No. 22-___

IN THE

Supreme Court of the United States

DARRELL HEMPHILL,

Petitioner,

v.

STATE OF NEW YORK,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Claudia Trupp
Matthew Bova
CENTER FOR
APPELLATE LITIGATION
120 Wall Street,
28th Floor
New York, NY 10005

Jeffrey L. Fisher
Counsel of Record
Pamela S. Karlan
Easha Anand
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081
jlfisher@stanford.edu

QUESTION PRESENTED

Whether the improper admission of the out-of-court statement by the alternative suspect in *Hemphill v. New York*, 142 S. Ct. 681 (2022), was "so unimportant and insignificant" as to be harmless under *Chapman v. California*, 386 U.S. 18, 22 (1967).

RELATED PROCEEDINGS

People v. Hemphill, 103 N.Y.S.3d 64 (App. Div. 1st Dep't 2019)

People v. Hemphill, 35 N.Y.3d 1035 (2020)

Hemphill v. New York, 142 S. Ct. 681 (2022)

People v. Hemphill, 38 N.Y.3d 1182 (2022)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Darrell Hemphill respectfully petitions for a writ of certiorari to review the judgment of the New York Court of Appeals.

OPINIONS BELOW

The opinion of the New York Court of Appeals is reported at 38 N.Y.3d 1182 and is reprinted in the Appendix to the Petition ("Pet. App.") at 1a-5a. A prior decision of the New York Court of Appeals is reported at 35 N.Y.3d 1035 and is reprinted at Pet. App. 6a-12a. The opinion of the Appellate Division of the New York Supreme Court, First Judicial Department is reported at 103 N.Y.S.3d 64 and is reprinted at Pet. App. 13a-33a. The relevant proceedings of the New York Supreme Court are unpublished.

JURISDICTION

The decision of the New York Court of Appeals was issued on July 21, 2022. Pet. App. 1a. On September 6, 2022, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including November 18, 2022. *See* No. 22A260. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISION

The Fourteenth Amendment to the U.S. Constitution provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

After unsuccessfully prosecuting Nicholas Morris for a homicide, the State of New York charged petitioner Darrell Hemphill with committing the same crime. Hemphill's trial hinged on who actually fired the 9-millimeter handgun that shot and killed the victim. Petitioner maintained that the State was right the first time: It was Morris. In response, the State introduced a statement by Morris (who did not testify) asserting that the gun he possessed at the crime scene was a .357 magnum—thereby suggesting he could not have been the shooter. The jury convicted petitioner of second-degree murder, and the court sentenced him to prison for a term of twenty-five-years-to-life.

Last Term, this Court held that the introduction of Morris's statement violated petitioner's Sixth Amendment right to confront witnesses against him. *Hemphill v. New York*, 142 S. Ct. 681 (2022). But despite the New York courts' previous determination that introducing Morris's statement had been "reasonably necessary" to enable the prosecution to "rebut" petitioner's defense, *id.* at 686 (citation omitted), the New York Court of Appeals held on remand that the statement's erroneous admission was harmless beyond a reasonable doubt. Petitioner now brings the case back to this Court.

A. Factual background

1. In April 2006, two men—Ronnell Gilliam and a companion—got into a fistfight with several other people on a street in the Bronx. Shortly after, Gilliam's companion opened fire with a 9-millimeter handgun, and a stray bullet struck and killed a child in a passing car. *Hemphill*, 142 S. Ct. at 687; Pet. App. 2a.

One witness told the police that Gilliam's best friend, Nicholas Morris, "had been at the scene" with him. *Hemphill*, 142 S. Ct. at 687; J.A. 126-27.[1] Within hours of the shooting, police searched Morris's home and recovered a live 9-millimeter cartridge on his nightstand, as well as other guns and ammunition for a .357 magnum revolver. J.A. 110, 123-24. The police arrested Morris the next day. They observed bruises on his knuckles consistent with fistfighting. *Hemphill*, 142 S. Ct. at 687.

Around the same time, three eyewitnesses independently identified Morris from a police lineup as the shooter. *Hemphill*, 142 S. Ct. at 687. A fourth eyewitness identified Morris in a photo array as "look[ing] like the shooter." Pet. App. 28a. Others did not identify the shooter but said that he wore some sort of blue top (perhaps a "short-sleeved shirt or polo," or a sweater) and had a tattoo on his right forearm. *Hemphill*, 142 S. Ct. at 687; Pet. App. 15a, 19a.

Meanwhile, Gilliam surrendered to the police. Confirming the eyewitness accounts, Gilliam said that Morris was his companion at the fight and had been the shooter. *Hemphill*, 142 S. Ct. at 687.

During a subsequent interview, police allowed Gilliam to speak on the phone to Morris, who was calling from jail. Telling Morris that he would "make it right," Gilliam changed his story. J.A. 174-75. Recanting his identification of Morris as the gunman, Gilliam asserted for the first time that petitioner—Gilliam's cousin, who had recently traveled with him

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[1] Citations to the J.A. are to the Joint Appendix in *Hemphill v. New York*, 142 S. Ct. 681 (2022) (No. 20-637).

to North Carolina—was the one who shot the victim. Pet. App. 19a, 29a.

