No.

IN THE
Supreme Court of the United States

RON NEAL,
Superintendent, Indiana State Prison,
Petitioner,
v.

WAYNE KUBSCH,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Whether a state court reasonably applies *Chambers v. Mississippi*, 410 U.S. 284 (1973), when it requires a defendant to meet traditional tests of reliability under rules of evidence for using hearsay as substantive evidence.

PARTIES TO THE PROCEEDING

All parties to the proceeding are set forth on the cover of this petition.

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PETITION FOR WRIT OF CERTIORARI

Ron Neal, Superintendent, Indiana State Prison, respectfully petitions the Court to grant a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

This petition seeks review of the opinion of the United States Court of Appeals for the Seventh Circuit in No. 14-1898. The *en banc* opinion is reported at 838 F.3d 845 (7th Cir. 2016) and reprinted at page 1a of the appendix. The split panel opinion is reported at 800 F.3d 783 (7th Cir. 2015) and reprinted at page 80a of the appendix. The opinion of the United States District Court for the Southern District of Indiana is unreported, but appears at 2013 WL 6229136 and 2013 U.S. Dist. LEXIS 169427. It is also reprinted at page 196a of the appendix. The Southern District's opinion denying Respondent's motion to alter or amend judgment is also unreported, but appears at 2014 WL 1260021 and 2014 U.S. Dist. LEXIS 41127. It is reprinted at page 188a of the appendix.

JURISDICTION

A panel of the Seventh Circuit Court of Appeals panel entered judgment on April 12, 2015. Respondent filed a petition for rehearing *en banc*, which the Court of Appeals granted. The Court of Appeals entered final judgment on September 23, 2016.

This Court granted Petitioner's first application for extension of time to file its petition for a writ of certiorari on December 23, 2016, and approved its second application on January 13, 2017, extending the filing deadline to February 20, 2017, which actually yields a deadline of February 21, 2017 because February 20 is a federal holiday. Sup. Ct. R. 30(1); *2017 Holiday Schedule*, U.S. Off. Personnel Mgmt., https://www.opm.gov/policy-data-oversight/snow-dismissal-procedures/federal-holidays/#url=2017 (last visited Feb. 17, 2017). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment of the U.S. Constitution provides,

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Section 1 of the Fourteenth Amendment of the U.S. Constitution provides,

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254 provides, in relevant part,

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States. . . .
>
> ***
>
> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as

> determined by the Supreme Court of the United States . . . .

STATEMENT OF THE CASE

On September 18, 1998, Beth Kubsch had planned to pick up her twelve-year-old son Anthony after a dance at school. Pet. App. 7a. When Beth did not arrive, Anthony caught a ride with a friend's mother, only to find his house in disarray. *Id.* At the bottom of bloody basement steps, Beth's ex-husband Rick Milewski and Anthony's eleven-year-old step-brother Aaron Milewski lay dead, both shot in the face and stabbed—Aaron 22 times. *Id.* at 7a, 199a. Beth's own lifeless, shanked, hog-tied body was under the stairway, head wrapped with duct tape. *Id.* at 199a. Wayne Kubsch, Beth's husband, had slaughtered them all.

The evidence demonstrating Kubsch's guilt was a "slow-moving accumulation of a glacier of circumstantial evidence." *Id.* at 202a. As the district court observed, "most damning to Kubsch was a series of lies, inexplicable omissions, and inconsistencies in what Kubsch told the police and later testified on the witness stand, and these statements—in conjunction with a few pieces of circumstantial evidence—are what almost assuredly got Kubsch convicted." *Id.* at 197a.

Kubsch, who was in financial straits, had purchased a $575,000 life insurance policy on his wife, with himself as the sole beneficiary. *Id.* at 3a. He had purchased the duct tape used to bind Beth just three

days before murdering her. *Id.* at 9a. His sunglasses were found next to Beth's body. *Id.* at 202a–03a. His friend, Dave Nichols, told the jury that Kubsch knew Beth was dead and that Aaron and Rick had been shot before police had that information. *Id.* at 8a. There was no evidence of forced entry at the house, and only Kubsch, Beth, and Anthony had a key. *Id.* at 84a.

