No. 22-488

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

REPLY BRIEF FOR PETITIONER

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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REPLY BRIEF FOR PETITIONER

The State's brief in opposition confirms the diagnosis of petitioner and amici: Courts and prosecutors too often mouth the standard enunciated in *Chapman v. California*, 386 U.S. 18 (1967), only to then conduct nothing more than sufficiency-of-the-evidence review. At nearly every turn, the State spins inconclusive or conflicting evidence in its favor. It also fails to come to grips with powerful indications that Morris, not petitioner, was the actual shooter. This will not do. This Court should clarify how harmless-error analysis truly works and ensure that its prior decision is not nullified.

I. The admission of Morris's allocution was not harmless.

A. There is a reasonable possibility (indeed, a virtual certainty) that Morris's allocution contributed to the verdict.

1. Perhaps the simplest path to reversal here is to recognize that the New York courts previously concluded (at the State's behest) that the admission of Morris's allocution was necessary to rebut petitioner's claim that Morris committed the killing at issue. *Hemphill v. New York*, 142 S. Ct. 681, 688 (2022) (reciting state court rulings); *see also* Pet. App. 22a; J.A. 184-85; *Hemphill I* Supp. App. to Br. in Opp. 207a-08a ("*Hemphill I* BIO App."). The State never even tries to explain how the same evidence could be "reasonably necessary" to rebut a defense and simultaneously immaterial to the jury's verdict. Instead, the State reimagines the New York courts' prior rulings as resting merely on the trial court's

"forecast[]" about the "*potential* value of Morris's plea allocution"—a forecast that, "in the end," turned out to be wrong. BIO 10, 13.

This is nonsense. The trial court admitted the allocution because it was necessary to "refute[]" petitioner's claim that Morris "was, in fact, the shooter." J.A. 184-86. The State defended that ruling on appeal based on the overall thrust of petitioner's defense, not some sort of prediction when the allocution was introduced. In the State's words, Morris's allocution was "necessary to correct" the impression the jury otherwise would have had that "Morris possessed the murder weapon on the date and time of the crime." *Hemphill I* BIO App. 208a. And the New York appellate courts agreed, explaining the jury might otherwise have thought that Morris was a "culpable third party" who "possessed a 9 millimeter handgun" and used it to commit the killing here. Pet. App. 7a, 22a.

At any rate, the State's "forecast" argument is ridiculous even on its own terms. The State says "no one could have known" when it moved to admit Morris's allocution "whether the allocution would prove important, cumulative, or irrelevant." BIO 13. This is so, according to the State, because the prosecution could not have predicted whether Gilliam "would give the jurors the full account of what had occurred." *Id.* That suggestion is implausible: The State no doubt obtained a proffer of Gilliam's testimony before agreeing to a plea deal, and Gilliam's cooperation agreement required him to "testify candidly, *fully*, and truthfully." People's Ex. 118

(emphasis added); *see also* J.A. 166-69.[1] Beyond that, the State's insistence throughout trial and on appeal that Morris's allocution was critical to refute petitioner's defense confirms that the State always expected the allocution to contribute to the verdict—as in fact it did. *See* J.A. 110, 139-41, 355-57; *Hemphill I* BIO 207a-10a, 413a-14a.

2. The State also insists that Morris's statement that he "possessed a .357" at the scene of the shooting was cumulative because Gilliam claimed the same thing at trial. BIO 11, 15. As petitioner has explained, however, Gilliam's testimony was "presumptively suspect" and thus in desperate need of the corroboration that Morris's allocution could provide. Pet. 16-18 (citation omitted). Neither of the State's responses to this point is persuasive.

First, the State asserts that "this Court has never described accomplice testimony as inherently unreliable." BIO 27. Wrong. In a long line of cases, this Court has explained that "accomplice's statements" that, as here, "shift or spread the blame to a criminal defendant" are "inherently unreliable." *Lilly v. Virginia*, 527 U.S. 116, 131-33 (1999) (plurality opinion) (summarizing precedent); *see also* Amicus Br. of Innocence Project at 3-8. And nothing in *Schneble v. Florida*, 405 U.S. 427 (1972), is to the contrary. *See* BIO 12. The testimony there that rendered the

[1] The State's suggestion that it was worried Gilliam might testify less than fully because "petitioner had a history of trying to manipulate witnesses," BIO 13, is baseless. The State cites no evidence supporting any such history, and none was presented to the jury. Insofar as one witness became "reluctant" at trial, *id.*, there was never any suggestion that petitioner was to blame.

improperly admitted evidence harmless came from the defendant himself (in the form of a confession), not from a blame-shifting accomplice. *Schneble*, 405 U.S. at 431. Furthermore, the confession in *Schneble* was "not contradicted by any other evidence in the case." *Id.* Gilliam's testimony, by contrast, was contradicted by powerful and important evidence. *See infra* 10-12.