2. Investigators "did not credit" Gilliam's revised allegation. *Hemphill*, 142 S. Ct. at 687. Instead, the State indicted Morris for the homicide and for possession of the 9-millimeter handgun, pointing principally to the strength of the eyewitness identifications and the physical evidence recovered from Morris's apartment. *Id.*; J.A. 6. The State also apparently believed that a sweater the police had found in Gilliam's apartment was the blue top Morris had worn while committing the crimes. In its opening statement at trial, however, the State did not reference the sweater. J.A. 4-17. Instead, the State focused on the fact that numerous eyewitnesses "separately and independently" reported that they "saw only one man with a gun, the defendant" Nicholas Morris. *Id.* 6, 13.

Before the parties submitted any evidence, they agreed to a mistrial. *Hemphill*, 142 S. Ct. at 687. The State explained that, upon learning from the defense that DNA found on the blue sweater did not match Morris, it intended to "reinvestigate" certain aspects of the case. Morris Tr. 241-42; Pet. App. 14a.[2]

By this time, Morris had spent over two years in jail. Pet. App. 14a. In lieu of trying him again for murder, the State offered Morris a deal: If he pleaded guilty to possessing a firearm at the scene of the shooting, the State would request that the homicide

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[2] Citations to "Morris Tr." refer to the trial of Nicholas Morris in *People v. Morris*, No. 1674-2006 (N.Y. Sup. Ct.). Citations to "Tr." refer to Mr. Hemphill's trial.

charge be dismissed. *Hemphill*, 142 S. Ct. at 687; J.A. 35-38.

To effectuate this plea bargain, Morris could have pleaded guilty simply to possessing the 9-millimeter gun, as charged in the indictment—or to possessing a gun without specifying the particular type at all.[3] Instead, Morris offered an allocution in which he specifically asserted that "the loaded operable firearm" he possessed at the scene of the shooting was a .357 revolver—a different caliber firearm than the murder weapon. J.A. 22, 35-36; *Hemphill*, 142 S. Ct. at 686-87. Even though there was scant evidence to support Morris's claim, J.A. 30, the prosecution and trial judge accepted it as "a truthful explanation of what happened," *id.* 38.

3. Three years later, police determined that DNA on the blue sweater found in Gilliam's apartment matched petitioner. Pet. App. 14a-15a. No eyewitness ever identified the sweater as the particular blue top worn by the shooter. *Id.* 29a & n.4. Nor did any eyewitness (save Gilliam, in his revised allegation) ever identify petitioner, instead of Morris, as the gunman. Nevertheless, in 2013, after two more years had passed, the State charged petitioner with the 2006 shooting. *Id.* 15a.

B. Procedural history

1. *The trial.* At petitioner's trial, the State abandoned the theory it had espoused at Morris's trial. Instead of contending that Gilliam acted with only one

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[3] The caliber of firearm illegally possessed is immaterial under the relevant state statute; the statute speaks only of possessing a "loaded firearm." N.Y. Penal Law § 265.02(4) (repealed 2006) (codified as amended at § 265.03(3) (2022)).

companion, the State now maintained that Gilliam had acted with two others (Morris and petitioner), and that petitioner shot the victim. J.A. 356.

To support this new theory, the State presented testimony from Gilliam, who agreed to testify at petitioner's trial as part of a plea bargain of his own. Under the deal, Gilliam received a sentence of five years in prison, avoiding a term of at least twenty-five years for his involvement in the murder. J.A. 165. Gilliam had previously mentioned only a single weapon in his accounts of the shooting. But Gilliam now claimed that there were two guns at the scene. *Id.* 178-79. He claimed that Morris had a .357 and that petitioner had the 9-millimeter. Tr. 980-81.

Petitioner contended that the State had been right the first time—that Morris was Gilliam's sole companion and the shooter. Pet. App. 2a. In support of this claim, petitioner "elicited undisputed testimony from a prosecution witness that police had recovered 9-millimeter ammunition from Morris' nightstand." *Hemphill*, 142 S. Ct. at 686. Petitioner also explained that eyewitnesses to the crime had identified Morris, not him, as the shooter.

In response, the State moved to introduce Morris's plea allocution. J.A. 101, 105-06, 138. The State also disclaimed any intention to call Morris to the stand. After a trip to Barbados, Morris had been denied re-entry to this country and, in any event, was "not willing" to appear in court, where he would have been subject to cross-examination. J.A. 139, 142-44.

Petitioner objected that admitting Morris's allocution without putting him on the stand would violate the Sixth Amendment's Confrontation Clause. J.A. 160-61. The trial court overruled petitioner's

objection. It acknowledged that petitioner's third-party defense that Morris was the shooter was "appropriate," "fair," and even a "necessary argument to make." *Id.* 120, 185. But invoking a New York evidentiary rule known as "opening the door," the trial court reasoned that Morris's allocution was "reasonably necessary" to allow the State "to rebut [petitioner]'s theory that Morris committed the murder." *Hemphill*, 142 S. Ct. at 686 (citation omitted). Indeed, the trial court judge explained that the allocution went "to the heart of this case." J.A. 120.

"The State, in its closing, cited Morris' plea allocution and emphasized that possession of a .357 revolver, not murder, was 'the crime [Morris] actually committed.'" *Hemphill*, 142 S. Ct. at 688 (quoting J.A. 356). In other words, because a 9-millimeter bullet killed the victim, the State insisted that Morris's allocution showed that he could not have possessed the "murder weapon." J.A. 355-56.

