No. _____

_____ ◆ _____

IN THE

SUPREME COURT OF THE UNITED STATES

_____ ◆ _____

WILLIAM RANDOLPH HARLOFF,
PETITIONER

V.

CRAIG KOENIG,
RESPONDENT

_____ ◆ _____

ON PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

_____ ◆ _____

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QUESTION PRESENTED

Whether the state court applied *Chapman v. California*, 386 U.S. 18 (1967) in an objectively unreasonable manner or made an unreasonable determination of facts when it found Harloff's absence from a critical part of his trial to be harmless error despite the key witness --Harloff's ex-girlfriend whom he was charged with assaulting-- admitting she testified differently because of Harloff's absence from the courtroom.

LIST OF PARTIES

All parties appear on the caption of the case on the cover page.

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The unpublished opinion of the Court of Appeals appears at Appendix A to this Petition. The unpublished opinion (including the Report and Recommendation) of the United States District Court appears at Appendix B. The unpublished opinion of the California Court of Appeal appears at Appendix C. The unpublished order of the Supreme Court of California appears at Appendix D.

JURISDICTION

The district court had jurisdiction of petitioner's habeas corpus petition under 28 U.S.C. §2254. The federal court of appeals issued a Certificate of Appealability and thus had jurisdiction under 28 U.S.C. §2253(c)(1). The federal court of appeals entered judgment on August 31, 2018. App A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2254 (d):

(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; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Sixth Amendment:

"In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ...."

STATEMENT OF THE CASE

PROCEDURAL BACKGROUND

On September 27, 2012, a jury convicted Harloff of one count of corporal injury to a cohabitant, one count of false imprisonment, and one count of criminal threats. The jury also found true the enhancement that Harloff personally inflicted great bodily injury and that he personally used a deadly weapon –a hammer. After Harloff waived a jury trial, the court found that he had four prison priors. The court sentenced Harloff to the high term of 4 years for the corporal injury plus 5 years for the great bodily injury plus 1 year for each of the four prison priors for a total sentence of 14 years.

On September 29, 2014, the state appellate affirmed Harloff's convictions and sentences.[1/] App C. On December 10, 2014, the California Supreme Court denied a petition for review. App D.

On December 1, 2015, Harloff filed a pro per habeas petition in the federal district court raising three claims related to his absence from part of his trial. On June 29, 2016, the magistrate judge recommended that the court

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[1/] The court reversed an erroneously imposed requirement that Harloff register as a sex offender.

deny Harloff's habeas petition. App B. On August 30,2016, after Harloff filed objections, the district court adopted the report and recommendation and denied and dismissed the habeas petition. App B.

On May 23, 2017, the Court of Appeals granted a certificate of appealability on one issue: "Whether appellant‘s constitutional rights were violated when the trial court found him to be voluntarily absent, and allowed the assault victim to testify outside his presence."

On August 31, 2018, the Court of Appeals affirmed the denial of Harloff's habeas petition in an unpublished memorandum decision. App. A.

FACTUAL BACKGROUND

On December 28, 2011, Harloff's girlfriend, Brianna Ikeler, was treated at a hospital for lacerations and contusions to her head, hands, arms and knee. A scalp laceration required 5-6 staples. Harloff and Ikeler told different stories about how Ikeler received those injuries.

Ikeler, without Harloff in the courtroom, told a harrowing tale about him assaulting her for hours with multiple different items including his fist, pliers, scissors, a hammer, a power drill, a car distributor, a motorcycle kickstand, a pitcher of ice tea, and a coffee mug.

According to Ikeler, Harloff had returned from a 17-day jail stay three days earlier. He believed Ikeler had been unfaithful during that time, and he

also believed Ikeler had done something to his truck while he was gone.[2/] On the morning of December 28, Harloff began arguing with Ikeler about these issues. He made her sign a paper "confessing" to her misdeeds. Although he had not been violent before, Harloff hit her with his fist more than 10 times. He would knock her down, make her get up, and then knock her down again. In addition, Harloff pierced Ikeler's shirt mid-breast with pliers; threatened to nail her foot to the floor and hit a pair of scissors with a hammer into her foot; turned on a power drill and told Ikeler what people can do with a drill; hit Ikeler multiple times with a ten-pound metal car distributor and with a motorcycle kickstand; poured ice tea over her head; hit her in the elbow, knee, and head multiple times with a hammer; and broke a coffee mug on her foot.

