No.

In the Supreme Court of the United States

PEDRO HERNANDEZ,

Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the New York State Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has long held that a criminal defendant has a constitutional right to introduce evidence suggesting that someone else committed the crime charged. In *Holmes* v. *South Carolina*, 547 U.S. 319 (2006), the Court affirmed that trial courts may exclude such evidence under neutral balancing principles, such as that contained in Federal Rule of Evidence 403. But the Constitution does not tolerate evidentiary rules that do not "rationally serve" the permissible goal of "focus[ing] the trial on the central issues by excluding evidence that has only a very weak logical connection to the central issues." *Holmes*, 547 U.S. at 330.

The lower courts have divided as to the meaning of *Holmes*. Some courts have concluded that *Holmes* prohibits application of rules that apply heightened standards of relevance to evidence of third-party guilt. That is, these courts hold that, under *Holmes*, while evidence of third-party guilt is certainly subject to normal evidentiary rules, it cannot be disfavored, with more exacting standards for its admission. Other courts, however, have created special rules for evidence of third-party guilt, requiring heightened showings of relevance prior to its admission.

Here, the lower courts applied a heightened standard, and thus denied petitioner's request to introduce evidence of third-party guilt. They did so even though, just a few years earlier, another court had granted a *search warrant* based on that same evidence, finding it satisfied the probable cause standard.

The question presented is: Whether the Constitution permits courts to subject evidence of third-party guilt to heightened relevance standards.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Pedro Hernandez, respectfully petitions for a writ of certiorari to review the judgment of the New York State Court of Appeals.

OPINIONS BELOW

The order of the New York State Court of Appeals denying leave to appeal (App., *infra*, 1a) is reported at 35 N.Y.3d 1066. The opinion of the New York Appellate Division of the Supreme Court, First Judicial Department (App., *infra*, 2a-7a) is reported at 181 A.D.3d 530. The New York Supreme Court's decision denying in relevant part petitioner's motion to introduce evidence of third-party guilt (App., *infra*, 8a-11a) is unreported.

JURISDICTION

The judgment of the New York State Court of Appeals was issued on August 24, 2020. This Court's order of March 19, 2020, extended the time to file this petition to January 21, 2021. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor[.]"

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "No State shall * * * deprive any person of life, liberty or property, without due process of law[.]"

STATEMENT

A criminal defendant has a constitutionally guaranteed right to present evidence at trial that someone else committed the charged crime. This Court has re-

peatedly recognized that evidentiary rules violate this right where the rules do not "rationally serve" the permissible end of "focus[ing] the trial on the central issues by excluding evidence that has only a very weak logical connection to the central issues." *Holmes* v. *South Carolina*, 547 U.S. 319, 330 (2006).

The state supreme courts, however, disagree as to a fundamental question of law regarding this constitutional right—as well as the meaning of *Holmes*. Some courts conclude that this constitutional right prohibits disfavoring evidence of third-party guilt by subjecting it to more rigorous relevance standards than other forms of evidence that a defendant may wish to present. By contrast, other courts have specifically adopted and approved heightened standards, preventing a defendant from presenting third-party guilt evidence unless a more demanding standard is satisfied.

New York has taken the latter approach. In a pair of cases handed down in 2016, the New York Court of Appeals held that a defendant must "establish that the probative value of relevant evidence outweighs the appropriate countervailing factors." *People* v. *Powell*, 27 N.Y.3d 523, 531 (2016); accord *People* v. *DiPippo*, 27 N.Y.3d 127, 136 (2016). This heightened standard is the opposite of the traditional balancing test contained in Federal Rule of Evidence 403 and its state equivalents.

This case provides the Court a suitable vehicle to resolve this conflict. Here, the trial court denied petitioner Pedro Hernandez the right to present specific evidence of third-party guilt in his trial for the 1979 disappearance of Etan Patz. Patz's case drew intense media scrutiny, and he was the first child whose image was printed on milk cartons. In 2012, FBI investigators began to train their attention on Othniel Miller, a handyman with a basement shop directly between

Patz's apartment and bus stop. To obtain a search warrant, prosecutors presented various evidence, including incriminating statements of Miller himself and the actions of a scent dog. Later, investigators focused their attention on petitioner, and charged him. Prior to trial, petitioner moved to introduce the same evidence against Miller that the state relied upon to obtain its search warrant. Although a judge had earlier concluded that this evidence established probable cause, the trial court held that it did not satisfy New York's heightened relevance requirement. The appellate court affirmed. Further review by this Court is now warranted.

A. Legal background.

1. The Court has repeatedly recognized that, "[w]hether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane* v. *Kentucky*, 476 U.S. 683, 690 (1986) (citations omitted) (quoting *California* v. *Trombetta*, 467 U.S. 479, 485 (1984)). Indeed, "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers* v. *Mississippi*, 410 U.S. 284, 302 (1973); see also *Washington* v. *Texas*, 388 U.S. 14, 19 (1967) (Defendant "has the right to present his own witnesses to establish a defense.").

