was arrested nearby, but petitioner escaped in a prearranged getaway car. *Id.* Petitioner went to a nearby Marine base where he visited two acquaintances. *Id.* He told one of them that he had cut a woman's throat during a robbery. *Id.* He told the other that he was running from the law. *Id.* When asked if he had killed someone, petitioner motioned across his throat with his finger. *Id.*

2. a. Petitioner was charged with robbery, burglary, and capital murder. Pet. App. 13. The jury convicted him on all counts, and found beyond a reasonable doubt that the alleged special circumstances—financial gain, lying in wait, robbery, and burglary—were true. *Id.* at 13-14.

The prosecution's penalty-phase evidence centered on petitioner's past criminality. *See People v. Michaels*, 28 Cal. 4th 486, 502 (2002). As a juvenile, petitioner possessed a gun and stole guns. *Id.* As an adult, he was arrested multiple times for illegal knives. *Id.* A few months before Clemons's murder, petitioner, accompanied by two others, went to the apartment of Chad Fuller and pointed a pistol at him. *Id.* Petitioner told Fuller he made a living by

taking contracts to get people's property back, and that he was training his companion in that field. *Id.* He said that if Fuller called the police he would cut Fuller into little pieces. *Id.*

The prosecution also submitted evidence about a "hit list" petitioner told people he had, and expert evidence about petitioner's antisocial personality disorder and psychopathic behavior. *Michaels*, 28 Cal. 4th at 502; Pet. App. 86. And the prosecution played petitioner's recorded confession, which is further described below. *See post* p. 4.

The defense case included evidence about petitioner's troubled childhood, including instances when he became aware that his female family members were being abused. Pet. App. 15. A defense expert testified that petitioner was subject to his girlfriend's manipulation and would be severely angered by her report that her mother was abusing her. *Michaels*, 28 Cal. 4th at 507. The defense expert also agreed with the prosecution expert's conclusion that petitioner was a psychopath and "showed no remorse for his crimes." Pet. App. 87.

The prosecution's rebuttal included testimony by Christina about her prior statements saying petitioner had sometimes hurt her. *Michaels*, 28 Cal. 4th at 508. (That testimony came out of order, before the defense case had concluded, because the defense had just called Christina as their own witness

on one point. RT 5571-5596.[1]) The rebuttal also featured a note that petitioner had written to a prior lawyer, which is further described below. *See post* p. 5.

The jury selected a sentence of death. Pet. App. 15.

b. In this Court, petitioner seeks to overturn the penalty verdict. Pet. i. He seeks to overturn that verdict based on two items of evidence. The first is petitioner's recorded confession, given to police upon his arrest, which petitioner challenged at his trial under *Miranda v. Arizona*, 384 U.S. 436 (1966). *See* Pet. 17-24. In the confession, petitioner explained that his girlfriend had been "destroyed" by Clemons and that he committed the murder to protect her from Clemons's "beatings [and] abuse." Pet. App. 24. He said that he and Popik had waited outside Clemons's apartment until they thought she would be asleep, and that after entering the apartment Popik beat her and petitioner cut her throat. *Id.* Petitioner also alluded to some 20 other murders he claimed responsibility for, but when the detective said he thought petitioner was "making [those] up," petitioner agreed, saying that he had to keep that "story" alive but that his reputation on the street was not true. *Id.*

The trial court concluded that petitioner had validly waived his *Miranda* rights in the interview. C.A. S.E.R. 156-157. The court nonetheless placed limits on the prosecution's use of the confession in the trial's guilt-phase—allowing the prosecution to introduce only the portion of the confession that referred exclusively to Clemons's murder without reference to any other

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[1] RT refers to the Reporter's Transcript.

crimes. Pet. App. 24. At the penalty phase, however, the entire recording was allowed. *Id.* at 24-25. The jury was instructed, however, to use petitioner's comments about other crimes not for their truth but only as evidence of petitioner's mental state. *Id.* at 25.