The jury's deliberations lasted "multiple days." *Hemphill*, 142 S. Ct. at 688. Among other things, the jury repeatedly requested to see headshots of Morris and petitioner. J.A. 364, 368. The jury also requested copies of the testimony of one of the eyewitnesses who initially identified Morris as the shooter. *Id.* 364-65. Eventually, the jury found petitioner guilty of second-degree murder. The court sentenced him to a term of twenty-five-years-to-life in prison. Pet. App. 6a.

2. *Proceedings on appeal*

a. Petitioner appealed his conviction, renewing, among other arguments, his Confrontation Clause claim. The State defended the trial court's decision to admit Morris's allocution. Specifically, the State contended that "when [petitioner] pursued a third-

party culpability defense stating Morris possessed the same caliber weapon that killed the victim, he opened the door for the People to admit evidence that Morris possessed a different caliber weapon." Supp. App. to Br. in Opp. 208a, *Hemphill v. New York*, 142 S. Ct. 681 (2022) (No. 20-637) ("*Hemphill I* BIO App.").[4]

The Appellate Division agreed with the State and affirmed. The panel recognized that a nontestifying witness's allocution "would normally be inadmissible" under the Confrontation Clause. Pet. App. 21a. But a majority of the panel held that petitioner had "created a misleading impression that Morris possessed a 9 millimeter handgun, which was consistent with the type used in the murder, and introduction of the plea allocution was reasonably necessary to correct that misleading impression." *Id.* 22a.

Justice Manzanet-Daniels dissented on the grounds that the State's evidence was legally insufficient—even with the allocution—to support petitioner's conviction. Pet. App. 27a. She stressed that, within two days of the shooting, three of the four eyewitnesses had identified Morris as the gunman. *Id.* 28a. She also emphasized that the only witness to claim petitioner was the shooter was Gilliam, who initially said that Morris had committed the crime, admitted to lying at various points during the investigation, and testified against petitioner "to avoid a murder sentence" of his own. *Id.* 28a-29a, 29a n.2.

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[4] Citations to this document are to the hard copy as filed in this Court, which petitioner assumes remains accessible. The document is posted as "Other" on this Court's online docket entry for the Brief in Opposition. But the posting appears to be an earlier draft and is not paginated the same as the ultimate filing.

b. The New York Court of Appeals affirmed. As relevant here, it held that "the trial court did not abuse its discretion by admitting evidence that the allegedly culpable third party pled guilty to possessing a firearm other than the murder weapon." Pet. App. 7a.

c. Petitioner sought certiorari in this Court, renewing his Confrontation Clause claim. The State opposed review, arguing in part that any error in admitting Morris's allocution was harmless. Br. in Opp. 30-32, *Hemphill v. New York*, 142 S. Ct. 681 (2022) (No. 20-637). Petitioner replied that the State's harmless-error argument was baseless. Cert. Reply at 9, *Hemphill v. New York*, 142 S. Ct. 681 (2022) (No. 20-637).

This Court granted certiorari and reversed. The Court accepted the trial court's determination that Morris's allocution was "reasonably necessary" to enable the prosecution "to rebut [petitioner]'s theory that Morris committed the murder." *Hemphill*, 142 S. Ct. at 686 (citation omitted). But the Court held that the Confrontation Clause still rendered the allocution inadmissible. No matter how "reliab[le] or credib[le]" testimonial hearsay may appear on its face, the Clause guarantees defendants the right to test the witness's veracity "in the crucible of cross-examination." *Id.* at 691-92 (citation omitted).

The Court did not address the State's harmless-error contention. Instead, the Court remanded to allow the state courts "initially to assess the effect of [the] erroneously admitted evidence." *Hemphill*, 142 S. Ct. at 693 n.5 (citation omitted).

3. *Subsequent proceedings*. On remand, the New York Court of Appeals held that the improper

admission of Morris's allocution was harmless. The court acknowledged that "[t]he primary disputed issue" in this case was who "fired [the] 9-millimeter firearm" that killed the victim. Pet. App. 2a. And the court recognized that Morris's allocution "supported a conclusion that Morris possessed a *.357 magnum revolver* on the day in question." *Id.* 4a (emphasis added). Yet the court declared that "'there is no reasonable possibility' that the erroneously admitted plea allocution 'might have contributed to [petitioner's] conviction.'" *Id.* (quoting *People v. Crimmins*, 36 N.Y.2d 230, 237 (1975), which, in turn, cites *Chapman v. California*, 386 U.S. 18 (1967)). According to the court, "[t]he plea allocution neither exculpated Morris nor inculpated [petitioner] as the shooter." *Id.* The court further asserted that "the prosecutor's reliance on the [allocution] was exceedingly minimal" and added that Gilliam had also testified that Morris possessed a .357 magnum. *Id.*

The Court of Appeals also maintained that there was "other, overwhelming evidence of petitioner's guilt." Pet. App. 4a. In particular, the court pointed to Gilliam's testimony that petitioner was the shooter; evidence purportedly indicating that petitioner "fled" to North Carolina after the killing; and the fact that petitioner's DNA was found on the blue sweater police found in Gilliam's apartment. *Id.* 2a-3a. Finally, the court suggested that petitioner's appearance matched eyewitness descriptions of the gunman. *Id.* In a footnote, the court conceded that three of those witnesses actually identified Morris, not petitioner, as the shooter. *Id.* 4a n.*. But the court discounted those specific averments during police lineups as "misidentifi[cations]" and speculated that news coverage "potentially bias[ed]" their recollections. *Id.*