A defendant's ability to present evidence of third-party guilt is an essential element of this constitutional right. Almost 130 years ago, in *Alexander* v. *United States*, 138 U.S. 353 (1891), the Court recognized the fundamental importance of being permitted to introduce evidence of a third-party's culpability for the crime charged. *Id.* at 355-357 (discussing error in ex-

cluding evidence that another man was hunting the victim at the same time as the alleged offense, but decided on other grounds).

Later, in *Chambers*, the Court vacated a conviction on the grounds that the trial court's application of evidentiary rules to exclude testimony of a third party's confessions to the murder at issue deprived petitioner of a "trial in accord with traditional and fundamental standards of due process." 410 U.S. at 302. That evidence was excluded based upon Mississippi's witness "voucher" rule. The Court observed that petitioner's "defense was far less persuasive than it might have been had he been given an opportunity" to present the evidence at issue. *Id*. at 294. It thus struck application of the Mississippi rule, as "the right to confront and to cross-examine," although "not absolute," does require close examination of the "competing interest" when these core rights are denied "or significant[ly] dimin[ished.]" *Id*. at 295.

Most recently, in *Holmes*, the Court vacated petitioner's capital conviction on the grounds that exclusion at trial of evidence of third-party guilt, based upon a state's evidentiary rule, deprived the petitioner of a meaningful opportunity to present a complete defense. 547 U.S. at 327-330. The trial court excluded substantial third-party guilt evidence, holding that it "merely casts a bare suspicion upon another or raises a conjectural inference as to the commission of the crime by another." *Id.* at 324 (internal quotation marks and alterations omitted). This Court reversed: The state evidentiary rule at issue fundamentally failed in its purpose, as it made the admissibility of defendant's third-party guilt evidence contingent upon the strength of the state's case, not upon its own probative value. *Id.* at 329-330.

In sum, the Constitution supplies limits to the scope of trial court discretion to exclude evidence. To be sure, trial courts may "exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." 547 U.S. at 326. The prototypical example of such a rule is Federal Rule Evidence 403, which allows a court to "exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403. This Rule passes constitutional muster—even if it excludes evidence of third-party guilt—because it "rationally serve[s]" the permissible end of "focus[ing] the trial on the central issues by excluding evidence that has only a very weak logical connection to the central issues." *Holmes*, 547 U.S. at 330. But at the other end of the spectrum, "the Constitution * * * prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote." *Id.* at 326.

2. New York has established a heightened relevance requirement regarding evidence of third-party guilt.

In 2001, the New York Court of Appeals rejected a "clear link" test that many lower courts had used to exclude defense evidence of third-party guilt where "the defense had failed to show a clear link between the third party and the crime in question." *People* v. *Primo*, 96 N.Y.2d 351, 354 (2001) (internal quotation marks omitted). The court instead held that "the test is better described in terms of conventional evidentiary principles" of relevance balanced against countervailing con-

siderations of delay, undue prejudice, or confusing the issues. *Id.* at 355.

But in a pair of cases decided weeks apart in 2016, the court established a new standard that imposed a heightened relevance requirement on third-party guilt evidence. In *People* v. *DiPippo*, 27 N.Y.3d 127 (2016), and *People* v. *Powell*, 27 N.Y.3d 523 (2016), the court held that, before a jury may hear evidence of third-party guilt, the defendant must "establish that the *probative value* of relevant evidence *outweighs the appropriate countervailing factors*." *Powell*, 27 N.Y.3d at 531 (emphases added); see also *DiPippo*, 27 N.Y.3d at 136. This standard reverses the traditional evidentiary approach—where relevant evidence is excluded only if countervailing factors "substantially outweigh[]" the evidence's "probative value." *E.g.*, Fed. R. Evid. 403.

Numerous lower courts in New York have since applied the heightened relevance requirement established by *DiPippo* and *Powell*. See *People* v. *Rodriguez*, 149 A.D.3d 464, 465 (2017) ("Evidence purporting to show third-party culpability is reviewed 'in accordance with ordinary evidentiary principles' requiring a defendant to establish that the probative value of the evidence outweighs the potential for undue prejudice, delay, or confusion.") (quoting *Powell*, 27 N.Y.3d at 526); *People* v. *Willock*, 125 A.D.3d 901, 902 (2015) ("[T]he proffered testimony was not sufficiently probative to outweigh the countervailing risks of trial delay, undue prejudice, confusing the issues, or misleading the jury."); *People* v. *Morgan*, 24 A.D.3d 950, 954 (2005) ("[D]efendant failed to establish that the probative nature of her testimony on the issue of possible third-party culpability outweighed the countervailing considerations of undue delay and juror confusion.").

