No.

IN THE SUPREME COURT OF THE UNITED STATES

KURT MICHAELS,

Petitioner,

v.

RON DAVIS, Acting Warden of San Quentin State Prison;
ATTORNEY GENERAL FOR THE STATE OF CALIFORNIA,

Respondents.

ON PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF *CERTIORARI*

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CAPITAL CASE

QUESTION PRESENTED

In *Arizona v. Fulminante*, 499 U.S. 279 (1991), this Court held that an error in admitting a defendant's confession in a capital case was not harmless, rejecting a claim that the evidence was cumulative because another confession was properly admitted. *Fulminante* emphasized that appellate judges must exercise "extreme caution" before finding harmless error in this context. *Id.* at 296. The lower courts have since issued conflicting and divided opinions when applying harmless-error analysis to erroneously admitted confessions. The Ninth Circuit's decision in this capital case was also sharply divided, with a majority finding that the erroneous admission of a confession and other improper aggravating evidence was harmless as to the death-penalty determination, while a dissent concluded that the effect of the errors "more than" met the standard for relief. The question presented is:

Whether a court reviewing a cold record in a capital case may determine that the effect of an erroneously admitted confession and other improper aggravating evidence was harmless as to the penalty by characterizing the evidence as cumulative without evaluating objective factors showing an effect on the jury deciding the case, including jury communications focusing on the confession, the prosecutor's statements about the importance of the evidence, and lengthy jury deliberations.

STATEMENT OF RELATED CASES

- *People v. Kurt Michaels*, No. CRN 14859, Superior Court of the State of California for the County of San Diego. Judgment entered July 31, 1990.

- *People v. Kurt Michaels*, No. S016924, Supreme Court of California. Judgment entered July 18, 2002, rehearing denied September 18, 2002.

- *Michaels v. California*, No. 02-8767, Supreme Court of the United States. Petition for writ of *certiorari* denied May 27, 2003.

- *In re Kurt Michaels on Habeas Corpus*, No. S071265, Supreme Court of California. Judgment entered December 23, 2003.

- *In re Kurt Michaels on Habeas Corpus*, No. S147647, Supreme Court of California. Judgment entered August 19, 2009.

- *Michaels v. Davis*, No. 04CV00122-JAH, U.S. District Court for the Southern District of California. Judgment entered February 11, 2015, and motion to alter or set aside the judgment denied on March 12, 2015.

- *Michaels v. Davis*, No. 15-99005, U.S. Court of Appeals for the Ninth Circuit. Judgment entered October 18, 2022, rehearing and rehearing *en banc* denied February 1, 2023.

- *Michaels v. Davis*, No. 22A872, Supreme Court of the United States. Order entered on April 6, 2023 extending time to file petition for a writ of *certiorari* to July 1, 2023.

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INTRODUCTION

When this Court announced the *Kotteakos v. United States*, 328 U.S. 750, 762 (1946) rule for harmless error, it set a goal of establishing a standard that, over time, would produce "discernible direction" that would be "tempered" by "what had been done in similar situations." Surveying what had been done in the past, it noted that the erroneous admission of a confession would almost invariably be harmful, even in the face of "clear" prosecution evidence. *Id.* at 764-65 n.19.

Thus, when this Court later concluded in a narrowly divided opinion that harmless-error analysis can apply to an erroneously admitted confession, it found that the error in that capital case was *not* harmless, rejecting the lower court's rationale that the tainted confession was "cumulative" because another properly admitted confession had been admitted. *Arizona v. Fulminante*, 499 U.S. 279, 295-302 (1991). This Court warned that, given "the profound impact that [a] confession has upon the jury," a reviewing court must use "extreme caution before determining that the admission of [a] confession at trial was harmless." *Id.* at 296. Harmlessness as to the death penalty was not even a close call, as it was "clear" that the error "influenced the sentencing phase of the trial." *Id.* at 301.

The majority decision below finding that the erroneous admission of petitioner's two-and-a-half-hour confession (and other improper aggravating evidence) was harmless as to even the jury's death verdict was flatly inconsistent

with *Fulminante* and employed a mode of analysis forbidden by *Kotteakos*. As the dissent explained, the majority ignored strong signs in the record that the improper evidence was influential, including a jury note focusing on the confession, the prosecutor's statements about the importance of the improperly admitted evidence, and lengthy jury deliberations demonstrating the closeness of the penalty verdict. For this reason alone, the Court should grant this petition, just as it has done in other capital cases where lower courts have departed from its precedent.[1]

There are also broader jurisprudential reasons for review. Despite the goal in *Kotteakos* of achieving "discernible direction" to guide the inquiry, and despite *Fulminante* requiring extreme caution when evaluating tainted confessions, there has been little direction and considerable conflict in the lower courts when determining harmless error in this context.[2] The opinion below reflects this division, and excusing the quandary as mere record-bound differences frustrates the *Kotteakos* goal of "discernible direction" informed by a consistent line of precedent, which is a necessity in capital cases where reliable results are

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[1] *See, e.g.*, *Andrus v. Texas*, 140 S. Ct. 1875 (2020); *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019); *Buck v. Davis*, 580 U.S. 100 (2017); *Foster v. Chatman*, 578 U.S. 488 (2016); *Wearry v. Cain*, 577 U.S. 385 (2016).

[2] *Compare Zappulla v. New York*, 391 F.3d 462 (2d Cir. 2004) (split decision, error not harmless); *Kordenbrock v. Scroggy*, 919 F.2d 1091 (6th Cir. 1990) (*en banc*) (same); *with Cooper v. Chapman*, 970 F.3d 720 (6th Cir. 2020) (split decision, error harmless); *Cooper v. Taylor*, 103 F.3d 366 (4th Cir. 1996) (*en banc*) (same).

paramount. Harmless-error analysis has been described as the "most frequently invoked doctrine in all criminal appeals[,]" and yet it "remains surprisingly mysterious" with "deep uncertainty and disagreement" about "how to conduct that analysis when it applies." Daniel Epps, *Harmless Errors and Substantial Rights*, 131 Harv. L. Rev. 2117, 2119-20 (2018). This capital case involving multiple errors, including a confession error, is an ideal vehicle for unpacking the mystery.

Indeed, "the character of the proceeding, what is at stake upon its outcome, and the relation of the error asserted to casting the balance for decision on the case as a whole, are material factors in" conducting harmless-error review. *Kotteakos*, 328 U.S. at 762. What is at stake in this case could not be more important, and because the death verdict required unanimity, harmfulness is shown if merely "one juror would have struck a different balance regarding [petitioner's] moral culpability." *Andrus*, 140 S. Ct. at 1886. The discretionary nature of a death verdict means that it is particularly susceptible to both a confession's influence and to erroneous harmless-error conclusions. *See* Justin Murray, *A Contextual Approach to Harmless Error Review*, 130 Harv. L. Rev. 1791, 1794 n.13 (2017) (reliability concerns are "most acute with respect to errors during the sentencing phase of death penalty trials, where the factfinder's decision whether to impose a death sentence is highly discretionary and thus unpredictable").

