No. 22-488

In The Supreme Court of the United States

DARRELL HEMPHILL,

Petitioner,

v.

STATE OF NEW YORK,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of New York

BRIEF OF NATIONAL ASSOCIATION FOR PUBLIC DEFENSE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*

The National Association for Public Defense ("NAPD") comprises more than 16,000 professionals who deliver the right to counsel throughout all U.S. states and territories. NAPD members include attorneys, investigators, social workers, administrators, and other support staff who are responsible for executing the constitutional right to effective assistance of counsel. NAPD's members are advocates in jails, courtrooms, and communities. They are experts in not only theoretical best practices, but also in the practical, day-to-day delivery of legal services. Their collective expertise represents federal, state, county, and local systems through full-time, contract, and assigned counsel delivery mechanisms; dedicated juvenile, capital, and appellate offices; and a diversity of traditional and holistic practice models.

NAPD hosts conferences and webinars where discovery, investigation, cross-examination, and prosecutorial duties are addressed to facilitate zealous advocacy at all levels.

Accordingly, NAPD has a strong interest in the issues raised in this case and fully supports the grounds for *certiorari* identified by Petitioner.[1]

[1] No counsel of a party authored this brief in any part, and no person other than NAPD, its members, or its counsel funded this brief. The parties received timely notice.

SUMMARY OF THE ARGUMENT

At issue in this case is whether lower courts are faithfully applying the "harmless beyond a reasonable doubt" standard for acknowledged constitutional violations in a jury trial. They are not. The court below, and others as well, are applying a watered-down sufficiency of the evidence standard that imagines a hypothetical new jury trial instead of focusing closely on how the case was presented to the jury in the actual trial that occurred. Further, some courts are not recognizing patently "reasonable" doubts about the effect of constitutional violations and are thereby diluting the "reasonable doubt" standard, which has ramifications far beyond harmless error review. What's at stake here is the constitutional entitlement emphasized in *Sullivan v. Louisiana*, 508 U.S. 275 (1993), which is a defendant's right to have a *jury* properly find guilt *beyond a reasonable doubt*. Having panels of appellate judges conclude that there was enough evidence for conviction is not a substitute for that right.

Chapman v. California established a demanding test for determining whether a constitutional error committed by a trial court was harmless: a court of review must be able to declare "beyond a reasonable doubt" that the erroneously admitted evidence "did not contribute to" the conviction. 386 U.S. 18, 25–26 (1967). This Court has made clear that the focus of this analysis must be on the actual jury trial that led to the verdict; not a hypothetical, revisionist jury trial with only permissible arguments based on the permissible evidence.

Further, *Chapman* review is not mere sufficiency of the evidence review asking whether there was enough evidence to convict. It is far more stringent. A reviewing court must be able to say that the conviction "was surely unattributable to the error." *Sullivan*, 508 U.S. at 279, and merely declaring sufficient evidence for a conviction can never be enough "or else directed verdicts for the State would be sustainable on appeal." *Id.* at 280.

Too often, though, lower courts invoke *Chapman* only to actually apply a less demanding standard. The New York Court of Appeals' unanimous decision is a prime example: The court spins a revisionist history compared to the *actual* jury trial that occurred. In Darrell Hemphill's actual trial, highly damaging evidence was admitted in violation of the Sixth Amendment, and the principal question was whether the correct suspect was being prosecuted for the murder.

This case is a particularly appropriate vehicle to address courts' misapplication of *Chapman* and *Sullivan* because this Court is already familiar with the facts. Summary reversal is warranted and would be a helpful corrective to misguided harmless error review that is watering down the constitutional right to a *jury* properly finding guilt beyond a reasonable doubt.

ARGUMENT

A. The roots of harmless error analysis.

Harmless error principles "may determine the outcome of more criminal appeals than any other doctrine." 7 Wayne LaFave et al., CRIMINAL PROCEDURE § 27.6(a) (4th ed. 2015) (quoting Jason M. Solomon, *Causing Constitutional Harm: How Tort Law Can Help Determine Harmless Error in Criminal Trials*, 99 N.W. L. Rev. 1053, 1054 (2005)). Accordingly, the uniform and correct application of this doctrine is fundamental to "public respect for the criminal process." *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986).