Even if blame-shifting accomplice testimony could sometimes be sufficiently trustworthy to render other evidence cumulative, that was not the case here. The State itself told the jury that Gilliam "was a liar" who "lied more than once" to the authorities. J.A. 344. Even Gilliam admitted to the jury that he repeatedly lied to detectives and prosecutors. Pet. 17; *see also* J.A. 177-81. And the jury knew that Gilliam, by implicating petitioner, was shaving twenty years off the twenty-five-year sentence he faced for his involvement in the killing. Pet. 17. A reasonable juror could easily have believed that Gilliam's interest in avoiding two decades behind bars took precedence over anything else.

Second, the State argues that Gilliam's "account of the shooting" was corroborated by evidence besides Morris's allocution. BIO 11. But it does not matter whether aspects of Gilliam's *overall* account aligned with other evidence. As this Court has recognized, "[o]ne of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature." *Lilly*, 527 U.S. at 133 (plurality opinion) (quoting *Williamson v. United States*, 512 U.S. 594, 599-600 (1994)). What matters, therefore, is whether any evidence besides Morris's allocution corroborated

Gilliam's specific testimony that Morris possessed a .357 magnum (and thus not a 9-millimeter gun) at the scene of the shooting.

None did. The closest thing the State identifies is the .357 ammunition that officers recovered from Morris's apartment. *See* BIO 11. But the State itself acknowledged earlier in the case that "nothing less [than admitting Morris's allocution]—including admitting the .357 bullets recovered from Morris's residence—would have dispelled" the impression that Morris had a 9-millimeter gun at the scene. *Hemphill I* BIO App. 413a-14a (citation omitted). That is because officers also found a 9-millimeter cartridge in Morris's apartment, *Hemphill*, 142 S. Ct. at 687, giving the jury equal reason from the various ammunition found there to believe Morris possessed a 9-millimeter gun.[2]

3. The State next repeats the New York Court of Appeals' assertion that Morris's allocution "neither exculpated Morris nor inculpated [petitioner]." BIO 24 (quoting Pet. App. 4a). This is so, the State contends, because the allocution "did not refer to the shooting" or "anyone else's conduct." *Id.* 10. This contention ignores how the State used Morris's allocution to

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[2] The State now asserts that the 9-millimeter cartridge recovered from Morris's apartment "did not match the brand of nine-millimeter bullets used in the shooting." BIO 3. The State never presented any such evidence at trial, so its current assertion is irrelevant under *Chapman*. In any event, petitioner has never claimed that Morris used any particular brand of bullets in the shooting. Instead, the 9-millimeter bullet on Morris's nightstand simply shows Morris had ready access to a 9-millimeter gun.

argue that petitioner was the real shooter. The State maintained that Morris's allocution established that he "possessed a .357 firearm—*not a .9mm*—on the date, time, and location where the victim was killed." *Hemphill I* BIO App. 205a (emphasis added); *see also Hemphill*, 142 S. Ct. at 688; J.A. 140-41. Accordingly, the allocution "tend[ed] to exculpate Morris as the shooter and rebut defendant's third-party culpability defense." *Hemphill I* BIO App. 209a-10a; *see also* Pet. 15-16.

In short, Morris's allocution was "central to the issue being litigated at trial"—namely, whether Morris or petitioner was the shooter. J.A. 161; *see also* Pet. App. 2a. As the trial court put it, the allocution went "to the heart of this case." J.A. 120.

4. Finally, the State repeatedly refers to Morris's allocution as a "snippet" and says that "the prosecutor's mention of it amounted to only a few transcript lines." BIO 8 (capitalization altered), 14. What matters for harmless-error review, however, is the content of the erroneously admitted statement, not its length. *See* Pet. 18. And the content of Morris's allocution refuted petitioner's third-party guilt defense—straight from the horse's mouth, so to speak.

