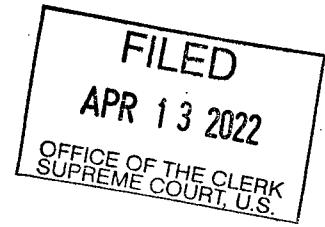


21-7694 ORIGINAL

No.

Term



IN THE
SUPREME COURT OF THE UNITED STATES

Jason Paul Maple
Petitioner, Pro se

v.

Superintendent Albion SCI
Respondent

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit (No. 20-2514).

PETITION FOR WRIT OF CERTIORARI

Jason Paul Maple
Pro se
Prisoner No. HV3555
SCI Mercer
801 Butler Pike
Mercer, Pa 16137

Question(s) Presented

Whether the Third Circuit Appellate Court adhered to the terms of harmless-error review, judged by the standard set-forth by the United States Supreme Court, as it relates to a constitutional trial error in this case.

Parties

1. *Petitioner*, Jason Paul Maple, is a *Pro se* litigant, Prisoner No. HV3555, housed at SCI Mercer, 801 Butler Pike, Mercer, Pa 16137.
2. *Respondent*, Superintendent Albion SCI, is represented by the Westmoreland County District Attorney's Office, located at, 2 North Main Street, Suite 206, Greensburg, Pa 15601..

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Decisions Below

From Federal Courts

1. Reported at, *Maple v. Superintendent Albion SCI*, 2021 U.S. App. LEXIS 36623 (3d Cir. 2021), is the decision of the United States Court of Appeals for the Third Circuit.
2. Reported at, *Maple v. Clark*, 2020 U.S. Dist. LEXIS 115052 (W.D. Pa 2020), is the decision of the United States District Court for the Western District of Pennsylvania.

Jurisdiction

From Federal Courts

1. On December 13, 2021, the United States Court of Appeals for the Third Circuit issued its judgment in the matter sought for review.
2. On December 23, 2021, a timely Petition for Rehearing presented to the Third Circuit Appellate Court; and was denied on January 27, 2022.
3. The statutory provision conferring on the United States Supreme Court the jurisdiction to review the judgment is 28 U.S.C. § 1254 (1).

Constitutional and Statutory Provisions Involved

1. This case involves the requirements of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), codified at 28 U.S.C. § 2254 (d), as it pertains to a federal harmless-error review. The text of § 2254 (d) 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 a 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 the light of the evidence presented in the state court proceeding.

2. This case further involves the Constitution for the United States, which provides in pertinent part:

Amendment V. No person shall be ... compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

Amendment VI. 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 ...; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment XIV. No state shall ... deprive any person of life, liberty, or property, without due process of law.

Statement of the Case

Factual History

1. The facts of the case brought out at Petitioner's trial were summarized by the Pennsylvania Superior Court (and referenced in the Western District Court's Memorandum and Order) as follows:

At approximately 4:00 A.M. on May 30, 2006, William Teck and Patrick Altman were walking along railroad tracks in Manor, Pennsylvania. Mr. Teck and Mr. Altman had been staying at the residence of Jennifer Vinsek, who was [Petitioner's] girlfriend and Mr. Altman's cousin. [Petitioner] shot and killed Mr. Teck with a shotgun and then fired his weapon at Mr. Altman. While Mr. Altman was not struck with a bullet, he dropped a bag that he was carrying as he fled the scene.

[Petitioner's] accomplices in the crime included Jennifer Vinsek, Dewayne Shank, Dewayne's brother Nathan Shank, and Ryan Bronowski. Following the shootings, Nathan removed a backpack from Mr. Teck's body, and [Petitioner] retrieved Mr. Altman's abandoned bag. Dewayne, Nathan, and Bronowski testified against [Petitioner] at trial. The Commonwealth witnesses also included Mr. Altman, Amy Kujawa, who was Vinsek's roommate, and Robert Johnson, a friend of Ms. Kujawa and Vinsek.

The motivation for the crimes generated from events that started about one week prior to the shooting on May 23, 2006. At that time, Mr. Johnson inadvertently walked in on Vinsek and Mr. Teck engaged in consensual sexual intercourse at Ms. Kujawa's and Vinsek's residence on 12 B Division Street, Greensburg, Pennsylvania. On Thursday, May 25, 2006, Vinsek left with [Petitioner] to go camping, where they stayed until May 29, 2006. During their camping trip, Vinsek told [Petitioner] that Mr. Teck had assaulted and attempted to rape her.

When Vinsek and [Petitioner] returned to Greensburg on May 29, 2006, they went to Vinsek's apartment, which was in disarray. Vinsek claimed that Mr. Teck and Mr. Altman were responsible for the damage and that they also had stolen items. Vinsek and [Petitioner] immediately tracked down Mr. Teck and Mr. Altman, who were drinking at Clear Waterz Bar in Greensburg, where Ms. Kujawa worked as a bartender. At about 12:30 A.M. on May 30, 2006, [Petitioner] and Vinsek confronted the two men and, at approximately 1:00 A.M., were ejected from Clear Waterz Bar by the owner.

[Petitioner] and Vinsek then returned to 12B Division Street and contacted police to report that a burglary had occurred. Greensburg Police Officer's Donald Sarsfield and Kerry Dieter responded to the burglary report. Mr. Johnson was present because he had seen Mr. Teck and Mr. Altman at the apartment during the day of May 29, 2006. Vinsek

informed police that Mr. Altman and Mr. Teck burglarized her apartment and that Mr. Teck had attempted to rape her the previous week. In the presence of police officer Sarsfield, police officer Dieter, and Mr. Johnson, [Petitioner] threatened to retaliate against Mr. Teck and Mr. Altman.

