

No. 17-5538

IN THE
SUPREME COURT OF THE UNITED STATES

WILLIAM JOHNSON,
Petitioner,

v.

MARIROSA LAMAS, et al.,
Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals for the Third Circuit

**BRIEF FOR RESPONDENTS IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Where – contrary to Johnson’s misstatement – the state appellate court explicitly ruled on the merits of his due process claim, did the federal court of appeals err in applying the “clearly established law” provision of 28 U.S.C. § 2254(d)?

2. Where the state appellate court explicitly ruled on the merits of Johnson’s Confrontation Clause claim – rejecting it on harmless error grounds – did the federal court of appeals err in granting deference to that harmless error ruling by applying the “unreasonable application” provision of 28 U.S.C. § 2254(d)?

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COUNTER-STATEMENT OF THE CASE

Johnson is a Pennsylvania state prisoner and convicted murderer who, together with another man, shot and killed an off-duty police officer.

On August 26, 2005, at approximately 2:00 a.m., Brenda Bowens, a prostitute, finished with a customer and walked to a corner store at 19th Street and Cecil B. Moore Avenue in Philadelphia. As she crossed the street, off-duty police officer Terrance Flomo called out to her. Uninterested in another customer, Ms. Bowens ignored him. As she neared the store, she passed Johnson and his co-conspirator, Mumin Slaughter. Johnson and Slaughter were drug dealers in the neighborhood that Bowens, a crack user, had known for years.¹ She told Johnson and Slaughter that Flomo had solicited her.

As Ms. Bowens left the store moments later, she saw Johnson, who was known for his intense temper, on the passenger side of Flomo's car, and Slaughter at the driver's side. She saw a flash and then heard a gunshot. As she ran to a nearby drug house, she heard a second shot. Although Ms. Bowens regularly saw Johnson and Slaughter in the area, both men disappeared from the neighborhood after Flomo's murder (N.T. 5/28/09, 203-09, 223-24; 5/29/09 32-34).²

¹ Bowens was not on drugs at the time of the murder (N.T. 5/28/09, 208).

² Johnson's appendix on appeal to the Third Circuit did not include the notes of testimony from his trial. Those notes, which are a part of the state court record, are currently with the lower court. The Commonwealth will supplement the record to this Court to provide the notes of testimony should this Court wish to review them.

Nora Williams, another prostitute in the area, also used Johnson and Slaughter as her drug dealers. She saw the interaction between Ms. Bowens and Flomo. She then saw Ms. Bowens speak with Johnson and Slaughter before entering the store. Ms. Williams saw both Johnson and Slaughter pull out guns and run toward Flomo's car. Johnson ran to the passenger side, and Slaughter to the driver's side. The men then fired several shots at Flomo from a distance of about eighteen inches. After the murder, the two fled toward Cecil B. Moore Avenue. Ms. Williams confirmed that, although she saw the men on a daily basis before the murder, Johnson and Slaughter disappeared after it (N.T. 5/29/09, 51-62, 69).

Police arrived on the scene and found the unresponsive victim bleeding from his abdomen. Officer Flomo was pronounced dead a short time later, having sustained three gunshot wounds: two to his right arm, and a fatal shot that breached the right side of his body and traveled through his liver, lung, and heart. A .38 or .357 caliber bullet was recovered from his body. The murder weapon was never found (N.T. 5/28/09, 43-49, 151-55, 178-81).

Johnson and Slaughter were arrested based on the statements and identifications of Ms. Bowens and Ms. Williams. The pair were jointly tried in 2007. The jury convicted Slaughter of third-degree murder and criminal conspiracy. The jury acquitted Johnson of first-degree murder and was unable to reach a unanimous verdict as to any of the other charges against him.

Slaughter was later sentenced to an aggregate term of twenty-five to fifty years imprisonment.

Before Johnson's retrial, Slaughter filed a motion to vacate his sentence upon his agreement to cooperate in the prosecution of Johnson. The trial court granted the motion and vacated the sentence. Slaughter then gave a statement to police naming Johnson as the shooter. Slaughter's statement was consistent with, but less detailed than, the eyewitness accounts. Slaughter denied, however, that he had a gun, and claimed he had not known in advance that Johnson was armed. He confirmed that Johnson killed Flomo because he believed Flomo was bothering Ms. Bowens, one of his regular customers. Slaughter consulted with his attorney before agreeing to cooperate (N.T. 5/29/09, 140; 6/1/09, 4-5, 65-70).

