No. 14-430

In The Supreme Court of the United States

BENNIE KELLY, WARDEN,

Petitioner,

v.

WILLARD MCCARLEY.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Sixth Circuit correctly followed this Court's holding in *Fry v. Pliler*, 551 U.S. 112, 121-122 (2007), that "in § 2254 proceedings a court must assess the prejudicial impact of constitutional error in a state-court criminal trial under the 'substantial and injurious effect' standard set forth in *Brecht* [*v. Abrahamson*, 507 U.S. 619 (1993)], whether or not the state appellate court recognized the error and reviewed it for harmlessness under the 'harmless beyond a reasonable doubt' standard set forth in *Chapman* [*v. California*], 386 U.S. 18 [(1967)]."

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STATEMENT

A. Legal Background

In *Chapman v. California*, this Court held "that before a federal constitutional error can be held harmless" on direct review, "the court must be able to declare a belief that [the error] was harmless beyond a reasonable doubt," 386 U.S. 18, 24 (1967). The Court later set forth a more forgiving (and thus harder-to-satisfy for habeas petitioners) standard for evaluating constitutional errors on *collateral review*: such errors are harmless unless they result in "actual prejudice," *i.e.*, unless the error had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (quoting *Kotteakos v. United States*, 328

U.S. 750, 776 (1946)). If the reviewing court harbors "grave doubt" on that issue, the error is not harmless under *Brecht*. *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995).

After *Brecht*, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). As relevant here, AEDPA bars habeas relief "with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim *** resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1). AEDPA does not purport to bar or limit collateral review of exhausted constitutional claims that were not adjudicated "on the merits."

This Court later applied AEDPA to a state court's application of *Chapman* harmless-error analysis in *Mitchell v. Esparza*, 540 U.S. 12 (2003) (per curiam). *Mitchell* held that a state court's *Chapman* analysis may be set aside on federal habeas review only if the resulting judgment was contrary to, or an unreasonable application of, clearly established law—*i.e.*, if the state-court conclusion that the constitutional error was harmless beyond a reasonable doubt was "unreasonable." *Id.* at 18. This form of review is known as the "AEDPA/*Chapman*" analysis.

Four years later, this Court clarified that the harmlessness of state-court constitutional errors must always be assessed under *Brecht*, "whether or not" the state court conducted a *Chapman* inquiry. *Fry v. Pliler*, 551 U.S. 112, 121-122 (2007). The Court explained that "[g]iven our frequent

recognition that AEDPA limited rather than expanded the availability of habeas relief, it is implausible that, without saying so, AEDPA replaced the *Brecht* standard of 'actual prejudice' with the more liberal AEDPA/*Chapman* standard which requires only that the state court's harmless-beyond-a-reasonable-doubt determination be unreasonable." *Id.* at 119-120 (citations omitted). For that reason, the Court concluded, "[i]t certainly makes no sense to require formal application of *both* tests (AEDPA/*Chapman* and *Brecht*) when the latter obviously subsumes the former." *Id.* at 120.

B. Factual Background

1. In 1992, Charlene Puffenbarger was killed at her home. Puffenbarger's son, "D.P.," was three years old at the time. Pet. App. 4a. D.P. made certain statements to the police and his grandmother suggesting that he was an eyewitness to the killing. *Id.* at 4a-5a. The police suggested that D.P. be interviewed by Dr. Dawn Lord, a child psychologist. Dr. Lord was asked to convey any relevant facts gleaned from her sessions with D.P. to police so that they could be used in the investigation. The police made clear that they "absolutely planned to use any information provided by Dr. Lord" to "assist [them] with identifying the persons responsible for the murder." *Id.* at 12a; *see id.* at 23a.

D.P. met with Dr. Lord several times during the six months following Puffenbarger's death. The substance of those meetings was memorialized in three letters from Dr. Lord to the officer in charge of the investigation. Pet. App. 6a. As relevant here, the letters recounted D.P.'s memories of the killing,

including that there were two perpetrators; that both were white males dressed in black clothing that resembled uniforms; and that Puffenbarger had let them into her home "without a struggle." *Id.* at 9a. According to Dr. Lord, D.P. told her that a man named "Tim"—also the name of one of Puffenbarger's former boyfriends—was responsible. *Id.* at 7a. Dr. Lord also recounted that she had presented D.P. with a series of photographs of possible suspects during one of their meetings, and that D.P. had identified Respondent William McCarley as the killer. *Id.* at 9a.