After officers Dieter and Sarsfield left Vinsek's apartment, [Petitioner] contacted Dewayne Shank and asked him for assistance in confronting Mr. Teck and Mr. Altman. [Petitioner] told Dewayne to enlist the aid of Nathan Shank and Bronowski and informed the Shank brothers that Mr. Teck had guns, money, and drugs in his backpack, and that he wanted to retaliate against Mr. Teck and Mr. Altman for certain crimes that they had committed against Vinsek. [Petitioner] promised the Shanks that they could keep the guns, money, and drugs in Mr. Teck's possession in return for their assistance.

While [Petitioner] was arranging for help, Mr. Teck and Mr. Altman left Clear Waterz bar and went to Manor Diner. Vinsek located the two men through Ms. Kujawa. Nathan, Dewayne, and Bronowski drove to manor and rendezvoused with [Petitioner] and Vinsek. Vinsek then induced Ms. Kujawa to invite Mr. Teck and Mr. Altman to a party at 12B Division Street so that the two victims, who did not have a vehicle, would leave the diner to walk to Greensburg. When the two men left Manor Diner and started out toward Greensburg along the railroad tracks, [Petitioner] followed the two men and fired his shotgun twice at them, killing Mr. Teck.

Respondents Reproduced Record ("RR"), P. 1536-37.

Procedural History

1. On or about May 30, 2006, Jason P. Maple ("Petitioner") was charged by criminal information with criminal homicide in the shooting death of William Teck; criminal attempt and aggravated assault of Patrick Altman; criminal conspiracy; and other related offenses. *RR, P.*

88-91.

2. On December 20, 2006, the Court of Common Pleas held a pretrial hearing regarding Petitioner's Omnibus Pretrial Motion which sought to suppress confessions made by himself on the grounds that they were obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). On May 21, 2007, the Court of Common Pleas entered an order denying Petitioner's motion to suppress. *RR, P. 91-95.*

3. On May 13, 2008, a jury trial in the matter of *Commonwealth v. Jason P. Maple*, 2544

& 2545 c 2006, commenced with deliberations beginning on May 21, 2008. On May 22, 2008, a mistrial was granted due to jury tampering by Teck's family. A second jury trial commenced on September 8, 2008. The jury returned a verdict of guilt on September 16, 2008, to the following: first degree murder, criminal attempt homicide, aggravated assault, three counts of criminal conspiracy, and robbery.

4. By amended order filed on December 2, 2008, Petitioner was sentenced to "life" in prison without parole, followed by 12 to 23 years consecutive imprisonment. *RR, P. 467-472.* Subsequent to sentencing, a timely Direct Appeal was taken to the Pennsylvania Superior Court, where Petitioner took issue *inter alia* with the trial court's error in not finding a violation of his *Miranda* warnings had occurred and allowing the admission of his confession into evidence at trial. *RR, P. 552-624.*

5. On August 6, 2010, a three judge panel of the Pennsylvania Superior Court unanimously concluded that Petitioner's confession was indeed procured in violation of his fifth amendment rights and erroneously admitted into evidence at trial. However, the Majority found that its admission into evidence constituted harmless error. *No. 2150 WDA 2008.* (in a concurring statement, Judge Musmanno emphasized his reluctance to find harmless error where the Majority had acknowledged that a constitutionally-infirm confession was improperly admitted into evidence). *RR, P. 699-732.* *See Appx. E.*

6. On January 30, 2014, Petitioner filed a *nunc pro tunc* Petition for Allowance of Appeal to the Pennsylvania Supreme Court, challenging the Superior Court's harmless error determination regarding the erroneously introduced illegally obtained confession. *RR, P. 1189-1263.* On June 12, 2014, the Supreme Court entered an order denying the petition. *No. 54 WAL 2014.*

7. On April 24, 2017, Petitioner presented a timely *Pro se* Petition for Writ of Habeas Corpus, 28 U.S.C. § 2254, to the United States District Court for the Western District of Pennsylvania (amended August 21, 2017), where Petitioner took issue *inter alia* with the decision below regarding the harmlessness of his erroneously introduced illegally obtained confession.

8. On May 15, 2018, the District Magistrate Judge issued a Report and Recommendation ("R&R") to the Court that Petitioner's petition be dismissed and a Certificate of Appealability be denied. *See Appx. C.* On June 23, 2018, Petitioner filed timely objections to the R&R.

9. On June 30, 2020, the District Court issued its final judgement, GRANTING Petitioner's Writ and VACATING his conviction. *No. 2:17 - cv - 00529. See Appx. B.*

10. On November 10, 2020, counsel for the respondent in the matter filed an appeal to the United States Court of Appeals for the Third Circuit, contending the District Court's order granting the Writ. On December 13, 2021, the Circuit Court issued judgment, reversing and remanding back to the District Court for denial of Habeas relief.

11. On December 23, 2021, Petitioner filed a timely Petition for Rehearing with the Circuit Court, bringing to its attention that its judgment reflected a departure from judicial precedent and custom, constituting error of law. ("The judgment of this Court here proceeds as if harmless error review is synonymous with weight and sufficiency-of-the-evidence review, and focuses on whether the State could theoretically sustain a conviction without the erroneously admitted confession. However, this is not and cannot be the test.").

12. On January 27, 2022, the Circuit Court denied Petition for Rehearing. *See Appx. D.* Petitioner now proceeds to the United States Supreme Court with a timely *Pro se* Petition for Writ of Certiorari to the Third Circuit Court of Appeals.