REASONS FOR GRANTING THE WRIT

The New York Court of Appeals' harmless-error holding is patently erroneous. Because petitioner maintained at trial that Nicholas Morris fired the 9-millimeter handgun that killed the victim, Morris's statement suggesting he did not possess the murder weapon was bound to contribute to the verdict. This is especially so because, contrary to the Court of Appeals' assertion, the other evidence against petitioner was not "overwhelming." Far from it. Several eyewitnesses identified Morris as the shooter; physical evidence supported these identifications; and the State itself initially charged Morris with the crime. The Court of Appeals attempted in various ways to discount these facts. But its reasoning resembles review for sufficiency of the evidence (itself a disputed issue earlier in this case), not an analysis of whether a constitutional error at trial potentially contributed to a guilty verdict.

This Court should not allow the Court of Appeals' erroneous decision to stand. The harmless-error doctrine is among the most important doctrines in criminal law; indeed, the value of constitutional criminal procedure rights depends on it. The Court of Appeals' holding also contravenes this Court's own earlier decision in this case, which recounts the facts and procedural history in terms starkly inconsistent with the decision on remand. Finally, the stakes here are significant: Petitioner stands convicted of second-degree murder and is serving a prison sentence of twenty-five-years-to-life. To preserve the integrity of this Court's earlier decision in this case, as well as the criminal justice system more generally, this Court should grant certiorari and reverse.

I. The New York Court of Appeals' harmless-error holding is patently erroneous.

When the prosecution in a state criminal prosecution is the "beneficiary" of a "trial error" of constitutional magnitude, the court must reverse the defendant's conviction unless the prosecution proves that the error was "harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967); *see also United States v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006) (distinguishing "trial error" from "structural defect"). To carry this burden, the prosecution must demonstrate that "there is [no] reasonable possibility that the evidence complained of might have contributed to the conviction." *Chapman*, 386 U.S. at 24 (quoting *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963)).

Under the *Chapman* standard, "[a]n error in admitting plainly relevant evidence which possibly influenced the jury" adverse to the defendant cannot be considered harmless. *Chapman*, 386 U.S. at 23-24. The conviction can be sustained only if the improperly admitted evidence is "so unimportant and insignificant," *id.* at 22, that the guilty verdict "was surely unattributable to the error," *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993). That rule is not remotely satisfied here.

A. The improper admission of Morris's allocution plainly contributed to the jury's guilty verdict.

1. Where, as here, the defendant plausibly claims that someone else committed the offense with which he is charged, the improper admission of a statement by the alternative suspect suggesting that the

alternative suspect did not commit the crime is not harmless.

a. As the New York Court of Appeals acknowledged, "[t]he primary disputed issue" in this case "was the shooter's identity." Pet. App. 2a. Petitioner presented a third-party culpability defense, asserting that Morris, not petitioner, shot the victim. *Id.* Accordingly, the prosecution explained to the jury that "the main question, the only real question put to you is very simple: Who did it, Nick Morris or Darrel [sic] Hemphill?" J.A. 305.

Furthermore, substantial evidence pointed toward Morris as the shooter. Within 48 hours of the killing, "[t]hree witnesses identified Morris as the shooter out of a police lineup." *Hemphill*, 142 S. Ct. at 687; Pet. App. 28a. Another eyewitness from the neighborhood, after viewing a photo array, stated that Morris "look[ed] like the shooter," and still another identified Gilliam and Morris as the two men she had seen during the fistfight prior to the shooting. Pet. App. 28a. Finally, Gilliam himself initially identified Morris as the shooter. *Hemphill*, 142 S. Ct. at 687.

In addition to all of these identifications, the police determined that the murder weapon was a 9-millimeter handgun. And within hours of the shooting, investigating officers found live 9-millimeter ammunition on Morris's nightstand. *Hemphill*, 142 S. Ct. at 687. Police also "observed bruising on [Morris's] knuckles consistent with fist fighting." *Id.* Given the eyewitness testimony that the same individual who was involved with Gilliam in the fistfight was the gunman, Pet. App. 2a, this bruising reinforced petitioner's claim that Morris was the shooter.

In fact, so strongly did the evidence indicate that Morris was the gunman that the State itself originally charged Morris with possessing a 9-millimeter gun and with killing the victim. *Hemphill*, 142 S. Ct. at 687. And even after the State dropped those charges in exchange for Morris's plea to possessing a firearm at the scene, the New York courts continued to agree there was evidence indicating that Morris was the actual shooter. The trial court acknowledged here that petitioner's third-party defense was a "fair argument," J.A. 120—indeed, "under the circumstances of this case probably a necessary argument to make," *id.* 185. And the New York Court of Appeals recognized that "there was evidence of third-party culpability." Pet. App. 6a.

b. Against this backdrop of petitioner's serious third-party guilt defense, the State offered Morris's allocution "to rebut [petitioner]'s theory that Morris committed the murder." *Hemphill*, 142 S. Ct. at 686. As the State itself put it, "Morris' plea allocution was admitted as evidence that he possessed a .357—*not a .9mm*—on the date, time, and location where the victim was killed." *Hemphill I* BIO App. 205a (emphasis added). Morris's allocution, in other words, "g[ave] rise to the inference that he did not fire the .9mm bullet that killed the victim. This directly refuted defendant's defense that Morris was the shooter." *Id.*