The other evidence on which petitioner focuses is a note that the prosecution introduced in its penalty-stage rebuttal case. Petitioner had given the note to his attorneys during his preliminary hearing—where Popik, Christina, and petitioner were present as codefendants. Pet. App. 40. The note requested that no defendant be handcuffed to another and that Popik be seated apart from petitioner and Kristina—warning that they might not "restrain" themselves from "doing Popik bodily harm" if locked up to him or seated next to him. *Id.* at 40-41. Petitioner's counsel at the time had provided the note to the court under seal. *Id.* at 41. Later, after new counsel took over the case, various portions of the record were unsealed and the new counsel failed to take steps to keep the note private. *Id.* As a result, the prosecution became aware of it. *Id.* The trial court did not allow the note's introduction in the prosecution's penalty-phase case-in-chief. *Id.* at 42. But after defense witnesses testified that petitioner was non-violent, the court allowed the note in the prosecution's rebuttal. *Id.* at 42; *Michaels*, 28 Cal. 4th at 537. The petition and the decisions below refer to this note as the "Popik note."

3. On direct appeal, the California Supreme Court affirmed. *People v. Michaels*, 28 Cal. 4th 486 (2002). As relevant here, the court rejected

petitioner's argument that the trial judge violated *Miranda* by admitting the confession. *Id.* at 510. In the California Supreme Court's view, petitioner had not unequivocally invoked his rights with respect to all questioning; at most, petitioner had declined to answer one question. *Id.* The court agreed with petitioner that the admission of the note that petitioner had written to his attorneys violated the attorney-client privilege, but it held that the error was harmless. *Id.* at 538. Indeed, "[t]he jury might even have viewed it as favorable to [petitioner]," because the note could have been viewed as petitioner's way of enlisting the attorney's assistance to avert violence. *Id.*

4. Petitioner sought a writ of certiorari from this Court, which this Court denied. *See Michaels v. California*, 538 U.S. 1058 (2003) (No. 02-8767).

5. Petitioner filed two state habeas petitions. The first, which coincided with his direct appeal, was denied by the California Supreme Court in 2003. *See* Pet. App. 42. The second—filed while his federal habeas case was pending—included a claim that petitioner had received ineffective assistance of counsel when his attorneys allowed the Popik note to be disclosed. *Id.* In 2009, the California Supreme Court denied the second petition in a summary order. *Id.* The court ruled that the ineffective assistance claim about the note was untimely and successive, stating that it could have been raised in the earlier petition. *Id.*

6. Petitioner sought federal habeas relief in the United States District Court for the Southern District of California. The court denied his petition.

See Pet. App. 16-17. With respect to the confession, the court held that the California Supreme Court had not applied this Court's precedent unreasonably when it concluded that there was no *Miranda* violation. C.A. E.R. 20-30; *see id.* at 25 ("In light of the fact that Petitioner's statement was ambiguous, accompanied by laughter, and Petitioner did not indicate either his refusal to talk to police nor express an unequivocal assertion of his intention to stop the interrogation, the California Supreme Court was not unreasonable in concluding that Petitioner did not invoke his right to remain silent.").

With respect to the Popik note, the court concluded that the state court's rejection of petitioner's claim was not unreasonable and the note did not render the trial "fundamentally unfair." C.A. E.R. 103. The note was of only "minimal weight in relation to the other evidence introduced in aggravation," such as the "brutal" circumstances of Clemons's murder and petitioner's other criminal acts, all of which were "of much greater weight." *Id.*[2]

7. The court of appeals affirmed in a per curiam opinion, Pet. App. 2-79, with additional reasoning provided in an opinion written by Judge Bea and joined by Judge Gould, *id.* at 80-124.

a. The court first held that the California Supreme Court had violated this Court's clearly established precedent when, after determining that

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[2] *See also* C.A. E.R. 103 (observing that the note had been admitted for the limited purpose of rebuttal); *id.* at 104 (noting that when the trial court told the jury about the alleged criminal activity that had been introduced for its consideration, "the note was not among evidence listed").

petitioner had selectively invoked his *Miranda* rights, it neglected to determine the areas of questioning that should have been suppressed by the selective invocation. Pet. App. 32-33. Deciding the *Miranda* issue de novo as a result, the court of appeals held that as to the parts of the interrogation that did not relate to petitioner's involvement in Clemons's murder—such as petitioner's comments about killing others—there had been no invocation and the evidence was permissible. *Id.* at 35-36. As to the admission of portions of the confession that addressed "how the murder [of Clemons] had occurred," the court held that the trial court erred. *Id.* at 34. But the court ultimately concluded that habeas relief was unavailable under *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1997), because the confession did not have a "substantial and injurious effect or influence in determining the jury's verdict" at either the guilt or penalty phases of petitioner's trial. Pet. App. 36.