Other than D.P.'s statements to Dr. Lord, no evidence directly tied McCarley to the crime. The State's other "circumstantial" (Pet. App. 29a) evidence consisted of: (1) witness testimony that McCarley and Puffenbarger had been arguing over child-support payments before her death, that McCarley had attempted to intimidate her into dropping a child-support suit, and that he may have been violent with her in the past; (2) DNA evidence recovered from the murder weapon (a belt) suggesting that McCarley or a paternal member of McCarley's family—such as McCarley's son, who also lived in the house, or McCarley's father, who frequently visited—was the source of the sample; (3) certain excited utterances D.P. made to the police officers at the scene and to his grandmother, suggesting that a man in uniform had murdered his mother; (4) witness testimony that McCarley purportedly had admitted to killing an unspecified person at an unspecified time; and (5) police testimony that, several years after the murder, an officer investigating an unrelated matter confiscated

a deputy sheriff's jacket and cap from McCarley's garage. *Id.* at 25a-29a.

2. McCarley was indicted for Puffenbarger's murder in 2004, twelve years after she was killed. After a jury trial, his initial conviction was overturned on direct appeal due to concerns that the trial court had impermissibly bolstered Dr. Lord's (one of the State's chief witnesses) credibility and reputation in the community. Pet. App. 117a-129a. D.P., a teenager by the time McCarley was indicted, testified at McCarley's first trial that he had no recollection of the events surrounding his mother's death or of his conversations with Dr. Lord. *Id.* at 15a.

After a second trial in 2007, McCarley was found guilty of aggravated murder and sentenced to life imprisonment with the possibility of parole after 20 years. Pet. App. 36a. Although the State again relied on D.P.'s recounting of his mother's murder to Dr. Lord as conveyed in the 1992 letters, D.P. was not called to testify at the second trial. *Id.* at 80a. Dr. Lord did testify, but she had no recollection of her conversations with D.P. *Id.* at 48a. Instead, and over defense counsel's objection, the trial court permitted Dr. Lord to read her 1992 letters recounting D.P.'s statements to the jury. *Id.* at 6a.

3. McCarley appealed to the Ohio Court of Appeals, arguing (as relevant here) that allowing Dr. Lord to testify for D.P. by proxy through her 1992 letters to police violated his rights under the Confrontation Clause of the Sixth Amendment to the U.S. Constitution. Pet. App. 108a-109a. The Ohio Court of Appeals "note[d]" its "doubt" that D.P.'s

statements to Dr. Lord were testimonial under *Crawford v. Washington*, 541 U.S. 36 (2004). Pet. App. 109a. It then held that "[e]ven assuming it was error to allow Dr. Lord to testify," any "purported error [was] harmless" because there was not a "reasonable possibility that the evidence complained of might have contributed to the conviction." *Id.* (citing *Chapman*, 386 U.S. at 23). The Ohio Court of Appeals believed that D.P.'s testimony was merely "corroborative" of other "similar, if not identical" statements that D.P. had made to his grandmother and police in the days following Puffenbarger's murder. *Id.* at 109a, 110a. It thus concluded that McCarley had not shown "that Dr. Lord's testimony, rather than D.P.'s other statements, contributed to his conviction." *Id.* at 110a.

The Ohio Supreme Court denied review. Pet. App. 96a.

4. McCarley petitioned for habeas relief in federal district court under 28 U.S.C. § 2254. As relevant here, he argued that "admit[ting] out of court statements made by a child when the adult interviewer, working at the behest of law enforcement, deliberately elicited the statements to investigate a past crime" violated his rights under the Confrontation Clause. Pet. App. 59.

The magistrate judge who screened McCarley's petition recommended that relief be denied, Pet. App. 58a-95a, and the district court adopted that recommendation, *id.* at 33a-57a. The district court agreed with McCarley that the introduction of D.P.'s out-of-court statements to Dr. Lord violated the Confrontation Clause, but held than the error was

harmless under *Brecht*. It found that Dr. Lord's testimony was duplicative and thus "was not the only manner by which the prosecution could have informed the jury of the details surrounding the homicide and link [McCarley] to the crime." *Id.* at 51a.