Before the police targeted Kubsch as a suspect, he failed to provide information to help their investigation and instead attempted to mislead police. *Id.* at 197a, 199a. His account of activities the day of the murders constantly changed, especially when police confronted him with evidence contradicting his story. *Id.* at 289a. "Putting all this evidence together left no reasonable doubt about Kubsch's guilt of the murders." *Id.*

Yet the divided *en banc* Seventh Circuit granted habeas relief based on a hearsay statement from Amanda Buck, a nine-year-old neighbor of victims Rick and Aaron Milewski at the time of the murders. *Id.* at 11a. Four days after the murders, Amanda, with her mother Monica, gave a videotaped statement to Police Sergeant Mark Reihl, stating she saw Rick and Aaron alive the day of the murders around 3:30-3:45 p.m. *Id.* at 94a, 313a. If that statement had been accurate, it would have tended to exculpate Kubsch because other evidence showed he was driving to Michigan by 3:30 p.m. the day of the murders. *Id.* at 161a. Several days later, however, Amanda's grandfather told police that Amanda and Monica actually saw Rick and Aaron on Thursday, September

17, not Friday, September 18. *Id.* at 15a (misidentifying Amanda's grandfather as her father).

Neither Amanda nor her mother were called as witnesses for Kubsch's first trial in 2000, which resulted in a guilty verdict and death sentence. *Id.* at 94a, 300a. The Indiana Supreme Court reversed because a piece of evidence was not sufficiently redacted to exclude Kubsch's invocation of his right to silence during questioning by police. *Id.* at 82a, 196a. Kubsch was retried in 2005. *Id.* at 303a. At the second trial, Amanda, repeating answers she gave in a deposition in 2004, said she neither remembered her statement to police in 1998 nor recalled seeing Aaron after she got home from daycare on September 18, 1998. Tr. at 2983–85, 90. Kubsch offered the videotape of Amanda's 1998 police interview as substantive evidence, but the trial court rejected it for lack of foundation demonstrating reliability under Indiana Rule of Evidence 803(5) (the hearsay exception for past recollections recorded). Pet. App. 16a–17a. In particular, the trial court refused to admit the recording because Amanda could not affirm the accuracy of her recorded prior statements. *Id.* at 17a–18a.

As an alternative, the trial court invited the defense to show the videotape to Amanda outside the presence of the jury to see if it refreshed her memory of the statements. *Id.* at 17a. The defense did so, but declined to elicit further testimony from her when the video failed to refresh her memory. *Id.* at 17a, 94a–95a. Instead, Kubsch argued he should be able to use the recording as substantive evidence. *Id.* at 95a.

On direct appeal, the Indiana Supreme Court affirmed the trial court's exclusion of the videotaped interview as substantive evidence because as hearsay, it lacked a sufficient demonstration of reliability under Rule 803(5). *Id.* at 313a–314a. It also held that the due process rule announced in *Chambers v. Mississippi*, 410 U.S. 284 (1973), did not require a different result. Pet. App. 316a. But the court did hold that the videotape should have been admitted to *impeach* Amanda's in-court testimony that she did not see Aaron the day of the murders, but that exclusion was harmless beyond a reasonable doubt. *Id.* at 18a.

At the state post-conviction-relief stage, additional evidence undermined the reliability of Amanda's videotaped interview. Sergeant Reihl testified about his conversations with Amanda's family, about how Amanda and her mother had told him the event they described on the video took place on the Thursday, not the Friday. Post-Conviction Transcript at 222–23. Another detective spoke with Monica in 2000, and Monica said that she and Amanda had, in that recorded interview four days after the murder, described events that occurred on the Thursday, not the Friday. Petitioner's Post-Conviction Exhibit 3 at 3.

On federal habeas review, the district court determined that (1) the Indiana Supreme Court's decision was consistent with *Chambers*, and (2) even if it were not, any error was harmless beyond a reasonable doubt. Pet. App. 228a–241a. A Seventh

Circuit panel affirmed, holding the Indiana Supreme Court reasonably applied *Chambers v. Mississippi*. *Id.* at 117a. Even under de novo review, said the majority, "the exclusion of Amanda's recorded statement as substantive evidence did not violate Kubsch's federal constitutional right to put on a defense." *Id.* at 125a. Chief Judge Wood dissented. *Id.* at 147a–87a.