B. Factual background.

1. Etan Patz disappeared from the streets of SoHo, New York, on the morning of May 25, 1979, while walking to catch his bus to school. At that time, the SoHo neighborhood was desolate and dangerous. Trial Tr. 4175-4176. Few families lived in the neighborhood, which was still primarily zoned for industry. *Ibid.*; *id.* at 3550-3551. But some adventurous New Yorkers had begun moving in, and converting abandoned factories into loft-style apartments. *Id.* at 3550-3551. The Patz family was one of them, and lived in a loft at 113 Prince Street, on the north side of the street, east of Wooster Street. *Id.* at 3550.

Othniel Miller was a carpenter and handyman, who had an office and shop in the basement of 127B Prince Street, near the northwest corner of Prince and Wooster. Mot. to Introduce Evid. 8. Miller's shop was directly between the Patz family's apartment and Patz's school bus stop (*ibid.*), which was in front of a bodega at the northwest corner of Prince and West Broadway (Trial Tr. 3572-3573).

Miller and Patz knew each other well. According to an August 1979 interview with Patz's mother, Patz

> very often in the mornings wanted to go into a basement on route [to his school bus stop]. There was a contractor there whom he liked very much who was his buddy and who would give him money, named Othniel Miller. If we had the time sometimes in the morning on the way to school [Patz] would run down there on the way and say a quick hello and come back up. This man would give him money for helping him do work, what little he could do.

Mot. to Introduce Evid. 8-9. The night before his disappearance, Patz spent approximately 45 minutes alone

with Miller in his basement shop, where Miller gave Patz a $1 bill. *Id.* at 8.

On the morning of his disappearance, Patz asked his mother if he could walk to his bus stop alone. Trial Tr. 3570-3571. She agreed. *Ibid.* Patz's mother walked him down to the street, where she could see a group of parents already at the bus stop, just over a block to the west. *Id.* at 3563, 3571. Patz reached the northeast corner of Prince and Wooster and looked both ways. *Id.* at 3583. Patz's mother returned upstairs. *Ibid.*

Just seconds after Patz's mother looked away, Patz would have crossed Wooster and arrived at stairs leading down to Miller's shop. Patz's school bus stop was one block further west, but three parents and one child testified at trial that they did not see Patz arrive at the bus stop that morning. *Id.* at 3735-3737, 3823, 3832-3834, 7083-7084, 7107-7108.

Patz has never been seen since.

2. In 2011, a renewed investigation into Patz's disappearance began to focus on Miller and his basement shop. During the course of this investigation, Miller made several incriminating statements to FBI investigators. Miller told the FBI that when he gave Patz a $1 bill the night before his disappearance, Miller was "changing out of his work clothes." Mot. to Introduce Evid. 8. Miller also admitted that in 1979, "he had sexual intercourse with a girl approximately ten years in age." *Id.* at 9.

On April 2, 2012, the FBI brought a scent dog from its Quantico Evidence Recovery Team to Miller's basement shop. Mot. to Introduce Evid. 8. The dog was trained to detect the odor of human decomposition, even after many years, if the decomposing body had been present in a location for longer than 20 minutes. *Ibid.* The dog alerted at two areas of Miller's basement:

the back corner of the office, and an area where Miller kept a table saw. *Ibid.*

The next day, Miller accompanied FBI agents to the basement shop. The agents told Miller that the scent dog had alerted to the odor of human decomposition. Rather than deny any crime, Miller responded, "What if the body was moved?" Mot. to Introduce Evid. 8. Miller also described Patz as "a beautiful boy" whom Miller "loved" and would hug. *Ibid.* Miller even demonstrated for the FBI agents how he would hug Patz. *Ibid.*

On April 16, 2012, the New York County District Attorney's office applied for a search warrant to excavate Miller's basement office. Mot. to Introduce Evid. 8. ADA Penelope J. Brady prepared an affirmation that included the facts the FBI had uncovered in its investigation, as well as Miller's incriminating statements. *Ibid.* A search warrant was issued on the prosecution's showing of probable cause, and later that month, Miller's basement was excavated. *Id.* at 10. The search was inconclusive, however, and Miller was not charged in connection with Patz's disappearance.

3. The search warrant executed in Miller's basement shop drew extensive media attention. One of the people who saw these press reports was petitioner Pedro Hernandez's brother-in-law. Trial Tr. 4448. On May 8, 2012, Hernandez's brother-in-law called police with a tip about rumors that Hernandez was involved in Patz's disappearance. *Huntley* Hrg. Tr. 209-210.

Back in 1979, Hernandez had worked at the bodega next to Patz's bus stop. *E.g.*, Trial Tr. 4912, 4916. Hernandez was interviewed by police in July 1979 about Patz's disappearance, along with other employees of the bodega, but Hernandez never attracted police scrutiny. PX 181; DX O. Police also searched the entire bo-

dega, including its basement, within days of Patz's disappearance. Trial Tr. 5025-5026. They found nothing.