Reasons for Granting the Writ

Conflicts

This case presents a fundamental question regarding the proper application of harmless-error review, judged by the standard set-forth by the United States Supreme Court, as it relates to constitutional trial error.

Here, the United States Court of Appeals for the Third Circuit has decided an important federal question that directly conflicts with the holdings of the United States Supreme Court; conflicts with relevant decisions of its own court and other federal courts; and conflicts with the Constitution of the United States.

Importance of the Question(s) Presented

Definitive guidance on the question presented is of great importance because it will provide lower courts throughout the United States and understanding of the laws involved, and will guard against extreme malfunctions in the criminal judicial system.

The issue's importance is enhanced by the fact that its resolve will command fairness and consistency in the application of clearly established federal law, irregardless of the personal preconceptions of judges.

The question presented is also of great public importance because its ruling will promote respect, trust and confidence in the fundamental principle of American jurisprudence.

Discussion

The Claim. When considering the matter at hand, it is essential to appreciate the contours of Petitioner's claim, or - perhaps more importantly - to understand what his claim is not.

Previously, a three judge panel of the Pennsylvania Superior Court reasonably litigated, considered and unequivocally concluded that Petitioner's confession was indeed procured in violation of his Fifth Amendment rights and erroneously admitted into evidence at trial. However, the Majority found that its admission into evidence constituted harmless error. *RR, P. 699-732. See Appx. E.*

At issue here is Petitioner's "claim" that the Superior Court's *Miranda* violation ruling in this case was *not harmless error*. Petitioner and the Superior Court do not dispute the *Miranda* violation ruling. Hence, it was never raised as a claim in his Habeas proceedings. Rather the issue in dispute in the Habeas Corpus petition was the harmless determination itself ... not the underlying *Miranda* violation. The Western District Court correctly acknowledges such:

With respect to the underlying *Miranda* violation, the Court agrees with Petitioner that, if the Commonwealth wished to challenge the Superior Court's finding, it should have pursued that argument on direct appeal. Because the Commonwealth did not do so, the determination is entitled to this Court's deference, and the undersigned finds no reason to disturb it. Rather, the issue presented by Petitioner is the harmless error determination.

See Appx. B-19 (Footnote 13).

The District Court then proceeded with a proper harmless-error review, consistent with the standard set-forth by the United States Supreme Court. The conclusion of the District Court was that the state court's harmless determination was an 'unreasonable application of federal law', firstly by the holding of *Harrison v. United States*, 392 U.S. 219 (1968); but also in that the admission of his confessions - including both of his confessions obtained in violation of *Miranda* and his "testimony impelled thereby" at trial - "had a substantial and injurious effect or influence

in determining the jury's verdict". *See Appx. B19 to B24 (quoting, Harrison 392 U.S. at 222; Brecht, 507 U.S. 637).*

The Third Circuit Appellate Court, however, reached a contrary conclusion inconsistent with the applicable law in its *de novo* review. The ultimate basis for its judgment was that, after weighing the evidence against Petitioner as being "very strong" and finding that he "doubtless would have been convicted of first-degree murder" absent the erroneous admission of his illegally obtained confession, the Pennsylvania Superior Court's harmless-error ruling was reasonable. *See Appx. A-6.*

With this background in mind, Petitioner turns to the pivotal question of whether the Court of Appeals adhered to the terms of harmless-error review, judged by the standard set-forth by the United States Supreme Court, as it relates to a constitutional trial error in this case.

Harmless-Error Review. The test for whether a federal constitutional error was harmless depends on the procedural posture of the case. When a state court addresses a harmless error issue on direct appeal, as did the Pennsylvania Superior Court in this case, the harmlessness standard is the one prescribed in *Chapman v. California*, 386 U.S. 18, 24 (1967) ("[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."). In *Arizona v. Fulminante*, 499 U.S. 279 (1991), the Supreme Court held that *Chapman's* "beyond a reasonable doubt" standard applies in the context of a coerced confession.

In a collateral proceeding, the test is different. In *Brecht v. Abrahamson*, 507 U.S. 619 (1993), the Supreme Court held that the less stringent harmless-error standard used by federal courts in cases of non-constitutional trial error - the *Kotteakos* standard - applies, as well, in

determining whether habeas relief should be granted in cases of constitutional trial error. *Id. at 638*. The test under *Kotteakos v. United States*, 328 U.S. 750 (1946), is whether the error "had a substantial and injurious effect or influence in determining the jury's verdict." *Id. at 756*.

For reasons of finality, comity, and federalism, habeas petitioners "are not entitled to habeas relief unless they can establish that it resulted in 'actual prejudice'." *Brech*t, 507 U.S. at 637 (quoting, *United States v. Lane*, 474 U.S. 438, 449 (1986)). Under this test, relief is proper only if the federal court has "grave doubt" about whether a trial error of federal law had a substantial and injurious effect or influence in determining the jury's verdict. *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995).

Three years after *Brech*t was decided, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") was enacted. The AEDPA's plain language requires court's to deny a habeas petition unless the petitioner satisfies the standard codified at 28 U.S.C. § 2254 (d) regarding a state court's determination of harmless error. *See, Constitutional and Statutory Provisions Involved, herein.*

In *Mitchell v. Esparza*, 540 U.S. 12 (2003), it was held that, when a state court determines that a constitutional violation is harmless, a federal court may not award habeas relief under § 2254 unless the harmlessness determination was itself "objectively unreasonable". *Id. at 18 (citation omitted)*. If the state court applied the *Chapman* standard of harmless error review, the state court's *Chapman* determination is subject to the deferential review afforded by § 2254. But because the *Brech*t test "subsumes" the 2254/*Chapman* test, the federal court need only apply the *Brech*t test. *See, Fry v. Pliler*, 551 U.S. 112, 120 (2007) ("[I]t certainly makes no sense to require formal application of both tests (AEDPA/*Chapman* and *Brech*t) when the latter obviously subsumes the former".).