A divided *en banc* Seventh Circuit reversed, ordering the State either to retry Kubsch or release him. *Id.* at 38a–39a. The majority opinion, written by Chief Judge Wood, said that excluding Amanda's videotaped statement as substantive evidence unreasonably applied *Chambers* because it amounted to a "total exclusion of relevant evidence" central to Kubsch's defense. *Id.* at 32a. Notwithstanding the rules of evidence, the recording of Amanda's past recollection had to be deemed reliable, the court said, because the State had not demonstrated that it was *un*reliable by showing one of the following: "(1) defects in the declarant's perception; (2) defects in the declarant's memory; (3) defective narration, on the part of either the declarant or the witness; and (4) lack of sincerity or veracity on the declarant's part." *Id.* at 33a. As authority for these tests of unreliability, the Seventh Circuit cited not federal or state rules of evidence or even their common law antecedents, but a scholarly distillation of "four dangers that have traditionally been thought to arise from hearsay evidence." *Id.* (citing 30 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 6324 (1997)).

Using the Wright & Graham decoction, and setting aside statements by Amanda and her family members that Amanda had been wrong about the date of events she witnessed, the court found the statement reliable because Amanda (and her mother): (1) would have been able to see events across the street clearly; (2) gave accounts that corroborated one another; and (3) lacked any motive to lie. *Id.* at 33a–35a. Also, the video would ensure no defects in narration of the events they witnessed. *Id.* at 34a. The majority did not expressly consider whether, even if exclusion of Amanda's statement was error under *Chambers*, that error was harmless beyond a reasonable doubt under *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

In dissent, Judge Hamilton, joined by Judges Easterbrook and Sykes, rejected the rule established by the majority because it "conflicts with both specific rules limiting hearsay evidence and the general principles that underlie those rules." Pet. App. 64a. In particular, the dissent underscored critical differences between the statements excluded here and in *Chambers*, including lack of factual corroboration or opportunity for cross-examination of the declarant. *Id.* at 70a.

More fundamentally, Judge Hamilton criticized the court's decision for its failure to identify any jurisprudential anchor. As he observed, "[t]he majority has not identified *any* case in *any* American jurisdiction where such an unsworn, *ex parte* witness statement would even be admissible as substantive evidence, let alone that the state courts' exclusion of

the statement here violated clearly established constitutional law." *Id.* at 64a.

The lack of any such precedents is a particular problem here, said Judge Hamilton, because this Court has repeatedly reminded "the lower federal courts in habeas corpus cases that we must allow state court decisions to stand unless 'the state court's ruling on the claim . . . was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Id.* (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)).

On that score, the dissent pointed the majority to summary reversals in habeas cases by this Court in recent years. *Id.* (citing *Woods v. Etherton*, 136 S. Ct. 1149 (2016); *White v. Wheeler*, 136 S. Ct. 456 (2015); *Lopez v. Smith*, 135 S. Ct. 1 (2014)). Even more on point, "the Court has summarily reversed a grant of habeas relief where the court of appeals, like the majority here, read *Chambers* too broadly." *Id.* at 65a (citing *Nevada v. Jackson*, 133 S. Ct. 1990 (2013)).

REASONS FOR GRANTING THE PETITION

In *Chambers v. Mississippi*, 410 U.S. 284 (1973), the Court declared that due process guarantees a defendant's right to put on a defense by calling a witness at trial and impeaching him with prior recorded statements. It did *not*, however, afford criminal defendants the right to use as substantive evidence hearsay that fails traditional indicia of reliability embodied by state (and federal) rules of

evidence. Yet in the name of *Chambers*, the decision below requires state courts to admit hearsay offered by murder defendants as substantive evidence unless the state proves it *un*reliable. Such a broad and novel reading of *Chambers* not only deviates from accepted doctrine and practice, but also negates the substantial deference that federal courts owe state criminal courts when interpreting and applying this Court's precedents.

Indiana courts applied a universal, longstanding evidentiary rule to exclude the disavowed hearsay statement of a nine-year-old girl that had also been repudiated by her mother and grandfather. *Chambers* does not require a contrary result, and the Court's intervention—and perhaps summary reversal—is required to clarify that *Chambers* does not override traditional hearsay reliability rules.

I. Certiorari Is Warranted Because a Divided *En Banc* Seventh Circuit Applied the Four-Decade-Old *Chambers* Case in a Way No Other Court Has

The Court decided *Chambers* 44 years ago—shortly after adoption of the Federal Rules of Evidence. Since then, courts at *all* levels of *all* American jurisdictions have had ample opportunity to consider whether *Chambers* protects the right of a defendant to admit favorable hearsay even absent traditional indicia of reliability. Yet as Judge Hamilton wrote below in dissent, "[t]he majority has not identified *any* case in *any* American jurisdiction where such an unsworn, *ex parte* witness statement

would even be admissible as substantive evidence, let alone that the state courts' exclusion of the statement here violated clearly established constitutional law." Pet. App. 64a.