This case is also a strong vehicle for review because there were *multiple*

errors. All jurists below also agreed that other aggravating evidence used to show future dangerousness at the penalty phase was erroneously admitted because defense counsel performed deficiently under *Strickland v. Washington*, 466 U.S. 668 (1984) by breaching the attorney-client privilege. Thus, this case provides an opportunity for this Court to provide guidance on the cumulative-error doctrine, which itself is the subject of further conflict and confusion. *Compare Hanson v. Sherrod*, 797 F.3d 810, 852 n.16 (10th Cir. 2015) (cumulative-error doctrine clearly established by this Court's precedent); *Parle v. Runnels*, 505 F.3d 922, 927-28 (9th Cir. 2007) (same); *with Williams v. Anderson*, 460 F.3d 789, 816 (6th Cir. 2006) (not clearly established, although this circuit precedent is "misguided"); *see also Brecht v. Abrahamson*, 507 U.S. 619, 638 n.9 (1993).

As mentioned, the record in this case is also replete with objective signs that the jury focused on the unconstitutional evidence, including a crucial jury note and the prosecutor's statements about the importance of the improper evidence. *See Buck*, 580 U.S. at 120 (relying on jury note). The jury also struggled with the death-penalty determination, only returning a verdict after lengthy deliberations. This Court should clarify that such objective factors must be considered so as to avoid sufficiency-of-the-evidence review and speculation by appellate judges about the result of a retrial based on *their* view of the properly admitted evidence, the very type of analysis prohibited by *Kotteakos*, 328 U.S. at 763-65.

Given the combination of errors and the objective factors showing prejudice, the dissent did not think the harmless-error question was a particularly close call, and the diametrically opposed views below leave an unsettling feeling about the reliability of the appellate process in capital cases. *See Satterwhite v. Texas*, 486 U.S. 249, 262 (1988) (Marshall, J., concurring) ("threat of an erroneous harmless-error determination thus looms much larger in the capital sentencing context than elsewhere"). The analysis by the Ninth Circuit majority was egregiously wrong and amounted to nothing more than the type of appellate-judge speculation specifically condemned in *Kotteakos*. The Court should grant this petition.

OPINIONS BELOW

The opinions below are *Michaels v. Davis*, 51 F.4th 904 (9th Cir. 2022) and *People v. Michaels*, 28 Cal. 4th 486 (2002), *cert. denied*, 538 U.S. 1058 (2003).

JURISDICTION

The Ninth Circuit filed its opinion on October 18, 2022 and denied rehearing on February 1, 2023. App. 1-2.[3] Justice Kagan granted an extension to file this petition until July 1, 2023. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The Fifth, Sixth, and Eighth Amendments are included in the Appendix.

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[3] "App." refers to the Appendix. "ER" refers to the Excerpts of Record in the Ninth Circuit. "RT" refers to the Reporter's Transcript of the trial-court proceedings.

STATEMENT OF THE CASE

A. State court proceedings

Petitioner was convicted and sentenced to death for killing his girlfriend's mother, JoAnn Clemons. At the time of the offense in 1988, he was 22-years old with no felony record; he had served in the military, had a horribly abusive childhood, and suffered from brain dysfunction, mental illness, and drug addiction. App. 9-15, 128-30. Petitioner gave a full, recorded confession that lasted two-and-a-half hours; its transcription occupied nearly 70 single-spaced pages. App. 21; 6-ER-1382-1450. His original attorneys hoped to have the confession suppressed and to argue to the jury that there was reasonable doubt based on the remaining evidence. RT 244-45. But because the judge denied the motion to suppress, the main dispute at trial boiled down to the penalty and whether petitioner killed Clemons because she had been sexually and physically abusing his 16-year-old girlfriend Christina, or whether he did so for financial gain. App. 9-11, 14, 24.

Christina testified that she was abused from an early age and had recently been severely beaten by her mother, who forced her to engage in digital penetration and oral sex; she told petitioner that she couldn't take it anymore and would commit suicide if her mother were not killed. App. 9-10. Petitioner then recruited roommates, including Darren Popik, to kill Clemons. *Id.* The prosecution disputed that petitioner's motive was to protect Christina, attacking her credibility and

presenting evidence that petitioner mentioned doing a "tax" and that there had been discussion of a $100,000 life insurance policy. App. 10-11, 14.[4]

According to petitioner's confession, he and Popik entered Clemons' apartment at night with a key that Christina had provided. App. 11-12. They mistakenly woke Clemons and then repeatedly beat and stabbed her, with petitioner cutting her throat. *Id.* Popik was arrested near the scene, but petitioner was able to get away and went to Camp Pendleton, where he allegedly told or gestured to acquaintances that he had cut a woman's throat. *Id.*

Officers arrested petitioner two weeks later, whereupon he gave the recorded confession. App. 12. Not only did petitioner provide a full confession in which he maintained that he, not Popik, inflicted the fatal wounds, but he also provided ample aggravation, including that Christina asked him to kill her mother because he was a professional killer. 6-ER-1418. As another example, the officers suggested (falsely) that Clemons had been raped because Christina stated that petitioner "wanted to do" things "[o]f a sexual nature" to her mother. 6-ER-1412-13. Petitioner responded, "I couldn't make my dick hard if I wanted to" and also: "I considered having Mexicans do the job and having her raped." *Id.* Consistent

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[4] Inexplicably, the jury never heard the "undoubtedly powerful" testimony of Wendell Clemons, Christina's father and the victim's ex-husband, who would have corroborated in detail that the victim horrifically abused Christina. App. 112.

with these comments, petitioner frequently laughed and expressed no remorse, and while he maintained that he killed Clemons so that Christina would not have to go back to her abusive mother, he also acknowledged that the life insurance proceeds were at least a secondary benefit. App. 143.

The prosecutor played the recording of the confession during the guilt phase of the trial and heavily emphasized it during his closing arguments, almost exclusively relying on it to establish the special circumstances required for death-penalty eligibility. App. 24; RT 4939-50. When the jurors retired to deliberate, the first thing they did was ask for a tape recorder so that they could listen to the confession. RT 5013. After a day and a half of deliberations, they sent a note asking: "Under the corpus delicti rule, what degree of proof must exist before evidence from the confession may be used?" RT 5015. They asked for definitions of "slight or prima facie evidence." *Id.* The judge responded that the prosecution only needed to make an "initial" showing with "small, meager or inconsiderable" proof to satisfy the corpus delicti rule, and, approximately an hour later, the jury returned guilty verdicts and found the special circumstances. RT 5031-37.