With respect to the guilt phase, the court considered this Court's warning about the damaging nature of confessions in *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991), as well as Ninth Circuit precedent that a defendant's erroneously admitted confession will seldom be harmless. Pet. App. 37. In this case, however, the court concluded that "the evidence at trial showing that [petitioner] committed capital murder was overwhelming even without the confession." *Id.*

With respect to the penalty phase, the court again acknowledged *Fulminante*'s warnings about the power of a confession. Pet. App. 80. But it

again concluded that there was no harm on the particular record here. The confession played a minor role in the prosecution's closing argument, *id.* at 83, and it was only "redundant" evidence for the points the prosecutor used it to prove, *id.* at 87; *see id.* at 85 (detailing other evidence, including petitioner's recounting of the murder details to multiple people); *id.* at 88 (observing that petitioner's financial motive for the murder was established through evidence separate from the confession). Indeed, the court noted that the confession may have helped petitioner in one regard by supporting his claim that he killed Clemons to protect Christina from Clemons's abuse. *Id.* at 89-90.

To the extent the confession illustrated a lack of remorse, that too was cumulative of other evidence. Even without the confession, the jury knew that petitioner had written his sister that he would "'never have any regret'" for killing Clemons, and that he had told his psychiatric expert that his only regret was stabbing Clemons when he should have shot her. Pet. App. 89-90. Petitioner's expert witness agreed with the prosecution's expert that petitioner was a psychopath and "showed no remorse for his crimes." *Id* at 87. Nor did the confession undercut petitioner's arguments in mitigation, since petitioner's primary mitigation argument—about his troubled childhood—was "skillfully rebutted" by the prosecutor in ways that had nothing to do with the confession. Pet. App. 89-90; *see id.* (noting prosecutor's argument that petitioner's other family members endured similar circumstances without turning into criminals).

b. With respect to counsel's failure to keep the Popik note private, the court first decided that petitioner's ineffective assistance claim could be considered on federal habeas because petitioner's procedural default was excusable. Pet. App. 43-60. The court determined that competent counsel would have prevented the note's disclosure to prosecutors, and that no reasonable jurist could fail to recognize as much. *Id.* at 60. Although that satisfied the deficient performance element of ineffective assistance under *Strickland v. Washington*, 466 U.S. 668 (1984), the court concluded that petitioner could not satisfy *Strickland*'s prejudice element, because the note—"even in combination with the confession evidence"—did not have a prejudicial effect on the jury. *Id.* at 91. The prosecution made "limited use" of the note, citing it only twice in an argument spanning 40 transcript pages. *Id.* at 90. And the note had "minimal evidentiary value," because whatever it showed about petitioner's dangerousness had already been established by independent evidence about petitioner's "'hit list' of future murders he wanted to commit for money and his great love of violence generally." *Id.*; *see also id.* (noting petitioner's statements that he would "'do [the Clemons murder] again'" and that, if he ever found his father, he would kill him too).

c. Judge Berzon concurred in part and dissented in part. Pet. App. 125-146. She agreed that any errors in the case did not affect the jury's guilt-phase verdict. *Id.* at 125. In her view, however, the admission of the confession and

of the Popik note could cumulatively have affected the penalty verdict, and she would have granted habeas relief as to the death sentence. *Id.* at 136-145.

ARGUMENT

In rejecting petitioner's claims, the court of appeals followed this Court's well-established precedent. The decision creates no conflict among the lower courts. No further review is warranted.