Harmless error recognizes that "the tools of the profession, including rules of evidence and procedure, are not perfect enough to make perfect trials a reasonable goal." 1 Christopher B. Mueller & Laird C. Kirkpatrick, FEDERAL EVIDENCE § 1:17 (4th ed. 2013). Harmless error balances two competing considerations. On the one hand, courts are reluctant to allow a conviction based on error to stand. Such a result can create "very unfair and mischievous results" and lead to a miscarriage of justice. *Chapman*, 386 U.S. at 22. On the other hand, unnecessarily requiring retrials based on any error—no matter how insignificant—wastes judicial resources. *Id.* As such, "the evaluation of an error as harmless or prejudicial is one of the most significant tasks of an appellate court, as well as one of the most complex." Traynor, Roger J., The Riddle of Harmless Error 80 (1970).

Early American courts did not recognize the concept of harmless error. For much of the nineteenth and early twentieth century, virtually any error—no matter how insignificant—required a new trial. 7 LaFave § 27.6(a); *Dietz v. Bouldin*, 579 U.S. 40, 52 (2016) ("At common law, any error in the process of rendering a verdict, no matter how technical or inconsequential, could be remedied only by ordering a new trial."). In one infamous example, the California Supreme Court reversed a larceny conviction because the indictment charged the defendant with "larcey" instead of "larceny." *People v. St. Clair*, 56 Cal. 406, 407 (1880) ("There is no such felony as 'larcey' known to our law. 'Larcey' is certainly not 'larceny. . . .' "). According to the court, its reversal was not based on a mere technicality; rather, the omission of the "n" in larceny "is more than a departure from an established form . . . [it] is a failure to describe any offense." *Id.*

Cases like *St. Clair* led to widespread criticism "that courts of review, 'tower above the trials of criminal cases as impregnable citadels of technicality' " and that retrials were burdensome on the courts. *Kotteakos v. United States*, 328 U.S. 750, 759 (1946); 7 LaFave § 27.6(a). Building on this criticism, reformers succeeded in convincing all 50 states and the federal government to pass harmless error statutes for nonconstitutional errors. *Id.*; *Chapman*, 386 U.S. at 22.

Until *Chapman*, though, it was generally assumed that *constitutional* errors could never be harmless.[2] While *Chapman* departed from this view, 386 U.S. at 21–22, it held that a constitutional error can be harmless only if the government proves beyond a reasonable doubt that the error did not contribute to the verdict. 386 U.S. at 26.

Chapman reiterated the need for this Court to police states' enforcement of federal constitutional rights: "With faithfulness to the constitutional union of the States, we cannot leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights." *Id.* at 21.

B. *Chapman* and *Sullivan* set forth a demanding standard.

Chapman established a "very exacting" test for when a constitutional error can be harmless. 3B Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE, § 855 (4th ed. 2008). A constitutional error is harmless only when "in the setting

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[2] 7 LaFave § 27.6(c) ("Prior to the 1960s, it was assumed that constitutional violations could never be regarded as harmless error."); 1 Mueller and Kirkpatrick § 1:23 ("With good reason, it was once thought that constitutional errors stood on different footing from others because they required automatic reversal."); 2 William J. Rich, MODERN CONSTITUTIONAL LAW § 31:45 (3d ed. 2011) ("At the time when the *Kotteakos* decision was made, the general assumption was that constitutional cases were not subject to a harmless error rule. That changed in the 1960s.").

of a particular case" the error is "so unimportant and insignificant" that the court may conclude beyond a reasonable doubt that the error "did not contribute to" the conviction. *Chapman*, 386 U.S. at 26.

Three features combine to make this standard so demanding.

1. To properly apply *Chapman*, reviewing courts must look at the effect of the constitutional error on the actual jury trial that led to the conviction rather than speculate about how a hypothetical jury that did not see the inadmissible evidence would resolve the case. *Id.* at 24 (explaining that the "beneficiary of a constitutional error [must] prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained").

The Court elaborated on this teaching in *Sullivan*. Writing for a unanimous Court, Justice Scalia explained that *Chapman* requires "the reviewing court to consider . . . 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.'" *Sullivan*, 508 U.S. at 279 (quoting *Yates v. Evatt*, 500 U.S. 391, 404 (1991)).

Emphasizing this point, the Court further explained that "[t]he inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this*

trial was surely unattributable to the error." *Id.* at 279; *see also* 7 LaFave § 27.6(e) ("[*Chapman*] looked not to the hypothetical question of whether the jury could have convicted without regard to the error, or whether the appellate court itself would have convicted without the error, but to the historical question whether the error had influenced the jury in reaching its verdict.").