During the assault, Harloff would vacillate between telling Ikeler she could leave and telling her she couldn't leave. Ikeler was scared to leave so she waited until she felt the time was right.[3/] Eventually Ikeler ran out of the apartment and into the apartment of a neighbor across the courtyard. The neighbor, O'Shea Myles, did not know Ikeler. Myles saw Ikeler run from her apartment yelling, "He's going to kill me. Help." Ikeler was barefoot, covered

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[2/] Although Harloff was in a wheelchair during trial, he was healthy and not in a wheelchair during this incident.

[3/] Ikeler claimed that Harloff had told her previously that if he ever started hitting her she should leave because he might not ever stop.

in dry blood, and had bloody, messy hair. Myles and her partner called the police. A few minutes later a man came out of Ikeler's apartment yelling, "She can't have my stuff," and "I'm going to kill her."[4/] While Ikeler was in Myles' apartment, she was shaking and said, "I'm scared he's going to kill me."

Officer Veloz responded to the call. He saw tools, car parts, a broken coffee mug, and blood on the walls in Ikeler's apartment. Veloz interviewed Ikeler in the hospital. He described her as "very bloody" and looking severely beaten. Ikeler was reluctant to talk about what happened. She said Harloff had been upset about his car and accused her of being unfaithful. Ikeler told Veloz that over several hours Harloff blocked her from going to the bathroom, slapped her several times, hit her once in the head with a distributor, hit her with a coffee mug until it broke, and hit her several times in the hands with a hammer.[5/] Ikeler did not want to press charges.

Ikeler testified that she did not want to talk to the police because she was scared of the consequences of doing so. She also refused to sign a photo of Harloff after she identified him for the police. Ikeler claimed Harloff told her that if she ever put him in jail his "homeboys" would come after her. She acknowledged giving more details in her trial testimony than she gave to the

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[4/] Myles could not say if Harloff was the man she saw. (RT 167.)

[5/] Ikeler did not say anything to Veloz about Harloff making her sign anything or about pliers, scissors, or power drills.

police.

Previously, at Harloff's preliminary hearing, Ikeler did not identify Harloff and refused to identify a photo of herself. In addition, Ikeler testified at the preliminary hearing that she did not remember any altercation or any injuries nor did she recall what she told the police that day. According to Ikeler, she lied at the preliminary hearing because Harloff was in court and she was scared. She explained it was easier to testify against Harloff at trial that morning because he was not in court.

Harloff testified in his defense and told a different story. Harloff was aggravated when he woke up that morning because someone had knocked on their door at 3:00 a.m. He believed it was a man coming to see Ikeler. He and Ikeler were also arguing because the apartment was messy, because Ikeler did not want to go with him to pick up his puppy, and because Ikeler could not explain how his truck's distributor ended up in the apartment when the truck had supposedly been stripped in Compton while he was in jail. During the argument, Ikeler began pulling her hair and raging.

At one point, Harloff's friend, Tim Wright, called and then stopped by briefly. While Harloff was telling Wright what was happening, Ikeler grabbed the distributor, said "This is what you want me to do," and hit herself in the

head. Wright said he was on parole and couldn't have police contact and left.[6/]

Harloff described Ikeler as out of control and raging. She reached for a hammer and was pulling her hair. Harloff slapped her once with his hand on the side of her head to get her to stop raging. his caused her to fall onto the floor which was stripped to the plywood because they were about to get new carpeting. Ikeler scraped her arms and knee from the plywood and nails. She was also bleeding profusely from the self-inflicted wound to her head. When she whipped her head around, blood got on the walls. Harloff poured ice tea on her head to try to clean up the wound.

Ikeler left when Harloff told her to leave; he never prevented her from leaving. Harloff left about 15 minutes after her. He did not say anything when he was walking out, but some neighbors yelled at him and told him not to come upstairs.

Harloff denied causing any injuries to Ikeler except for the scrapes from her fall after the one slap. He specifically denied raising his voice, using scissors, pliers, a kickstand, or a power drill, having her sign anything, or

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[6/] Wright testified and corroborated Harloff's testimony. Ikeler had no visible injuries when Wright arrived. While he was briefly in the apartment, he saw Ikeler, whom he met for the first time that day, hit herself in the head with a car distributor.

threatening to kill her. He threw the coffee mug and broke it after Ikeler left.

REASONS FOR GRANTING THE PETITION

I.