[In] 2254 proceedings, a federal court must assess the prejudicial impact of constitutional

error in a state-court criminal trial under the 'substantial and injurious effect' standard set-forth in *Brecht*, whether or not the state appellate court recognized the error and reviewed it for harmlessness under the 'harmless beyond a reasonable doubt' standard set-forth in *Chapman*.

Fry, 551 U.S. at 121-22 (citations omitted).

Fry expressly holds then, that federal habeas courts need not first assess whether a state court unreasonably applied *Chapman* before deciding whether that error was prejudicial under *Brecht*. Such a requirement would "mak[e] no sense ... when the latter [standard] obviously subsumes the former". *Fry*, 551 U.S. at 120. Thus, if a trial error is prejudicial under *Brech's* standard, a state-court's determination that the error was harmless beyond a reasonable doubt is necessarily unreasonable.

See, *Howard v. Horn*, 2014 U.S. Dist. LEXIS 156433, * ____ (3d Cir. 2014) ("Importantly, a district court on habeas review is required to apply the *Brech* harmless error test even if the lower court applied the *Chapman* standard."); see also, *Bond v. Beard*, 539 F.3d 256, 275-76 (3d Cir. 2008) (a court considering a habeas petition must perform its "own harmless error analysis under *Brech v. Abrahamson*, rather than review the state court's harmless error analysis under the AEDPA standard."); *Eddleman v. McKee*, 471 F.3d 576, 582-83, 585 (6th Cir. 2006) (that if the petitioner can make the showing required by *Brech*, "he will surely have demonstrated that the state court's finding that the error was harmless beyond a reasonable doubt - the *Chapman* standard - was outside the realm of credible outcomes, and therefore resulted from an 'unreasonable' application of *Chapman*".)

Clearly then, where the Third Circuit Appellate Court explicitly conducted *de novo* review in this case, it was to conduct its own harmless-error analysis under the *Brech/Kotteakos* standard rather than test its confidence in the state court's *Chapman* analysis under AEDPA's unreasonableness standard. Still, even a strong case against Petitioner does not make the state

court's harmlessness determination reasonable.

The Brecht/Kotteakos Standard. The answer to the question presented is simpler than this lengthy petition might suggest. In the context of a harmless-error review in this case, the Court of Appeals was given a very comprehensive legal standard to which they were to adhere when applying it. *Brecht* controls that context, and the standard to which it's Court repeatedly referred, drawn from *Kotteakos*, answers the question: "[T]he standard for determining whether habeas relief must be granted is whether ... the error 'had a substantial and injurious effect or influence in determining the jury's verdict'". *Brecht*, 507 U.S. at 623 (quoting *Kotteakos*, 328 U.S. at 776).

Kotteakos could not be clearer on this point, given its repeated descriptions of the actual-effect focus of harmless-error analysis. *See, Kotteakos*, 328 U.S. at 762 (analysis focuses on "relation of the error asserted to casting the balance for decision on the case as a whole"); *Id. at* 764 ("effect the error had or reasonably may be taken to have had upon the jury's decision"); *Id.* ("impact of the thing done wrong on the minds of [the jurors]"); *Id.* (whether the error "influence[d] the jury"); *Id. at* 765 (whether "the judgment was ... substantially swayed by the error"); *Id.* ("whether the error itself had a substantial influence"); *Id. at* 776 (whether "error had substantial and injurious effect or influence in determining the jury's verdict").

The determinative consideration under the *Brecht/Kotteakos* standard is not the strength of the evidence or the probability of conviction at a hypothetical retrial absent the error. *See, Brecht*, 507 U.S. at 642 (*Stevens, J., concurring*) ("The habeas court cannot ask only whether it thinks the petitioner would have been convicted even if the constitutional error had not taken place. *Kotteakos* is full of warnings to avoid that result.").

Rather, the relevant question is whether the error substantially affected the actual thinking of the jurors or the deliberative processes by which they reached their verdict. Once again, the words of Justice Rutledge in *Kotteakos* are instructive as he eloquently expounded on the proper way in which the reviewing court should assess whether the error was harmless in the context of determining the effect of errors in a criminal case:

[I]t is not the appellate court's function to determine guilt or innocence. Nor is it to speculate upon probable reconviction and decide according to how the speculation comes out. Appellate judges cannot escape such impression. But they may not make them sole criteria for reversal or affirmance. Those judgments are exclusively for the jury, given always the necessary minimum evidence legally sufficient to sustain the conviction unaffected by the error.

But this does not mean the appellate court can escape altogether taking into account of the outcome. To weigh the error's effect against the entire setting of the record without relation to the verdict or judgment would be almost to work in a vacuum. In criminal causes that outcome is conviction. This is different, or may be, from guilt in fact. It is guilt in law, established by the judgment of laymen. 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 upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting.

Kotteakos, 328 U.S. at 763-65 ("The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error"); See, *Brecht*, 507 U.S. at 642 (Stevens, J., concurring) (passage quoted in text above is one "that should be kept in mind by all courts that review trial transcripts").

The best way to illustrate proper application of the *Brecht* harmless-error review is to consider the approach in the case in which it was established - *Kotteakos*. In *Kotteakos*, the court reversed a lower court conclusion that an instructional error was harmless "since guilt was so manifest". *Kotteakos*, 328 U.S. at 755. Although agreeing with the lower court that guilt was manifest, the court nonetheless found the error prejudicial because the error "pervaded the entire charge", *Id.* at 768; and accordingly made "highly probable that the error has substantial and injurious effect or influence in determining the jury's verdict". *Id.* at 776.