This focus on the actual jury trial is required by the Sixth Amendment. As this Court held in *Sullivan*, "hypothesiz[ing] a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the [Sixth Amendment's] jury-trial guarantee." 508 U.S. at 279.

The focus in *Chapman* and *Sullivan* on the jury trial that actually occurred is critical. Juries do not receive evidence in a vacuum. Trials are messy, and they come with evidence supporting both sides, as well as arguments, theories, and instructions. Sometimes, it may be reasonable to conclude that a jury can follow instructions to disregard erroneously admitted evidence or improper argument. But sometimes a jury cannot unhear or unsee those things; some bells are so prejudicial that they cannot be unrung. *See Bruton v. United States*, 391 U.S. 123, 135 (1968) ("[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.").

The focus on the jury trial that actually occurred ensures that reviewing courts look at the entire record—including erroneously admitted evidence, evidence supporting innocence, instructions, and arguments and theories of counsel. And it excludes engaging in a purely hypothetical exercise.

2. Further, as this Court has explained, *Chapman* is much more than a sufficiency of the evidence standard. *Satterwhite v. Texas*, 486 U.S. 249, 258–59 (1988) ("The question . . . is not whether the legally admitted evidence was sufficient to support the [conviction], which we assume it was, but rather, whether the State has proved 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' ") (quoting *Chapman*, 386 U.S. at 24); *see also* 7 LaFave § 27.6(e) ("The *Chapman* standard clearly rejected a 'correct result' test, especially if the correct result was to be measured simply by sufficient evidence to sustain a conviction.").

Indeed, sufficiency of the evidence standing alone cannot be enough "or else directed verdicts for the State would be sustainable on appeal." *Sullivan*, 508 U.S. at 280. Instead, a reviewing court—after assessing the actual jury trial that occurred—must be confident that the conviction "was surely unattributable to the error." *Id.* at 279.

3. *Chapman* and *Sullivan* also require a very demanding burden of proof. *Chapman*, 386 U.S. at 26. This Court has applied at least four standards for determining whether a trial error is prejudicial. *See*

United States v. Dominguez Benitez, 542 U.S. 74, 86 (2004) (Scalia, J., concurring) (describing "four assertedly different standards of probability relating to the assessment of whether the outcome of trial *would* have been different *if* error had not occurred, or *if* omitted evidence had been included") (emphasis in original). Of these, *Chapman*/*Sullivan* is the most "defendant-friendly" because it requires the government to prove harmlessness beyond a reasonable doubt. *Id.* (contrasting *Chapman* with the "substantial and injurious effect or influence" on the verdict standard, the "reasonable probability" standard, and the "more likely than not" standard").

C. Lower courts are lapsing into sufficiency of the evidence review and watering down "beyond a reasonable doubt," which ultimately diminishes the right to a *jury's* proper determination of guilt.

Confusion about how to apply *Chapman* extends beyond New York. Other state courts have also treated *Chapman* as requiring something akin to a sufficiency of the evidence review rather than a determination that the unconstitutionally admitted evidence did not contribute to the verdict. And even those courts that have focused on the actual jury trial that produced the verdict have not followed this Court's instruction to affirm only if the government demonstrates beyond a reasonable doubt that the inadmissible evidence did not contribute to the verdict. *See*, *e.g.*, Traynor, The Riddle of Harmless Error 28 ("All too often an

appellate court confuses review by applying the substantial evidence test to determine whether an error is harmless.").

Most errors occur in unpublished decisions from intermediate state courts. But state supreme courts continue to misapply *Chapman*/*Sullivan* too. The Mississippi Supreme Court's decision in *Haynes v. State*, 934 So. 2d 983 (Miss. 2006), and the Kansas Supreme Court's decision in *State v. Thornton*, 481 P.3d 1212 (Kan. 2021), are two particularly striking recent examples.

1. *Haynes v. State*

In 2004, a house was burned, and a woman inside died of smoke inhalation. *Haynes*, 934 So. 2d at 985–86. Justin Haynes was convicted of murder, sexual battery, and arson after the prosecution introduced his confession to the crimes. *Id.* at 985–87. On appeal, the Mississippi Supreme Court held that the confession should not have been admitted because the police obtained it in violation of the Fifth Amendment by questioning Haynes without his lawyer present. *Id.* at 988–91. Even so, the court affirmed the convictions because by some perversion of the *Chapman*/*Sullivan* standard the court apparently concluded that it wasn't reasonable to think that the conviction was attributable—even in part—to the jury's hearing a confession to the crimes. That is especially far-fetched, if review had been properly undertaken, because the evidence

against Haynes was thin, and there was evidence pointing elsewhere.