The trial court, for its part, explicitly and repeatedly recognized the importance of the allocution, explaining that the allocution went "to the heart of this case." J.A. 120; *see also id.* 161 (explaining that the allocution was "central to the issue . . . being litigated in this trial"). If true, the

allocution "refut[ed] the claim that Morris was, in fact, the shooter." *Id.* 185; *see also id.* 105-06 (same); *id.* 119 (noting that the allocution "answers an argument that [defense counsel] made that Nick Morris is the shooter with the nine-millimeter"); *id.* 184 (observing that the allocution indicated that petitioner "may have possessed a different firearm than Morris and that Morris' firearm cannot be connected to this shooting"). Indeed, the trial judge made clear that the prosecution's case would have been "substantially weakened" without the allocution. *Id.* 121.

3. Despite all of this, the New York Court of Appeals declared that "there is no reasonable possibility" that admission of Morris's allocution "might have contributed to [petitioner's] conviction." Pet. App. 4a (citation omitted). None of the three reasons the court advanced for this startling assertion has merit.

First, the Court of Appeals asserted that Morris's allocution "neither exculpated [him] nor inculpated [petitioner] as the shooter." Pet. App. 4a. As explained above, however, the notion that Morris's allocution did not "exculpate[]" him flatly contradicts the record, procedural history, and this Court's opinion. The very reason the State introduced the allocution was to respond to petitioner's suggestion that Morris was the shooter. That is why the State itself explained that the allocution "tend[ed] to *exculpate* Morris as the shooter and rebut defendant's third-party culpability defense." *Hemphill I* BIO App. 209a-210a (emphasis added).

To be sure, Morris's allocution did not also directly "inculpate[] [petitioner] as the shooter." Pet. App. 4a. But where the jury's task is to determine whether the prosecution has proven that the defendant—and not

an alternative suspect—is guilty, evidence that exculpates the alternative suspect works great harm to the defense. *See Richardson v. Marsh*, 481 U.S. 200, 208 & n.3 (1987) (even if evidence is not inculpating "on its face," it still "harm[s]" the defendant where it is incriminating when linked with other evidence at trial). That is precisely what happened here. Everyone agreed that the child was killed by a 9-millimeter bullet. So excluding Morris as the potential shooter—on the ground that he supposedly possessed a .357 at the scene, not a 9-millimeter—left petitioner as the only remaining suspect.

Second, the Court of Appeals reasoned that the allocution's admission did not contribute to the verdict because "Gilliam had already testified" that "Morris possessed a .357 magnum revolver on the day in question." Pet. App. 4a. This reasoning is equally flawed.

This Court has repeatedly held that evidence that reinforces an important witness's testimony on a disputed issue is not harmless. For example, in *Arizona v. Fulminante*, 499 U.S. 279 (1991), this Court held that the erroneous admission of the defendant's confession to a fellow inmate was not harmless even though the prosecution had introduced a second confession containing all of the same material but through a different, less reliable witness. The Court explained that, absent exposure to the first confession, the jury might have found the witness who testified to the second confession "unbelievable." *Id.* at 298. That is, "the jury might have believed that the two confessions reinforced and corroborated each other." *Id.* at 299; *see also Satterwhite v. Texas*, 486 U.S. 249, 259-60 (1988) (similar reasoning).

Similarly here, the plea allocution's admission was not harmless because Gilliam was an important yet unreliable witness whose testimony required corroboration to be believed. Gilliam changed his story three times and admitted at trial that he had lied to the police and prosecutors. J.A. 178-81. During his first meeting with the police, he identified Morris as the shooter. Pet. App. 29a. Then, after Morris called Gilliam from jail, Gilliam recanted and instead claimed that petitioner was his sole accomplice and the shooter. *Id.* 29a & n.3. Years later, Gilliam asserted that he, Morris, and petitioner were all involved in the altercation, but that petitioner was the shooter, while Morris merely possessed a .357 magnum. *Id.* 29a. Gilliam himself admitted during trial that these shifting stories were not the product of faulty memory but instead that "[d]uring th[e] investigation [he] lied repeatedly to the district attorney and detectives." J.A. 177; *see also id.* 170 (admitting he lies to protect himself and others).

The jury also knew that Gilliam faced a twenty-five-year sentence for his participation in the crime and gave his testimony at petitioner's trial as part of a cooperation agreement under which he received a sentence of only five years in prison. J.A. 165. Because Gilliam was a participant in the offense and gave his testimony in exchange for leniency, New York law required the jury to view his testimony "with utmost caution" and "a suspicious eye." *People v. Berger*, 52 N.Y.2d 214, 218-19 (1981); *see also Lilly v. Virginia*, 527 U.S. 116, 131-33 (1999) (plurality opinion) (summarizing case law holding that accomplice confessions that "shift or spread blame" are "inherently unreliable"); *Lee v. Illinois*, 476 U.S. 530, 541 (1986) ("[W]hen one person accuses another of a

crime under circumstances in which the declarant stands to gain by inculpating another, the accusation is presumptively suspect.").