Particularly in habeas cases, such novelty on a routine evidentiary issue is a red flag justifying Supreme Court review.

A. *Chambers* protects a right to call and impeach witnesses, not a right to use as substantive evidence hearsay that fails traditional tests of reliability

In *Chambers v. Mississippi*, a defendant charged with killing a police officer after a bar brawl was stymied by an antiquated trial rule from proving the assailant was someone else, namely Gable McDonald. 410 U.S. 284, 288–89 (1973). Indeed, McDonald had confessed to the crime on three occasions, one of which was transcribed and signed—only to recant at the preliminary hearing. *Id.* at 287–88, 291. Chambers moved for leave to call McDonald as an adverse witness at trial to confront him with those confessions, but the court denied his request under Mississippi's "voucher rule," which prohibited impeachment of one's own witnesses. *Id.* at 291, 295. As a result, Chambers "was unable to either cross-examine McDonald or to present witnesses in his own behalf who could have discredited McDonald's repudiation and demonstrated his complicity." *Id*. at 294. The Court reversed his conviction, deeming the voucher rule an arbitrary "remnant of primitive English trial practice." *Id.* at 295–98. The voucher

rule "plainly interfered with Chambers' [due process] right to defend against the State's charges." *Id.* at 298.

While *Chambers* safeguards due process against evidentiary barriers that serve no truth-gathering function, it in no way "stand[s] for the proposition that the defendant is denied a fair opportunity to defend himself whenever a state or federal rule excludes favorable evidence." *United States v. Scheffer*, 523 U.S. 303, 316 (1998). Critically, because the hearsay offered in *Chambers* satisfied the statement-against-interest reliability test, was uttered by a declarant available for cross-examination, and was offered only for impeachment, *Chambers* did not address whether such traditional tests for admissibility could legitimately bar as substantive evidence "vital" hearsay offered by the accused. Rather, the focus in that case was another barrier, the "voucher rule," which had *nothing to do* with hearsay reliability—it had only to do with ancient forms of trial practice that served no purpose.

Yet here a divided *en banc* Seventh Circuit ruled that *Chambers* "clearly establishes" the rule that a traditional test for hearsay reliability—a witness's assurance that a past recollection recorded was accurate when made—must give way if the evidence is "vital" and the state fails to prove the statement *un*reliable. Pet. App. 31a–38a. That holding is facially unsupported by *Chambers* and, as highlighted by Judge Hamilton, unique in American jurisprudence.

B. No other circuit has understood *Chambers* to override traditional rules of evidence governing whether hearsay may be used as substantive evidence

Again, as Judge Hamilton observed, no other court, state or federal, has said that *Chambers* obliges a trial court to admit hearsay favorable to the defense that fails traditional reliability standards. *Id.* at 64a. In fact, eight circuits—the First, Second, Third, Fifth, Sixth, Ninth, Tenth, and Eleventh—have rejected similar arguments for such a requirement:

- ***First Circuit***: The First Circuit refused to apply *Chambers* to override traditional rules barring hearsay in a case where an accused murderer offered police notes of informant tips implicating others. *United States v. Patrick*, 248 F.3d 11, 23–24 (1st Cir. 2001). The court upheld the exclusion because the hearsay "lacked the indicia of reliability of the testimony in *Chambers*," in particular because the notes did not constitute declarations against penal interest. *Id.* at 24.

- ***Second Circuit***: Though it did so without opinion, the Second Circuit has affirmed a district court's decision to exclude uncorroborated hearsay notwithstanding *Chambers* owing to "a legitimate concern for reliability." *Soto v. Lefevre*, 651 F. Supp. 588, 597 (S.D.N.Y. 1986), *aff'd*, 812 F.2d 713 (2d Cir. 1987).

• ***Third Circuit***: In a habeas challenge to a murder conviction, the Third Circuit rejected a *Chambers* claim that a state court should have admitted as substantive evidence an eve-of-trial confession by the defendant's mother. *Staruh v. Superintendent Cambridge Springs SCI*, 827 F.3d 251, 261–62 (3d Cir. 2016), *cert. denied*, *Staruh v. Torma*, No. 16–6575, 2017 WL 69416 (2017). The court held that *Chambers* did not require admission because it failed the traditional statement against penal interest test, which requires affirmative assurances of reliability. *Id.*

• ***Fifth Circuit***: The decision below made much of Kubsch's capital sentence in justifying its holding. Pet. App. 33a. Yet in the capital case *Simmons v. Epps*, 654 F.3d 526, 542–44 (5th Cir. 2011), the court affirmed penalty-phase exclusion of the defendant's own hearsay statements showing remorse—statements that "would surely have been relevant to the jury's consideration of mitigating factors." *Id.* at 543. It excluded the hearsay because, notwithstanding *Chambers*, the court could not "say that its reliability [was] 'substantial.'" *Id.* at 544.

