No. 22-488

IN THE

Supreme Court of the United States

DARRELL HEMPHILL,

Petitioner,

v.

NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the New York Court of Appeals correctly applied the well settled legal framework announced in *Chapman v. California*, 386 U.S. 18 (1967), in determining that, under the circumstances of this case, there was no reasonable possibility that an erroneously admitted out of court statement by a third party contributed to petitioner's conviction and, therefore, that the error was harmless beyond a reasonable doubt.

TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

Cases

Cited Authorities

Page

Page

Page

Page

Statutes and Other Authorities

BRIEF IN OPPOSITION

The State of New York submits this brief in opposition to the petition for a writ of certiorari.

JURISDICTION

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

Petitioner was tried and convicted of murder for firing the nine-millimeter bullet that killed two-year-old David Pacheco, Jr. ("David") on Easter Sunday 2006. At trial, the court permitted the People to elicit a redacted and very brief plea allocution by a non-testifying third party and alternative suspect—Nicholas Morris. In his allocution, Morris mentioned only his own conduct—that he had possessed a .357 magnum at the shooting scene.

This Court ruled that the admission of the plea allocution was error and remanded for further proceedings. *Hemphill v. New York*, 142 S.Ct. 681, 694 n.5 (2022). On remand, the New York Court of Appeals held that the error was harmless beyond a reasonable doubt. Petitioner now contests that finding.

The state court's harmless error finding did not offend the Constitution. Instead, that finding was a straightforward application of this Court's settled jurisprudence. It warrants no further review.

Morris's allocution did not mention the shooting. It did not inculpate petitioner. And it was entirely cumulative of the testimony of petitioner's accomplice—his cousin, Ronald Gilliam—who was fully cross-examined at trial. Despite their kinship, Gilliam unequivocally identified petitioner as the shooter and provided a detailed account of the shooting. DNA evidence independently corroborated Gilliam's account, as did the testimony of several other witnesses, including petitioner's own grandmother. Furthermore, after trying to frame Morris, petitioner fled to North Carolina where he lived under an alias, evincing his consciousness of guilt.

Thus, as the state court found, there was "no reasonable possibility" that the wrongly admitted plea allocution "might have contributed" to petitioner's conviction. Pet. App. 4a. The error was "harmless beyond a reasonable doubt" under *Chapman v. California*, 386 U.S. 18 (1967). *Id.* at 5a.

A. Factual Background[1]

The fatal 2006 Easter shooting was the culmination of a street fight between five members of a Hispanic family and two black men: petitioner and Gilliam (a/k/a "Burger"). They were later joined by Gilliam's friend, Nicholas Morris. The dispute started with a verbal exchange, which escalated into a physical altercation. After the fisticuffs, one of the black men left the scene and returned with a nine-millimeter pistol. He fired five shots

1. A more detailed recitation of the facts and trial evidence is contained in New York's Respondent's Brief *Hemphill v. New York*, 142 S. Ct. 681 (2022) (No. 20-637) ("Resp. Br.").

at one of the Hispanic men but missed the intended target. Instead, a bullet fatally struck two-year-old David as he sat in the backseat of his mother's minivan. Eyewitnesses said the shooter wore a blue sweater. Resp. Br. 2-3.

The police investigation initially focused on Morris. A nine-millimeter cartridge and three .357 caliber cartridges were recovered from his apartment, and Morris's hands were bruised. After three witnesses identified Morris in a lineup, he was arrested and charged with murder. As the investigation continued and questions arose about Morris's culpability, however, Morris consented to have his DNA compared to DNA found on a blue sweater that the police had recovered from Gilliam's apartment. That testing established that the DNA on the sweater did not come from Morris. Resp. Br. 7-9.

In April 2008, the trial against Morris commenced. Following opening statements, the prosecutor consented to a mistrial and agreed to reinvestigate the case for several reasons: the sweater DNA did not match Morris; the nine-millimeter cartridge that police had recovered from Morris's apartment did not match the brand of nine-millimeter bullets used in the shooting; Morris did not match the description of the shooter; the lineup was flawed; and Gilliam had called Morris—who lived half a mile away—on Morris's home phone moments after the initial altercation. The case was reinvestigated, and Morris voluntarily spoke with prosecutors. Resp. Br. 9.