In light of these realities, the State itself emphasized at closing that Gilliam's credibility as a witness hinged on whether his testimony was "corroborated." J.A. 352. "There's only one reason you should believe any witness at a trial," the prosecution continued, "because he or she is corroborated. Corroboration is a magic word in every courtroom in this courthouse." *Id.* And Morris's allocution was the *only* evidence to corroborate Gilliam's claim that Morris possessed a .357, and not a 9-millimeter, at the crime scene. What is more, it offered corroboration in the form of a sworn statement that had previously been accepted as the truth by a court of law. *See id.* 38, 40, 156, 161.

Third, the New York Court of Appeals asserted that the State's reliance on Morris's allocution was "exceedingly minimal." Pet. App. 4a. The importance of the allocution, however, spoke for itself. In light of petitioner's claim that Morris was the shooter, Morris's statement suggesting he possessed only "a .357-magnum revolver, not the 9-millimeter handgun" used in the killing, *Hemphill*, 142 S. Ct. at 686, must have commanded the jury's attention regardless of any extra argumentation by the prosecution.

In any event, the State relied on the allocution in much more than an "exceedingly minimal" way. As this Court highlighted, "[t]he State, in its closing, cited Morris' plea allocution and emphasized that possession of a .357 revolver, not murder, was 'the crime [Morris] actually committed.'" 142 S. Ct. at 688 (quoting J.A. 356). Indeed, the State's whole theory

was that introducing Morris's allocution was "reasonably necessary" to refute petitioner's third-party defense. *Id.* at 686, 688 (citation omitted); *see also* J.A. 101, 110-11, 116-17, 139. And the New York courts endorsed this theory, holding that introducing the plea allocution was "reasonably necessary to correct th[e] misleading impression" that Morris possessed the murder weapon. Pet. App. 22a (Appellate Division); *see also id.* 7a (Court of Appeals).

There is no way to square the New York courts' prior holding that the admission of the allocution was necessary to rebut petitioner's third-party defense with the Court of Appeals' declaration that the allocution could not have contributed to the verdict. Nor did the Court of Appeals even try to do so.

B. The other evidence against petitioner was not even remotely overwhelming.

Apart from its analysis of Morris's allocution, the New York Court of Appeals also asserted that "the evidence of [petitioner]'s guilt was overwhelming." Pet. App. 1a. This Court, of course, has long "admonished . . . against giving too much emphasis to 'overwhelming evidence' of guilt" in harmless-error review. *Harrington v. California*, 395 U.S. 250, 254 (1969) (citation omitted). Even so, any fair reading of the record demonstrates that the evidence against petitioner was far from overwhelming. Multiple eyewitnesses identified Morris as the shooter, and the jury deliberated for "multiple days" and repeatedly asked to see headshots of Morris and petitioner. *Hemphill*, 142 S. Ct. at 687-88; J.A. 364, 368. Indeed, the State's evidence was so thin that one appellate justice found it "was insufficient to support [petitioner]'s conviction." *Hemphill*, 142 S. Ct. at 689;

see also Pet. App. 27a-33a (Manzanet-Daniels, J., dissenting).

1. To begin, almost all the evidence to which the New York Court of Appeals pointed existed at the time the State charged Morris with the shooting. At that time, the State presumably believed that *Morris*, not petitioner, fired the fatal shot. Not surprisingly, therefore, this body of evidence fails to point overwhelmingly to petitioner.

The Court of Appeals first summarized Gilliam's testimony. Pet. App. 2a-3a. But for the reasons stated above, this testimony was highly suspect. *See supra* at 16-18. Indeed, when Gilliam changed his story to implicate petitioner, investigators "did not credit" his account and instead charged Morris with the killing. *Hemphill*, 142 S. Ct. at 687. The jury here was also instructed to view Gilliam's testimony skeptically and told that the testimony could support a guilty verdict only if "corroborated by other evidence." Tr. 1696. And the jury seemingly did view Gilliam's testimony with suspicion. J.A. 364 (jury requesting to review Gilliam's cooperation agreement).

The Court of Appeals next asserted that petitioner "fled" to North Carolina shortly after the shooting and "eva[ded] authorities by use of an alias." Pet. App. 3a-4a. These assertions, however, ignore evidence cutting the other way. Shortly after the shooting, petitioner retained an attorney and made himself available to the police. J.A. 94. Police also knew where petitioner and his family resided in North Carolina, and he even returned to New York for business multiple times. *Id.* 293-95.

At any rate, under New York law, evidence of evasion has "limited probative force." *People v.*

Yazum, 13 N.Y.2d 302, 304 (1963); *see also Illinois v. Wardlow*, 528 U.S. 119, 125 (2000) (noting that "there are innocent reasons for flight from police and that, therefore, flight is not necessarily indicative of ongoing criminal activity"). And the jury here was instructed to this effect. Tr. 1684. Consequently, any evidence of flight could not provide overwhelming evidence of guilt.

The Court of Appeals lastly referenced various eyewitness accounts of the shooting. In particular, the court stated that several eyewitnesses "identified the shooter as a tall, slim, black man" and that petitioner is "tall and slim." Pet. App. 3a. This, however, distorts the record. One eyewitness described the shooter as "tall" and "skinny." J.A. 330-31. But that witness identified Morris, not petitioner, as the shooter. *Id.* Other witnesses testified simply that the shooter was "tall*er*" and "slimm*er*" than Gilliam. *Id.* 135, 236, 256 (emphasis added). That comparison points no more to petitioner than to Morris: Both petitioner and Morris were considerably taller and slimmer than Gilliam, who weighed about 400 pounds, *id.* 9, 12.