5. The Sixth Circuit reversed the district court's judgment and directed it on remand to issue a conditional writ of habeas corpus. Pet. App. 1a-32a.

The Sixth Circuit first determined that because the Ohio Court of Appeals had "made a point of *not deciding*" McCarley's Confrontation Clause claim "on the merits," AEDPA's relitigation bar (28 U.S.C. § 2254(d)) did not apply. Pet. App. 16a-17a. The court thus reviewed the claim *de novo*. *Id*. at 17a.

Turning to the merits, the Sixth Circuit held that McCarley had established a Confrontation Clause violation, as D.P.'s statements "constitute[d] testimonial evidence" under *Crawford*. Pet. App. 23a. "Although Dr. Lord is not a member of the police department," the court reasoned, she was "'at least [an] agent[] of law enforcement' such that her acts could likewise be considered 'acts of the police.'" *Id*. at 22a-23a (quoting *Davis v. Washington*, 547 U.S. 813, 823 n.2 (2006)) (alterations in original); *see also id.* at 23a (finding that the "primary purpose" of D.P.'s meetings with Dr. Lord was "to establish or prove past events potentially relevant to later criminal prosecution" in an "interrogation-like atmosphere absent an ongoing emergency").

The Sixth Circuit next considered whether the error had been harmless under *Brecht*, which "is

always the test" in the Sixth Circuit in evaluating harmlessness "on collateral review." Pet. App. 24a (quoting *Ruelas v. Wolfenbarger*, 580 F.3d 403, 412 (6th Cir. 2009)). The court of appeals asked whether the constitutional error "'substantially influenced the jury's decision,'" or at least whether the court was "'left in grave doubt'" as to that issue. Pet. App. 24a (emphasis omitted) (quoting *O'Neal*, 513 U.S. at 436, 438). Applying that rule in connection with the five harmlessness factors identified in *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986), the court held that it had "grave doubts" as to whether Dr. Lord's improperly admitted testimony had not had "a 'substantial and injurious effect or influence in determining the jury's verdict.'" Pet. App. 29a (quoting *Brecht*, 507 U.S. at 637).[1]

Specifically, the court noted that a majority of the *Van Arsdall* factors weighed in McCarley's favor. *First*, the court observed that "[t]he importance of Dr. Lord's testimony to the prosecution's case *** cannot be overstated." Pet. App. 25a. The prosecution read all of D.P.'s statements to Dr. Lord during closing argument, billed them as being "absolutely accurate as to what happened in this case," and stressed the fact that Dr. Lord had recounted that D.P. had

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[1] The *Van Arsdall* factors "include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." 475 U.S. at 684.

"[t]wice *** identified" McCarley as the murderer. *Id.* at 26a-27a.

Second, the court determined that while some of Dr. Lord's testimony may have been duplicative, it was not cumulative. Pet. App. 27a-28a. Instead, it was "more akin to a keystone holding the arch of the State's case together" because "[a]ll of the *** testimony paint[ed] a clear picture of the crime, but only when considered in light of Dr. Lord's testimony about D.P.'s statements to her." *Id.* at 28a. "Remove that crucial block, especially D.P.'s eyewitness identifications, and the State's case collapses into disjointed pieces." *Id.*

Third, the court noted that if the jury had not been presented with D.P.'s testimony identifying McCarley as the murderer, the State's case "would have been almost entirely circumstantial." Pet. App. 29a. The DNA evidence was inconclusive because it could not exclude McCarley's son or father as the source, and, other than D.P., no witness had specifically linked McCarley to the murder. "In sum," the court of appeals concluded, "without Dr. Lord's testimony, the prosecution's case was far from 'substantial and overwhelming,' as the district court described it." *Id.*[2]

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[2] Although the court found that two of the *Van Arsdall* factors favored the State, Pet. App. 28a-29a, it concluded that those factors did not carry as much weight as those favoring McCarley. *Id.* at 30a. That McCarley "had the opportunity to cross-examine the other witnesses" in his trial did not negate the "critical error" of not being allowed to cross-examine D.P., *id.*, and the fact that other testimony corroborated D.P.'s