The Fifth Circuit also rejected a *Chambers* challenge to the exclusion of hearsay offered by the accused to implicate someone else in a consumer fraud. *United States v. John*, 597 F.3d 263, 276–77 (5th Cir. 2010). The court in that case deemed the hearsay evidentiary barrier "not analogous to *Chambers*" because the voucher rule invalidated

in that case "bore little relationship to the realities of the criminal process." *Id.* at 277.

• ***Sixth Circuit***: The Sixth Circuit has at least twice rejected application of *Chambers* where the defense offered hearsay that, as in this case, either could not be tested via cross examination or lacked traditional indicia of reliability. In *West v. Bell*, 550 F.3d 542, 560 (6th Cir. 2008), it refused to admit a taped confession exonerating the defendant, notwithstanding *Chambers*, because the declarant invoked his Fifth Amendment rights and could not be cross-examined. In *Sinkfield v. Brigano*, 487 F.3d 1013, 1017 (6th Cir. 2007), it rejected a *Chambers* argument because the hearsay statement "did not carry the same indicia of reliability as a truly self-inculpatory statement."

• ***Ninth Circuit***: Similar to the Fifth Circuit in *Simmons*, the Ninth Circuit in a capital case rejected the argument that *Chambers* required admission of allegedly exculpatory hearsay statements with "fewer indicia of reliability." *Ayala v. Chappell*, 829 F.3d 1081, 1113–14 (9th Cir. 2016).

In addition, the Ninth Circuit has rejected application of *Chambers* where, as here, the prosecution had no meaningful opportunity to cross-examine the witness at trial about the out-of-court statement offered by the defense. *Christian v. Frank*, 595 F.3d 1076, 1085 (9th Cir. 2010). Similar to the Sixth Circuit's decision in

West, the court specifically distinguished *Chambers* because the witness invoked the Fifth Amendment and "could not 'have been cross-examined by the State' nor could 'his demeanor and responses [be] weighed by the jury' to gauge the truthfulness of the alleged confessions." *Id.* (quoting *Chambers*, 410 U.S. at 301).

• ***Tenth Circuit***: Rejecting a certificate of appealability in an aggravated battery case, the Tenth Circuit concluded it was not even "reasonably debatable" whether, consistent with *Chambers*, a court could exclude the defendant's own hearsay statements about who started the fight. *Showalter v. McKune*, 299 F. App'x 827, 830 (10th Cir. 2008). Though the excluded statement conceded the defendant's involvement, it also largely justified his actions and therefore (1) failed to qualify for admission under the rule permitting statements against penal interest, and (2) "did not have the same reliability as the evidence at issue in *Chambers*." *Id.*

• ***Eleventh Circuit***: In a rape case where the testimony of three witnesses about the victim's drug use might have evidenced a consensual sex-for-drugs exchange, the Eleventh Circuit said exclusion on relevance grounds did not even "come close" to making the trial "fundamentally unfair" under *Chambers*. *Taylor v. Sec'y, Fla. Dep't of Corr.*, 760 F.3d 1284, 1297 (11th Cir. 2014), *cert. denied*, 135 S. Ct. 2323 (2015). Because the court's "authority is severely restricted in the review of state evidentiary rulings" under § 2254(d)(1), it

refused so to extend *Chambers*. *Id.* at 1295 (internal quotations omitted).

In sum, these eight circuits have held that due process permits use of hearsay reliability tests embodied by the rules of evidence, even as to exculpatory evidence offered by the accused. In contrast, a divided *en banc* Seventh Circuit held that due process precludes such use of hearsay reliability tests, at least where the hearsay is "vital" to a capital defendant. The Court should take this case to ensure uniformity among the circuits as to when courts may require proof of reliability before admitting hearsay offered by the defense in a criminal trial. And, given the immediate unworkable and unpredictable burdens the decision below places on prosecutions in Indiana, Illinois, and Wisconsin, the Court should take up the issue now rather than wait to see if other circuits will take their cues from the *en banc* Seventh Circuit.