At the penalty phase, the prosecution again played the confession in its entirety to the jury. App. 24-25, 131. The defense's mitigation included testimony from his family and friends recounting his abusive childhood at the hands of his father, a violent alcoholic, and the sexual molestation of his sister and the rape of

his mother. App. 15, 128-30. The defense also presented an expert, who diagnosed petitioner's multiple forms of mental illness and brain damage, and opined that, given the sexual abuse inflicted on petitioner's mother and sister, his motivation to protect Christina from her abusive mother is what drove him to commit the murder. *Id.* The entirety of the prosecution's rebuttal was dedicated to a note that petitioner had given his attorneys in the courtroom, which they improperly disclosed, wherein petitioner claimed that he would inflict great bodily harm on Popik if they were not separated. App. 15, 40-42. Among the rebuttal witnesses was petitioner's former attorney, who testified that he had never experienced anything like that in his entire career. *Id.* 6-ER-1292-93.

During summations, the prosecutor played the confession yet again, argued it repeatedly for a variety of points, including lack of remorse, and ultimately contended that it was "one of the most horrible and aggravated parts of this case" and confirmed that petitioner doesn't "like people" and would kill without remorse. App. 135; 6-ER-1333-34. The prosecutor also argued that the note disclosed by petitioner's attorneys showed his future dangerousness in prison and emphasized that his "favorite witness" in the whole case was petitioner's former attorney, who "had to testify against his own client." App. 136; 6-ER-1309. The prosecutor called petitioner a "beast," a "monster," a "psychopath," and "evil," and asked the jurors to think of themselves as the victim. App. 93. He claimed that petitioner

was a professional hit-man although he knew that was not true and had even previously promised he would not make that false argument. App. 14-15, 99-101.[5]

Given the substantial mitigation, it is not surprising that the jury only returned a death verdict after lengthy deliberations lasting more than three days and almost as long as the penalty phase itself. App. 15, 126-27; RT 5813, 5947-52. Petitioner appealed, raising numerous claims, including challenges to his confession and the admission of the note given to his attorneys; the California Supreme Court affirmed. App. 16. It agreed that petitioner selectively invoked his right to silence but rejected his claim that the confession should have been suppressed; it also agreed that his counsel violated the attorney-client privilege but found that the error was harmless. App. 30-31, 42. The California Supreme Court also denied petitioner's habeas corpus applications. App. 16.

B. The majority opinion in the Ninth Circuit

Petitioner filed for 28 U.S.C. § 2254 relief, and a divided Ninth Circuit panel affirmed the district court's denial of his request. App. 9, 16-17. The panel agreed that the entirety of petitioner's recorded confession was erroneously admitted because he selectively invoked his rights under *Miranda v. Arizona*, 384 U.S. 436

[5] The prosecutor made the promise, which he breached, so that he could introduce a purported "hit list" that petitioner possessed for the limited purpose of showing that petitioner wanted to create a "street" reputation. App. 99.

(1966) as to the Clemons murder, but the officers then continued to ask about the murder. App. 32-36. The panel also agreed that defense counsel performed deficiently when they violated the attorney-client privilege and disclosed the note about attacking Popik (referred to as the "Popik note"). App. 53-54, 60-63. The panel, however, disagreed as to harmless error.

The majority, in an opinion written by Judge Bea, held that the confession and Popik note were cumulative of other evidence presented, and therefore the errors were harmless. App. 80-91. He mostly focused on the confession and maintained that the prosecutor relied on it "infrequently" in his penalty summation and instead began his remarks discussing petitioner's prior record. App. 83. He reasoned that although petitioner's record, which was mostly for possessing weapons, may not have been as bad as the records of defendants in other cases where the death penalty was vacated, those cases involved mitigating evidence that had been omitted, which would have a greater influence on the jury. App. 84.

The majority also explained that other witnesses, particularly the defense expert, recounted statements made by petitioner that showed the special circumstances, including a financial motivation for the murder, and a lack of remorse. App. 85-87. Although "the defense did offer some mitigating evidence," the exclusion of the confession still would not have "tipped the scales" in petitioner's favor. App. 87-88. The confession could have even helped the

defense, as petitioner discussed his motivation to protect Christina. App. 89.

With respect to the erroneous admission of the Popik note, the majority discounted its influence on the jury's assessment of future dangerousness, reasoning that it heard other similar evidence, such as the purported "hit list" that petitioner possessed. App. 90-91. It summarily found that the Popik note had "minimal evidentiary value" and therefore did not have a prejudicial effect, even in combination with the erroneous admission of the confession. *Id.*

Finally, the majority agreed that the prosecutor engaged in misconduct in the penalty phase summation when he called petitioner a "beast," a "monster," a "psychopath," and "evil," and asked the jurors to think of themselves as the victim, but it rejected petitioner's other claims of misconduct and did not believe that the improper comments justified relief given the general jury instruction that the attorneys' arguments are not evidence. App. 93-103. The majority never addressed the cumulative effect of the misconduct with the other errors. *Id.*

C. The dissent in the Ninth Circuit

Judge Berzon dissented. She initially emphasized that the death-penalty determination is highly discretionary, and the lengthy jury deliberations at the penalty phase demonstrated a close case and that at least one juror may have spared petitioner's life if the errors had not been made. App. 125-27.

She explained that the defense offered substantial mitigation, including

petitioner's military service, mental illness, and brain dysfunction. App. 127-30. The defense also provided a significant mitigation argument; given petitioner's own abusive childhood and the sexual trauma inflicted on his mother and sister, his prime motivation in committing the murder was to protect Christina. *Id.* The confession, however, significantly weakened this defense. App. 130-31.

Judge Berzon found that the prosecution heavily relied on the confession at the penalty phase, playing the entire confession and then cross-examining defense witnesses about the confession, including the parts where petitioner joked about raping Clemons. App. 131-36. Likewise, the entire rebuttal at the penalty phase was dedicated to the Popik note and included the testimony of petitioner's own attorney. *Id.* She found that the prosecutor emphasized both the confession and the Popik note during his summation, arguing that the confession was the most aggravated part of the case and petitioner's attorney was his favorite witness. *Id.*

She also explained that the confession was not cumulative of other evidence, as it provided much more detail than the derivative statements in the record cited by the majority, and, without the confession, the evidence of a financial motivation was weak. App. 136-43. She also criticized the majority for heavily relying on statements made by the defense expert, who had to explain the confession because it had already erroneously been admitted. *Id.* With respect to the Popik note, she took the majority to task for relying on evidence, such as the purported "hit list,"

that had only been admitted for a limited purpose. App. 143-44. Furthermore, the Popik note was specifically used to counter the defense's mitigation. *Id.*

Petitioner's case was not the "worst of the worst," as he had not even been convicted of a prior felony, and the Ninth Circuit had granted sentencing relief in numerous cases where the facts were far more aggravated. App. 144-45. She concluded that the combined effect of the errors "more than meets the *Brecht* standard," and therefore the death verdict should have been vacated. App. 145.