Johnson's retrial began on May 28, 2009. The two eyewitnesses to the crime – Ms. Bowens and Ms. Williams – again testified. Both indicated that they had been intimidated as a result of their cooperation with police, requiring that they be relocated for their own safety. Bowens acknowledged that she was scared for her life. N.T. 5/28/09, 225; N.T. 5/29/09, 67). There was also testimony from two new witnesses. David Kelly, a resident of the neighborhood, testified that Slaughter was known to carry a gun. Anthony Bennett, a friend of Slaughter's, testified that he heard the gunshots, that he had seen Slaughter a short time before just a few blocks away, that he shook

Slaughter's hand and gave him a hug, that he felt a bulge he believed was a gun, and that he knew Slaughter to carry a gun (N.T. 6/29/09, 6-10).

The evidence also included testimony from the medical examiner establishing that, with the victim sitting in the driver's seat, the gunshots must have come from the passenger side of the car. A firearms expert testified that a revolver fired the single spent bullet recovered from the victim's body. There was gunshot residue on Flomo's clothing, meaning that the gun was likely two and a half to three feet away when fired. There were two unburnt gunshot particles found on the passenger-side armrest, and there was testimony that a revolver can leave unspent gun powder, but that it would not normally travel more than three feet, and up to a maximum of five feet (N.T. 5/28/09, 108-10, 178-80, 187-89). Ms. Bowens and Ms. Williams had both previously testified that Johnson had been standing on the passenger side when the bullets were fired.

When it was time for Slaughter to testify, the prosecutor (outside the presence of the jury) informed the trial court that he had just learned that Slaughter was now refusing to take the stand, despite his previous willingness to testify expressed as recently as the day before. Slaughter was brought to the courtroom for examination before the jury. Slaughter answered the prosecutor's initial questions, testifying that he was in jail, having been convicted of murder and conspiracy. When asked if his lawyer filed a motion to vacate his sentence in an attempt to cooperate with the government, he said

“no” and denied having made any statement to the police. He then purported to assert a Fifth Amendment right not to answer further questions. The trial court ruled, however, that he did not have a valid right to remain silent because he had already been convicted (N.T. 5/29/09, 135-143). Slaughter still refused to answer additional questions.

During a recess, Slaughter’s own lawyer advised him that he had no Fifth Amendment privilege and could be held in contempt. The court reiterated this advice and the parties agreed that Slaughter would be given another chance to comply with his cooperation agreement (N.T. 6/1/09, 12-19).

Upon being recalled to the stand, Slaughter at first refused to respond, but then changed course. He now testified at length, claiming that his statement was untrue, that both he and Johnson were innocent, that he was scared and only agreed to cooperate to reduce his own sentence, and that Johnson knew him well enough to realize that, when push came to shove, Slaughter would be unwilling to testify to “a lie.”³

³ Listen, I got found guilt[sic] for a fucking murder that nobody don’t know who killed this man. They gave me 50 years and nobody said I did nothing. They trying to railroad us. They gave me 50 years. My own lawyer even told me I can never get back in court to get back my kids or nothing. They said just say that you all did it and he won’t want to go to trial. You can get your 50 years back and he’ll take a statement – I mean, he’ll take a deal. He won’t want to go nowhere, because he be scared if I come out there with all these liars saying that we did something.

I didn’t have no choice. I didn’t know what to do. I was scared. A desperate man do desperate things. I tried it. Now, he didn’t go for it. He didn’t take it because he know me. He know that I was lying. He knew I wouldn’t do this because it was a lie.

(N.T. 6/01/09, 37-44).

After Slaughter completed his testimony, the prosecutor called the detective who took Slaughter's statement to read it to the jury. The statement reiterated what the jury had already heard from the other witnesses: Slaughter was known by the nickname "Muk"; on the night in question, he and Johnson were selling crack on the corner of 20th Street and Cecil B. Moore Avenue; Brenda came up and was upset and told Johnson that a man in a car tried to pick her up for sex; the car she pointed to then pulled up heading north on 20th Street, and stopped at the traffic light; Johnson pulled out his gun and started firing at the man through the passenger side and then they both ran in different directions (N.T. 6/1/09, 66-70).

On June 3, 2009, the jury convicted Johnson of third-degree murder and criminal conspiracy. He was sentenced to twenty to forty years imprisonment for murder, and to a consecutive term of ten to twenty years imprisonment for criminal conspiracy. Johnson's post-sentence motion was denied on December 14, 2009.