Over the past 40 years, Hernandez has told multiple people that he killed someone in New York City. But the details of Hernandez's statements have changed as frequently as they have been made. On one occasion, Hernandez stated he killed a "black kid" who "threw a ball at" Hernandez. Trial Tr. 4057-4059. Another time, it was an anonymous "kid." *Id.* at 3902-3905, 3919-3920, 3959-3960. And yet another time, Hernandez claimed he killed a "muchacho" of his own height, who had "violated" Hernandez. *Id.* at 4328-4330.

Hernandez has an extensive history of mental illness, memory issues, and intellectual impairment. Hernandez has an IQ of 70, making him less intelligent than 98% to 99% of people his age. *Huntley* Hrg. Tr. 847-857; Trial Tr. 7768. In 2004, Hernandez was diagnosed with psychotic disorder NOS and schizophrenia/bipolar. DX AA at SSA 19, 23-25, 50, 71. In 2005, he was again diagnosed with psychotic disorder and chronic mental illness. *Ibid.* He began taking the antipsychotic drug Zyprexa to treat these conditions. *Id.* at SSA 19, 27-28, 37. More recently, Hernandez was diagnosed with Schizotypal Personality Disorder. DX L at 10.

Following his brother-in-law's tip, on May 23, 2012, at 7:45 a.m., police cars pulled up outside Hernandez's home in New Jersey, where he lived with his wife. *Huntley* Hrg. Tr. 371-372, 577; Trial Tr. 5070. NYPD detectives asked Hernandez to accompany them to the local police station to discuss an old missing persons case in New York City. *Huntley* Hrg. Tr. at 233-236, 408.

Over the next seven hours, police subjected Hernandez to a highly choreographed interrogation. Police did not read Hernandez his *Miranda* rights, and did not videotape their interview. As the hours went by, Hernandez broke down and curled on the floor in the fetal position, sobbing. *Huntley* Hrg. Tr. 705-706, 752-753. Eventually, Hernandez claimed he killed Patz in the bodega's basement, put his body in a garbage bag inside a box, then took the box and left it around the corner from the bodega. *Id.* at 597, 714.

Once Hernandez made these statements, the police finally read him his rights and turned on the room's videotaping system. *Huntley* Hrg. Tr. 426, 598; *Huntley* Hrg. Ex. 45. Police then asked Hernandez to repeat his statements. PX 103, at 14:54-14:56. Over the course of the next 24 hours, Hernandez made even more inconsistent statements about his actions back in 1979. See Def.'s App. Div. Br. 105 (summarizing inconsistencies).

Hernandez's conflicting confessions are the only evidence tying Hernandez to Patz's disappearance.

C. Procedural background.

1. Hernandez was arrested after his interrogations and charged with murder in the second degree and kidnapping in the first degree. His trial began in January 2015, but after 18 days of deliberations, the jury deadlocked. The court declared a mistrial on May 8, 2015.

On November 4, 2015, Hernandez's counsel moved pursuant to *People* v. *Primo*, 96 N.Y.2d 351 (2001), *Washington* v. *Texas*, 388 U.S. 14 (1967), and the Sixth Amendment, to introduce evidence of third-party guilt. Mot. to Introduce Evid. 2-3. One part of the motion focused on Jose Ramos, a longtime suspect in Patz's disappearance. The other part focused on Miller and the evidence prosecutors relied upon to obtain a warrant to

search his basement office—including the response of the FBI scent dog and Miller's incriminating statements to FBI agents. *Id.* at 8-10.

On December 15, 2015, the trial court held argument on Hernandez's motion. The prosecutors argued that Hernandez had not satisfied the high burden of admissibility set by *DiPippo*, which "excludes evidence of remote acts disconnected and outside the crime itself, requiring that third-party culpability evidence shares nearness in time, place, and circumstance to the alleged crime." Mot. Hrg. Tr. 13. Prosecutors also argued that Miller had an alibi for the morning of Patz's disappearance. *Id.* at 10.

Hernandez's counsel pointed out that prosecutors were aware of Miller's supposed alibi, yet still obtained a warrant to search his basement. As counsel put it: "You can't have it both ways. You can't get a search warrant in 2012, now claim there's no credible evidence on Othniel Miller." Mot. Hrg. Tr. 11.

On March 7, 2016, the trial court issued its decision on Hernandez's motion. App., *infra*, 8a. The court largely granted Hernandez's motion with respect to evidence implicating Ramos. But the court rejected Hernandez's request to introduce evidence about "statements Miller made to the FBI in 2012," as well as "the actions of a 'scent dog' in 2012 at 127B Prince Street." App., *infra*, 11a.[1]

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[1] Although the court allowed Hernandez or the People to put Miller on the stand (App., *infra*, 11a), Miller was certain to assert his Fifth Amendment right to silence. Indeed, the People had argued in opposing Hernandez's motion that putting Miller on the stand to assert his Fifth Amendment right was not "proper evidence." Mot. Hrg. Tr. 11.