ARGUMENT

The Court should grant review in this capital case to correct a divided and egregiously wrong Ninth Circuit opinion and simultaneously provide much-needed guidance regarding perhaps the most important doctrine in criminal appellate law – harmless error. Because the majority's decision below is so significantly flawed and stands in sharp conflict with this Court's harmless-error precedent, petitioner will begin with that reason for granting the petition, *see* S. Ct. R. 10(c), before addressing the conflict and inconsistency in the lower courts. Indeed, regardless of the conflict and confusion, this Court has frequently intervened in capital cases where lower courts have departed from this Court's case law. *See Andrus v. Texas*, 140 S. Ct. 1875 (2020); *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019); *Buck v. Davis*, 580 U.S. 100 (2017); *Foster v. Chatman*, 578 U.S. 488 (2016); *Wearry v. Cain*, 577 U.S. 385 (2016).

I. This Court should grant review in this capital case because the harmless-error analysis adopted by the majority below flatly conflicts with this Court's precedent and was egregiously wrong.

A. This Court's harmless-error precedent

To show how flawed the majority decision was, it is first helpful to recount what this Court has previously said regarding harmless-error review, particularly in the context of erroneously admitted confessions. In *Kotteakos v. United States*, 328 U.S. 750 (1946), the Court established the ground rules when interpreting the then-existing federal "harmless error statute," which stated that an appellate "'court shall give judgment after an examination of the entire record . . . without regard to technical errors . . . which do not affect the substantial rights of the parties.'" *Id*. at 757. Thus, *Kotteakos* explained that the statutory test was whether the error substantially influenced the verdict. *Id.* at 764-65.

This Court provided some guidance about how appellate judges should make that determination, although it admitted that it was perhaps easier to explain what they should not do than what they should do. *Id.* at 763. Appellate judges should *not* "determine guilt or innocence" or "speculate upon probable reconviction and decide according to how the speculation comes out." *Id.* "Those judgments are exclusively for the jury . . . ." *Id.*[6]

[6] About the same time as *Kotteakos*, this Court similarly explained that in "view of the place of importance that trial by jury has in our Bill of Rights," harmless-

Instead, an appellate judge must determine whether the error could have affected the verdict from the perspective of the lay jurors deciding the case; the "crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting." *Id.* at 764. "This must take account what the error meant to them, not singled out and standing alone, but in relation to all else that happened. And one must judge others' reaction not by his own, but with allowance for how others might react and not be regarded generally as acting without reason. This is the important difference, but one easy to ignore when the sense of guilt comes strongly from the record." *Id.* Despite this guidance, some of the confusion, reflected in the majority opinion below, results from judges who find errors harmless because *they* view the prosecution evidence as overwhelming or improperly admitted evidence as cumulative, notwithstanding indications that the jurors struggled to reach a verdict or were focused on the evidence at issue. Appellate judges must avoid the tendency to disregard those important clues in the record as the views of irrational lay jurors.

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error review is not "intended to substitute the belief of appellate judges . . . however justifiably engendered by the dead record, for ascertainment of guilt by a jury . . . however cumbersome that process may be." *Bollenbach v. United States*, 326 U.S. 607, 614-15 (1946). Likewise, it stated: "We are not authorized to look at the printed record, resolve conflicting evidence, and reach the conclusion that the error was harmless because we think the defendant is guilty. That would be to substitute our judgment for that of the jury and, under our system of justice, juries alone have been entrusted with that responsibility." *Weiler v. United States*, 323 U.S. 606, 611 (1945).

Kotteakos ultimately held that the error in the case (conviction of a single conspiracy although the evidence proved multiple conspiracies) was *not* harmless. While the evidence was sufficient to convict each of the defendants, and may have even been quite clear of their guilt, this Court rejected the government's claim of harmless error, emphasizing that sufficiency of the evidence is not the standard. *Id.* at 767. The error was of the type that permeated the trial, potentially affecting other evidentiary questions and aspects of the proceedings. *Id.* at 769.

After *Kotteakos*, this Court held that the harmless-error standard for constitutional errors found on direct review is whether the government can prove that the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18 (1967). This Court found the error (improper comment on silence) was *not* harmless even though the prosecution presented "strong" evidence of guilt, particularly because the prosecutor emphasized silence in summations. *Id.* at 25.

This Court subsequently found that the erroneous admission of a confession was *not* harmless in *Arizona v. Fulminante*, 499 U.S. 279 (1991), requiring the defendant's murder conviction and death sentence to be vacated. The defendant had actually made two confessions, and only one was erroneously admitted. This Court nevertheless found harmful error and rejected the lower court's rationale that the tainted confession was merely "cumulative" of the other properly admitted confession. *Id*. at 295-302. "A confession is like no other evidence[,]" this Court

explained, and a "defendant's own confession is probably the most probative and damaging evidence that can be admitted against him." *Id.* at 296. Confessions "have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so." *Id.* 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.*[7]

Thus, this Court warned that a reviewing court must use "extreme caution before determining that the admission of [a] confession at trial was harmless." *Id.* In finding the error was not harmless, this Court emphasized three factors. First, the prosecutor acknowledged the importance of the improper confession in his arguments. *Id.* at 297. Second, the jurors' assessment of the second confession could have depended upon the first improperly admitted confession. *Id.* at 298. Third, the erroneous admission of the confession also shaped how the trial was conducted and led to the presentation of other aggravating facts that may have been avoided had the confession not been admitted. *Id.* at 300. This Court also stated that harmlessness as to the death penalty was not even a close call, as it was "clear"

[7] Justice Kennedy provided the fifth vote and separately gave a similar explanation, stating that a "court conducting a harmless-error inquiry must appreciate the indelible impact a full confession may have on the trier of fact," and if "the jury believes that a defendant has admitted the crime, it doubtless will be tempted to rest its decision on that evidence alone, without careful consideration of the other evidence in the case." *Id.* at 313 (Kennedy, J., concurring).

that the error "influenced the sentencing phase of the trial." *Id.* at 301.

While *Fulminante* utilized the *Chapman* standard, *Brecht v. Abrahamson*, 507 U.S. 619 (1993) subsequently held that the *Kotteakos* standard governs federal habeas corpus review. Justice Stevens' concurrence provided the critical fifth vote, however, *see Marks v. United States*, 430 U.S. 188, 193 (1977), and he explained that the different standards should not often matter. The difference between *Chapman* and *Kotteakos* "is less significant than it may seem," particularly in the context of erroneously admitted confessions, and he cited Justice Kennedy's concurrence in *Fulminante* to emphasize that the confession error there "could not reasonably have been viewed as harmless under a standard even more relaxed than the one we announce today." *Brecht*, 507 U.S. at 643. *Brecht* ultimately held that the error in the case (reference to post-*Miranda* silence) was harmless because it was barely mentioned during the entirety of the trial and paled in comparison to the extensive and permissible use of the petitioner's pre-*Miranda* silence. *Id.* at 639.