State Appeals

On Johnson's direct appeal, the trial court recognized in its post-verdict opinion that, although co-defendant Slaughter had already been convicted when he was called to the stand, the conviction was not yet final, and the court had therefore erred at trial in ruling that Slaughter lacked a Fifth Amendment right to remain silent. As a result, Slaughter's prior statement was not properly read to the jury. The trial court concluded, however, that any

resulting Confrontation Clause error was harmless given the evidence as a whole. The Pennsylvania Superior Court, in a thorough review of the record, agreed that the error was harmless. The appellate court also rejected Johnson's due process claim that the Commonwealth had intentionally called Slaughter to the stand, knowing that he a constitutional right to remain silent, in order to create an improper inference of guilt. The Superior Court found to the contrary that the trial judge and both parties (as well as Slaughter's own attorney) were simply operating under a legally mistaken view about the Fifth Amendment issue; there was no improper attempt. *See Commonwealth v. Johnson*, No. 3675 EDA 2009. Johnson's application requesting reargument was denied on June 2, 2011. The Pennsylvania Supreme Court denied allowance of appeal on May 16, 2012. *Commonwealth v. Johnson*, No. 405 EAL 2011.

Federal Proceedings

On September 10, 2012, Johnson filed a counseled petition for a writ of habeas corpus. On December 18, 2013, United States Magistrate Judge Elizabeth Hey issued a report and recommendation, concluding that there was no substantial showing of the denial of a constitutional right requiring the grant of a writ. Johnson submitted objections. On July 1, 2014, United States District Court Judge Anita Brody overruled Johnson's objections and approved and adopted the report and recommendation. The court issued a certificate of appealability as to his claim regarding his constitutional right to confrontation.

The Court of Appeals expanded the COA to include the due process claim regarding Slaughter's invocation of the Fifth Amendment at trial.

After full briefing and oral argument, the Third Circuit affirmed the ruling of the district court in an opinion by Judge Rendell, joined by Judge Fuentes and Judge Krause. *Johnson v. Lamas*, 850 F.3d 119 (3d Cir. 2017). The court ruled, with the deference required by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. 2254, that Johnson failed to establish a due process violation where the prosecutor called Slaughter to the stand, and that the Pennsylvania Superior Court did not act unreasonably in concluding that the Confrontation Clause error was harmless. It therefore affirmed the ruling of the district court. Johnson's subsequent motion for panel rehearing or rehearing en banc was denied.

REASONS FOR DENYING THE WRIT

I. CONTRARY TO JOHNSON'S MISSTATEMENT, THE STATE APPELLATE COURT EXPLICITLY RULED ON THE MERITS OF HIS DUE PROCESS CLAIM, AND THE FEDERAL COURT OF APPEALS PLAINLY DID NOT ERR BY APPLYING THE "CLEARLY ESTABLISHED LAW" PROVISION OF 28 U.S.C. § 2254(d).

Johnson's due process claim was that the prosecution improperly attempted to create an inference of guilt by association by presenting co-defendant Slaughter solely for the purpose of forcing him to assert his Fifth Amendment privilege in front of the jury. He asserts that the state appellate court never ruled on the merits of this claim, and that the Third Circuit therefore should not have applied 28 U.S.C. § 2254 on habeas review.

This argument is patently inaccurate. At page 12 of its opinion, the Pennsylvania Superior Court explicitly rejected Johnson's due process claim on the merits: "We conclude that this was not an improper attempt by the Commonwealth to create an inference of guilt by association between Johnson and Slaughter." The court reached this conclusion on the ground that "both parties and the trial court were operating under the mistaken belief that Slaughter had no Fifth Amendment privilege," and that even Slaughter's own lawyer did not assert the privilege (*id.* at 11-12). Johnson decries this reasoning. But his disagreement with the court's *rationale* does not somehow make the court's *ruling* disappear. The state court rejected the claim on the merits, and § 2254(d) therefore plainly applied.

Nevertheless, Johnson tries to bolster his argument by asserting that the Third Circuit itself concluded that the state court did not render a merits ruling on his due process claim. This too is patently inaccurate. At page 137 of its opinion, directly under the heading "Due Process Claim," the court of appeals explicitly stated: "The Superior Court rejected this claim on the merits."