C. The decision below failed to apply § 2254(d)(1) in any meaningful way

It bears observing that none of the decisions from other circuits cited above considered the possibility that, if hearsay is sufficiently vital to the defense, it should be admitted unless the prosecution *disproves* reliability. The question before them, as in this case, was whether *Chambers* precludes a trial court from using the *actual* rules of evidence, not whether federal appellate courts can make a better assessment of admissibility using other standards.

Yet here, the Seventh Circuit held that a trial court's routine, uncontroversial application of an even-handed, long-recognized rule of evidence was so contrary to law that it requires giving the defendant a third trial. But as the decisions recounted above suggest, neither *Chambers* nor any other decision of this Court has clearly established a rule that criminal defendants are entitled to admit favorable hearsay statements that fail a traditional test of reliability. To the contrary, in the decades since *Chambers*, the Court has commented on the narrowness of its holding. *See United States v. Scheffer*, 523 U.S. 303, 316 (1998) (observing that *Chambers* confined its holding to the "'facts and circumstances' presented in that case"); *see also Montana v. Egelhoff*, 518 U.S. 37, 52 (1996) (plurality opinion) ("*Chambers* was an exercise in highly case-specific error correction.").

Even more to the point, the Court has recognized multiple times that states may exclude defense evidence based on traditional rules that serve the ends of ensuring fairness and reliability. *See, e.g.*, *Holmes v. South Carolina,* 547 U.S. 319, 324 (2006) ("[S]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials." (quoting *Scheffer*, 523 U.S. at 308)); *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (observing the Court has "never questioned the power of States to exclude evidence through the application of evidentiary rules that themselves serve the interests of fairness and reliability—even if the defendant would prefer to see the evidence admitted").

It is therefore hardly surprising that this Court has *never* granted a habeas claim predicated on *Chambers*. Indeed, as Judge Hamilton pointed out in dissent, the Court in *Nevada v. Jackson*, 133 S. Ct. 1990, 1992–94 (2013), rejected a habeas claim over exclusion of the victim's prior uncorroborated police reports. It stressed that, under *Harrington v. Richter*, 562 U.S. 86 (2011), habeas relief is warranted only where "there is no possibility fairminded jurists could disagree" about the state court violation—a standard nearly impossible to meet with evidence claims because "[o]nly rarely have we held that the right to present a complete defense was violated by the exclusion of defense evidence under a state rule of evidence." *Jackson*, 133 S. Ct. at 1992.

Additionally, as the Court specifically noted in *Jackson*, in each of the rare "right-to-present-a-defense" cases where the accused prevailed, the evidence rule at issue was arbitrary or incapable of rational defense. *See Holmes*, 547 U.S. at 331; *Rock v. Arkansas*, 483 U.S. 44, 61 (1987); *Chambers*, 410 U.S. at 302–03; *Washington v. Texas*, 388 U.S. 14, 22 (1967). The Seventh Circuit nowhere said Indiana Rule of Evidence 803(5) is either arbitrary or irrational, facially or as applied. Instead, its § 2254(d)(1) analysis rests entirely on the assertion that "[t]he facts of Kubsch's case parallel . . . closely the facts of *Chambers*." Pet. App. 38a. Yet even the court's own account suggests only the most general similarities: *Chambers* and this case both featured murder trials where the court excluded hearsay "vital" to the defense. *Id.* at 19a. That's the extent of any parallel.

The Seventh Circuit also asserted that "ample assurance that the evidence was reliable" existed in both this case and *Chambers*. *Id.* But that is a legal conclusion, not objective fact (or even a relevant comparison since *Chambers* did not involve the use of hearsay as substantive evidence). Indeed, the whole *question* is whether Indiana courts legitimately enforced traditional hearsay reliability standards. And describing both this case and *Chambers* as "clash[es] between ordinary evidence rules and constitutional due process," *id.*, is not only untenable—the "voucher rule" was hardly "ordinary" by 1973—but also merely asserts that which must be proven, *i.e.*, that due process is implicated by use of traditional hearsay reliability standards.

Material differences between the cases are actually stark and deep. Where Chambers sought to use four corroborated confessions to impeach a declarant fully available for cross-examination, Kubsch sought to use a single uncorroborated statement as substantive evidence with no meaningful opportunity for cross-examination. *Compare Chambers*, 410 U.S. at 287, 291, 292–93, *with* Pet. App. 71a–72a. Unless *Chambers* requires courts to presume the admissibility of all "vital" hearsay evidence offered by the defense in a capital murder trial, it in no way dictates a particular result here—and at the very least is reasonably distinguishable under 28 U.S.C. § 2254(d)(1). The cases from other circuits cited in Part I.B, *supra*, confirm as much. Accordingly, summary reversal may be appropriate here.