1. The petition primarily alleges harm from the erroneous admission of petitioner's confession during his trial's penalty phase in violation of *Miranda*. Pet. 1-2, 17-28.[3] This Court's precedent governing harmlessness for such errors is clear. "The test for whether a federal constitutional error was harmless depends on the procedural posture of the case." *Davis v. Ayala*, 576 U.S. 257, 267 (2015). On direct appeal, under *Chapman v. California*, 386 U.S. 18 (1967), the prosecution has the burden to show that a constitutional violation was "'harmless beyond a reasonable doubt.'" *Davis*, 576 U.S. at 267. In federal habeas, however, for reasons of "finality, comity, and federalism," a mere "'reasonable possibility' that the error was harmful" is not enough. *Id.*; *see id.* (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"). Instead, under *Brecht v. Abrahamson*, 507 U.S. 619 (1993), federal habeas petitioners must "establish that [the error] 'resulted in actual prejudice.'" *Davis*, 576 U.S. at

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[3] *But see* C.A. E.R. 25 (district court's conclusion that the California Supreme Court's adjudication of the *Miranda* issue "was neither contrary to, nor an unreasonable application of, clearly established federal law").

267 (quoting *Brecht*, 507 U.S. at 637). For that test to be satisfied, the record must at least give rise to "grave doubt" about whether the error "had 'substantial and injurious effect or influence in determining the jury's verdict.'" *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995).

As to the ineffective assistance claim, Pet. 28-30, the controlling legal standard asks if it is "'reasonably likely' the result would have been different" with effective counsel. *Harrington v. Richter*, 562 U.S. 86, 111 (2011). "The likelihood of a different result must be substantial." *Id.* Where a state court has concluded that the ineffective assistance caused no prejudice, moreover, a federal habeas court must defer to that finding unless it was "unreasonable." *Id.*

The court of appeals correctly denied petitioner relief under those tests. With respect to petitioner's confession, the court recognized that the prosecution's penalty-phase case mainly relied on petitioner's extensive and violent criminal history, to which the confession bore no relation. Pet. App. 83. To the extent the confession supported the prosecution's points about petitioner's dangerous personality and lack of remorse, those were independently established by other evidence—including petitioner's own expert. *Id.* at 86-87. And the confession allowed petitioner (who did not testify) to bolster his main mitigation argument, by providing in his own voice his claim that he committed the murder to protect his girlfriend from abuse. *See supra* p. 4. The court similarly concluded that the Popik note did not affect the

outcome of petitioner's case based on an analysis of the evidence as a whole. Pet. App. 93. Petitioner's dangerousness was established by other evidence—including statements petitioner had made to his own expert about his desire to kill his father and his feeling that he would commit the murder again (only in a different way). *Id.*

2. Petitioner's central contention is that the court of appeals' determination of harmlessness with respect to the confession violated this Court's decision in *Arizona v. Fulminante*, 499 U.S. 279 (1991). Pet. i, 20-24. That is incorrect.

The *Fulminante* defendant had been suspected of murdering his 11-year-old stepdaughter. *Fulminante*, 499 U.S. at 285. While imprisoned on other charges, the defendant was befriended by an informant who claimed to be a mobster. *Id.* at 283. In exchange for the informant's offer of protection from other inmates, the defendant admitted that he had sexually assaulted and killed the girl. *Id.* When the defendant was tried for the murder, the trial court admitted the confession but the Arizona Supreme Court determined it should have been suppressed. *See id.* at 284.

Although the defendant contended a rule of automatic reversal should be applied to the erroneously admitted confession on direct appeal, this Court held that *Chapman*'s "harmless beyond a reasonable doubt" standard for direct appeals applied. *Fulminante*, 499 U.S. at 295, 306-312. In applying that standard, this Court concluded that the State had "not carried its burden,"

reasoning that "a confession is like no other evidence" and "'is probably the most probative and damaging evidence that can be admitted against [the defendant].'" *Id.* at 296. "In the case of a coerced confession" such as *Fulminante*'s, the court explained, "the risk that the confession is unreliable, coupled with the profound impact that the confession has upon the jury, requires a reviewing court to exercise extreme caution before determining that the admission of the confession at trial was harmless." *Id.*

