No. 14-430

**In the Supreme Court of the United States**

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BENNIE KELLY, Warden,

*Petitioner*,

v.

WILLARD McCARLEY,

*Respondent*.

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*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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# REPLY BRIEF FOR PETITIONER

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At Willard McCarley's first trial for murdering Charlene Puffenbarger, McCarley cross-examined Puffenbarger's son, D.P., about D.P.'s out-of-court statements implicating McCarley. D.P. (a teenager at the time of trial) testified he could not remember the statements, which he made when he was just a three-year-old. Doc.7-2, Exhibits, 1-41, at 148, PageID#246. After the state intermediate court remanded McCarley's conviction for a second trial, nobody called D.P. On review of McCarley's fresh conviction, the state intermediate court found that D.P.'s failure to testify was harmless—even assuming the prosecution violated the Confrontation Clause by admitting his statements without calling him. Pet. App. 108a-10a. On habeas review, the Sixth Circuit disagreed with the state court (and the district court and magistrate judge) on this harmless-error question. When doing so, it reviewed the question *de novo*, Pet. App. 24a, and granted relief based only on its "grave doubts" about whether the alleged Confrontation Clause error was prejudicial, Pet. App. 29a.

The Warden's Petition showed that the Court should review the Sixth Circuit's decision. *First*, the Court's guidance is needed to address how federal habeas courts should apply the substantial-and-injurious effect test from *Brecht v. Abrahamson*, 507 U.S. 619 (1993), when a state court *has* made a harmless-error ruling. *Second*, circuit courts are split over the habeas standards to apply in that context. *Third*, this case raises an important and recurring question that strikes at the heart of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). *Fourth*, this case provides a good vehicle to address these issues.

McCarley's Brief in Opposition fails to rebut these reasons for the Court's review.

## I. MCCARLEY MISTAKENLY SUGGESTS THAT *FRY* RESOLVED ALL ISSUES IN THIS CASE

McCarley initially argues (at 12-14) that *Fry v. Pliler*, 551 U.S. 112 (2007), leaves no doubt that the Sixth Circuit applied the proper harmless-error standards. This assumes the answer to the question presented—the proper meaning of *Fry*. Contrary to McCarley's claim, the Court's review is needed to resolve issues that remain unclear even after *Fry*.

A. The Court's review is initially needed to determine the proper harmless-error rules for federal courts to apply when a state court *has* found that an alleged constitutional error was harmless beyond a reasonable doubt under *Chapman v. California*, 386 U.S. 18 (1967). Should a habeas court *initially* apply AEDPA's deferential review to the state court's *Chapman* holding or *immediately* proceed to a *de novo* review under *Brecht*'s substantial-effect test?

On this question, McCarley argues that *Fry* authoritatively determined that *Brecht*—and *only Brecht*—applies even when a state court *has* engaged in harmless-error review. Opp. 13. To do so, McCarley cites *Fry*'s statement that a habeas court should apply *Brecht*'s substantial-effect test, "*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 121-22 (emphasis added). But McCarley ignores that statement's context.

As the Petition noted (at 19-20), the question in *Fry* was *limited* to what standard applies "when the state appellate court failed to recognize the error and *did not review it for harmlessness*" under *Chapman*. 551 U.S. at 114 (emphasis added). *Fry* "assume[d] that the state appellate court did not determine the

harmlessness of the error under the *Chapman* standard." *Id.* at 116 n.1. And it "granted certiorari to decide a question that ha[d] divided the Courts of Appeals—whether *Brecht* or *Chapman* provides the appropriate standard of review when constitutional error in a state-court trial is *first* recognized by a federal court." *Id.* at 120 (emphasis added).

Furthermore, unlike in *Fry*, the Court in *Mitchell v. Esparza*, 540 U.S. 12 (2003) (per curiam), rejected a federal habeas claim in which the state court *had* applied *Chapman*. When doing so, the Court held that the state court's application of *Chapman* was not "unreasonable" within the meaning of 28 U.S.C. § 2254(d)(1). *See id.* at 17-18. "*Fry* did not overrule *Esparza*" or suggest that AEDPA disappears in the harmless-error context. *Johnson v. Acevedo*, 572 F.3d 398, 404 (7th Cir. 2009) (Easterbrook, J.).

B. The Court's review is also needed to address whether AEDPA affects the "grave doubt" modification of the *Brecht* test that the Court established in *O'Neal v. McAninch*, 513 U.S. 432 (1995). Specifically, do AEDPA's deferential standards alter *O'Neal*'s pre-AEDPA holding 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"? 513 U.S. at 436.