Hernandez's second trial began on September 12, 2016, and continued for five months. Based on the trial court's ruling, Hernandez did not introduce evidence pointing towards Miller's guilt. On February 14, 2017, after more than two weeks of deliberations, the jury acquitted Hernandez of intentional murder, but convicted him of felony murder and kidnapping. Trial Tr. 10253-10258. Hernandez was sentenced to 25 years to life. App., *infra*, 2a.

2. Petitioner appealed his conviction to New York's Appellate Division, First Department. Citing this Court's decision in *Chambers* v. *Mississippi*, 410 U.S. 284 (1973), *Crane* v. *Kentucky*, 476 U.S. 683 (1986), and *Holmes* v. *South Carolina*, 547 U.S. 319 (2006), petitioner argued that Hernandez was deprived of his right to present a complete defense. Def.'s App. Div. Br. 138-144. He also contended that evidence of third-party guilt could not be considered a different category of evidence, but instead must be evaluated under ordinary evidentiary principles. *Ibid.*

On March 26, 2020, the Appellate Division affirmed Hernandez's conviction. With respect to the excluded evidence of Miller's guilt, the court recognized Miller's constitutional "right to present a defense." App., *infra*, 5a (citing *Crane*, 476 U.S. at 689-690 (1986)). But applying the standard of *People* v. *DiPippo*, 27 N.Y.3d 127 (2016), the court held that the trial court had providently exercised its discretion, as the proffered evidence relating to Miller "was so remote as to be irrelevant." App., *infra*, 5a (citing *DiPippo*, 27 N.Y.3d at 135-136).

Petitioner moved for leave to appeal to the New York Court of Appeals based on all issues raised in petitioner's appellate briefs. Mot. for Leave 23. But on August 24, 2020, the Court of Appeals denied this motion. App., *infra*, 1a.

REASONS FOR GRANTING THE PETITION

The Court should grant further review: There is a clear conflict regarding whether the Constitution authorizes courts to apply a heightened evidentiary standard with respect to evidence of third-party guilt; this case squarely presents that important issue; and the approach relied on below—that evidence of third-party guilt may be subject to uniquely unfavorable rules—is plainly wrong.

A. The lower courts have divided as to whether the Constitution permits heightened standards of proof for evidence supporting third-party guilt.

1. On one side of the ledger, multiple courts have recognized that the constitutional right to present a defense prohibits heightened relevance standards for evidence suggesting third-party guilt.

Take for example Hawai'i, which had previously adopted "a 'legitimate tendency' test requiring that, in order to admit evidence regarding a third person's motive to commit the crime, 'there must be a "legitimate tendency" that the third person could have committed the crime.'" *State* v. *Rabellizsa*, 79 Haw. 347, 350 (1995). Recently, in reliance on *Holmes*, the Supreme Court of Hawai'i overruled *Rabellizsa*. See *State* v. *Yoko Kato*, 147 Haw. 478 (2020). Rather than that heightened standard, the court held that, "when a defendant seeks to introduce third-party culpability evidence, the defendant must initially clear no higher hurdle than that set by HRE Rule 401." *Id.* at 493-494. The court recognized that *Holmes* prohibits giving the state's evidence more weight than a defendant's—an approach that invades "determinations that should have been reserved to the jury for its consideration." *Id.* at 497.

Similarly, also referencing *Holmes*, the District of Columbia Court of Appeals held that "a trial court may not wholly prevent a defendant from offering evidence of third-party perpetration. Nor may it require a higher threshold of relevance for such evidence to be admissible." *Johnson* v. *United States*, 960 A.2d 281, 293 (D.C. 2008) (citing *Holmes*, 547 U.S. at 329-331; *Winfield* v. *United States*, 676 A.2d 1, 4-5 (D.C. 1996) (en banc)); see also *Gray* v. *Commonwealth*, 480 S.W.3d 253, 266-267 (Ky. 2016) ("[T]he critical question for [third-party guilt] evidence is one of relevance.").