Brecht was not a capital case, and it emphasized the "societal costs" of retrying defendants whose *convictions* had been overturned. *Id*. at 637. Those costs are lessened when only a sentence is overturned, and, despite the Eighth Amendment concerns, the dangers of erroneous harmless-error conclusions are actually heightened for death-penalty determinations, which are discretionary and unpredictable, supporting application of *Chapman* in that context. *See Satterwhite*,

486 U.S. at 262 (Marshall, J., concurring). Indeed, "the character of the proceeding" and "what is at stake upon its outcome" are important factors in the inquiry, *Kotteakos*, 328 U.S. at 762, supporting the use of *Chapman* in the death-penalty context. Shortly after *Brecht*, however, this Court applied its standard to a capital proceeding in *Calderon v. Coleman*, 525 U.S. 141, 145-46 (1998), although the defendant did not dispute its applicability. *Id.* at 148 (Stevens, J., dissenting).

While this Court should hold that *Chapman* governs harmless error in the capital sentencing context, the errors here easily satisfied the *Brecht/Kotteakos* standard, as the dissent explained below and as Justice Stevens reasoned in *Brecht*. As discussed below, the Ninth Circuit majority opinion is flatly inconsistent with *Fulminante*, *Kotteakos*, and other decisions of this Court.[8]

B. The majority's opinion conflicts with *Fulminante*

The heart of the majority opinion below was that petitioner's confession was "cumulative" of other evidence. App. 83-90. While this assertion was factually wrong, and egregiously so as demonstrated by the dissent, App. 136-43, it was blatantly inconsistent with *Fulminante*.

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[8] This Court also recently held that a federal court must apply both *Brecht* and *Chapman* (under an AEDPA standard) when a state court has found that an error is harmless. *See Brown v. Davenport*, 142 S. Ct. 1510 (2022). The AEDPA/*Chapman* standard does not apply here, however, because the state court did not conduct a harmless-error analysis as to the confession. App. 82, 125.

The majority mostly relied on testimony provided by the *defense* expert at the penalty phase, Dr. Hubbard, to assert that the details of the murder, petitioner's motivations, and his lack of remorse were otherwise presented. App. 85-88. This reasoning was nonsensical. Because the confession *was* admitted, the defense had to explain it and planned the expert's testimony accordingly (and the testimony of the other witnesses). If the confession had been excluded, the testimony of the defense witnesses clearly would have looked different, and some of them, including the expert, may not have even been presented at all. Indeed, the *entire* trial would have unfolded differently; for example, the attorneys stated before trial that they had to abandon their defense that petitioner did not commit the murder once their motion to suppress the confession had been denied. RT 244-45.[9]

This type of obvious impact of a confession on the trial proceedings was the third factor emphasized in *Fulminante*, 499 U.S. at 300. This Court explained that "the admission of the first confession led to the admission of other evidence prejudicial to Fulminante" and criticized the lower court's harmless-error analysis, which was largely based on a similar "cumulative" rationale, because it failed to account for the fact that "had the confession not been admitted," the trial clearly would have unfolded differently and other evidence explaining or derivative to the

[9] In opening statements, the prosecution admitted it had "very little, if any, physical evidence" that petitioner was present during the murder. RT 3859.

presentation of the confession would likely have been omitted. *Id.* Likewise, *Kotteakos*, 328 U.S. at 767-70, explained that the error "permeated" the entire trial because it had other derivative effects on the case, including broadening the admission of evidence. This is one reason why a "confession is like no other evidence" and a reviewing court must use "extreme caution before determining that the admission of [a] confession at trial was harmless." *Fulminante*, 499 U.S. at 296. Unlike a comment on silence, for example, *see Brecht*, 507 U.S. at 639, it is much more likely, if not inevitable, that the introduction of a confession will critically affect the entire strategic and evidentiary framework of a trial.

The majority also ignored *Fulminante*'s recognition that a "defendant's own confession is probably the most probative and damaging evidence that can be admitted against him" and that "confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so." *Fulminante*, 499 U.S. at 296. The majority had no real answer to the fact that the emotional impact of petitioner's own words on the recording, together with his laughter and other demeanor, clearly had a devastating impact on the jury.[10] The majority simply stated that "to whatever extent this is true," the

[10] The majority avoided the actual language in the confession, undoubtedly because it fueled arguments for the death penalty. For example, the interrogating officers suggested (falsely) that Clemons was raped because Christina had stated that petitioner "wanted to do" things "[o]f a sexual nature" to her mother. 6-ER-1412-13.

jury also heard from other witnesses, like the experts presented by the prosecution, who stated that petitioner lacked remorse. App. 86-87. Putting aside that the opinions were formed based on petitioner's confession, *Fulminante* emphasized that the jurors certainly could have discounted these other witnesses, and, even if they gave them some credit, their persuasive force paled in comparison to petitioner's own words, which were also harmful because they served to corroborate the experts' testimony. *Fulminante*, 499 U.S. at 298.

Blatantly disregarding *Fulminante*, the majority tried to distinguish cases granting penalty relief where the defendant's conduct and prior record were much more aggravated than petitioner's by reasoning that those cases involved missing mitigating evidence, which "is far likelier to have an impact on a penalty-phase jury than" the confession error here. App. 84. The majority cited no authority to support its position, undoubtedly because *Fulminante* stated the exact opposite; the admission of a confession is perhaps *the* most damaging form of trial error having perhaps the most profound impact on a jury. *See Fulminante*, 499 U.S. at 296.

The majority's rationale also ignored *Buck v. Davis*, 580 U.S. 100 (2017),

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While this hearsay allegation was prejudicial, petitioner's responses were even more damaging, stating "I couldn't make my dick hard if I wanted to" but also that he "considered having Mexicans do the job and having her raped." *Id.* This bolstered the prosecution's emphasis on lack of remorse and simultaneously undermined the defense that petitioner sought to protect women from sexual abuse.

which involved the erroneous admission of evidence, not missing mitigation. The petitioner's conduct in *Buck* was more aggravated, as he shot and killed two victims, one in front of her children while they begged for her life, and nearly killed a third person. *Id.* at 105. Buck was "happy" and "smiling" and "laughing" about what he had done at the time of arrest. *Id.* He had also served prison time for convictions involving weapons and drugs and had routinely beaten and pointed a gun at a prior girlfriend. *Id.* at 106.[11] While the error in *Buck* involved testimony about race, which is an odious factor, it was provided by the defense expert and was only mentioned briefly. *Id.* at 107-08, 121. In finding prejudice, this Court emphasized that some "toxins can be deadly in small doses." *Id.* at 122.

Fulminante establishes that a confession is that type of "toxin," and here the jury received a large dose, as discussed below. The majority's analysis cannot be squared with *Fulminante*, which is why, unlike the dissent, it barely mentioned this Court's opinion. *Compare* App. 82 (majority); *with* App. 135, 137, 144 (dissent).

C. The majority opinion conflicts with this Court's precedent by ignoring objective factors showing an influence on *this* jury

The majority completely ignored objective evidence that *this* jury was

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[11] Although the majority emphasized petitioner's criminal record as an aggravating factor, he had no prior felony convictions. App. 83. His record was not nearly as bad as those in other cases finding penalty prejudice. *See Rompilla v. Beard*, 545 U.S. 374 (2005); *Williams v. Taylor*, 529 U.S. 362 (2000).

influenced by the confession and found the penalty question to be close. *Kotteakos* requires such consideration, and appellate judges cannot, based on their own review of a cold record, override objective factors showing influence on the jurors' decision as the irrational responses of laymen. *See Kotteakos*, 328 U.S. 763-64.