On May 29, 2008, the prosecutor dismissed the murder charge against Morris. Instead, Morris pleaded guilty to a felony for possessing a .357 caliber firearm at the time of the shooting. Resp. Br. 9.

Meanwhile, petitioner was living in North Carolina under an assumed name. Police tracked him down and, pursuant to a court order, collected a DNA sample. Testing revealed that petitioner's DNA matched the DNA recovered from the blue sweater. Petitioner was charged with murder. His trial began in 2015, more than nine years after David was killed. Resp. Br. 3, 6.

B. Procedural Background

1. The Trial

At trial, the jurors heard testimony from 29 witnesses, including petitioner's cousin Ronnell Gilliam, neutral eyewitnesses, experts, police officers, and petitioner's friends and family members. Pet. App. 15a. Gilliam testified that petitioner—and not Morris—was the person who shot David. Petitioner presented a third-party culpability defense implicating Morris as the shooter. In support of that defense, defense counsel argued, improperly, that the jurors should draw conclusions about Morris's involvement based, in part, on what the police and prosecutors initially believed when they pursued murder charges against him. Resp. Br. 10-13.

As a result, the court permitted the prosecutor to elicit a redacted version of Morris's brief plea allocution, in which Morris mentioned only his own conduct—that he had possessed a .357 magnum on the date and time in question. The allocution did not mention the shooting or anyone else's conduct. Resp. Br. 12-13. Moreover, the allocution was entirely cumulative to Gilliam's trial testimony. Gilliam was thoroughly cross-examined, and his account was wholly corroborated. Pet. App. 2a-3a.

On December 7, 2015, the jury convicted petitioner of second-degree murder. Resp. Br. 13.

2. The Appeal

On appeal, petitioner argued, among other things, that the proof was legally insufficient, that the verdict was against the weight of the evidence, and that the admission of Morris's allocution violated petitioner's Sixth Amendment right to confrontation. Supp. App. to Br. in Opp. SA002-174, *Hemphill v. New York*, 142 S. Ct. 681 (2022) (No. 20-637).

On June 11, 2019, the New York Appellate Division, First Department, affirmed. It found that the verdict was "supported by legally sufficient evidence and was not against the weight of the evidence" and that admission of the plea allocution was proper. Pet. App. 18a. In rejecting petitioner's challenges to the strength of the proof, the court found that "the People proved, through their witnesses and forensic evidence, that [petitioner] was correctly identified as the shooter, the only issue at trial." *Id.* at 18a-19a. The court marshaled the evidence of petitioner's guilt including the eyewitness descriptions, the DNA evidence, and petitioner's post-shooting conduct, which the court described as "overwhelming evidence demonstrating [petitioner's] consciousness of guilt." *Id.* The court rejected petitioner's contention that Gilliam's accomplice testimony was inherently unreliable. *Id.* at 20a-21a. A single dissenting judge opined that although the evidence was legally sufficient, the verdict was against the weight of the evidence under state law. In that judge's view, the evidence had not proven petitioner's identity as the shooter beyond a reasonable doubt. The dissenting

judge concluded, alternatively, that petitioner was entitled to a new trial based on an unrelated claim not at issue here. *Id.* at. 27a-33a.

The New York Court of Appeals affirmed. Significantly, the Court ruled that the admission of Morris's plea allocution was a proper exercise of discretion. Pet. App. 6a-8a. A single judge dissented on an issue not raised here. *Id.* at 8a-12a.

This Court granted certiorari and, on January 20, 2022, reversed. *Hemphill v. New York*, 142 S. Ct. 681 (2022). It held that the trial court's admission of Morris's plea allocution violated defendant's Sixth Amendment right to confrontation. This Court remanded the case to the New York Court of Appeals for further proceedings not inconsistent with its opinion.