The court of appeals' decision here in no way contradicts *Fulminante.* The court of appeals quoted *Fulminante*'s exact language, and opined that, under Ninth Circuit precedent, "an erroneously admitted confession 'will seldom be harmless.'" Pet. App. 82. Having considered those warnings, however, the court concluded that a finding of harmlessness made sense in *this* case based on the entirety of the evidence and the focus of the penalty-phase arguments. Nothing in *Fulminante* required a different result. That is particularly so since, in this federal habeas case, harmlessness is governed by the "actual prejudice" test of *Brecht*—which is "more forgiving" and "less onerous" to the State than the *Chapman* standard that *Fulminante* applied. *Fry v. Pliler*, 551 U.S. 112, 116-117 (2007); *see Brown v. Davenport*, 142 S. Ct. 1510, 1519 (2022) (*Brecht* "effectively invert[s] *Chapman*'s burden").

b. Nor is petitioner correct to claim that the court of appeals violated other precedents of this Court. Petitioner asserts that, in basing its decision on the limited role that the challenged evidence played, the court of appeals

effectively "ignored" the warning in *Buck v. Davis*, 580 U.S. 100 (2017), that "'toxins can be deadly in small doses.'" Pet. 23-24; *but see* Pet. App. 54 (quoting that language from *Buck*). Nothing in *Buck*, however, implies that a habeas court should disregard the limited role that particular evidence played in a case. Nor is the "toxin[]" in *Buck*—an expert's purportedly scientific opinion that a Black defendant posed heightened danger because of his race—remotely comparable to the challenged evidence here. *See Buck*, 580 U.S. at 107, 119.

Petitioner also argues that the court of appeals violated *Kotteakos v. United States*, 328 U.S. 750 (1946), and *Sullivan v. Louisiana*, 508 U.S. 275 (1993), by giving inadequate consideration to the effect of the evidence on "*this* jury" as demonstrated by "the communications from the jurors and their behavior." Pet. 24-25. In petitioner's view, those cases foreclosed a finding of harmlessness here because the jury requested an opportunity to listen to the confession at the outset of deliberations and delivered its verdict shortly after receiving clarification about considering confessions under the corpus delicti rule. *Id.* at 25. But the events he describes—the request for the confession and clarification on the corpus delicti rule shortly before rendering a verdict—occurred at the *guilt* phase of the trial. *Id.* at 8. In this Court, petitioner does not challenge his guilt-phase verdict. *See* Pet. i. He challenges only the penalty

verdict, and he points to nothing in the penalty-phase deliberation indicating that the jury placed special weight on the confession at that stage.[4]

3. Petitioner contends that there is "conflict and confusion in the lower courts regarding harmless-error review of erroneously admitted confessions." Pet. 32, 39. The four cases petitioner cites do not support that contention.

In *Zappulla v. New York*, 391 F.3d 462, 465 (2d. Cir. 2004), a state court had held that the admission of a confession was error but that the error was harmless beyond a reasonable doubt under *Chapman*. *See* Pet. 32. The Second Circuit determined that federal habeas review should assess harmlessness not by applying the *Brecht* test but by deciding whether the state court's decision was contrary to, or involved an unreasonable application of *Chapman*. *Zappulla*, 391 F.3d at 467. That holding was later superseded by this Court's clarification that habeas petitioners must satisfy both tests to obtain relief. *See Brown v. Davenport*, 142 S. Ct. 1510, 1517 (2022). More importantly, *Zappulla*'s reasoning meant that the Second Circuit never considered how the confession should be analyzed under the *Brecht* test that is at issue here. *Zappulla*, 391 F.3d at 467-474. Nor does petitioner's case feature the facts that petitioner identifies as crucial to the *Zappulla*'s finding of prejudice. *See* Pet.

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[4] Although petitioner stresses that the jury's penalty-phase deliberation took three days, Pet. 10, 28, 33, that likewise did not require a finding of substantial and injurious effect. *Cf. Rushen v. Spain*, 464 U.S. 114, 120-121, 134 (1983) (unconstitutional ex parte communication between trial judge and juror was harmless beyond a reasonable doubt in case where jury deliberated for 24 days).

33 (deeming it "important[]" that in *Zappulla* "'the first trial resulted in a hung jury,'" and that in the retrial that resulted in conviction the prosecutor "shifted his focus . . . to the improperly admitted confession").