In reaching this result, the *Kotteakos* court took great pains to make clear to lower court judges that the touchstone of harmless error is not whether "there was enough [evidence] to support the result, apart from the phase affected by the error"; or whether "the evidence offered specifically and properly to convict each defendant would be sufficient to sustain his conviction, if submitted in a separate trial"; or whether "conviction would, or might probably, have resulted in a properly conducted trial"; or even whether "the evidence concerning each petitioner was so clear that conviction would have been dictated and reversal forbidden, if it had been presented in [proper] trials". *Id. at 763-65, 767, 775-76.*

As the Supreme Court has stated, the question of harmless error is not simply whether there is other legally "sufficient evidence [of guilt] on which the accused could have been convicted without the evidence complained of." *Fahy v. Connecticut*, 375 U.S. 85, 86 (1963). "Further, it has been held to be inappropriate to ask whether there was sufficient evidence to support the result, apart from the phase of trial affected by the error. Rather, the correct inquiry is whether the error had a substantial and injurious influence on the verdict despite sufficient evidence to support the result apart from the error." *Hassine v. Zimmerman*, 160 F.3d 951, 955 (3d Cir. 1998).

See, Calderon v. Coleman, 525 U.S. 141, 147 (1998) (per curiam) (reversing and remanding because Court of Appeals did not adequately "inquire into the actual effect of the error on the jury's verdict" and emphasizing that "court must find that the error, in the whole context of the particular case, had a substantial and injurious effect or influence on the jury's verdict"); *Id. at 150* (Stevens, J., dissenting) (concluding that reversal and remand for further harmless error analysis is unnecessary because "it is perfectly clear that [district court judge] was convinced that the [error] had a substantial and injurious effect on the jury's deliberations ...").

See, Gov't of the Virgin Islands v. Martinez, 620 F.3d 321, 337-38 (3d Cir. 2010) (where the court reiterated that constitutional harmless error analysis is not merely a review of whether the jury "could have" returned a verdict absent the constitutional error. Such an analysis improperly conflates sufficiency-of-the-evidence review with the appropriate ... [harmless error] standard).

Actual Prejudice. Petitioner does not attempt to minimize the significance of relevant evidence that was presented at trial. Notably, the jury *could have* found sufficient evidence to convict him without his confession. However, it is not the province of the court to weigh the evidence or search for evidence to support a harmlessness determination. While Petitioner recognizes that there is evidence in support of the jury's verdict, this is not a sufficiency-of-the-evidence issue. The question is whether the error had a substantial and injurious influence on the verdict. That there was sufficient evidence for a conviction without the confession does not prove an absence of prejudice.

"[U]nder the *Chapman* standard reserved for constitutional error ... the government must prove beyond a reasonable doubt that the defendant was uninjured by the error ... There must be 'no reasonable possibility' of prejudice for an error to be deemed harmless." *United States v. Toliver*, 330 F.3d 607, 613 (3d Cir. 2002). Likewise, "[i]n 2254 proceedings, a court must assess the prejudicial impact of constitutional error in a state court criminal trial under the 'substantial and injurious effect' standard articulated in *Brech*. *Fry v. Pliler*, 551 U.S. 112, 121 (2007). Under this standard, habeas petitioner's are not entitled to relief unless they can establish that it resulted in "actual prejudice". *United States v. Lane*, 474 U.S. 438, 449 (1986).

The presence of 'actual prejudice' in this case is first made apparent through the

Pennsylvania Superior Court's harmless-error analysis under *Commonwealth v. Hutchison*, 811 A.2d 556, 561 (Pa. 2002) (where, in part, a finding of harmlessness requires conclusion that the error did not prejudice the defendant or the the prejudice was *de minimis*). Yet, not even the Superior Court could come to such a conclusion - that is, that the admission of Petitioner's confession did not prejudice him or that the prejudice was *de minimis*. See Appx. E-18. This is for good reason too.

The context of Petitioner's statement - a full confession - contained many highly damaging admissions that substantially bore plainly on issues central to the jury's verdict. In his confession, Petitioner acknowledges his provocation (motive) for the shooting; his intent to kill; his presence at the scene of the crime; his guilt and role as the shooter; what type of weapon was used; and more. Petitioner's confession locked him into a highly incriminating depiction of the shooting. Indeed, it was "probative and damaging", *Brecht*, 507 U.S. at 642-43; "infecting his entire trial with error of constitutional dimensions". *United States v. Frady*, 456 U.S. 152, 170 (1982).

When such a powerfully incriminating extrajudicial statement of a defendant who stands accused is deliberately spread before the jury, "the practical and human limitations of the jury system cannot be ignored". *Bruton v. United States*, 391 U.S. 123, 135 (1968). As the Third Circuit has explained:

[A] classic example arises during a joint criminal trial, in which one defendant has confessed to the crime and the confession implicates his co-defendant. The confession is admitted into evidence, and the jury is instructed to ignore the confession as evidence against the co-defendant. This asks the impossible of our jurors. In *Bruton v. United States*, 391 U.S. 123 (1969), the Supreme Court held that in these circumstances we cannot rely on a juror's ability to put such an inculpatory statement out of their minds.

Johnson v. Superintendent Fayette SCI, 949 F.3d 791, 794 (3d Cir. 2020) (holding that the error was not harmless because co-defendant's confession, when viewed in tandem with the prosecution's witnesses' less-than-credible testimony, eliminated the space for reasonable doubt in the jurors' minds).