THIS COURT SHOULD GRANT THIS PETITION BECAUSE THE STATE COURT APPLIED CLEARLY ESTABLISHED FEDERAL LAW IN AN OBJECTIVELY UNREASONABLE MANNER WHEN IT FOUND THAT HARLOFF WAS NOT PREJUDICED WHEN HE WAS ABSENT FOR MOST OF THE TESTIMONY OF THE KEY PROSECUTION WITNESS -- HARLOFF'S EX-GIRLFRIEND WHOM HE WAS CHARGED WITH ASSAULTING-- EVEN THOUGH SHE ADMITTED THAT SHE TESTIFIED DIFFERENTLY AT TRIAL PRECISELY BECAUSE HARLOFF WAS NOT PRESENT IN THE COURTROOM DURING HER TESTIMONY

Harloff argued on appeal in state court and again in his federal habeas proceedings that the trial court violated his constitutional right to confront the witnesses against him when the court allowed the key prosecution witness

--Harloff's ex-girlfriend and the alleged victim of his assault– to testify while Harloff was not in court because of medical treatment. The state appellate court declined to address whether Harloff's rights were violated because it

concluded Harloff failed to demonstrate prejudice. ER 53; App C. The federal district court quoted the state court decision verbatim, restated what the state court said, and concluded that the state court had not conducted its harmless error analysis in an "objectively unreasonable manner" and that Harloff's absence had not had a "substantial and injurious effect or influence in determining the jury's verdict." ER 50-58. The federal Court of Appeals, like the two previous courts, did not address whether Harloff's absence from trial established a constitutional violation, but simply opined that the state court's application of *Chapman v. California*, 386 U.S. 18 (1967), was not objectively unreasonable. App A.

In this petition, Harloff is asking this Court to review the question of harmlessness. The issue of whether the trial court violated Harloff's constitutional rights when it held a critical part of the trial without Harloff being present is not before this Court. Nevertheless, for purposes of placing the harmlessness question in context, Harloff briefly explains how he came to miss most of the testimony of the key prosecution witness.

A. The Trial Court Treated Harloff, Who Was in Custody and Confined to a Wheelchair Because of a Fractured Spine, as Voluntarily Absent from Trial Despite Evidence That He Was Absent from Court for Medical

Reasons

At the time of trial, Harloff suffered from an L-4 lumbar spinal fracture that required treatment with a urinary catheter and pain medication. Harloff needed a wheelchair to get around and was housed in a medical dormitory at the jail. ER 69, 87-88. The morning after jury selection, Harloff was taken to the doctor. The record is unclear whether this was a pre-existing order to see a doctor or whether Harloff requested to see the doctor. ER 67-69. In any event, Harloff, who was in custody, was brought by his jailers to the doctor and not to court. The doctor visit, which involved obtaining pain medication, did not take long. Afterwards, Harloff fully expected to go to court, but the deputies brought him back to jail. Harloff was concerned enough about this that he called his attorney to ask why he was back in jail and not in court. ER 68, 70, 98-100. The court meanwhile continued the trial to the next day because Harloff had not been brought to court.

The real problem began after the court ordered Harloff brought to court that afternoon to ascertain what was going on. While Harloff was being transported to court in a sheriff's van in his compromised physical condition, another inmate sitting in a wheelchair fell backwards onto Harloff causing him pain and requiring him to be brought to a hospital emergency room for a medical evaluation. ER 119-121. Harloff reported that he received three pain

shots, including a shot of morphine, at the hospital and was prescribed bed rest. ER 100-101, 122-123.

The next morning, Harloff was in pain and believed the doctor had ordered bed rest. This apparently got reported to the court as Harloff refusing to leave his cell to come to court. When Harloff was told that he would be forcibly extracted, he voluntarily left his cell but requested to see a doctor for pain medication. ER 101-102, 112, 122-123. Harloff was again taken for a medical evaluation where the doctor ordered x-rays to be taken. ER 102.

In the meantime, the trial court believing Harloff was malingering, declared him to be voluntarily absent, and let the trial begin without Harloff being present. ER 81, 82. During Harloff's 1¼-hours absence, the court instructed the jury with pre-trial instructions, the prosecutor gave an opening statement, trial counsel deferred the defense opening statement, and the key prosecution witness, Brianna Ikeler, Harloff's former girlfriend and the alleged assault victim, gave 38 pages of her 49 pages of direct testimony.