The Court of Appeals also claimed that "several" eyewitnesses "identified [petitioner] as the shooter." Pet. App. 3a. This is incorrect. In actuality, Gilliam (whose testimony was exceptionally unreliable, *see supra* at 16-18) was the *only* witness who said petitioner was the shooter. *Id.* 28a. And three eyewitnesses independently identified Morris—who "does not resemble" petitioner—as the shooter. *Id.* In a brief footnote, the Court of Appeals tried to brush aside this evidence, pointing to the "chaotic circumstances of the shooting" and speculating that eyewitnesses may have been "potentially bias[ed]" by

later news coverage. *Id.* 4a n.*. The State, however, presented these identifications as accurate when it charged Morris. *See* J.A. 6 (stressing, in the State's opening in Morris's trial, that three eyewitnesses "independently and separately identified that man, Nicholas Morris" as the shooter). And in fact, the eyewitnesses had about ten minutes in broad daylight to observe the shooter before he returned and pulled the trigger. Pet. App. 27a-28a.[5]

The New York Court of Appeals' slanted tour of the record recalls *Wearry v. Cain*, 577 U.S. 385 (2016) (per curiam), where this Court reversed the Louisiana Supreme Court's holding that certain withheld evidence was immaterial under *Brady v. Maryland*, 373 U.S. 83 (1983). This Court chastised the Louisiana court for "emphasiz[ing] reasons a juror might disregard new evidence while ignoring reasons she might not" and for "failing even to mention" other pieces of potentially exculpatory evidence. 577 U.S. at 394. Likewise here, the New York Court of Appeals imagined every reason a juror might have voted to convict, while ignoring powerful exculpatory evidence. This approach might be appropriate when a court reviews a conviction for sufficiency of the evidence and

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[5] To make matters worse, the Court of Appeals discounted the eyewitness identifications of Morris on the ground that "the shooter's face was partially obscured." Pet. App. 4a n.*. Yet in the same breath, the Court of Appeals found the eyewitness testimony telling because Morris "had a large scar down the side of his face—an identifying characteristic not mentioned by any eyewitness." *Id.* 4a. The Court of Appeals cannot have it both ways. If the shooter's face was sufficiently visible that witnesses should have noticed Morris's scar, it was also sufficiently visible that witnesses' multiple identifications of Morris as the shooter cannot be so easily discounted.

considers the evidence "in the light most favorable to the prosecution" to determine whether a rational juror could have convicted, *Musacchio v. United States*, 577 U.S. 237, 243 (2016) (citation omitted). But it simply will not do for harmless-error review.

2. The only evidence highlighted by the Court of Appeals that postdates the State's charging of Morris was the discovery of petitioner's DNA on the blue sweater recovered from Gilliam's apartment. Pet. App. 2a. But the court's focus on that sweater is misplaced.

Recall that Gilliam and petitioner are cousins. People often leave clothing at their family members' homes. Moreover, the DNA test indicated only that petitioner had worn the sweater at some point prior to the testing. J.A. 270. The test did not determine when or where he wore it. *Id.*

Nor is it necessarily suspicious that petitioner was allegedly "wearing a blue sweater on the day of the shooting." Pet. App. 3a. No witness testified that petitioner was wearing the particular sweater found in Gilliam's apartment. Nor did any witness identify the sweater "as the one worn by the shooter." *Id.* 29a. In fact, as this Court recognized, witnesses disagreed over whether the shooter was even wearing a sweater. "Eyewitnesses had described the shooter as wearing a blue shirt *or* sweater." *Hemphill*, 142 S. Ct. at 687 (emphasis added); *see also* J.A. 254 ("[The shooter] was wearing a golf shirt, a blue golf shirt. . . . [I]t had three buttons on top.").

The Court of Appeals' blue-sweater theory is also out of joint with its emphasis on eyewitness testimony saying that the shooter had a tattoo. *See* Pet. App. 3a. The only tattoo petitioner has is on his "upper right arm." *Id.*; *see also* J.A. 265 ("upper shoulder"). Yet if

the shooter had been wearing this blue sweater, the garment's long sleeves would have prevented witnesses from seeing an upper-shoulder tattoo. J.A. 95. Indeed, to show his tattoo at trial, petitioner had to remove his shirt entirely. *Id.* 374.

The Court of Appeals bent over backwards to explain away this discrepancy, surmising that the shooter's sleeves "may have been rolled up," enabling the witnesses to "ca[tch] glimpses" of a shoulder tattoo. Pet. App. 3a. Again, this approach (at best) considers the evidence in the light most favorable to the prosecution—the exact opposite of the approach the court should have taken. *See Chapman*, 386 U.S. at 24. The Court of Appeals' speculation also ignores a basic fact: Witnesses suggested the shooter had a tattoo on his "right forearm," Pet. App. 15a, not his upper arm.