Numerous federal courts have also agreed that heightened relevance requirements violate a defendant's constitutional right to present a meaningful defense. See, *e.g.*, *Wade* v. *Mantello*, 333 F.3d 51, 62 (2d Cir. 2003) (expressing "doubt" about "whether categorically requiring evidence of third-party culpability to meet a heightened showing of probity comports with the constitutional guarantee of the right to present a complete defense"); *Narrod* v. *Napoli*, 763 F. Supp. 2d 359, 376 (W.D.N.Y. 2011) ("[T]he Constitution does not separate third-party culpability proof into a special category requiring demonstration of a higher standard of probity."); *Wilson* v. *Firkus*, 457 F. Supp. 2d 865, 886 (N.D. Ill. 2006) (rejecting the contention "that a state may permissibly require a heightened standard of probity instead of traditional rules of relevance when the defendant seeks to offer evidence regarding a third party's guilt"); *Sparman* v. *Edwards*, 26 F. Supp. 2d 450, 472 (E.D.N.Y. 1997) ("[A] general rule of evidence that bars the introduction of relevant, exculpatory evidence and imposes a burden on defendants to produce another piece of evidence supporting defendant's defense strikes this Court as constitutionally questionable."), *aff'd*, 154 F.3d 51 (2d Cir. 1998).

At bottom, these decisions recognize that "a criminal defendant is entitled to all reasonable opportunities to present evidence that might tend to create doubt as to the defendant's guilt." *People* v. *Elmarr*, 2015 CO 53, ¶ 26. Heightened relevance requirements "place[] too high a burden on a criminal defendant who is without the vast investigatory resources of the State." *State* v. *Robinson*, 628 A.2d 664, 667 (Me. 1993). The result is that these rules "improperly tend[] to *exclude* evidence of third party culpability on all but extraordinarily strong showings." *People* v. *Hall*, 41 Cal. 3d 826, 833 (1986) (internal quotation marks omitted). Instead of heightened standards applied to third-party guilt, traditional rules of evidence "effectively safeguard against the admission of 'conjectural inferences' without * * * needing to apply [a] direct connection doctrine" or other heightened relevance requirement. *State* v. *Meister*, 148 Idaho 236, 241 (2009); see also, *e.g.*, *State* v. *Packed*, 2007 S.D. 75, ¶ 22 ("[T]here is no special rule in South Dakota dealing solely with third-party perpetrator evidence. Relevant evidence is admissible; irrelevant evidence is inadmissible, subject to the considerations of SDCL 19-12-3 (Rule 403)."); *State* v. *Powers*, 101 S.W.3d 383, 395 (Tenn. 2003) (recognizing that direct connection "standard imposes too high a threshold for the admissibility of evidence concerning third-party culpability."); *State* v. *Prion*, 203 Ariz. 157, 161 (2002) ("The proper standard regarding third party culpability evidence is found in Rules 401, 402, and 403 of the Arizona Rules of Evidence. Any such evidence must simply be relevant and then subjected to the normal 403 weighing analysis between relevance, on the one hand, and prejudice or confusion on the other."); *Hall*, 41 Cal. 3d at 834 ("[C]ourts should simply treat third-party culpability evidence like any other evidence.").

2. By contrast, other courts have adopted—and approved as constitutionally sanctioned—rules that uniquely disfavor evidence demonstrating third-party guilt.

For example, several states apply a "direct connection" rule, which often requires evidence that "tend[s] to prove that the other person committed some act directly connecting him with the crime" (*State* v. *Rousan*, 961 S.W.2d 831, 848 (Mo. 1998)), or "some overt act on the part of another towards the commission of the crime itself" (*Gore* v. *State*, 2005 OK CR 14, ¶ 15). However phrased, the effect of all of these rules is the same: a defendant must clear a "special admissibility hurdle" to introduce evidence of third-party guilt. *State* v. *Godfrey*, 2010 VT 29, ¶ 33 (internal quotation marks omitted).

Several courts have stated that *Holmes* "*expressly ratified*" heightened relevance requirements. *Dorsey* v. *Steele*, 2019 WL 4740518, at *11 (W.D. Mo. Sept. 27, 2019) (emphasis added) (citing *Holmes*, 547 U.S. at 327 n.*); see also *Hester* v. *Ballard*, 679 F. App'x 273, 283 (4th Cir. 2017); *Armstrong* v. *Hobbs*, 698 F.3d 1063, 1067 (8th Cir. 2012); *Warner* v. *Workman*, 814 F. Supp. 2d 1188, 1228 (W.D. Okla. 2011); *State* v. *Wilson*, 2015 WI 48, ¶ 52; *Godfrey*, 2010 VT 29, ¶¶ 33-34. The basis for this conclusion is a footnote in *Holmes*, where the Court string-cited 24 cases that it described as containing "widely accepted" "specific application[s]" of the basic principle that "trial judges [can] exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." *Holmes*, 547 U.S. at 326-327 & n.*.

B. This is a suitable vehicle to resolve the conflict.

1. The unique facts of this case make it an appropriate vehicle to resolve this persistent disagreement among the lower courts. The case starkly presents the question of whether the Constitution tolerates disfavored treatment of third-party guilt evidence, holding it to heightened standards. In particular, the evidence petitioner sought to admit in the trial below was not some speculation without basis—it was the *same evidence* that prosecutors relied upon to obtain a search warrant issued on probable cause to investigate another suspect for the very crime being tried.