At any rate, the State's reliance on the allocution was not "exceedingly minimal," BIO 14 (quoting Pet. App. 4a). As this Court has explained, the allocution enabled the State to "emphasiz[e]" in closing "that possession of a .357 revolver, *not murder*, was 'the crime [Morris] actually committed.'" *Hemphill*, 142 S. Ct. at 688 (quoting J.A. 356) (emphasis added).

B. The evidence against petitioner was in no way "overwhelming."

The State also attempts to defend the Court of Appeals' assertion that the evidence against petitioner was "overwhelming." But all the State can muster are inconclusive pieces of evidence, contested fragments of testimony, and rank speculation—all while refusing to confront inconvenient facts. None of this carries the prosecution's burden under *Chapman*.

1. Once again, the State begins with the testimony from Gilliam—this time stressing Gilliam's allegation that petitioner was the shooter. *See* BIO 14-15. As petitioner has already explained, Gilliam's testimony was inherently (and demonstrably) unreliable. Indeed, Gilliam initially identified Morris, not petitioner, as the shooter. *Hemphill*, 142 S. Ct. at 687.

Hoping to bolster Gilliam's finger-pointing at petitioner, the State asserts that Michelle Gist corroborated Gilliam's account of "the initial altercation and the moments after the shooting." BIO 16. But the State's formulation obscures a crucial detail: As the State later acknowledges, Gist "did not see the shooting" itself. *Id.* So she could not identify anyone, much less petitioner, as "the assailant" *id.* What is more, Gist's testimony itself was highly suspect. She told law enforcement immediately after the shooting that she saw Morris—not petitioner—with Gilliam at the crime scene. J.A. 127.

2. Next, the State doubles down on the Court of Appeals' reliance on the blue sweater found at Gilliam's apartment. The State concedes that no witness identified that blue sweater as the top worn

by the shooter. BIO 18. But the State offers a flurry of excuses for that critical gap in its evidence and otherwise strains mightily to connect the sweater to the killing. None of this comes close to satisfying *Chapman.*

To begin, the State claims that witnesses would have been "hard-pressed" to identify the shooter's top due to the time that elapsed between the shooting and petitioner's trial. BIO 18. That speculation only underscores the absence of an airtight case here.

The State also points to one witness's testimony that the sweater in Gilliam's apartment looked "similar" to the top worn by the shooter. BIO 18 (quoting Tr. 283-84). But such testimony hardly "confirm[s]," *id.*, that the shooter wore a blue sweater. Indeed, other witnesses said the assailant wore a "blue shirt *or* sweater." *Hemphill*, 142 S. Ct. at 687 (emphasis added).

Nor does the State have any good answer for the disjuncture between its theory that petitioner shot the victim while wearing a blue sweater and its reliance on testimony saying the shooter had a tattoo on his arm. The State points to one eyewitness's suggestion that the shooter's sleeves "were rolled up," thus potentially exposing a tattoo. BIO 18. But petitioner's only tattoo is on his "upper shoulder." J.A. 265; *see also* Pet. 23. Rolling up sleeves on a sweater does not expose one's upper shoulder. Indeed, at trial, petitioner had to remove his entire shirt to reveal his tattoo. J.A. 374.

Falling back, the State hypothesizes that petitioner "could have" had a tattoo on "his forearm" during the events at issue and then had that tattoo

removed sometime before trial. BIO 19. Really? Suffice it to say that harmless-error analysis requires evaluating the effect of improperly introduced evidence against other evidence "the jury considered on the issue in question, as revealed in the record." *Yates v. Evatt*, 500 U.S. 391, 403 (1991). And the State's alternative-tattoo speculation has no basis in the record. Nor was it a hypothesis the State ever proposed to the jury.

Even if one could be certain that the shooter wore a blue sweater, there is little to support the State's theory that the Izod Lacoste sweater found at Gillam's apartment was the one the shooter actually wore. Only one witness said the shooter's top had an "alligator logo." BIO 16. And this was the witness who said the shooter wore a "golf shirt," not a sweater, Tr. 809—testimony the State otherwise calls out as incorrect, BIO 16. Harmless-error review does not allow stitching together different pieces of testimony—a blue sweater here, an alligator logo there—to defend a verdict while turning a blind eye to all the evidence that cuts the other way.