At trial, Haynes pointed to another suspect—a man who was found with the victim's gun and who told the police inconsistent stories about how he obtained it—as potentially responsible for the fire. *Id.* at 991–92. The Mississippi Supreme Court recognized that without the confession, the evidence that Haynes started the fire was slight: there was evidence suggesting that he was at the house and committed the sexual battery, but "the State presented little concrete evidence actually showing Haynes was responsible for setting the fire." *Id.* at 991. The *only* evidence potentially linking Haynes to the fire other than his confession was that his jacket smelled like smoke and had a small burn. *Id.* But that evidence demonstrated (at most) only that he was present while a fire was burning, not that it was the fire that caused the death or that he started it.

The Mississippi Supreme Court admitted that "[w]ithout Haynes' confession, the jury may have given different weight to the State's evidence, and possibly in Haynes' favor," and it also "might have questioned [the other suspect's] credibility." *Id.* Those are sensible concessions: This Court has recognized that confessions are "like no other evidence" and " 'have profound impact on the jury, so much so that [the Court] may justifiably doubt its ability to put them out of mind even if told to do so.' " *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) (quoting *Bruton*, 391 U.S. at 139–40 (White, J., dissenting)). Indeed, this Court has

observed that "a full confession in which the defendant discloses the motive for and means of the crime may tempt the jury to rely upon that evidence *alone* in reaching its decision." *Id.* at 296 (emphasis added).

But, despite admitting that the confession "might have" affected the jury's assessment of the evidence,[3] the Mississippi Supreme Court held that the confession was harmless because there was overwhelming evidence that Haynes was at "the scene of the crime." *Haynes*, 934 So. 2d at 991–92. But mere presence at the scene of a crime does not prove murder, *Griffin v. State*, 293 So. 2d 810, 812 (Miss. 1974), and, as the Mississippi Supreme Court admitted, the evidence suggesting that Haynes started the fire was weak.

In the end, the Mississippi Supreme Court's analysis is flatly inconsistent with *Chapman*: "An error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot . . . be conceived of as harmless." 386 U.S. at 23–24. The court erroneously focused on sufficiency of the evidence and watered down the "reasonable doubt" standard.

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[3] This "might have" should have been enough. *See Chapman*, 386 U.S. at 23 ("The question is whether there is a reasonable possibility that the evidence *might have* contributed to the conviction.") (emphasis added) (quoting *Fahy v. Connecticut*, 375 U.S. 85, 86–87 (1963)); *see also Sullivan*, 508 U.S. at 279 (conviction must be "surely unattributable" to the error).

2. *State v. Thornton*

The Kansas Supreme Court recently made similar errors. In *Thornton*, a Kansas police officer saw James Thornton bicycling away from "a known drug house." *State v. Thornton*, 462 P.3d 662, 2020 WL 2503480, at *1 (Kan. Ct. App. 2020). After the officer detained and questioned him, Thornton admitted that he had a marijuana pipe on him. *Id.* Without permission, the officer searched Thornton's backpack and found a syringe. *Id.* The officer then traced Thornton's path and came across a small plastic bag on the ground, which contained marijuana and methamphetamine. *Id.*

Thornton was convicted of possessing marijuana, methamphetamine, and drug paraphernalia. *Thornton*, 481 P.3d at 1213–14. At trial, the State used the syringe in two ways. First, it argued that the syringe was drug paraphernalia, so the jury could convict Thornton of the paraphernalia possession charge based on the syringe alone. *Id.* at 1215. Second, the State argued that the syringe linked Thornton to the drugs. *Id.*

On appeal, the Kansas Supreme Court accepted the State's concession that the officer's search of the backpack violated the Fourth Amendment and that the syringe should not have been admitted. *Id.* at 1214. Even so, the court affirmed the convictions because it held that the admission of the syringe was harmless. *Id.* at 1215–16. In a strained analysis, the court concluded that the evidence of Thornton's possession of the pipe was so strong that none of the jurors could have voted to convict on the paraphernalia charge

based on the syringe, despite the prosecutors urging them to do so. *Id.* at 1215. And the court held that "there is no reasonable possibility the syringe . . . contributed to the jury's" verdict on the methamphetamine possession charge because the syringe was "simply . . . circumstantial evidence linking Thornton to the bag of drugs," and the other evidence "overshadowed" the syringe. *Id.* at 1215–16.