There can be no doubt that evidence used to obtain a search warrant qualifies as relevant to the offense being investigated. Probable cause is a bedrock principle of constitutional law that provides the standard of proof required for the State to take action against the target of a criminal investigation, in the form of arrest or charge, or to invade private property in search of evidence or fruits of a crime, by obtaining a search warrant. The standard is "practical and common-sensical" and inherently involves an evaluation of the "totality of the circumstances." *Florida* v. *Harris*, 568 U.S. 237, 244 (2013).

If evidence establishes probable cause to investigate a suspect for a crime, that evidence certainly is relevant in a trial of another person for that very same crime. Here, by issuing the search warrant for Othniel Miller's basement, a New York judge necessarily concluded that "the facts available to him would warrant a person of reasonable caution in the belief that contraband or evidence of a crime is present." *Harris*, 568 U.S. at 243 (internal quotation marks and alterations omitted). That same evidence should be available to a

defendant to offer as part of his "meaningful opportunity to present a complete defense." *Crane* v. *Kentucky*, 476 U.S. 683, 690 (1986) (citation omitted).

Evidence that has already established probable cause will also satisfy other permissible considerations, in particular, the need to "focus the trial on the central issues by excluding evidence that has only a very weak logical connection to the central issues." *Holmes*, 547 U.S. at 330. The evidence prosecutors used to establish probable cause to investigate Miller's basement went directly to the central issue at Hernandez's trial—what happened to Etan Patz on the morning of May 25, 1979. That same evidence necessarily focuses on that central issue; if it did not, the warrant would not have issued in the first place. Cf. *Green* v. *Georgia*, 442 U.S. 95, 97 (1979) (per curiam) (summarily reversing exclusion of hearsay evidence that state relied upon in previous trial of co-defendant for the same crime).

The probable cause standard also provides assurance that the evidence against Miller was sufficiently reliable. Cf. *Chambers* v. *Mississippi*, 410 U.S. 284, 300 (1973) (rejecting exclusion of "hearsay statements * * * [that] were originally made and subsequently offered at trial under circumstances that provided considerable assurance of their reliability"). The totality of the circumstances considered by the judge issuing the warrant encompasses the reliability of the underlying evidence as part of the totality of the circumstances. See *Illinois* v. *Gates*, 462 U.S. 213, 230-231 (1983). Probable cause equally ensures that the evidence met minimum standards of reliability, because "the substance of all the definitions of probable cause is a reasonable ground for belief of guilt, and that the belief of guilt must be particularized with respect to the person to be searched or seized." *Maryland* v. *Pringle*, 540 U.S. 366,

371 (2003) (internal quotation marks and citations omitted).

2. The proceedings below also frame the issue of heightened standards of relevance squarely for this Court. Hernandez's counsel clearly raised this issue and its constitutional dimensions in his motion to the trial court. Mot. to Introduce Evid. 2. He tied the relevance of this evidence directly to the warrant prosecutors obtained. Mot. Hrg. Tr. 11. And for their part, the prosecutors clearly argued that Hernandez needed to meet a heightened standard of relevance, including "requiring that third-party culpability evidence shares nearness in time, place, and circumstance to the alleged crime." *Id.* at 13.

The Appellate Division's decision did not muddy these waters. The court did not address any countervailing considerations of delay, unfair prejudice, or confusion. Instead, the court relied entirely on the conclusion that Hernandez had not satisfied the initial hurdle of relevance—that the evidence supporting the search warrant was "so remote as to be irrelevant." App., *infra*, 5a. The court's citation to *People* v. *DiPippo*, 27 N.Y.3d 127 (2016), confirms that it was applying New York's heightened relevance standard, which requires a defendant to show that the "probative value of the evidence plainly outweighs the dangers of delay, prejudice and confusion." *DiPippo*, 27 N.Y.3d at 136 (internal quotation marks omitted).

This case therefore presents a pure and preserved issue of law, and gives this Court a suitable vehicle to clarify its decision in *Holmes*, and conclusively reject rules that place arbitrarily heightened standards of relevance on evidence of third-party guilt.

C. The Constitution does not authorize disfavoring evidence of third-party guilt.

The governing rule should be straightforward: "[T]he Constitution does not separate third-party culpability proof into a special category requiring demonstration of a higher standard of probity." *Narrod* v. *Napoli*, 763 F. Supp. 2d 359, 376 (W.D.N.Y. 2011).

To start with, it is non-controversial that the Constitution entitles a defendant to present evidence of his or her choosing in order to mount a complete defense. It is likewise established that trial courts may police evidence to ensure only that which is relevant to the issues in the trial may be put before the jury. The critical question here is whether trial courts may disfavor evidence of third-party guilt, subjecting it to heightened evidentiary standards inapplicable to other forms of evidence. Rules that adopt heightened standards for evidence of third-party guilt violate the Constitution—and this Court should so declare.