In a brief concurring opinion, Judge Daughtrey expressed the view that the Ohio Court of Appeals, by conducting a harmlessness inquiry under *Chapman*, had actually adjudicated McCarley's Confrontation Clause claim "on the merits." Pet. App. 31a. She nevertheless reached the same conclusion as the majority because "there can be no doubt that the state court unreasonably applied settled federal constitutional law in concluding that McCarley was not prejudiced by the admission of the challenged testimony." *Id.* at 32a.

Petitioner did not seek rehearing or rehearing *en banc*.

REASONS FOR DENYING THE PETITION

In *Fry v. Pliler*, 551 U.S. 112, this Court made clear that federal courts must adjudicate the harmlessness of constitutional errors in state-court proceedings under the "actual prejudice" framework set forth in *Brecht,* "whether or not" the state court itself recognized the error and evaluated it for harmlessness. *See id.* at 121. Faithfully applying *Fry*, the Sixth Circuit correctly determined on the record below that the Confrontation Clause violation in McCarley's state-court trial was not harmless under *Brecht*.

The court of appeals' straightforward application of this Court's precedent is consistent with the law of every circuit court to have considered the issue and does not warrant further review. The "three way[]"

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account of the murder only underscored the importance of his testimony to the State's case. *Id.*

split Petitioner purports to identify over the application of *Fry* (Pet. 22) does not exist; at most, there is a "technical[]" disagreement that is of no practical consequence under this Court's precedents. Nor do the courts of appeals "disagree about whether (and to what extent) *Brecht* requires deference to state harmless-error findings," Pet. 25; on the contrary, all courts apply *Brecht's* collateral review standard without deferring to the state court's harmless-beyond-a-reasonable-doubt determination.

This case is also a poor vehicle through which to resolve any purported conflict. First, in light of the Sixth Circuit's uncontested conclusion that the state appellate court had not adjudicated the Confrontation Clause claim "on the merits," Section 2254(d)(1)'s deferential standard does not even apply. Second, Petitioner expressly argued below that *Brecht* should apply and therefore invited the Sixth Circuit's alleged "error." Finally, even if the court of appeals could have applied Section 2254(d)(1) to a claim not adjudicated "on the merits," any alleged error in its application of harmlessness review could not have affected the outcome. Judge Daugherty's concurring opinion, expressing "no doubt" that the Ohio Court of Appeals unreasonably applied *Chapman* review, confirms as much. That is entirely unsurprising given this Court's holding that the standard Petitioner now seeks is "subsumed" within—and is thus even *easier* for a habeas petitioner to satisfy—than the *Brecht* standard Petitioner sought and the court of appeals applied below.

I. THE DECISION BELOW CORRECTLY APPLIES THIS COURT'S PRECEDENT

In *Fry*, this Court held that "in § 2254 proceedings a court *must* assess the prejudicial impact of constitutional error in a state-court criminal trial under the 'substantial and injurious effect' standard set forth in *Brecht*, *** *whether or not* the state appellate court recognized the error and reviewed it for harmlessness under the 'harmless beyond a reasonable doubt' standard set forth in *Chapman*." 551 U.S. at 121-122 (emphasis added). As this Court explained, the more forgiving (and thus harder-to-satisfy for a habeas petitioner) "actual prejudice" test (*Brecht*) "obviously subsumes" any question of whether the state court acted unreasonably in finding an error harmless beyond a reasonable doubt (AEDPA/*Chapman*), and it would make "no sense to require formal application of *both* tests." *Id*. at 120. This Court has further recognized that "[w]hen a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict,' that error is not harmless." *O'Neal*, 513 U.S. at 436.

Taking the Court at its word, the Sixth Circuit applied *Brecht* to McCarley's Confrontation Clause claim. After reviewing the record evidence in light of the state court's factual findings and the *Van Arsdall* harmlessness factors, the Sixth Circuit granted McCarley relief because it had "grave doubts as to whether the violation of McCarley's rights under the Confrontation Clause had a 'substantial and injurious effect or influence in determining the jury's

verdict." Pet. App. 29a (citation omitted). That was a straightforward and reasonable application of this Court's precedents.