Petitioner's citation to *Kordenbrock v. Scroggy*, 919 F.2d 1091, 1096-1100 (6th Cir. 1990), is similarly off point. Pet. 34. That case—which predated *Brecht*, *Fulminante*, and AEDPA—similarly applied *Chapman*, not *Brecht*. *See id.* Its "fact specific" conclusion that the particular confession in that case was not harmless beyond a reasonable doubt, *Kordenbrock*, 919 F.2d at 1097-1098, creates no conflict with the application of the *Brecht* standard here. *See supra* p. 8.

Nor does the opinion here conflict with *Cooper v. Chapman*, 970 F.3d 720, 730 (6th Cir. 2020), or *Cooper v. Taylor*, 103 F.3d 366, 370 (4th Cir. 1996). *See* Pet. 34, 36. Those cases did apply *Brecht*. Like the court of appeals here, the Sixth and Fourth Circuits examined the facts of each case and held that the erroneous admission of a particular confession was harmless. *Cooper v. Chapman*, 970 F.3d at 730-733; *Cooper v. Taylor*, 103 F.3d at 370-372.[5] Although some judges in those cases dissented from the harmlessness determinations (Pet. 35, 37), the presence of dissents does not establish a circuit conflict between various courts of appeals. At most it reflects that,

[5] This Court denied certiorari in each case. *Cooper v. Chapman*, 141 S. Ct. 2644 (2021) (No. 20-7485); *Cooper v. Taylor*, 522 U.S. 824 (1997) (No. 96-8379).

although the test for harmlessness is clear, its application is highly fact-specific.

4. Petitioner advances two other reasons for this Court's review. He first asserts that there is a "conflict" in the lower courts "regarding the cumulative error doctrine." Pet. 39. According to the petition, the Ninth and Tenth Circuits have held that this Court's precedents have clearly established the cumulative error doctrine, allowing it to serve as a basis for federal habeas relief, whereas the Sixth Circuit has held that the doctrine is not clearly established or cognizable in habeas. *Id.* To the extent there is tension among various decisions on this subject, however, this case would not be the right vehicle for resolving it. The court of appeals applied the cumulative error doctrine to petitioner's claims and determined that the cumulative effect of petitioner's asserted errors was still harmless. Pet. App. 81, 91.

Petitioner next argues that he should not have been required to show prejudice at all. Pet. 39-40. Petitioner notes that *Brecht* left open the possibility that "in an unusual case, a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict." *Brecht*, 507 U.S. at 638 n.9. Petitioner asserts that judges on the Ninth Circuit have disagreed with each other as to what that statement means and urges this Court to grant certiorari to determine whether such an

exception in fact exists. Pet. 40 & n.14. But such an internal disagreement—which was nowhere voiced among the opinions in this case—would hardly be a reason for this Court to act. *See Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties."). Nor does this case feature the sort of "deliberate and especially egregious error" or "pattern of misconduct" that might make a case so "unusual" as to call into question whether a rule other than *Brecht* should apply. *See* Pet. App. 101-103 (concluding that there was *one* instance of prosecutorial misconduct in the form of improper argument). In any event, petitioner appears not to have made this argument to the court of appeals, and provides no reason why this Court should consider it now. *See* C.A. Dkt. 17 at 48-55 (opening brief); C.A. Dkt. 42 at 17-20 (reply brief).

5. Finally, the petition glosses over an array of factors that would make this case an especially poor vehicle in which to further develop the *Brecht* doctrine. It ignores the complicated question of procedural default with respect to petitioner's claim of ineffective assistance of counsel in allowing the admission of the Popik note. That issue took the Ninth Circuit 17 pages to resolve. Pet. App. 43-60. This Court would have to review that analysis and consider the State's arguments before it could reach the question whether counsel's purported ineffectiveness, when combined with the erroneous confession, could establish cumulative prejudice. And petitioner's claims about harm from the Popik note would also require consideration of any deference

due, under Section 2254(d) and (e), to the California Supreme Court's determination that it was "not reasonably possible that [the note's] admission made the difference between a verdict of death and one of life imprisonment without possibility of parole." *People v. Michaels*, 28 Cal. 4th 486, 538 (2002).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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