II. Even Apart from Failing to Afford Proper Deference to Indiana Courts, the Decision Below Is Incorrect

Exclusion of Amanda's unsworn, unconfirmed past recollections as substantive evidence is nothing like the categorical exclusion of cross-examination in *Chambers*—an exclusion the State did not even attempt to justify in that case. *Chambers v. Mississippi*, 410 U.S. 284, 294–303 (1973). *Chambers* does not impel state courts to cast aside traditional reliability tests when a capital defendant offers hearsay supposedly "vital" to his case.

A. It is legitimate to require a declarant to verify the accuracy of a past recollection, even in capital cases

The rule invalidated in *Chambers* was an archaic, groundless barrier that impeded the ability of the defense to cross-examine live witnesses. Mississippi did not even "defend the rule or explain its underlying rationale." *Id.* at 297. With no justification for the voucher rule, there was no basis for upholding its use to infringe a defendant's right to present a defense. *See also Holmes v. South Carolina*, 547 U.S. 319, 325–26 (2006) (observing that, because the voucher rule served no "legitimate interests," it did not survive constitutional scrutiny in *Chambers*).

Here, the Court of Appeals stated that Amanda's prior recollection missed admission as substantive evidence by "just a hair." Pet. App. 36a. That "hair,"

however, was the lack of any affirmation from Amanda that her since-repudiated statement four days after the murders was accurate. Hearsay statements pose "particular hazards" as evidence, namely lack of reliability. *Williamson v. United States*, 512 U.S. 594, 598 (1994). A witness may have a faulty memory or may have misperceived an event. Or, the declarant's words "might be misunderstood or taken out of context by the listener." *Id.* Consequently, it has long been the rule that, before hearsay is admissible as substantive evidence, the proponent must establish its reliability according to particular standards embodied by the rules of evidence.

Usually the rules require the proponent to show the hearsay declarant is available to be cross-examined about the statement—as was the declarant in *Chambers*. 410 U.S. at 301; s*ee* Ind. R. Evid. 801(d)(1). As one venerable treatise has explained, "the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination." 5 Wigmore on Evidence § 1420 (J. Chadbourne rev. 1974). Once a witness's statement is thoroughly cross-examined, it is then "free enough from the risk of inaccuracy." *Id.*; *see also Scott v. State*, 425 N.E.2d 637, 639 (Ind. 1981) ("The major bar against admitting hearsay evidence is its insusceptibility to cross-examination. We have held that the availability of the declarant for cross-examination is a safeguard of paramount importance.").

Yet even when the declarant is not available for cross-examination, if the hearsay at issue is a past recollection recorded, another means of ensuring reliability is proof that the recorded recollection "accurately reflects the witness's knowledge." Ind. R. Evid. 803(5)(C). Absent such affirmation (or meaningful cross-examination), courts have no way of determining whether a statement accurately represented the witness's thoughts at the time. 3 Wigmore on Evidence § 734 ("[W]e have to provide, in using a record of past recollection, for certain practical tests of the accuracy and identity of the record."); 3 Wigmore on Evidence § 747 ("The witness must be able now to assert that the record accurately represented his knowledge . . . at the time."). This rule ensures that the past recollection was in fact a "satisfactory one," accurately representing the witness's knowledge at the time. 3 Wigmore on Evidence § 734.

Indiana is hardly unique—or even unusual—in requiring that a declarant affirm the accuracy of a recorded recollection before permitting such hearsay to be used as substantive evidence (absent cross-examination of the declarant). Almost every state's version of 803(5) contains that requirement, as does the federal rule.[1]

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[1] Fed. R. Evid. 803(5); Ala. R. Evid. 803(5); Alaska R. Evid. 803(5); Ariz. R. Evid. 803(5); Ark. R. Evid. 803(5); Cal. Evid. Code § 1237; Colo. R. Evid. 803(5); Conn. Code Evid. 8-3(6); Del. R. Evid. 803(5); Fla. Stat. § 90.803(5); Ga. Code Ann. § 24-8-803(5); Haw. Rev. Stat. § 626-1, R. 802.1(4); Idaho R. Evid.

Enforcing such a useful and traditional rule of evidence, even to exclude "vital" hearsay in murder cases, is entirely legitimate and carries no threat to fundamental fairness.