Petitioner offers no alternative reading of *Fry* that would support a different result. Petitioner nowhere even mentions *Fry*'s mandate that federal courts on habeas review "must" apply *Brecht* "whether or not" the state court reviewed for harmlessness under *Chapman*. *Fry*, 551 U.S. at 121-122. Even where the state court has conducted *Chapman* review, the habeas court's application of *Brecht* is necessarily *de novo* in the sense that it embodies a different—more forgiving—legal standard of harmlessness. And whether labeled *de novo* or not, a properly conducted *Brecht* analysis (as the Sixth Circuit conducted here) defers to state-court factual findings. *See* 28 U.S.C. § 2254(e)(1); *see also, e.g.*, *Blackston v. Rapelje*, 769 F.3d 411, 429 (6th Cir. 2014) ("The deferential posture of § 2254(d)(1) is understood to be 'subsume[d]' within *Brecht* review, which is itself deferential.") (alteration in original). Accordingly, *Fry* already answers the questions Petitioner presents.

Petitioner nevertheless suggests (Pet. 20) that post-*Fry* developments have undermined that decision. Perhaps *Brecht* does not in fact subsume AEDPA/*Chapman*, the petition posits, because AEDPA as construed today is more deferential than when *Fry* was decided in 2007. But all of the cases on which Petitioner relies (Pet. 20-21, 24) reiterate principles that pre-date *Fry*. *See, e.g.*, *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011) ("Section 2254(d) reflects the view that habeas corpus is a 'guard

against *extreme malfunctions* in the state criminal justice systems[.]'") (emphasis added) (quoting *Jackson v. Virginia*, 443 U.S. 307, 332, n.5 (1979) (Stevens, J., concurring in judgment)). Reading subsequent AEDPA jurisprudence to undercut *Fry* is particularly odd given that *Fry*'s holding expressly accounts for AEDPA's deferential posture. *See Fry*, 551 U.S. at 119-120 (Congress, through AEDPA, did not "replace[]" *Brecht* "with the more liberal AEDPA/*Chapman* standard"); *see also Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000) ("This Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*.").[3]

II. NO RELEVANT CIRCUIT CONFLICT EXISTS

Masking what is really a disagreement with this Court's clear command in *Fry*, Petitioner alleges two circuit conflicts over *Fry*'s meaning. But every circuit to have addressed the question agrees that *Fry* meant what it said: a federal habeas court evaluating the harmlessness of a constitutional error need apply only *Brecht*, not AEDPA/*Chapman*. There thus is no circuit conflict for this Court to resolve.

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[3] *Harrington*, which cited neither *Brecht* nor *Fry*, did not even consider harmlessness or prejudice as a freestanding inquiry. Because *Harrington* involved an ineffective assistance of counsel claim, governed by the "highly deferential" standards of *Strickland v. Washington*, 466 U.S. 668, 689 (1984), and Section 2254(d), AEDPA is "doubly" deferential in that context. 131 S. Ct. at 788.

1. Petitioner contends (Pet. 22) that courts are split over how to apply *Fry* "where *** a state court *has* engaged in *Chapman*'s harmless-error analysis." In particular, Petitioner asserts (Pet. 23) that in *Johnson v. Acevedo*, 572 F.3d 398 (7th Cir. 2009), the Seventh Circuit—alone among the courts of appeals [4]—adopted a "two-part" harmlessness test that prohibits courts from conducting a *Brecht* analysis before first determining that the state court's *Chapman* determination was unreasonable under AEDPA. *See id.*

As *Johnson* makes clear, however, no court—not even the Seventh Circuit—will grant habeas relief without first finding *Brecht* satisfied. *See* 572 F.3d at 404 (if state-court *Chapman* analysis unreasonable, court still "must apply the *Brecht* standard to determine whether the error was harmless"). So *Brecht* still controls.