On this question, McCarley concludes that the Sixth Circuit's reliance on *O'Neal*'s "grave doubt" standard *automatically* follows from *Fry*'s incorporation of *Brecht*. Opp. 12. But *Fry* does not help him here. It said nothing about the continuing validity of *O'Neal*'s *pre-AEDPA* "grave doubt" standard *post-AEDPA*. Indeed, the State in *Fry* did not even raise a question about the proper understanding of *Brecht* after AEDPA. Rather, it "conceded throughout th[e]

§ 2254 proceeding that it [bore] the burden of persuasion." *Fry*, 551 U.S. at 121 n.3. Further, neither the majority nor the dissent in the *Fry* circuit decision had suggested that they had any doubt on the harmless (or harmful) nature of the alleged error—so *O'Neal*'s standard for close cases was not even implicated. *Id.* If anything, *Fry* has *undercut O'Neal*'s standard because its "language strongly implies that the burden is on the petitioner," not on the State (as it would be under *O'Neal*). *Connolly v. Roden*, 752 F.3d 505, 509 n.6 (1st Cir. 2014).

As the Petition noted (at 20-22), moreover, AEDPA and *O'Neal* are in some tension. It is not easy to see how a circuit court's "grave doubt" over whether an error is harmful, *O'Neal*, 513 U.S. at 436, shows that the state court's contrary holding that the error was harmless beyond a reasonable doubt qualifies as "the 'extreme malfunctio[n]' for which federal habeas relief is the remedy." *Burt v. Titlow*, 134 S. Ct. 10, 16 (2013) (citation omitted). Indeed, *O'Neal* agreed that it declined to adopt the rule that would have "help[ed] protect the State's interest in the finality of its judgments and would promote federal-state comity." 513 U.S. at 433. Those are the very values that Congress subsequently passed AEDPA to promote. *Duncan v. Walker*, 533 U.S. 167, 178 (2001) (noting that AEDPA was designed to "'further the principles of comity, finality, and federalism'" (citation omitted)). Finally, *O'Neal* made clear that it placed "the risk of doubt on the State." 513 U.S. at 439. But, under AEDPA, "[t]he petitioner carries the burden of proof" to establish that the state court unreasonably applied clearly established law. *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011).

All told, McCarley is at least mistaken to suggest that *Fry* issued a "clear command" on these addition-

al harmless-error questions. Opp. 14. That is evidenced by the fact that "the Courts of Appeals have differed in their interpretations of *Fry*." *Connolly*, 752 F.3d at 510. Whoever is right in this debate, it raises a question worthy of the Court's attention.

## II. McCarley Fails To Reconcile The Disagreement in The Circuit Courts

McCarley next asserts that the Petition exaggerates the disagreement within the circuits regarding the proper habeas standards to apply when a state court has reviewed an alleged error for harmlessness. Opp. 14-18. But the Court need not take the Warden's word for this conflict. As the First Circuit recently said, "[g]iven the apparent disagreement both between and within the various circuit courts, this field may be ripe for Supreme Court review." *Connolly*, 752 F.3d at 511 n.7 (noting that "[m]any of the cases attempting to apply *Fry* have . . . generated vigorous dissents"). McCarley fails to undermine the circuit conflicts that the Petition identified (at 22-27).

A. *Split Over The Test*. The circuits are split over whether federal courts must *exclusively* apply *Brecht* when considering whether an error was harmless. Pet. 22-25. Several circuits have held that federal courts should not consider whether a state court's finding of no error was an unreasonable application of *Chapman* before proceeding directly to *Brecht*. *See, e.g.*, *Wood v. Ercole*, 644 F.3d 83, 93-94 (2nd Cir. 2011) (holding that the "'unreasonable application of *Chapman*' standard does not survive *Fry*"). The Seventh Circuit, by contrast, *requires* habeas courts to consider whether a state court unreasonably applied *Chapman* under AEDPA before applying *Brecht*. *Johnson*, 572 F.3d at 404.