Johnson ignores this explicit statement. Instead he focuses on the very next sentence in the opinion below: "We do not need to determine whether we owe deference to the Superior Court's determination because we do not think the authorities Johnson relies upon clearly establish a due process violation." Johnson asserts that the Third Circuit is confused about the nature of habeas

review. He equates “deference” with the requirement for “clearly established law” and contends that the court of appeals believes the requirement applies even when there has been no state court ruling on the merits.

But of course there was a state court ruling on the merits, the federal court acknowledged that ruling, and the confusion about habeas review, if any, is entirely Johnson’s. “Deference” is a shorthand reference to the “unreasonable application” provision of subsection (1) of § 2254(d). The “clearly established law” provision appears not in subsection (1), but in the main body of § 2254(d). These are two independent requirements for habeas relief; the petitioner must satisfy both; and if he cannot meet either requirement, he cannot prevail. Thus the Third Circuit was merely and correctly observing that, if Johnson’s claim was not supported by clearly established precedent of this Court, then there was no cause to determine whether the state court’s application of federal law was unreasonable. That observation does not remotely suggest that “deference” applies absent a state court adjudication on the merits – particularly in light of the immediately preceding sentence, in which the court of appeals stated explicitly that there *was* a state court adjudication on the merits here.⁴

⁴ In any case, even if the state court had rejected his due process claim on procedural grounds rather than on the merits, Johnson would have found himself in no better position before the Third Circuit. If the Pennsylvania Superior Court had formally ruled that the claim was waived because trial counsel mistakenly failed to lodge an objection, the claim would have been procedurally defaulted in federal court based on an independent and adequate state law ground. Pennsylvania Rule of Appellate Procedure 302(a) states that “issues not raised in the lower court are waived and cannot be raised for the first time on appeal.” Judges in the district have found that Pa.R.A.P. 302 constitutes an independent and adequate state ground on which a state court

Johnson does not seriously contend with the substance of the Third Circuit's conclusion that his due process claim was not supported by clearly established precedent of this Court. He primarily cites authority from lower courts, which obviously does not do the trick. He then cites only one opinion of this Court, *Douglas v. Alabama*, 380 U.S. 415 (1965). But the court of appeals explicitly distinguished *Douglas*, as well as the other authority he raised below. 850 F.3d at 138. Johnson does not even attempt a response to the court's treatment of the issue.

Furthermore, the court of appeals noted that, even if there had been a clearly established due process right, the state court's resolution of the claim was not unreasonable. The habeas court recognized that the record did not show that the prosecutor wanted Slaughter to assert his Fifth Amendment privilege. To the contrary: no one at the time believed Slaughter had a legitimate privilege claim; the prosecutor wanted Slaughter's testimony, not his silence; and Slaughter in fact wound up giving testimony – in which he asserted before the jury that neither he nor Johnson had anything to do with

bases its decision. *See Martinez v. Wynder*, Civ. A. No. 06-4453, 2007 WL 1725189, at *8 (E.D.Pa. June 12, 2007) (Rule 302(a) is an adequate and independent state rule); *O'Halloran v. Ryan*, 704 F. Supp. 70, 74 (E.D. Pa. 1989) (failure to comply with Pa.R.A.P. 302(a) created a procedural default thereby barring review by federal court of issue raised in habeas petition), *aff'd*, 887 F.2d 262 (3d Cir. 1989), *cert. denied*, 494 U.S. 1035 (1990).

Johnson pled no cause for the default and failed to prove actual prejudice resulted from the alleged violation of federal law, nor did he demonstrate that failure to consider the claim resulted in a fundamental miscarriage of justice. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991) Thus, even if Johnson's baseless assertion that the Superior Court failed to undertake a merits review were accurate, his defaulted claim would not provide him any relief.

the crime. The state court did not rule unreasonably, and the opinion below does not warrant this Court's review.

II. THE STATE APPELLATE COURT EXPLICITLY REJECTED JOHNSON'S CONFRONTATION CLAUSE CLAIM ON HARMLESS ERROR GROUNDS, AND THE FEDERAL COURT OF APPEALS PLAINLY DID NOT ERR IN GRANTING DEFERENCE TO THAT RULING BY APPLYING THE "UNREASONABLE APPLICATION" PROVISION OF 28 U.S.C. § 2254(d).

Johnson also seeks review of his claim that Slaughter's assertion of the right to remain silent prevented him from confronting the witness, in violation of the Sixth Amendment. He asserts various arguments for disregarding the Third Circuit's holding that the state court did not act unreasonably in ruling that any confrontation error was harmless. All fail.