As Justice Scalia has described it, "[c]onsistent with the jury-trial guarantee, the question [for] the reviewing court to consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand." *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993). The question is what effect did the errors have on *this* jury, not a "hypothetical" jury. *Id.* at 280. An objective way to answer this question is to look at the communications from the jurors and their behavior, and that is exactly what this Court did in *Buck*, 580 U.S. at 108, 120, emphasizing that the jurors sent a note asking to see the "psychology reports," one of which was created by the expert who provided the impermissible testimony.

Here, the jurors' conduct was even more elucidating. The first thing they did when they retired to deliberate at the guilt phase was to request a tape recorder so that they could listen to the confession. RT 5013. After approximately a day and a half of deliberations, they sent a note asking: "Under the corpus delicti rule, what degree of proof must exist before evidence from the confession may be used?" RT 5015. They asked for definitions of "slight or prima facie evidence."

Id. The trial judge instructed the jury that the prosecution only needed to make an "initial" showing with "small, meager or inconsiderable" proof to satisfy the corpus delicti rule, and, about an hour later, the jury returned guilty verdicts and found the special circumstances needed for death-penalty eligibility. RT 5031-37.

These parts of the record strongly demonstrate that the confession influenced the jurors. At least some apparently had doubts about the evidence apart from the confession, hence the question about the corpus delicti rule. While these facts show that the confession influenced the jurors even as to the convictions, at the very least it was an influential factor as to the degree of murder and the special circumstances. Indeed, the prosecutor's argument as to the special circumstances at the guilt phase focused almost entirely on the confession. RT 4939-50.

The majority claimed that the prosecutor did not emphasize the confession in his penalty summation, App. 83, but it erroneously ignored his heavy reliance on it during guilt summations, especially when addressing the special circumstances. *See Kotteakos*, 328 U.S. at 764 (court must "take account what the error meant to them [the jurors], not singled out and standing alone, but in relation to *all else that happened*") (emphasis added). The majority also ignored the jurors' note, directly showing the confession's influence on them, which is not surprising given that it was a lengthy recording of petitioner providing first-hand details as opposed to a generic inculpatory statement relayed second-hand through the testimony of a brief

witness. App. 21; 6-ER-1382-1450. In any event, as the dissent explained, the prosecutor *did* heavily rely on the confession during penalty summations, just as he did throughout the entire case. App. 131-36.

The prosecutor played the recording again, in its entirety, at the penalty phase, and the majority incorrectly declared that he did not mention the confession until the eleventh page of his argument (as if that really made it an after-thought). App. 83. The first fact mentioned (on the third page of his argument) was from the confession. 6-ER-1298 (petitioner sat on her chest and was the cutter). He then made several more factual arguments directly derived from the confession, including that Christina chose petitioner to kill her mother because he was a "professional," 6-ER-1299-1300,1418, which was a false argument that he promised not to make. He played the recording yet again towards the end of his argument, when it would leave a final impression, and then asserted that the confession was "one of the most horrible and aggravated parts of this case." App. 135-36. "He's telling us that he can kill and he can kill without remorse. Because he no longer has the normal feelings that everybody else does. And he told us, 'I don't like people.'" 6-ER-1333-34. These comments demonstrate harmfulness. *See Fulminante*, 499 U.S. at 297; *see also Riggins v. Nevada*, 504 U.S. 127, 143-44 (1992) (Kennedy, J., concurring) (in "a capital sentencing proceeding, assessment of character and remorse may . . . be determinative").

Even if there were any doubt, the majority had no response to the dissent's reliance on the jury's lengthy deliberations at the penalty phase, which showed that it found the death-penalty question to be close. App. 126-27. The penalty phase lasted approximately five days, in which much time was spent on legal arguments outside the presence of the jury, and the jury deliberated for more than three days, almost as long as the penalty phase itself. *Id.* This Court has emphasized similarly lengthy deliberations in concluding that a jury found the case to be close and an error was harmful, as have lower courts. *See Parker v. Gladden*, 385 U.S. 363, 365 (1966); *Johnson v. Superintendent Fayette SCI*, 949 F.3d 791, 805 and n.8 (3d Cir. 2020) (collecting cases); *Dugas v. Coplan*, 428 F.3d 317, 335 (1st Cir. 2005).

Given the nature of a full confession, the prosecutor's emphasis on it throughout the trial, and the jury's note and lengthy deliberations, there can be little question that its erroneous admission was not harmless, at least as to the death penalty. Yet, the majority's contrary conclusion was all the more remarkable because the admission of the confession was not the only significant error. All three judges agreed that petitioner's attorneys also performed deficiently by disclosing the Popik note, which was then "presented, and its import emphasized as aggravating evidence during the penalty phase." App. 40. The attorneys' conduct constituted "*egregious* violations of trial counsel's duty of confidentiality [and] a violation of [petitioner]'s right to effective assistance of counsel." App. 54.

As recounted by the dissent, the prosecution's *entire* rebuttal at the penalty phase, which included the testimony of a bailiff, court staff, and even petitioner's own former attorney, was about the note. App. 134. The note was used to show that petitioner, who had everything on the line in a capital case, would even resort to violence in the controlled setting of a courtroom, and his attorney was forced to admit that he had never experienced anything like that in his entire career, suggesting that petitioner was uniquely dangerous. App. 15, 40-42, 134; 6-ER-1292-93. The prosecutor argued that the note showed petitioner would be a future danger in prison and stated that his "favorite witness" in the whole case was petitioner's lawyer, App. 136; 6-ER-1309, capitalizing on the dramatic effect of an attorney testifying against his own client. *See Buck*, 580 U.S. at 122 ("[w]hen a defendant's own lawyer puts in the offending evidence, it is in the nature of an admission against interest, more likely to be taken at face value").

The majority's analysis of the harm flowing from the Popik-note error was superficial and did not meaningfully assess its *cumulative* effect with the confession error. The majority stated that the prosecutor did not emphasize the note in his summation, only arguing it twice. App. 90. It is not clear how arguing something not simply once but *twice* demonstrates a minimal prejudicial effect, and the prosecutor explicitly told the jury that petitioner's attorney was his favorite witness in the case. Given the importance of future-danger evidence, the amount

of attention given to the note was more than sufficient to establish prejudice; the note was emphasized to a far greater degree than the improper future-danger evidence in *Buck*. *See Buck*, 580 U.S. at 121 (evidence only mentioned once on direct and once on cross and not mentioned at all during summations).