In response, McCarley claims that this debate is over a "technical" issue with no real-world relevance. That is so, he says, because even the Seventh Circuit applies *Brecht* after the AEDPA/*Chapman* standard, and because a habeas petitioner will *always* satisfy the AEDPA/*Chapman* standard if the petitioner also satisfies *Brecht*. Opp. 15. But the Seventh Circuit obviously did not think so; otherwise, it would have had no reason to require its two-part test. *See Johnson*, 572 F.3d at 404. Furthermore, that court did not believe that *Fry* commanded a different result, because the question in *Fry* "was not whether a federal court should disregard a state court's considered decision on the subject of harmless error," but "what a federal court should do if the state court concludes that no constitutional error occurred and therefore does not make a harmless-error decision." *Id.*

McCarley also suggests that *Jones v. Basinger*, 635 F.3d 1030 (7th Cir. 2011), eliminated this conflict. Opp. 16. While *Jones*'s analysis was conclusory, it did not abandon *Johnson*'s two-step analysis; it recognized that circuit precedent required it to consider a state court's harmless-error finding before granting habeas relief. *Id.* at 1052 n.8. That is made plain by recent Seventh Circuit decisions, which continue to look to the two-step analysis that *Johnson* established. In *Kamlager v. Pollard*, 715 F.3d 1010 (7th Cir. 2013), for example, the court rejected the petitioner's reliance on the *Brecht* standard because, "where, as here, the state court has conducted a harmless-error analysis, our role is to decide whether that analysis was a reasonable application of *Chapman*." *Id.* at 1016; *see also Ashburn v. Korte*, 761 F.3d 741, 754 (7th Cir. 2014).

B. *Split Over Deference.* The circuits have also diverged on the proper deference due to state courts

when those courts have undertaken harmless-error determinations. Pet. 25-27. Some circuits, like the decision below, give *no* deference to the reasoned decision of their state counterparts. Pet. App. 24a-30a. Others do take account of the state court's decision when determining whether an error was harmless. *See Connolly*, 752 F.3d at 511-15.

In response, McCarley says no split exists because the latter courts are really saying that the *Brecht* standard is "more difficult" to satisfy than the AEDPA/*Chapman* standard, not that a federal court should defer to a state court's analysis. Opp. 17. McCarley is mistaken. *Connolly*, for example, specifically rejected the habeas petitioner's view "that no deference to the state court is owed at all." 752 F.3d at 511 n.8. Likewise, the Eleventh Circuit found that "[i]n concluding that the error . . . was not harmless under *either* AEDPA/*Chapman or Brecht*, the district court improperly afforded virtually no deference to the Florida Supreme Court's reliance on the considerable body of evidence mounted against" the petitioner. *Mansfield v. Sec'y Dept. of Corr.*, 679 F.3d 1301, 1309 (11th Cir. 2012) (emphases added).

Regardless, even if these decisions do stand only for the principle that satisfying *Brecht* should be more difficult than satisfying AEDPA/*Chapman*, that would confirm the need for review. Other circuits have *not* applied the harmless-error inquiry with anything near the deference this Court has applied under AEDPA. McCarley overlooks the many dissents making that very point. *See Wood*, 644 F.3d at 101 (Livingston, J., dissenting) (criticizing majority for losing sight of the reasons "*why* the Supreme Court in *Fry* concluded that *Brecht*'s harmless error standard survived passage of AEDPA"); *Ayala v. Wong*, 756 F.3d 656, 722 (9th Cir. 2013) (Ikuta, J., dissent-

ing from denial of rehearing en banc) (stating that panel majority "lands yet another blow to our AEDPA jurisprudence by concluding that we review a state court's harmless error analysis under an exceptionally nondeferential standard"), *cert. granted Chappell v. Ayala*, No. 13-1428; *Gongora v. Thaler*, 726 F.3d 701, 712 (5th Cir. 2013) (Smith J., dissenting from denial of rehearing en banc) (noting that the "gross misapplication of [the *Brecht*] standard evades the Supreme Court's recent habeas instructions").

## III. MCCARLEY'S VEHICLE FLAWS DO NOT EXIST

McCarley argues that this case is a poor vehicle to address the disagreement on the harmless-error issue. Opp. 18-21. His three reasons are mistaken.

*First*, McCarley asserts that the Sixth Circuit's decision that the state court's harmless-error ruling was not a decision "on the merits" triggering AEDPA with respect to the *Confrontation Clause* question also means that it was not a decision "on the merits" triggering AEDPA with respect to the *harmless-error* question. Opp. 19. That is wrong. There can be no dispute that the state court's harmless-error finding constituted a decision on the merits under 28 U.S.C. § 2254(d)(1). The state court found "that the error, if any, in admitting Dr. Lord's testimony [regarding D.P.'s hearsay] was harmless." Pet. App. 110a. Nor did the Sixth Circuit contend otherwise. It engaged in *de novo Brecht* review based on its understanding that such review incorporates AEDPA; it did not say that AEDPA was simply inapplicable to the harmless-error issue. Pet. App. 24a (quoting *Ruelas v. Wolfenbarger*, 580 F.3d 403, 412 (6th Cir. 2009)). To make his claim that a harmless-error determination is, in fact, not a harmless-error determination, McCarley blurs the line between the Confrontation

Clause question and the harmless-error question. Whether or not a harmless-error ruling is a decision on the merits of the Confrontation Clause question, it certainly is a decision on the merits of the harmless-error question. AEDPA deference applies. This case asks what it looks like.