In a last-ditch effort, the State suggests the sweater in Gilliam's apartment "smelled of burnt gunpowder." BIO 16-17. Petitioner has already debunked this outlandish suggestion. *See Hemphill I* Petr. Br. 9; Petr. *Hemphill I* Reply 7 n.2. Nor, contrary to the State's claim, did the police overhear Gilliam "ask[] his brother to get rid of the sweater," BIO 16. One detective claimed to have overheard a phone call that referenced a "shirt," not a sweater. Tr. 1494. The other officer present at the time testified that he could not hear the call at all. *Id.* 667.

3. The State tries to shore up the Court of Appeals' reliance on petitioner's supposed "flight." BIO 19-20. But the State never contests other evidence suggesting petitioner did not evade the authorities at all. *See* Pet. 20. Besides, the State simply repeats the Court of Appeals' error in overlooking that evidence of evasion has nothing more than "limited probative force," *id.* 20-21 (quoting *People v. Yazum*, 13 N.Y.2d 302, 304 (1963))—particularly where, as here, the evidence comes from an inherently unreliable witness, *see supra* at 4-5.

4. When assessing the strength of the prosecution's case, a court must also account for exculpatory evidence presented at trial. *Wearry v. Cain*, 577 U.S. 385, 394 (2016) (per curiam). The State, however, is unable to minimize the substantial evidence implicating Morris as the shooter.

First, the State claims that the bruises law enforcement observed on Morris's knuckles hours after the shooting "*could have* come from a different episode." BIO 22 (emphasis added). Again, such guesswork has no place under a proper application of *Chapman*. The only salient point is the opposite: The jury could easily have taken the bruises as evidence that Morris *was* Gilliam's companion in the fistfight before the killing—that is, the person who moments later shot the victim. *See* Pet. 13.

Second, the State notes that Morris allocuted to possessing a .357 magnum "only to get out of jail that same day." BIO 25. That reality only reinforces the likelihood that Morris was the shooter. The allocution was published to petitioner's jury with the imprimatur of a formal court decree, but the State now admits it

was procured under questionable circumstances. *See Hemphill I* Petr. Br. at 23-24.

Third, the State attempts, "upon reflection," to discredit the very line-up identifications it presented as fair and reliable when it took Morris to trial for this homicide. BIO 22-23. The State, however, is wrong that the eyewitnesses observed the shooter only during a "fast-paced, chaotic, harrowing incident," *id.* 23. In reality, the eyewitnesses observed the shooter "in broad daylight, at close range, for a 10-minute period during the initial [altercation]." Pet. App. 27a (Manzanet-Daniels, J., dissenting). And line-up identifications made after observing the perpetrator "in good light for several minutes" can be highly reliable. *Perry v. New Hampshire*, 565 U.S. 228, 240 (2012); *see also Neil v. Biggers*, 409 U.S. 188, 197 (1972) (photographic identifications "reliable" where witnesses viewed offenders for "periods of up to five minutes under good lighting conditions").

The State also discusses the cross-racial nature of the identifications, the arrangements of the line-ups, and the eyewitnesses' possible exposure to media accounts of the crime. BIO 22-23. But none of these things demonstrates that the multiple, independent identifications of Morris were so untrustworthy as to render the evidence against petitioner overwhelming. Far from it. Every day across this country, jurors find persons guilty *beyond a reasonable doubt* based in part on line-ups like the ones conducted here.

Lastly, the State offers no response to the lengthy jury deliberation during which the jurors repeatedly asked to see headshots of Morris and petitioner. *See* Pet. 19; *Hemphill*, 142 S. Ct. at 688.

II. This Court should grant certiorari and reverse.

This Court warned in *Chapman* itself that shoddy harmless-error review "can work very unfair and mischievous results when, for example, highly important and persuasive evidence, or argument, though legally forbidden, finds its way into a trial in which the question of guilt or innocence is a close one." 386 U.S. at 22. That is precisely what has happened here—and in the teeth of this Court's own decision just last Term. Petitioner urges this Court to grant review and reinforce that the harmless-error doctrine is not nearly as malleable as the State and the Court of Appeals would have it be. The doctrine is one of the most oft-invoked and consequential doctrines in criminal law, and its proper application is essential to the integrity of the criminal justice system.

CONCLUSION

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

Respectfully submitted,

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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