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[4] It is undisputed (*see* Pet. 23-24) that the other ten circuits to have addressed the issue are in agreement with the decision below, per *Fry*, that *Brecht* "subsumes" AEDPA/*Chapman*. *See Connolly v. Roden*, 752 F.3d 505, 509-511 (1st Cir.), *petition for cert. filed*, No. 14-6852 (Oct. 20, 2014); *Wood v. Ercole*, 644 F.3d 83, 93-94 (2d Cir. 2011); *Bond v. Beard*, 539 F.3d 256, 275-276 (3d Cir. 2008); *Bauberger v. Haynes*, 632 F.3d 100, 104-105 (4th Cir. 2011); *Burbank v. Cain*, 535 F.3d 350, 356 (5th Cir. 2008); *Ruelas v. Wolfenbarger*, 580 F.3d 403, 411-413 (6th Cir. 2009); *Jackson v. Norris*, 573 F.3d 856, 858 (8th Cir. 2009); *Ayala v. Wong*, 756 F.3d 656, 674 & n.13 (9th Cir.), *cert. granted sub nom. Chappell v. Ayala*, 135 S. Ct. 401 (Oct. 20, 2014); *DeRosa v. Workman*, 679 F.3d 1196, 1233 (10th Cir. 2012); *Burns v. Secretary, Fla. Dep't of Corr.*, 720 F.3d 1296, 1305 (11th Cir. 2013).

Two years after *Johnson*, moreover, the Seventh Circuit recognized that while "[t]echnically" it applies *Johnson*'s two-step approach, the fact that *Brecht* "obviously subsumes" AEDPA/*Chapman* means that, practically speaking, satisfying the former test means satisfying the latter as well. *See Jones v. Basinger*, 635 F.3d 1030, 1052 & n.8 (7th Cir. 2011) (quoting *Fry*, 551 U.S. at 120). The Seventh Circuit thus explicitly applied *Brecht* before AEDPA/*Chapman*. *See id.* ("Because we conclude below that the placement of Lewis' statement before the jury caused Jones 'actual prejudice' under *Brecht*, the state court of appeals' application of *Chapman* harmless error analysis was clearly unreasonable as well."). A mere "technical[]" distinction without practical consequence hardly makes a circuit conflict worthy of this Court's intervention. *See id.*[5]

Petitioner further suggests that of the remaining circuits (all of which expressly agree that *Brecht* is the proper test), some have held that AEDPA/*Chapman* "does not survive *Fry*," Pet. 23 (quoting *Wood v. Ercole*, 644 F.3d 83, 93-94 (2d Cir. 2011)), while others (including the Sixth Circuit) have "adopted a flexible approach that allows, but does not require, courts to look to *Esparza* before *Brecht*," *id.* at 22-23. Again, Petitioner cannot point to any case in which that distinction did (or could) make any practical difference, given that (1) every

[5] Any intra-circuit tension between the Seventh Circuit's post-*Jones* decisions and *Johnson*, of course, does not warrant this Court's review. *See Wisniewski v. United States*, 353 U.S. 901, 902 (1957).

circuit agrees that habeas relief is available only to those who can satisfy *Brecht*'s standards, and (2) every circuit follows this Court's guidance that *Brecht* "obviously subsumes" AEDPA/*Chapman*.

2. Petitioner's "split over deference" (Pet. 25) is the other side of the same coin. Courts do not "disagree about whether (and to what extent) *Brecht* requires deference to state harmless-error findings," for the obvious reason that the standard a state court applies on direct review (*Chapman*) is very different than the one a federal court applies on collateral review (*Brecht*). Indeed, in applying *Brecht*, this Court has instructed federal habeas courts to "ask directly, 'Do I, the judge, think that the error substantially influenced the jury's decision.'" *O'Neal*, 513 U.S. at 436.

The three out-of-context statements Petitioner proffers (Pet. 25-26) fall far short of establishing a circuit split. *First*, Petitioner points to the First Circuit's statement that *Brecht* is "even more deferential than the ordinary standard of review" under AEDPA. *Connolly v. Roden*, 752 F.3d 505, 506 (1st Cir. 2014). In context, that statement refers to *Fry*'s holding that satisfying *Brecht* is more difficult for a habeas petitioner than satisfying AEDPA/*Chapman*. In other words, it simply means that *Brecht* is "more deferential" to the State as defender of its state-court convictions, and does not speak to deference to a state court's specific determinations on harmlessness.