Likewise, the Supreme Court in *Arizona v. Fulminante*, 499 U.S. 279 (1991), also explains:

A confession is like no other evidence. Indeed, the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him ... [T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so. *Id. at 296* (citing, *Bruton*, 391 U.S. at 139-40).

That said, the court conducting a harmless error inquiry must appreciate the indelible impact a full confession may have on the trier of fact ... [I]f the jury believes that a defendant has admitted the crime, it doubtless will be tempted to rest its decision on that evidence alone, without careful consideration of the other evidence in the case. Apart, perhaps, from a videotape of the crime, one would have difficulty finding evidence more damaging to a criminal defendant's plea of innocence. *Id. at 313* (Justice Kennedy, concurring in the judgment, in that he cannot, with confidence, find admission of the confession to be harmless).

See Appx. E-33 (Pennsylvania Superior Court's August 6, 2010, Memorandum) (Judge Musmanno, quoting Fulminante above in text when emphasizing reluctance in finding harmless error); see also, Appx. B21-22 (Western District Court's June 30, 2020, Memorandum) (Judge Bisson, quoting Fulminante above in text when listing driving considerations for the court's conclusion).

In the case at hand, the prejudicial impact on the jury cannot be ignored. It was very real indeed! The jury was faced with a sharply incriminating confession, of which they could not unhear. First, the prosecution alerted the jury to the existence of Petitioner's confession in his opening statement. *RR, P. 1783*. Next, Detective Kuhns took the witness stand and testified regarding the interview he had with Petitioner leading up to and during the tape recorded version of the confession. *RR, P. 2802-2902*. Then, the prosecution played the tape recorded version of the confession for the jury to hear. In addition to the recording, the jury was also provided a typed transcript of the confession so they could even read along with what they were hearing. *RR, P. 2841-45*. Moreover, the statement was repeatedly referenced in the closing arguments. *RR, P. 3155-90*. The devastating impact of such a multifold introduction and admission of Petitioner's

confession doubtless affected the actual thinking of the jury or deliberative process by which it reached its verdict.

The prejudicial effect of Petitioner's confession further became impacted where its admission induced him to take the witness stand himself in order to provide a defense to and overcome the impact of the confession. With the improper use of Petitioner's extrajudicial confession impelling his testimonial admission of guilt, his testimony also became tainted by the same illegality that rendered the confession itself inadmissible - the fruit of the poisonous tree. *See, Harrison v. United States, 392 U.S. 219 (1968)*. This tainted testimony is testimony that a jury would certainly have difficulty forgetting when deciding Petitioner's culpability.

Harrison's Exclusionary Rule. The judgment of the Third Circuit Appellate Court in the present case conflicts with *Harrison v. United States, 392 U.S. 219 (1968)*, which mandates what is essentially an exclusionary rule, where the principle that prohibits the use of wrongfully obtained confessions also prohibits the use of any testimony impelled thereby. *Id. at 222*. With respect to this issue, the District Court in this case succinctly summarized *Harrison*:

[T]he defendant was charged with felony murder. Defendant made three confessions which were used in evidence at his trial, and he testified after the confessions were admitted. He was found guilty, but on appeal, his convictions were reversed after the court of appeals determined that his confessions were illegally obtained. At the defendant's second trial, the prosecution did not introduce the confession, but it did introduce the defendant's trial testimony from the first trial. The defendant was again convicted, and this conviction was upheld by the court of appeals.

The Supreme Court held that because the defendant testified only after the illegally obtained evidence was wrongfully introduced at trial, his testimony was the fruit of the poisonous tree. Under such circumstances, the Supreme Court found it was improper to "demand a demonstration by a petitioner that he would not have testified as he did if his inadmissible confession had not been used".

See Appx. B-20 (citations omitted).

Harrison applies to the case at hand because, as in *Harrison*, it was only after the prosecution introduced Petitioner's wrongfully obtained confession into evidence did he take the stand at trial and testify as to his guilt "in order to overcome the impact of confessions illegally obtained and hence improperly introduced". *Harrison*, 392 U.S. at 223.

"Having 'released the spring' by using [P]etitioner's unlawfully obtained confession against him, the government must show that its illegal action did not induce his testimony". *Harrison*, 392 U.S. at 225. Having placed his confession before the jury, however, the State can hardly demonstrate that Petitioner would have testified as he did even if his inadmissible confession had not been used. But even if Petitioner would have decided to testify whether or not his confession had been used, it does not follow that he would have admitted being at the scene of the crime and holding the gun when the fatal shot was fired. "The more natural inference [would be] that no testimonial admission so damaging would have been made if the prosecutor had not already spread the petitioner's confession before the jury". *Id.* at 225-26. In the District Court's words, "[the petitioner's] trial testimony cannot excuse the constitutional violation; it is part and parcel of the same constitutional harm". *See Appx. B-21.*

The Right To Trial By Jury. "There is ... a distinction of true importance between a harmless-error test that focuses on what the jury did decide, rather than on what appellate judges think the jury would have decided if given an opportunity to pass on an issue". *Neder v. United States*, 527 U.S. 1, 27 (1999) (Stevens, J., concurring). "Harmless-error analysis is not an excuse for overlooking error because the reviewing court is itself convinced of the defendant's guilt. The determination of guilt is for the jury to make, and the reviewing court is concerned solely with whether the error may have had a substantial effect upon that body". *United States v. Lane*, 474

U.S. 438, 465 (1986) (Brennan, J., concurring in part and dissenting in part).