This analysis does not comport with *Chapman* and *Sullivan*.

To begin, the court offered no basis for concluding *beyond a reasonable doubt* that not a single juror voted to convict Thornton of the paraphernalia charge based on the syringe. The syringe was relevant and somewhat inflammatory evidence. The prosecutors told the jurors that they could convict based on *either* the syringe or the pipe. And because the jury returned a general verdict, there was no way for the Kansas Supreme Court to determine beyond a reasonable doubt that the jury's verdict on the paraphernalia charge was not influenced by the presence of the syringe.

The court's analysis of the effect of the syringe on the methamphetamine possession conviction fares no better. The court held that the syringe could not have affected the verdict because it was "simply . . . circumstantial evidence." *Id.* at 1215. But this reasoning makes little sense. Circumstantial evidence is entitled to the same weight as direct evidence, *State v. Wilkins*, 523 P.2d 728, 737 (Kan. 1974), and the state's *entire case* was circumstantial. Indeed, the pipe's role in the

State's case was identical to that of the syringe, yet the court concluded that the pipe was critical evidence while the syringe did not matter at all.

In the end, the syringe was an especially valuable piece of evidence introduced to link Thornton to the drugs. The Kansas State Supreme Court's conclusion otherwise cannot be squared with *Chapman* and *Sullivan*.

D. This case is a good vehicle to address proper application of *Chapman* and *Sullivan*.

We agree with Petitioner's arguments for why this case is especially appropriate for the Court's review. *See* Pet. at 24–28. Several points bear emphasis.

First, this case is an egregious example of how *Chapman* and *Sullivan* have been all too often misapplied. The New York Court of Appeals went down the sufficiency of the evidence path, focusing on the allegedly "overwhelming" evidence of Hemphill's guilt. *See* Pet. App. at 1a–4a. Nowhere did the court analyze whether and how the erroneously admitted evidence featured in the actual jury trial. *See id.* By focusing only on the strength of the evidence without looking at the prejudicial impact of the erroneously admitted evidence, the New York Court of Appeals effectively

conducted a (deeply flawed) sufficiency of the evidence review.[4]

The improperly admitted evidence was highly prejudicial. In the plea allocution, Nicholas Morris admitted to possessing only a .357 revolver, and not a 9-millimeter handgun, which was the type of gun involved in the shooting. *Hemphill v. New York*, 142 S. Ct. 681, 686 (2022). The prosecution then argued that this plea allocution proved that Morris did not possess a 9-millimeter handgun, thus fatally undercutting Hemphill's primary defense: that Morris was the shooter. Worse yet, this contention was irrebuttable because Hemphill could not cross-examine Morris.

Second, this case provides an efficient vehicle for this Court to correct lower courts' misapplication of *Chapman*. This Court is already familiar with the facts and background of this case. Only last term, this Court held that the trial court's admission of a plea allocution violated Hemphill's Sixth Amendment rights. *Hemphill*, 142 S. Ct. at 694. And the New York Court of Appeals disregarded this Court's understanding of the record. *See* Pet. at 26–27.

Third, the constitutional sanctity of the right to a trial by jury applying the "beyond a reasonable doubt" standard is ultimately at issue here. That right is at the heart of the unanimous decision in *Sullivan*. Defendants have a constitutional right to a trial by a jury,

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[4] For the reasons stated in the Petition, the evidence against Hemphill was exceedingly weak and likely failed even under sufficiency of the evidence review. *See* Pet. at 19–24.

including a *jury's* determination that there was proof beyond a reasonable doubt. That an appellate court concludes there was sufficient evidence for a conviction is *not* enough "or else directed verdicts for the State would be sustainable on appeal." *Sullivan*, 508 U.S. at 280. Unless a conviction is "surely unattributable" to the constitutional error, *id.* at 279, and there is no reasonable doubt about the harmlessness of the constitutional error, a new jury trial is warranted. That is because, as *Sullivan* instructs, a defendant has a constitutional right to have a *jury* properly find guilt beyond a reasonable doubt. Varying groups of appellate judges doing so is not enough.

CONCLUSION

This Court should grant the Petition and summarily reverse, emphasizing the standards and constitutional values at the heart of *Chapman* and *Sullivan*.

January 6, 2023

Respectfully submitted,

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