Second, the Eleventh Circuit's statement faulting a district court for "afford[ing] virtually no deference to the Florida Supreme Court[]" in

applying harmless error review was plainly a reference to the district court's application of AEDPA/*Chapman*, given that it applied *Brecht* "*de novo*" later in the same opinion. *Mansfield v. Secretary, Dep't of Corr.*, 679 F.3d 1301, 1309, 1313 (11th Cir. 2012). That case thus cannot stand for the proposition that *de novo* review is incompatible with *Brecht*.

Third, the Tenth Circuit's ambiguous statement regarding affording "deference" under *Brecht* appears to refer only to the fact that federal courts defer to state court "factual findings." *Humes v. Arellano*, 413 F. App'x 68, 71 (10th Cir. 2011) (citing 28 U.S.C. § 2254(e)(1)). In any event, such a statement in an unpublished opinion does not even bind the Tenth Circuit, never mind present a circuit conflict demanding this Court's attention.

III. THIS CASE IS A POOR VEHICLE FOR CERTIORARI REVIEW

Even if there were meaningful disagreement among the courts of appeals on how harmless error is to be assessed on collateral review after *Fry*, this case is a poor vehicle to resolve that conflict, for at least three reasons.

1. The Sixth Circuit concluded as a threshold matter that there was no state-court adjudication of the Confrontation Clause claim "on the merits"—a predicate for triggering AEDPA/*Chapman* analysis. AEDPA's relitigation bar applies on federal habeas review only with respect to a "claim" that was "adjudicated on the merits in State court proceedings." 28 U.S.C. § 2254(d); *Harrington*, 131

S. Ct. at 784 (Section 2254(d) "bars relitigation of any claim 'adjudicated on the merits' in state court, subject only to the exceptions" in subsections (d)(1) and (d)(2)). When an exhausted claim is not "adjudicated on the merits," it is reviewed *de novo*. *See Cone v. Bell*, 556 U.S. 449, 472 (2009).

Here, the Sixth Circuit concluded that McCarley's lone constitutional claim was not "adjudicated on the merits in state court," Pet. App. 16a-17a—an issue on which Petitioner does *not* seek this Court's review. Thus, although the Sixth Circuit evaluated McCarley's claim for harmlessness, Section 2254(d)'s relitigation bar—including its deferential "unreasonable application of[] clearly established *** law" exception, 28 U.S.C. § 2254(d)(1)—was never triggered. *See Harrington*, 131 S. Ct. at 784 (noting that Section "2254(d) applies when a 'claim,' not a component of one, has been adjudicated"). In light of the Sixth Circuit's unchallenged holding that the claim was not adjudicated "on the merits," neither circuit conflict that Petitioner alleges—both of which involve the interaction between *Brecht* and Section 2254(d) for claims decided "on the merits"—is implicated in this case.

2. Petitioner took a position in the courts below directly contrary to the one he advances here, arguing that "a federal habeas court *must* assess the prejudicial impact of [a] constitutional error under the 'substantial and injurious effect' standard set forth in *Brecht*." Br. for Respondent-Appellee 33, No. 12-3825 (6th Cir. filed June 19, 2013) (emphasis added); Respondent's Answer/Return of Writ 45, No. 5:09CV2012 (N.D. Ohio filed Dec. 18, 2009) ("In

federal habeas review, an error is harmless unless it 'had [a] substantial and injurious effect or influence in determining the jury's verdict.'") (quoting *Fry*, 551 U.S. at 116). This Court generally does not decide questions not "raised or litigated" below, especially where, as here, the Petitioner actually argued the contrary position. *See City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 259 (1987) (per curiam) (dismissing writ as improvidently granted and noting the "considerable prudential objection to reversing a judgment because of instructions that petitioner accepted, and indeed itself requested"). Petitioner was content to rely on *Brecht*'s "actual prejudice" standard over the "more liberal AEDPA/*Chapman* standard" when he felt that it gave him a better shot of winning on collateral review, *see Fry*, 551 U.S. at 119, 120, and should not be heard to complain when that strategy did not work out.