Because of its apparent judicial desire to affirm the verdict supported by 'very strong' evidence, the Third Circuit Appellate Court assumes it can "reconstruct the world of the criminal trial" by subtracting the constitutionally inadmissible evidence that was presented to the factfinder, so as to determine whether the violation contributed to the verdict. *Robert Weisburg, Forward: Criminal Procedure Doctrine: Some Versions of the Skeptical*, 76 J.Crim.L. & Criminology 832, 846 (1985). Such reconstruction requires a court to speculate regarding a counter-factual reality and, a substantial leap of faith. How can a court say with confidence what a jury would have done in that entirely and non-existent world? *See, Sullivan v. Louisiana*, 508 U.S. 275, 284 (1993) (Chief Justice Rehnquist, concurring) ("[A]ny time an appellate court conducts harmless-error review it necessarily engages in some speculation as to the jury's decisionmaking process; for in the end no judge can know for certain what factors led to the jury's verdict").

By focusing on the reliability of the verdict, the Court of Appeals de-emphasizes the values of the United States Constitution underlying a trial by jury. *See, Rose v. Clark*, 478 U.S. 570, 588 (1986) (Stevens, J., concurring) ("Our constitution, and our criminal justice system, protect other values besides the reliability of the guilt or innocence determination.").

A hallowed principle of criminal law is a defendant's "presumption of innocence" which succinctly conveys the principle that no person may be convicted of a crime unless the government proves every element of a crime beyond a reasonable doubt. *Blacks Law Dictionary*, 823 (6th Ed. 1991). Under the Due Process Clause of the Fifth Amendment of the United States Constitution, the prosecution must prove every element necessary to constitute the crime with which the defendant is charged. *See, In Re Winship*, 397 U.S. 258, 364 (1970) (holding that

government must prove "every fact necessary to constitute the crime" beyond a reasonable doubt).

The *Winship* "beyond a reasonable doubt" standard protects four interests. First, it protects the defendant's liberty interests. *Winship*, 397 U.S. at 363-64. Second, it protects the defendant from the stigma of conviction. *Id.* Third, it encourages community confidence in criminal law by giving "concrete substance" to the presumption of innocence. *Id.* Fourth, it encourages individual confidence in the presumption of innocence because the prosecution must convince the factfinder with "utmost certainty". *Id.* at 364. See, *Id.* at 372 (*Harlan, J., concurring*) (noting that the standard is founded on "a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free").

Furthermore, as Justice Scalia concluded in *Sullivan*, the proper approach to harmless-error analysis is dictated by the Sixth Amendment of the United States Constitution, which protects a defendant's right to trial by an impartial jury, which includes "as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of guilt". *Sullivan*, 508 U.S. at 277. In view of the Fifth Amendment's Due Process Clause requirement of proof beyond a reasonable doubt, "jury verdict required by the Sixth Amendment is a jury verdict of guilt beyond a reasonable doubt". *Id.* at 278. Accordingly, a jury verdict reached at a level of certainty less than beyond a reasonable doubt is not valid under the Sixth, as well as the Fifth, Amendments of the United States Constitution and must be replaced by a verdict that is valid under both Amendments.

In proceeding with their *de novo* review by imagining the behavior of hypothetical jurors at a hypothetical new trial, the Court of Appeals in this case deprives Petitioner of a jury trial altogether; or, at best, of putting the reviewing judges in the role of jurors, in violation of the

Sixth Amendment requirement of a jury-trial of one's peers drawn from one's community. As the Court in *Sullivan* explains:

Consistent with the jury-trial guarantee, the question ... the reviewing court [is] to consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. Harmless-error review looks, we have said, to the basis on which the jury actually rested its verdict. 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. That must be so, because to hypothesize a guilty verdict that was never in fact rendered - no matter how inescapable the findings to support that verdict might be - would violate the jury-trial guarantee.

Sullivan, 508 U.S. at 279 (citations and quotations omitted). See also, *Id.* at 280 ("not enough" to "conclude that a jury would surely have found petitioner guilty beyond a reasonable doubt") (internal citation and quotations omitted); *Id.* at 281 (improper for "reviewing court" to "engage in pure speculation - its view of what a reasonable jury would have done"; "when it does that, the wrong entity judge[s] the defendant guilty"). (internal citation and quotations omitted).

Where the Court of Appeals simply presumes that Petitioner 'doubtless would have been convicted of first-degree murder' absent the erroneous admission of his illegally obtained confession, it is removing the prosecution's burden of proving an element beyond a reasonable doubt. The Supreme Court has cautioned that a presumption of guilt is unconstitutional if it "undermine[s] the factfinder's responsibility ... to find the [elements of a crime] beyond a reasonable doubt". *Cty. Court of Ulster Cty. v. Allen*, 442 U.S. 140, 156 (1979). See, *Francis v. Franklin*, 471 U.S. 307, 316 (1985) (due process prohibits use of presumption that relieves the State of its burden of persuasion on essential element of intent).

Because the Sixth Amendment's jury trial guarantee allocates to *actual jurors* the exclusive responsibility to render criminal verdicts, those same actual jurors must be the focus of harmless-error analysis. If those jurors deliberated to a verdict free of influence from an error, then their verdict satisfies the Constitution's jury-verdict requirement and may stand. Here,

however, those jurors deliberated to a verdict under the influence of a constitutional error; their verdict is tainted and a new verdict, produced by a new set of actual jurors who are not influenced by the error, must supplant the first verdict.