A. No "cumulative prejudice analysis" was warranted.

Johnson has always characterized Slaughter's appearance at trial as "separate violation[s]" of both the Confrontation Clause and the Due Process Clause. 850 F.3d at 137. At the same time, however, he contends that the state court's denial of his confrontation claim does not count, because the state court should have *combined* the two "separate" claims for purposes of harmless error analysis. His entire authority for this assertion is the dictum in a footnote at the end of this Court's opinion in *Brecht v. Abrahamson*, 507 U.S. 619, 638 n.9 (1993).

Brecht is a case about harmless error analysis on federal habeas review. In the footnote, the Court observes that in theory there might be unusual cases

in which harmless error analysis would not apply. Johnson completely fails to explain how this vague dictum created clearly established precedent requiring the state court to assess his two separate claims as if they were one. Nor does he explain why his disagreement with the substance of the state court's harmless error analysis would entitle a federal habeas court to pretend the state court never even adjudicated the question. As above, Johnson simply seeks to avoid the requirements for review of state court merits rulings under § 2254(d).

B. The Third Circuit Applied the Correct Standard in Considering Whether the State Court's Harmless Error Ruling Was Unreasonable.

The Third Circuit articulated its standard of review of the state court's Confrontation Clause harmless error ruling by quoting directly from this Court's decision in *Davis v. Ayala*, 135 S. Ct. 2187, 2199 (2015): a "federal court may not award habeas relief under § 2254 unless the harmlessness determination itself was unreasonable." The court also quoted from *Ayala's* statement, *id.*, that "Ayala must show that he was actually prejudiced by this procedure, a standard he necessarily cannot satisfy if a fairminded jurist could agree with the [state court's] decision that this procedure met the *Chapman* standard of harmlessness." 850 F.3d at 134.

Bizarrely, Johnson contends that the Third Circuit erred by following this Court's most recent precedent. He contends that the language above is somehow inconsistent with the Court's statement in an earlier case, *Fry v.*

Pliler, 551 U.S. 112, 120 (2007), that the *Brecht* standard “subsumes” the requirements of § 2254(d). *Ayala* itself, however, rejected precisely this argument: “The *Fry* Court did not hold – and would have had no possible basis for holding – that *Brecht* somehow abrogates the limitation on federal habeas relief that § 2254(d) plainly sets out.” 135 S. Ct. at 2198. Johnson simply fails to identify any misstatement of law in the opinion below; nor does he suggest how any different statement of the law would have changed the result on this question.

Nevertheless, Johnson insists that the Third Circuit’s approach is inconsistent with other circuits, even though it is fully consistent with this Court. The cases he cites, however, do not support his claim. In *Garcia v. Long*, 808 F.3d 771 (9th Cir. 2015), for example, the court explained that “[u]nder AEDPA we accord deference to a state court’s harmlessness determination.” *Id.* at 781. The court then concluded that the state court’s harmless error determination was not a “reasonable application of *Chapman*.” *Id.* at 784.

Similarly, in *Jensen v. Clements*, 800 F.3d 892 (7th Cir. 2015), the circuit court addressed Jensen’s claim “that the Wisconsin court’s finding that the error was harmless beyond a reasonable doubt was not just wrong, but also unreasonable.” *Id.* at 902. The court concluded that the claim “satisfies the AEDPA standard of an unreasonable application of the *Chapman* harmless error standard.” *Id.* at 908. And in *McCarley v. Kelly*, 801 F.3d 652 (6th Cir.

2015), the circuit court simply quoted *Ayala* for the proposition that “the *Brecht* test subsumes the limitations imposed by AEDPA.” *Id.* at 665.

Once again, Johnson fails to explain how these cases are in conflict with the decision below, beyond the fact that the petitioners in those particular cases happened to receive relief while Johnson did not. But that does not constitute a circuit split warranting this Court’s review.