B. Amanda's statement bears no other indicia of reliability

Not only was there no statement from Amanda affirming her earlier recollection, but Kubsch provided no other assurances that Amanda's statement was reliable, such as bank records supporting Monica's statement that she cashed a check the day Amanda saw Aaron and Rick. *See* Pet. App. 178a–79a. Yet because this was a capital case where the court excluded "vital" hearsay, the Seventh Circuit rejected traditional indicia of *reliability* in favor of its own criteria for *un*reliability. It looked for "(1) defects in the declarant's perception; (2) defects in the declarant's memory; (3) defective narration, on the part of either the declarant or the witness; and (4) lack of sincerity or veracity on the declarant's part."

803(5); Ill. R. Evid. 803(5); Iowa R. Civ. P. 5.803(5); Ky. R. Evid. 803(5); La. Code Evid. Ann. art. 803(5); Me. R. Evid. 803(5); Md. R. Evid. 5-802.1(e); Mass. R. Evid. 803(5); Mich. R. Evid. 803(5); Minn. R. Evid. 803(5); Miss. R. Evid. 803(5); Mont. R. Evid. 803(5); Neb. Rev. Stat. § 27-803(4); Nev. Rev. Stat. § 51.125; N.H. R. Evid. 803(5); N.M. R. Evid. 11-803(5); N.C. Gen. Stat. § 8C-1, 803(5); N.D. R. Evid. 803(5); Ohio R. Evid. 803(5); Okla. Stat. tit. 12, § 2803(5); Or. Rev. Stat. § 40.460(5); Pa. R. Evid. 803.1(3); R.I. R. Evid. 803(5); S.C. R. Evid. 803(5); S.D. Codified Laws § 19-19-803(5); Tenn. R. Evid. 803(5); Tex. R. Evid. 803(5); Utah R. Evid. 803(5); Vt. R. Evid. 803(5); Wash. R. Evid. 803(a)(5); W. Va. R. Evid. 803(5); Wis. Stat. § 908.03(5); Wyo. R. Evid. 803(5).

Id. at 33a. Because the State did not demonstrate any of these weaknesses in Amanda's statement, the statement should have been admitted as substantive evidence, the court said.

That analysis flips hearsay doctrine on its head by presuming the substantive admissibility of hearsay—even though there was nothing fundamentally unfair about excluding it. Again, the State had no meaningful opportunity to cross-examine Amanda about the accuracy of her statement four days after the murders. When he first interviewed Amanda and Monica, Sergeant Reihl could not have anticipated that prosecution of the murderer might hinge on the accuracy of Amanda's statements, so he had no reason to probe every detail of her story. His "gentle questioning" elicited only unsworn (and later repudiated) statements from Amanda. *Id.* at 72a. As Judge Hamilton observed, Reihl never "pushed" Amanda on any of "the critical details," including anchoring the observations to a particular day. *Id.* And by the time of Kubsch's second trial, Amanda could not remember any of it, so no useful cross-examination about her initial statement was possible. *Id.* at 94a. Far from requiring admission of Amanda's statement, fairness required exclusion.

Regardless, as the Indiana Supreme Court suggested, any error attendant to excluding Amanda's statement was harmless. *Id.* at 315a. The prosecution, after all, would have responded to use of the statement by calling Sergeant Reihl, Detective Whitfield, Monica, and Monica's father to testify about the correct date Amanda and Monica saw

Aaron and Rick. *Id.* at 315a–16a. Additionally, Amanda's statement was not consistent with any other witness's testimony and could not begin to melt the "glacier" of incriminating evidence against Kubsch. *Id.* at 202a. Given the relative weakness of the excluded statement and the availability of contradictory evidence, even the evidence the Seventh Circuit majority deemed "vital" could not reasonably have led to Kubsch's acquittal.

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It has long been the considered judgment of the American system of justice that juries should not base their decisions on unreliable, untested out-of-court statements. The Sixth Amendment itself is predicated on the idea that all evidence should be subjected to adversarial testing. Where such testing is unavailable, and where there is nothing to substitute for it (such as corroborative evidence), fundamental fairness does not dictate that defendants—including capital defendants—get to conduct the trial via dossier. Yet here a divided *en banc* Seventh Circuit held that capital defendants have a presumptive right to admit "vital" hearsay as substantive evidence (a decision it reached without expressly considering whether the exclusion of hearsay was harmless). The Court should take this case to determine whether that is a correct understanding of the law, or at least whether it was reasonable for Indiana courts to conclude it is not.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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