The Right of Confrontation. The Government's case against Petitioner seems lacking in direct physical evidence. At trial, the prosecution introduced no DNA, no blood, no hair, no fingerprints, no gunshot residue, nor any gun registration or serial numbers that directly linked Petitioner to the crime or the murder weapon. Aside from Petitioner's admissions, the only evidence introduced that did directly link him to the crime consisted entirely of prosecution witness testimony, of which were corrupt source accomplices who were substantially impeached and suffered from significant credibility issues. And although some circumstantial evidence was introduced at trial, it was not compelling taken alone.

Here, the error - the erroneously admitted confession and its tainted 'fruits' - significantly corroborated and bolstered the testimony of prosecution witnesses. The effect of the error furthered the prejudicial impact on the conduct of the defense where Petitioner's admissions undercut the defense counsel's ability to raise doubt about witnesses in that their version of events should not be believed. This directly conflicts with Petitioner's right of confrontation.

Extending to state prosecutions through the Due Process Clause of the Fourteenth Amendment of the United States Constitution, is the Sixth Amendment's Confrontation Clause. *Pointer v. Texas*, 380 U.S. 400, 403 (1965). The confrontation right gives the defendant a "full and fair opportunity to probe", *United States v. Watson*, 76 F.3d 4, 9 (1st Cir. 1996); allows a defendant to impeach witnesses by challenging witness credibility, *United States v. Rivera*, 799 F.3d 180, 184-85 (2d Cir. 2015); allows a defendant to expose falsehoods and inconsistencies,

challenge a witness's credibility by demonstrating bias, prejudice, ulterior motive, or untruthful disposition, *United States v. Ramos-Cruz*, 667 F.3d 487, 503-04 (4th Cir. 2012); and allows a defendant to expose a witness's bias, possible incentives to lie, or motivation for testifying, *United States v. Williams*, 892 F.3d 242, 247 (7th Cir. 2018).

Given the substantial flaws of prosecution key witnesses, a reasonable jury very may well have received a significantly different impression of the witness's version of events if defense counsel was able to pursue a line of cross-examination without the prejudicial effects of Petitioner's admissions' bolstering witness credibility. Speculation as to the effect of the remaining evidence, without the error, on the jurors' finding of guilt cannot justify a finding of harmlessness where such a strong potential to demonstrate the falsity of witness testimony exists. This potentially violates Petitioner's right of confrontation - that is, his right to directly confront adverse witnesses and challenge their testimonial accounts WITHOUT the bolstering influence of his confession. This certainly is enough to leave any judge in 'grave doubt' about the harmlessness of the error.

Even if it may be found that all the prosecution's witnesses, taken together without the error, created a 'strong' case by establishing Petitioner's role in the shooting, this assumes the jury believed these witnesses absent the corroborating force of his admissions. However, it is not for the reviewing court to decide what they think that 'they' would have voted to convict. "The question, rather, is whether the erroneous admission of [Petitioner's] confession had a substantial and injurious effect on the jury's decision. It was for the jury to decide the credibility of the witnesses", and absent the impact of Petitioner's admissions, they very may well not have found their version of events to be credible and reasonably could have concluded that Petitioner had not participated in the crime to the extent in which he confessed. *Wood v. Ercole*, 644 F.3d 83,

96 (2d Cir. 2001).

See, Gov't of the Virgin Islands v. Davis, 561 F.3d 159, 165-66 (3d Cir. 2009) (where the reviewing circuit court was unsatisfied with the conclusion of the appellate court's finding that the testimony of three eyewitnesses was "significant evidence from which the jury could have found guilt" and therefore the constitutional trial error could not have affected the outcome of the trial, insofar as the appellate court focused on whether the evidence was sufficient to convict despite the error, as opposed to whether there was a reasonable possibility that the error contributed to the jury's verdict).

Conclusion

The case at hand requires considering a trial at which a defendant's illegally obtained confession is erroneously introduced into evidence. The overwhelming prejudicial effect of its introduction, *inter alia*, induced testimony from the defendant; monopolized the defense counsel's ability to rebut and cross-examine evidence; was the focus of the State's case-in-chief and defendant's rebuttal; and was addressed in closing arguments.

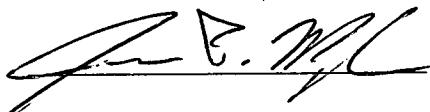
In such a case, the harmless-error analysis and conclusion are clear under a rule focused on the impact of the error on the actual trial - the error substantially affected the proceedings and *was not harmless*. Such a conclusion holds even if the prosecution's presentation also included reference to other 'very strong' evidence.

However else the prosecution *might* have chosen to present its case under different, hypothetical circumstances, the prosecution in fact chose to concentrate its attention on the illegal confession - thus, in fact, forcing the defense, and doubtlessly the jurors, to focus their attention on the admissions. In the context of the actual trial, the confession *was not harmless*. This, the District Court perfectly made clear where it was convinced that the error in this case had a substantial and injurious effect on the jury's deliberations.

Petitioner is entitled to be tried by a fair and impartial jury in a new trial where he is presumed to be innocent. He is entitled to rebut and cross-examine evidence free from the corroborative force of error. In this due process, Petitioner's guilt is to be proven beyond a reasonable doubt only after a full and fair consideration of the properly introduced evidence. And after being influenced only by legal and competent evidence (not illegally obtained), is the jury to declare the truth upon the evidence laid before them.

WHEREFORE, Petitioner prays this Honorable Court exercise its supervisory power, and thereby GRANT Petition for Writ of Certiorari. With an interest in expediting the conclusion of a protracted litigation, Petitioner further requests this Court employ the option of summarily reversing the judgment of the Third Circuit Appellate Court in this case, and remand it for further proceedings consistent the June 30, 2020, final judgment of the Western District Court.

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