B. Harloff Suffered Identifiable Harm When the Court Allowed the Key Prosecution Witness to Testify Without Harloff in the Courtroom

Confrontation is a vital part of our trial court system. The United States Constitution guarantees criminal defendants the right to be present at

trial through the due process clause of the Fourteenth Amendment and the confrontation clause of the Sixth Amendment. Under the Fourteenth Amendment, a criminal defendant has a due process right to be present at any stage of the trial "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge" and "to the extent that a fair and just hearing would be thwarted by his absence." *Snyder v. Massachusetts*, 291 U.S. 97, 105-106, 108 (1934), overruled in part on other grounds *Malloy v. Hogan*, 378 U.S. 1, 17 (1964); *see also Kentucky v. Stincer*, 482 U.S. 730, 745 (1987) ("A defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure").

In the Sixth Amendment context, the right to confrontation confers upon the defendant the right to engage in a face-to-face meeting with a witness. *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988). Additionally, the presence of the defendant affords the jury an opportunity to consider the defendant's "behavior, manner, facial expressions, and emotional responses, or their absence" as the trial unfolds. *Riggins v. Nevada*, 504 U.S. 127, 142 (1992).

The deprivation of the constitutional right to be present during every critical stage of the trial is reversible error unless the defendant's absence

was harmless beyond a reasonable doubt. *Arizona v. Fulminate*, 499 U.S. 279, 307 (1991);

Campbell v. Rice, 408 F.3d 1166, 1172 (9th Cir. 2005) (en banc). The harmless error test asks whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24 (1967). The burden is on the prosecution to prove the error was harmless beyond a reasonable doubt. *Id.* When considering the defendant's absence from the proceeding, the reviewing court should consider the absence "in light of the whole record." *United States v. Gagnon*, 470 U.S. 522, 527 (1985).

When a state court has found a constitutional error to be harmless, the federal habeas court can only grant habeas relief if the state court applied *Chapman* in an objectively unreasonable manner. *Davis v. Ayala*, __U.S.__, 135 S.Ct. 2187, 2198 (2015). If "fairminded jurists could disagree" on the correctness of the state court finding of harmless error, then the decision is not unreasonable. *Id.* at 2199, citing *Harrington v. Richter*, 562 U.S. 86, 101 (2011). On the other hand, the federal court may grant relief if it has "grave doubt about whether a trial error of federal law had substantial and injurious effect or influence in determining the jury's verdict." *Hall v. Haws*, 861 F.3d 977, 991-992 (9th Cir. 2017), quoting *Ayala*, 135 S.Ct. at 2197-2198. If a

constitutional error is prejudicial under this test, then the state court's finding of harmless error was necessarily objectively unreasonable. *Hall*, 861 F.3d at 992.

In cases involving a defendant's absence from part of a trial, the claim is often denied because it is difficult to isolate a specific harm that occurred due to the defendant's absence. This case is unusual because the harm is set forth in the record by the main prosecution witness who explained why her direct testimony portraying Harloff in the worst possible light was so different than her preliminary hearing testimony where she stated repeatedly under oath that she did not remember what happened:

> Well, like I said before, I was -- I was scared. Mr. Harloff was right there. And in the same chair he's sitting now. And just earlier today when I was speaking about those things, and I did remember Mr. Harloff was not present in that chair, and it made it a lot easier for me to talk about it and to say it because I wasn't and back then and I still am, like I said, he said that, if I ever put him in jail, I better move out of the area because his homeboys would come after me. And I'm not -- I was living in the area back then still, and that's why. And I was very scared. ER 117-118.

Ikeler testified differently than she had at the preliminary hearing, and in a way that was highly prejudicial to Harloff, because Harloff wasn't present in court during most of her testimony.

Harloff would be hard-pressed to present clearer evidence that he was

harmed by the court allowing Ikeler to testify without him being present. At the start of trial, the prosecutor had no idea what Ikeler would say on the stand. During opening argument, he told the jury: "I'm not exactly sure what she's going to tell you once she gets on the stand ... I anticipate that she may say more or less the same thing that she said at the previous hearing, that she doesn't remember much of what happened ...." (RT 58.)

When Ikeler took the stand, however, Harloff was not in the courtroom. Spared from having to face Harloff, Ikeler not only testified that Harloff assaulted her, but she added extensive and improbable details that she had not previously reported. For example, Ikeler testified for the first time that Harloff made her sign a paper confessing to misdeeds while he was in jail, that he hit her with a fist more than ten times,[7/] that he pierced her shirt at breast level with pliers, that he hammered a pair of scissors into her foot with a hammer, that he threatened to use a power drill on her, that he threatened to send his "homeboys" after her if she reported him to the police, and that he hit her multiple times in the head with a ten-pound car distributor.[8/] (RT 143-144.)

[7/] Ikeler told the police that Harloff slapped her but did not slug her. (RT 135, 138.)