3. At bottom, Petitioner seeks little more than fact-bound error correction. Petitioner suggests that the Sixth Circuit erred in finding prejudice under *Brecht* because "fairminded jurists [could] disagree" about whether the Confrontation Clause violation in this case was "harmless beyond a reasonable doubt" under AEDPA/*Chapman*. *See* Pet. 30-33 (internal quotation marks omitted). But given that that "more liberal" test is easier for a habeas petitioner to satisfy than *Brecht*, *see* p. 12, *supra*, Petitioner is essentially arguing that the Sixth Circuit misapplied *Brecht* to the evidence in this case.

In any event, there is no reason to believe that resolution of the question presented in Petitioner's favor would change the ultimate outcome below. The

petition nowhere disputes that the manner in which D.P.'s testimonial statements were introduced to the jury violated the Confrontation Clause. As to prejudice, the Sixth Circuit's conclusion was well-founded. Altering the standard of harmlessness review would not diminish "[t]he importance of Dr. Lord's testimony to the prosecution's case"; the fact that the DNA evidence was inconclusive; and the fact that none of the other witnesses' testimony "specifically link[ed] McCarley to the murder." Pet. App. 25a, 29a-30a. Given the record, a more deferential standard would not eliminate the court of appeals' "grave doubts" over whether the unconstitutional introduction of an out-of-court statement from the lone identified eyewitness to the murder caused McCarley "actual prejudice."

Judge Daughtrey's concurring opinion is telling. Based on her view that there had been a state-court adjudication "on the merits," she apparently applied AEDPA/*Chapman* harmlessness analysis. Yet she found "no doubt that the state court unreasonably applied settled federal constitutional law in concluding that McCarley was not prejudiced by the admission of the challenged testimony." Pet. App. 32a (Daughtrey, J., concurring).

IV. THIS CASE SHOULD NOT BE HELD FOR *CHAPPELL v. AYALA*

In *Chappell v. Ayala*, No. 13-1428 (cert. granted Oct. 20, 2014), this Court will consider: (i) whether a state court adjudicates a claim of constitutional error "on the merits" for purposes of 28 U.S.C. § 2254(d)'s relitigation bar when it concludes that "any error, if one occurred, was harmless beyond a reasonable

doubt"; and (ii) whether the Ninth Circuit "properly applied the standard articulated in *Brecht*" to the facts of that case. *See* 135 S. Ct. 401 (2014).

The first question presented in *Chappell* is not presented in this case. Although the Sixth Circuit held that the state appellate court's adjudication of the Confrontation Clause claim was not "on the merits," Pet. App. 16a-17a, Petitioner has not sought review of that holding in this Court. The resolution of that issue, moreover, could not conceivably affect the outcome here: Petitioner challenges *only* the Sixth Circuit's harmless error determination, and *Brecht* is the operative standard for determining harmless error on collateral review "whether or not" the state court recognized and reviewed the error for harmlessness. *See* pp. 11-12, *supra*. If the Ninth Circuit's "on the merits" determination in *Chappell* is affirmed, the lack of a state-court adjudication "on the merits" in this case will provide an additional reason to deny this petition. *See* p. 19, *supra*. But the opposite is not true if *Chappell* is reversed, because the Sixth Circuit applied the correct standard (*Brecht*) in either event.

The second question presented in *Chappell* is not of consequence here either. Whether or not the Ninth Circuit "properly applied" *Brecht* on the facts of *Chappell* is a distinct and narrower question from that posited in this petition: whether the standards enunciated in *Brecht* (and *O'Neal*) should have been applied at all. *See* Pet. i. On that issue, moreover, the parties in *Chappell* (and the Ninth Circuit) all agree: "[F]ederal courts should assess whether an error warrants federal habeas relief using the 'actual

prejudice' standard of *Brecht*." Pet. Br. 38, No. 13-1428 (U.S. filed Dec. 9, 2014); Br. in Opp. 26, No. 13-1428 (U.S. filed Aug. 13, 2014); *Ayala*, 756 F.3d at 660 ("We review [for harmless error] under *Brecht*[.]"). Accordingly, this Court's resolution of whether the Ninth Circuit "properly applied" *Brecht* to *Chappell*'s facts will not affect this case.

CONCLUSION

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

Respectfully submitted.

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