In *Holmes*, the court established a touchstone constitutional standard for evidentiary rules: They must "rationally serve" the permissible end of "focus[ing] the trial on the central issues by excluding evidence that has only a very weak logical connection to the central issues." 547 U.S. at 330.

Rules that categorically disfavor evidence of third-party guilt flunk this test. These rules mechanistically treat evidence of third-party guilt as suspect, and force defendants to satisfy requirements different and stricter than other categories of proof. Courts upholding these rules do not subject them to scrutiny under the *Holmes* test, nor do they explain why third-party guilt evidence must be considered inherently less worthy for a jury's consideration. These courts do not because they cannot. Heightened evidentiary standards are instead

precisely the type of wooden evidentiary rules that "the Constitution [] prohibits" because they "serve no legitimate purpose or [] are disproportionate to the ends that they are asserted to promote." *Holmes*, 547 U.S. at 326.

Contrary to some discussion in lower court cases, *Holmes* did not approve the use of a heightened relevance standard in this context. Rather, the Court observed that Rule 403 and other "rules of this type" pass constitutional muster, as they simply "permit[] judges to exclude evidence that is repetitive, only marginally relevant or poses an undue risk of 'harassment, prejudice, or confusion of the issues." *Holmes*, 547 U.S. at 326-327 (internal quotation marks and alterations omitted). Given the well-established approach of Rule 403, this Court also approved of the "specific application of this principle" to the context of third-party guilt. *Id.* at 327. Citing two treatises, and string-citing 24 state court decisions, the Court suggested that examples of this specific application would be to exclude evidence that is "'speculative or remote, or [that] does not tend to prove or disprove a material fact in issue.'" *Ibid.* (quoting 40A Am. Jur. 2d, Homicide § 286, at 136-138 (1999), and citing 41 C.J.S., Homicide § 216, at 56-58 (1991)). These types of rules are "widely accepted," and represent just one example of a "specific application" of the Rule 403 approach. *Ibid.*

Holmes' footnote, which cited examples of rules limiting third-party evidence (547 U.S. at 327 n.*), certainly did not approve of subjecting this evidence to disfavored treatment. Indeed, many of the cases cited by the Court "treat third-party culpability evidence like any other evidence." *People* v. *Hall*, 41 Cal. 3d 826, 834 (1986). And other decisions cited by the Court have since been reversed, in part *because of Holmes*. For example, the Court cited (547 U.S. at 327 n.*) the Hawai'i

Supreme Court's decision in *State* v. *Rabellizsa*, 79 Haw. 347 (1995)—but, in view of *Holmes*, that court later reversed course. See *State* v. *Yoko Kato*, 147 Haw. 478, 491 (2020).[2]

Ultimately, there is no basis to distinguish evidence of third-party guilt from other evidence tending to negate a defendant's culpability. Indeed, this type evidence does not carry the same risk of tainting a jury with information unrelated to the crime at issue, as do other categories of evidence like character (*e.g.*, Fed. R. Evid. 404(a)), other bad acts (*e.g.*, Fed. R. Evid. 404(b)), or other sexual behavior of a victim (*e.g.*, Fed. R. Evid. 412(a)).

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[2] A similar dynamic occurred in Kentucky. *Holmes* cited the Kentucky Supreme Court's decision in *Beaty* v. *Commonwealth*, 125 S.W.3d 196 (Ky. 2003), which suggested that a defendant must show both motive and opportunity of the third party to commit the crime. See *Beaty*, 125 S.W.3d at 207-208. But the Kentucky Supreme Court later revisited *Beaty* and clarified that motive and opportunity was "not an absolute prerequisite for admission into evidence." *Gray* v. *Commonwealth*, 480 S.W.3d 253, 266 (Ky. 2016). Rather, the court held that "the critical question for [third-party guilt] evidence is one of relevance: whether the defendant's proffered evidence has any tendency to make the existence of any consequential fact more or less probable. And the best tool for assessing the admissibility of [such] evidence is the Kentucky Rules of Evidence." *Ibid.*

So too in Colorado. The Colorado Supreme Court walked back from its prior holding in *People* v. *Mulligan*, 193 Colo. 509 (1977), which *Holmes* cited, because lower courts had interpreted this decision as applying a "direct connection" test. *People* v. *Elmarr*, 2015 CO 53, ¶¶ 33-34. The court clarified that the correct test was that "alternate suspect evidence * * * must be both relevant (under CRE 401) and its probative value must not be sufficiently outweighed by the danger of confusion of the issues or misleading the jury, or by considerations of undue delay (under CRE 403)." *Id.* ¶ 31.

Ultimately, the Court should conclude that the right to put on a complete defense does not permit states to erect higher relevance standards for third-party guilt evidence than it applies to other categories of evidence that can create reasonable doubt of a defendant's guilt.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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