[8/] Ikeler told the police that Harloff hit her once with the distributor. (RT 150.) Getting hit multiple times with a ten-pound object would likely have resulted in more serious injuries than Ikeler sustained.

This was a he said/she said trial. Credibility was critical. While Ikeler unquestionably sustained injuries that day, Ikeler and Harloff told different stories about how those injuries were sustained. Ikeler's version was most likely embellished to portray Harloff in the worst possible light, something that likely would not have occurred had Ikeler had to face Harloff while she testified. Consequently, had Harloff been present, there is a reasonable likelihood that Ikeler would have testified consistent with her preliminary hearing testimony and not provided the detailed but questionable account she gave when she was able to testify without having to face Harloff in the courtroom. *See Coy v. Iowa*, 487 U.S. 1012, 1019 (1988) ("It is always more difficult to tell a lie about a person 'to his face' than 'behind his back.'")

In finding no prejudice, the state court minimized the importance of what Ikeler did at trial and her explanation for it. Instead, the court opined that Ikeler's preliminary hearing testimony would have been enough: "Although the victim was reluctant to answer questions at the preliminary hearing and said she could not remember many details, she did admit that she was hit in the head and on her hands and that another person caused her to suffer those injuries—statements that

were consistent with her trial testimony and her injuries." ER 64. The state court also discounted Harloff's testimony as "inconsistent with the nature and

extent of the victim's injuries," and concluded that even if Ikeler had testified as she had at the preliminary hearing, "that testimony in conjunction with the testimony of the neighbor and the police officer and the nature and extent of the victim's injuries, whether Harloff put on a defense or not, is overwhelming such that it establishes
that any error from proceeding in his absence was not prejudicial." ER 64-65.

The state court's view of Harloff's testimony being inconsistent with Ikeler's injuries is not supported by the record. The parties stipulated that Ikeler suffered "multiple contusions and lacerations on her head, hands, arms, and knee, as well as a laceration on her scalp that required five to six staples." (RT 175.) Harloff testified that he slapped her in the head which caused her to fall to the uncarpeted plywood floor resulting in cuts and abrasions from the wood and nails. In addition, according to both Harloff and Wright, Ikeler hit herself in the head with the car distributor. Thus, Ikeler's injuries were not inconsistent with Harloff's testimony.

The state court's view that even if Ikeler only testified to what she said at the preliminary hearing the evidence against Harloff was overwhelming and, therefore, not prejudicial applies the wrong test. Harmless error review under *Chapman* requires consideration of the bases upon which the jury actually rested its verdict. *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993).

"The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." *Id.*; *see also Satterwhite v. Texas*, 486 U.S. 249, 258-259 (1988) ("The question, however, is not whether the legally admitted evidence was sufficient to support the [verdict], which we assume it was, but rather, whether the State has proved 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained'"); *Fahy v. Connecticut*, 375 U.S. 85, 86 (1963) ("We find that the erroneous admission of this unconstitutionally obtained evidence at this petitioner's trial was prejudicial; therefore, the error was not harmless, and the conviction must be reversed. We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of"); *Kotteakos v. United States*, 328 U.S. 750, 764-765 (1946) ("And the question is, not were they right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had on the jury's decision....The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence")

It is undisputed that Ikeler testified radically different during Harloff 's

absence than she did at the preliminary hearing where Harloff was present, and that Ikeler admitted that the difference in her testimony was attributable to Harloff's absence at trial. The question the state court should have asked was whether Ikeler's testimony given without Harloff being present contributed to or substantially influenced the jury's verdicts. The answer to that question is most assuredly yes. Under these circumstances, the state court finding of harmlessness was either an objectively unreasonable application of *Chapman* or was based on an unreasonable determination of the facts in light of the state court record.

What took place in this case cuts to the heart of why criminal defendants have a constitutional right to confront the witnesses against them. Idler admitted under oath that she testified differently because Harloff was not in the courtroom.

Without having to look Harloff in the eye, Ikeler not only claimed to remember what happened, in stark contrast to her preliminary hearing testimony, but she added extensive, improbable, and highly damning details that she had not previously reported. A fairminded jurist could not find beyond a reasonable doubt that Ikeler's testimony given without Harloff being present did not contribute to the jury's guilty verdict. This Court should grant certiorari to prevent the diminution of the *Chapman* harmless error

test.

CONCLUSION

For the reasons set forth above, this Court should grant certiorari on this claim.

Dated: November _____, 2018

Respectfully submitted,

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