II. This Court should correct the New York Court of Appeals' error.

A. The harmless-error doctrine is important and too-often misapplied.

The harmless-error doctrine is "almost certainly the most frequently-invoked doctrine in all criminal appeals." Daniel Epps, *Harmless Errors and Substantial Rights*, 131 Harv. L. Rev. 2117, 2119 (2018); *see also* William M. Landes & Richard A. Posner, *Harmless Error*, 30 J. Legal Stud. 161, 161 (2001) (the doctrine is "probably the most cited rule in modern criminal appeals"). Harmless-error review is also "one of the most significant tasks of an appellate court, as well as one of the most complex." Roger J. Traynor, The Riddle of Harmless Error 80 (1970). Yet over thirty years have passed since the Court assessed

whether improperly admitted evidence was harmless. *See Arizona v. Fulminante*, 499 U.S. 279 (1991).

Meanwhile, the doctrine has "remain[ed] surprisingly mysterious" and challenging for lower courts to apply consistently. Epps, *supra*, at 2120. Worse yet, "there are worrying signs that reviewing courts are currently bungling" harmless-error analyses, and some courts now find constitutional errors harmless "with remarkable frequency." Justin Murray, *A Contextual Approach to Harmless Error Review*, 130 Harv. L. Rev. 1791, 1793-94 (2017); *see also id.* at 1793 n.10 (collecting empirical studies); *Anthony v. Louisiana*, 143 S. Ct. ___, ___ (2022) (slip op. at 11-13) (Sotomayor, J., dissenting from the denial of certiorari) (state appellate court "failed to apply" the proper standard and focused instead on "the sufficiency of the evidence"). Such profligate use of the harmless-error doctrine reduces constitutional rights to protections in name only—"ghosts that are seen in the law but are elusive to the grasp." *The Western Maid*, 257 U.S. 419, 433 (1922).

Petitioner's case throws into relief "how malleable harmless error is in practice and how powerful a tool it can be for a court that wishes to affirm . . . a decision below," Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 Va. L. Rev. 1, 7 (2002). Rarely will a murder trial feature such compelling evidence that another individual committed the offense. And the improperly admitted evidence here spoke directly to this issue. If the New York Court of Appeals truly believed the error here harmless, that simply underscores just how important it is for this Court to step in to correct that misunderstanding.

B. This is the right case to provide a fresh demonstration of how harmless-error review should operate.

1. Applying the harmless-error doctrine requires an assessment of a case's overall record and the particular circumstances under which the evidence at issue was improperly admitted. Petitioner recognizes that the Court does not often undertake such analyses. But the Court does periodically review fact-intensive applications of doctrines that determine liability and criminal punishment. *See, e.g.*, *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4 (2021) (per curiam) (qualified immunity); *Taylor v. Riojas*, 141 S. Ct. 52 (2020) (per curiam) (same); *Mays v. Hines*, 141 S. Ct. 1145 (2021) (per curiam) (prejudice prong of ineffective-assistance-of-counsel doctrine); *Shinn v. Kayer*, 141 S. Ct. 517 (2020) (per curiam) (same).

There is good reason to do so here as well. Indeed, this Court has already considered the record in this case and the manner in which the State introduced and relied upon Morris's allocution. *See Hemphill v. New York*, 142 S. Ct. 681 (2022). And the statement of facts and procedural history in that opinion go a long way toward showing why the New York Court of Appeals' harmless-error holding is unsupportable. In that respect, this case offers a particularly economical opportunity to provide guidance regarding this important constitutional doctrine.

2. The case also presents this Court with a scenario in which the integrity of its own prior decision is at stake. In this Court's initial decision in this case, this Court stressed that the State introduced Morris's allocution to "rebut" petitioner's defense and to prove that "possession of a .357 revolver, *not murder*, was

'the crime that [Morris] actually committed.'" 142 S. Ct. at 686, 688 (emphasis added) (citation omitted). Yet the Court of Appeals stated the allocution did not "exculpate[] Morris." Pet. App. 4a. These two findings are flatly incompatible.

This Court also explained that the State "emphasized" Morris's allocution at trial, and that the trial court even found the allocution was "reasonably necessary" to enable the State to push back against petitioner's third-party defense. 142 S. Ct. 688 (citation omitted). Yet the Court of Appeals characterized the State's reliance on the allocution as "exceedingly minimal." Pet. App. 4a. The Court should not allow its own understanding of a case's record to be swept aside so easily.

3. Finally, the stakes here are significant. Petitioner stands convicted of second-degree murder and has been sentenced to twenty-five-years-to-life in prison. Yet from the start, petitioner has maintained he is actually innocent. The State initially agreed, determining—based on nearly all of the same evidence the Court of Appeals surveyed below—that someone else committed the crime. Even when the State assembled additional evidence and made its strongest possible case against petitioner, a justice in the Appellate Division found the evidence so weak that no reasonable jury could have voted to convict. Pet. App. 27a (Manzanet-Daniels, J., dissenting). Under these circumstances, petitioner should not be relegated to spending potentially the rest of his life in prison without a trial that respects his constitutional rights.

* * *

The New York Court of Appeals' decision is so demonstrably incorrect that this Court may wish to

consider summary reversal. Alternatively, this Court may prefer plenary review as an occasion to provide fuller guidance regarding the harmless-error doctrine. Whatever mode of redress the Court prefers, the vital point is that petitioner's conviction must be reversed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Claudia Trupp
Matthew Bova
CENTER FOR APPELLATE LITIGATION
120 Wall Street, 28th Floor
New York, NY 10005

Jeffrey L. Fisher
Counsel of Record
Pamela S. Karlan
Easha Anand
STANFORD LAW SCHOOL SUPREME COURT LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081
jlfisher@stanford.edu

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