C. The Third Circuit Correctly Held that the State Court Harmless Error Determination Was Not Unreasonable.

Stripped of his untenable efforts to create any legal issues of general import, Johnson is left with a fact-based claim of error review. In essence, he argues that, because the eyewitnesses were (at the time) prostitutes and drug users, they should not have been believed, and therefore no fairminded jurist could possibly find harmless error. And yet every judge in every court that has reviewed this case has done just that. The court below was thorough in explaining why:

the Superior Court concluded that the introduction of Slaughter’s statement was harmless because it “was merely cumulative of the testimony provided by Bowens and Williams.” In so holding, it recounted Bowens’s and Williams’s identifications, their impeachment, and some of the factors that rehabilitated their credibility, including that both eyewitnesses had known Johnson for years, that both provided consistent identifications at the preliminary hearings, and were “unwavering in their identifications” during “vigorous cross-examination”

We begin by noting that the jury heard rehabilitation testimony that bolstered Bowens’s and Williams’s credibility. It is true that Bowens—exhausted, and in tears—admitted to some doubt as to her identification. But despite this, Bowens affirmed on redirect that she had been telling the truth at this trial, at the

previous trial, at the preliminary hearing, and when she gave her statement to the police. In fact, the jury actually heard several portions of these prior consistent identifications. And, unlike Bowens, Williams expressed no doubt whatsoever during cross-examination. Finally, as the Superior Court notes, Bowens and Williams had known Slaughter and Johnson for over five years, making it more likely that the jury could accept their identifications as accurate.

Bowens also responded specifically to charges of bias and fabrication by explaining that she overcame her earlier hesitancy to give a statement at the urging of her family, who believed she was in danger and needed help. Further, on redirect examination, Bowens repeatedly testified that she feared for her life and that she worried about reprisals. The jury also heard that Bowens and Williams needed to be relocated. In short, while “[these] reasons could easily be disbelieved,” the jury, which observed both witnesses throughout their testimony, could have, by the same token, determined that both were in fact more credible given their willingness to testify in the face of these fears. In light of this rehabilitative testimony, we cannot say that the Superior Court’s determination that Slaughter’s statement was harmless “was so lacking in justification” that we should refuse to give it AEDPA deference. *Harrington*, 562 U.S. at 103.

Johnson argues that the prosecutor’s attempt to introduce Slaughter’s statement made it the “central focus” of the trial, and, as a convicted co-defendant, Slaughter’s refusal to testify on self-incrimination grounds amplified the statement’s effect.

Although it is difficult to ascertain the exact effect this episode had on the verdict, we believe that certain aspects of Slaughter’s statement may have lessened the effect of the statement. Slaughter not only denied in front of the jury that he committed the murder, but also explained that he gave the statement implicating Johnson in the belief that it would cause Johnson not to go to trial. So while the corroborative aspects of Slaughter’s statement might have had some impact on the jury’s verdict, we cannot be certain that it had as damaging an effect as we typically find when a nontestifying co-defendant’s statement is admitted, unrepudiated and unchallenged. *Cf. Adamson v. Cathel*, 633 F.3d 248, 259–61 (3d Cir. 2011); *Vazquez v. Wilson*, 550 F.3d 270, 283 (3d Cir. 2008). Similarly, while Confrontation Clause errors such as these present a risk of creating guilt by

association, Slaughter blunted those inferences by denying Johnson's guilt and even his own. Taken together with Bowens's and Williams's consistent eyewitness testimony and the forensic evidence, Johnson has not shown "more than a 'reasonable possibility'" that the statement itself was harmful. *Ayala*, 135 S. Ct at 2198 (quoting *Brecht*, 507 U.S. at 637).

In sum, we do not wish to diminish the importance of the right to confront witnesses, but because Slaughter's statement was cumulative of Bowens's and Williams's largely consistent identifications, the Pennsylvania Superior Court did not act unreasonably in concluding that the error was harmless. Therefore, we conclude that Johnson "necessarily cannot satisfy" the *Brecht* requirement of showing that he was "actually prejudiced" by the state court's error. *Ayala*, 135 S.Ct. at 2199. Accordingly, we will affirm the judgment of the District Court on this aspect of Johnson's appeal.

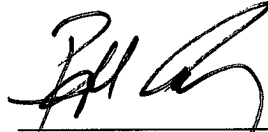
Johnson, 850 F.3d at 134-37 (internal citations omitted).

Ayala cautions that the "role of a federal habeas court is to guard against extreme malfunctions in the state criminal justice systems, not to apply de novo review of factual findings and substitute its own opinions for the determinations made on the scene by the trial judge." *Ayala*, at 2202 (citing *Richter*, 562 U.S. at 102-03) (internal quotations omitted). But that is exactly what Johnson is urging this Court to do. This Court should reject Johnson's invitation to second-guess the state and lower federal courts. The petition should be denied.

CONCLUSION

For the foregoing reasons, the Commonwealth of Pennsylvania respectfully requests that this Court deny the Petition for Writ of Certiorari.

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