The majority claimed there was other evidence of future dangerousness, pointing to statements petitioner made to an expert that he would do it all over again, App. 91, but that evidence was not nearly as powerful as hearing petitioner's own words and, again, may not have even been admitted if the confession had been properly suppressed; in any event, the comments did not really address future danger *in prison*, which was the force of the Popik note. *See Simmons v. South Carolina*, 512 U.S. 154, 165 n.5 (1994). The majority also pointed to the purported "hit list" that petitioner possessed, App. 91, but the dissent dismantled that point, explaining that the "hit list" was only admitted for a very limited purpose and was not permitted for future-danger evidence or even to prove that petitioner intended to kill the people on the list. App. 144. In short, the majority's flimsy analysis of the Popik note ignored *Buck* and failed to appreciate how properly to analyze the *cumulative* effect of the errors.[12]

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[12] As one example of the synergistic effect of the errors, petitioner stated in his confession that he would either get killed in prison or commit suicide rather than face a lengthy sentence for the murder. "Better off killing myself. Point blank. I hate captivity. I'll die before I'll fuckin' do the whole time. If I waste myself with my

Finally, these were not even the only two errors at the trial. The majority also agreed that the prosecutor engaged in misconduct during closing arguments under *Darden v. Wainwright*, 477 U.S. 168, 179-82 (1986), as he improperly called petitioner a "beast," a "monster," a "psychopath," and "evil," and he violated the "golden rule" by asking the jurors to think of themselves as the victim. App. 102.[13] The majority never evaluated that misconduct as part of the cumulative-error analysis, despite the fact that it was required to evaluate the errors "in relation to *all* else that happened." *Kotteakos*, 328 U.S. at 764. Indeed, the improper golden-rule argument was based on the details provided in the confession. In sum, while the prejudicial effect of these additional errors is icing on the cake, the erroneous admission of the confession alone was harmful as to the penalty determination, and the dissent below correctly observed that the errors "more than" met the *Brecht* standard. App. 146. This Court should grant review.

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blanket, it don't matter. I'll kill myself." 6-ER-1417, 1442. This reinforced the danger-in-prison argument based on the Popik note and would dissuade jurors from saving petitioner's life, as he would kill himself anyway.

[13] The prosecutor engaged in additional misconduct, arguing something – that petitioner was a professional killer – which he knew was false, and he actually promised the court he would not make the argument. The majority stated that the hit-man arguments were "ambiguous," App. 99-101, but they were clear and came directly from the confession: "But ask yourselves why did Christina Clemons pick Kurt Michaels to do this murder. Because he was a professional." 6-ER-1300 (summation), 1418 (confession). The majority also ignored the prosecutor's opening where he clearly suggested that petitioner was a contract killer. RT 5198.

II. This Court should grant review to settle the conflict in the lower courts' application of harmless-error review, particularly in the context of erroneously admitted confessions and cumulative error.

A. There is significant conflict and confusion in the lower courts regarding harmless-error review of erroneously admitted confessions

Despite the guidance in *Kotteakos* and *Fulminante*, the lower courts have struggled for years in applying those cases in the context of erroneously admitted confessions. Like the decision below, the conflict tends to boil down to judges who point to those two decisions in finding harmful error while observing indications in the record that the confession was emphasized or focused upon by the jury, versus other judges who rely on *Brecht* to conclude that the confession was cumulative in the face of overwhelming evidence.

- ***Zappulla v. New York*, 391 F.3d 462 (2d Cir. 2004)**

In *Zapulla*, 391 F.3d at 465, a divided Second Circuit panel found that a confession error was harmful. The defendant was arrested at a motel for theft; officers found a key to a motel room on his person, and when they searched the room, they found a dead woman. The defendant, who attempted to flee, later gave a confession, taken in violation of *Miranda*, that he was doing drugs with the woman and choked her when he found out that she had stolen jewelry from him.

The *Zapulla* majority relied on *Fulminante* to find that the confession was harmful, distilling this Court's harmless-error precedent into four factors: (1) the

overall strength of the prosecution's case; (2) the prosecutor's conduct with respect to the improperly admitted evidence; (3) the importance of the wrongly admitted testimony; and (4) whether such evidence was cumulative of other properly admitted evidence. *Id.* at 468. Although the forensic testimony revealed that the defendant had the victim's blood on him, he was seen on surveillance tapes going to the motel room, and he had allegedly made a separate confession to another inmate, there was at least one other potential suspect who could have committed the murder, and, importantly, "the first trial resulted in a hung jury." *Id.* at 471.

"The fact that the first jury deliberated for three days and ultimately could not reach a verdict" while the second jury deliberated for a "full day" and sent a note seeking to examine the inadmissible signed statement demonstrated that the evidence was not overwhelming and the error was harmful. *Id.* The majority also reasoned that the prosecutor shifted his focus at the second trial to the improperly admitted confession, heavily emphasizing it in his opening and closing statements. *Id.* at 471-72. Quoting *Fulminante*, it concluded that the fact the statement was signed and detailed weighed heavily against a finding of harmless error. *Id.* at 473.

Judge Raggi dissented, claiming "overwhelming evidence." *Id.* at 477. She diminished the importance of *Fulminante*, briefly mentioning it as a case that approved of harmless-error review of confessions. She emphasized the blood found on the defendant, and she found that the inmate who claimed the defendant

confessed was credible given the corroboration of his testimony. *Id.* at 478-85. She concluded that the admission of the signed confession was "cumulative" to the confession given to the inmate and did not prejudice the defense that another suspect committed the murder. *Id.* at 486-87.

- ***Kordenbrock v. Scroggy*, 919 F.2d 1091 (6th Cir. 1990) (*en banc*)**
  ***Cooper v. Chapman*, 970 F.3d 720 (6th Cir. 2020)**

Another splintered opinion is the Sixth Circuit's *en banc* decision in *Kordenbrock*, a capital case. The defendant shot the owner and an employee of a store during a robbery, and he signed a confession, admitted in violation of *Miranda*, that he aimed and fired at the victims' heads. *Kordenbrock*, 919 F.2d at 1095. The defendant conceded he committed the homicide but claimed he was under the influence, which mitigated the degree of murder and the penalty.

The lead opinion found the error harmful, reasoning that it had to be open to "the possibility that at least one member of the jury took the language of the confession seriously and relied on the harshness of its description to tip the balance in favor of the death penalty[,]" and it "would be unreasonable to assume that not one member of the jury, in sentencing Kordenbrock, gave weight to the confession when considering the death sentence." *Id.* at 1097. Although other evidence supported an intent to kill, the confession undermined the diminished capacity defense, and the jurors appeared to struggle with the decision, asking whether they

could sentence the defendant to life without parole. *Id.* at 1098-99.

Two judges concurred, explaining that although the "untainted" evidence was "very strong" and their conclusion may have been different in a non-capital case, "[d]eath cases can be different for jurors as well as for judges," and given that the jury appeared to struggle, it might "have settled for life imprisonment . . . had it not been for the emotional impact of the appellant's written statement." *Id.* at 1133 (Nelson, J., concurring). Although part of the confession was admissible, the actual words in the offending section had "an emotional level – and jurors do have emotions – . . . which could have tipped the scales." *Id.* Judge Ryan joined and separately added that the "language, tone, and content" of the inadmissible portion undermined the defense and was "the most powerful, although not the sole, evidence in the record of the defendant's malice and premeditation." *Id.* at 1135.