*Second*, McCarley argues that the Warden asserted below that *Brecht* applied, and should not be heard to complain otherwise now. Opp. 19-20. Yet the Petition is not even *now* saying that *Brecht* does *not* apply; it is asking how *Brecht* and AEDPA apply together when a state court engages in a harmless-error determination. Pet. 20-22, 27-29. If a federal court wishes to be consistent with *Fry*'s suggestion that *Brecht* "obviously subsumes" AEDPA, it must give deference to a state court's harmless-error finding. In all events, *binding* Sixth Circuit precedent instructed the Warden that *Brecht* applies. *See Ruelas*, 580 F.3d at 412. The Warden should not have to tell the Sixth Circuit to depart from its own binding precedent to preserve an issue for this Court's review (where that precedent is *not* binding).

*Third*, McCarley argues that the Petition seeks fact-bound error correction. That is mistaken. As the dissent in *Ayala* noted, application of an insufficiently deferential standard "is not a case-specific error that will be confined to the facts of [a single] opinion"; it instead "sets the groundwork for authorizing federal courts to review a habeas petition de novo . . . contrary to the Supreme Court's admonition to defer to the state court's decisions." *Ayala*, 756 F.3d at 722 (Ikuta, J., dissenting from denial of rehearing en banc). That same analysis applies here. Despite McCarley's suggestion otherwise, Opp. 20-21, this is a case where the standard of review matters. The Sixth Circuit granted relief solely because

of its "grave doubts" about the harmful effect of the claimed error, *not* because the error substantially affected the verdict. Pet. App. 25a, 29a. But having "grave doubts" is not the same as concluding that a state court made "an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 131 S. Ct. 770, 786-87 (2011).

## IV. THIS CASE SHOULD AT LEAST BE HELD FOR *CHAPPELL V. AYALA*

For two reasons, this case should at least be held for *Chappell v. Ayala*, No. 13-1428. *First*, *Chappell* could affect the case's outcome. When the Court agreed to review *Chappell*, it added the question "[w]hether the court of appeals properly applied the standard articulated in *Brecht*." *Chappell v. Ayala*, 135 S. Ct. 401 (2014). If this Court reaches the *Brecht* question, its analysis will guide whether the Sixth Circuit applied the proper harmless-error standards here. Indeed, that the Court added the *Brecht* question *sua sponte* shows that the question is worthy of the Court's time. If it is cert-worthy there, it is cert-worthy here.

*Second*, *Chappell* might not reach the *Brecht* question. The Court might instead resolve the first *merits* question in the Petitioner's favor. That would moot the harmless-error question. This case would then provide an ideal vehicle to resolve any questions about the proper application of *Brecht* that remain unanswered. If anything, this case provides a better vehicle. Unlike in *Chappell* where the Ninth Circuit found prejudice under *Brecht*, *see Ayala*, 756 F.3d at 684, the Sixth Circuit here could only say that it had "grave doubts" about whether there was prejudice. Pet. App. 29a. This case thus presents the closest

possible one under *Brecht*, and also one where *Brecht*'s standards might be in the most tension with AEDPA's standards.

At day's end, the Sixth Circuit held that McCarley's lack of "opportunity to cross-examine D.P. was the critical error." Pet. App. 30a. But when McCarley *did* have that opportunity in his first trial, McCarley's briefing in state court characterized D.P.'s testimony as "merely a formality" because he did not remember anything. Doc.7-2, Exhibits, 1-41, at 148, PageID#246; *cf. United States v. Owen*, 484 U.S. 554, 559-60 (1988). Further, plenty of other evidence implicated McCarley, ranging from his death threats, to his statement to a third party that he had killed a person, to the victim's excited-utterances. Pet. App. 107a-08a. It is wrong for a federal court to treat a mere formality as harmful error over a state court's considered judgment otherwise.

## CONCLUSION

The Court should grant the petition for certiorari. At the least, it should hold the petition for *Chappell*.

Respectfully submitted,

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