Several judges dissented in an opinion written by Judge Kennedy. He reasoned that the evidence was overwhelming, and the confession did not in any way undermine the defense. *Id.* at 1110-15 (Kennedy, J., dissenting). He also discounted the jury's question about life without parole, stating that "the majority is reading too much into the jury's request." *Id.* at 1115 n.5.

The divided opinion in *Cooper*, 970 F.3d 720, presents the other side of the coin for the Sixth Circuit. The majority found harmless error in a non-capital case, where the defendant's initial statements that he was at the murder scene to get the

victim to pay a debt were properly admitted, but his subsequent statement that he participated in subduing the victim while he was shot in the head violated *Miranda*. The majority only cited *Fulminante* for the proposition that harmless-error review applies to confessions, *id.* at 729, and concluded that the properly admitted statements rendered the erroneously admitted ones cumulative, and the prosecution "presented overwhelming and more than sufficient proof to demonstrate . . . that Cooper was guilty of felony murder." *Id.* at 731-32.

Judge Moore dissented, asserting that the majority employed "sufficiency-of-the-evidence review" and did not assess the "impact of Cooper's full confession upon the jury . . . ." *Id.* at 733-34. Although the defendant had made other incriminating statements, she reasoned that they merely placed him at the scene, and the inadmissible part of his confession "was by far the best evidence against him" and "the prosecution knew this – it emphasized Cooper's confession again and again in its closing statement." *Id.* at 733, 737-38. She heavily relied on *Fulminante* and the fact that a "full" confession was at issue. *Id.* at 735-36.

- ***Cooper v. Taylor*, 103 F.3d 366 (4th Cir. 1996) (*en banc*)**

In *Cooper*, 103 F.3d at 368-69, the defendant's first two oral confessions to murder were admissible, but his third, tape-recorded confession violated *Miranda*. A majority of an *en banc* panel found harmless error, explaining that the first two confessions combined with evidence that the defendant tried to cash the victim's

check constituted an overwhelming case, and the defendant offered no evidence of his own. *Id.* at 371. It reasoned that just because the erroneously admitted confession was important did not mean it was not harmless. *Id.*

Five judges dissented in opinions written by Judges Hamilton and Motz. Judge Hamilton explained that if the question were sufficiency of the evidence without the inadmissible confession, he would agree with the majority, but the question under *Kotteakos* was whether the erroneously admitted confession had a substantial influence on the jury, and the majority did not apply that standard. *Id.* at 374 (Hamilton, J., dissenting). He explained that the taped confession was played for the jury, the transcript of the recording was 19 pages, it covered every aspect of the crime, the prosecutor repeatedly argued it during summations, and the trial judge stated that the case hinged on the taped confession. *Id.* at 374-75.

Judge Motz explained that the majority employed its own view that the evidence was "overwhelming" without considering what effect the error "had *on the jury* at the actual trial at which Cooper was convicted." *Id.* at 375. She stated the issue could be "summed up in a single, common-sense question: Can an appellate court fairly decide whether an error was harmless without once considering the effect of that error on the verdict of the jury which originally considered the trial evidence?" *Id.* at 376. She asserted that the "obvious answer is no," and the majority's analysis disregarded decades of precedent established

since at least *Kotteakos*. *Id.*

She explained there were only brief references to the admissible statements, whereas the inadmissible confession occupied 19 pages of transcript, recounted every detail of the crime, and was played for the jurors and provided to them during deliberations. *Id.* at 379-80. The prosecutor emphasized the inadmissible statement in summations, and the trial judge, who was in a better position to assess the evidence, stated that the case hinged on the inadmissible confession. *Id.* at 380-81. She criticized the majority for failing to address *Fulminante* and stated that when Justice Stevens concurred in *Brecht*, he "could hardly have foreseen the decision of today's majority, which both follows a misguided legal approach and applies an analysis that flies in the face of *Fulminante* as well as fifty years of harmless-error precedent." *Id.* at 382. In conclusion, the majority "conduct[ed] its own shadow-trial" and "'hypothesize[d] a guilty verdict that was never in fact rendered' – the precise result Justice Scalia warned against in *Sullivan*." *Id.*

* * *

These conflicting and divided opinions demonstrate that the goal in *Kotteakos*, 328 U.S. at 762, of establishing a standard that, over time, would produce "discernible direction" and would be "tempered" by "what had been done in similar situations" has not been attained. The lower courts could greatly benefit from further guidance from this Court.

B. There is conflict in the lower courts regarding cumulative error

There is also conflict regarding the cumulative-error doctrine. The Ninth and Tenth Circuits have held that the doctrine is clearly established by this Court's precedent, and therefore such claims can be entertained under the AEDPA standard governing § 2254 petitions. *See Hanson v. Sherrod*, 797 F.3d 810, 852 n.16 (10th Cir. 2015); *Parle v. Runnels*, 505 F.3d 922, 927-28 (9th Cir. 2007). The Sixth Circuit, on the other hand, has held that the doctrine is not clearly established by this Court's precedent, although judges on that court have stated that its approach is "misguided." *Williams v. Anderson*, 460 F.3d 789, 816 (6th Cir. 2006).

This Court should grant review to confirm that the Sixth Circuit's approach is misguided, as the cumulative-error doctrine is clearly established. *See Chambers v. Mississippi*, 410 U.S. 284, 298-302 (1973) (sustaining cumulative-error claim). Indeed, *Kotteakos* explained that a reviewing court "must take account what the error meant . . . not singled out and standing alone, but in relation to *all else that happened*." *Kotteakos*, 328 U.S. at 764 (emphasis added).

Finally, *Brecht* did "not foreclose the possibility that in an unusual case, a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict." *Brecht*, 507 U.S. at 638 n.9; *see id.* at 654-55 (O'Connor, J.,

dissenting). This capital case is a prime candidate for treatment under footnote 9.[14] *Fulminante* classified the erroneous admission of a confession as perhaps *the* most profound trial error, and all agreed below that the conduct of petitioner's attorneys in disclosing the Popik note constituted "*egregious* violations of trial counsel's duty of confidentiality" and the "right to effective assistance of counsel." App. 54. The majority also agreed that the prosecutor engaged in some misconduct. App. 102. The combination of these profound and egregious errors infected the integrity of these capital proceedings as contemplated by footnote 9, and this Court should grant review to provide long-awaited guidance on this exception to *Brecht*.

CONCLUSION

For the foregoing reasons, the Court should grant this petition.

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Respectfully submitted,

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[14] Judges dispute whether footnote 9 triggers automatic reversal or *Chapman*. *See Hardnett v. Marshall*, 25 F.3d 875 (9th Cir. 1994) (three opinions).