On July 21, 2022, on remand, the New York Court of Appeals unanimously affirmed petitioner's conviction. Applying the standard articulated in *Chapman v. California*, 386 U.S. 18 (1967), the court found "no reasonable possibility" that the erroneously admitted plea allocution "might have contributed" to petitioner's conviction and, that therefore, the error was harmless beyond a reasonable doubt. Pet. App. 1a-5a.

SUMMARY OF ARGUMENT

Petitioner seeks review of an unremarkable decision by the New York Court of Appeals applying *Chapman*'s clear and settled harmless error standard. Nothing about the state court's ruling warrants Supreme Court intervention. The state court appropriately found that the

erroneous admission of Morris's brief plea allocution was harmless beyond a reasonable doubt. Nor does this case present a novel or unsettled issue that demands resolution by this Court.

First, the redacted plea allocution was extremely limited in scope—it did not mention the shooting or petitioner's conduct. And it was entirely cumulative of other evidence. Therefore, weighed against all the other the incriminating proof, there is no reasonable possibility that the third party's statement about only his own conduct contributed to the petitioner's conviction. *See* Pet. App. 1a-5a.

Second, the *Chapman* standard is well settled, clearly articulated, and easy to apply. Significantly, petitioner points to no conflict among the circuit or state courts about what *Chapman* means or how it is to be applied. And although one amicus alleges that there is such a conflict, that is incorrect. Constitutional harmless error review is familiar to courts. While an errant court might conceivably apply an incorrect standard, that alone does not warrant a "fresh" look at harmless error jurisprudence or suggest that review of this matter will meaningfully impact future determinations.

Third, this case is a poor vehicle by which to review the *Chapman* standard. New York's highest court fully embraced and applied that standard. In a thoughtful decision addressing petitioner's express attacks on the strength of the evidence, the state court reviewed the entire trial record, and it appropriately considered both the impact of the wrongly admitted evidence *and* the strength of the properly admitted proof of guilt.

After undertaking this comprehensive review, the court correctly determined that the very brief, very limited plea allocution—which did not reference petitioner, did not address petitioner's conduct, and did not incriminate petitioner—could not have impacted the jury's verdict.

Petitioner believes the state court should have reached a different outcome. That, however, is not a valid reason to review this case. Nonetheless, this Court can rest assured that the state court gave the erroneously admitted evidence its proper weight and reached a just result. Its fact-intensive determination is fully supported by the record.

ARGUMENT

I. THE ADMISSION OF A SNIPPET OF A THIRD PARTY'S PLEA ALLOCUTION THAT DID NOT REFERENCE PETITIONER OR IMPLICATE HIM IN ANY CRIME WAS HARMLESS BEYOND A REASONABLE DOUBT.

A. The Test to Determine Whether a Constitutional Trial Error Is Harmless.

There is no dispute that the admission of an out-of-court statement by a non-testifying third party or accomplice in violation of the Confrontation Clause can be harmless. *Lilly v. Virginia*, 527 U.S. 116, 140 (1999); *Cruz v. New York*, 481 U.S. 186, 194 (1987); *Lee v. Illinois*, 476 U.S. 530, 547 (1986); *Brown v. United States*, 411 U.S. 223, 231-32 (1973); *Schneble v. Florida*, 405 U.S. 427, 430 (1972); *Harrington v. California*, 395 U.S. 250, 251 (1969); *accord Delaware v. Van Arsdall,* 475 U.S. 673, 684

(1986) (restriction on a defendant's right to cross-examine a witness for bias in violation of the Sixth Amendment Confrontation Clause was harmless). Accordingly, the constitutional error that occurred in this case—the erroneous admission of a small portion of a third party's plea allocution—is subject to harmless error review.

The test for whether a constitutional trial error is harmless is plainly stated: "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman,* 386 U.S. at 24; *accord Arizona v. Fulminante*, 499 U.S. 279, 295 (1991); *Harrington*, 395 U.S. at 251. In making this determination, an appellate court conducts a *de novo* review of the trial record. *See Fulminante*, 499 U.S. at 295-96; *Van Arsdall,* 475 U.S. at 681; *United States v. Hastings*, 461 U.S. 499, 510 (1983); *see also Yates v. Evatt*, 500 U.S. 391, 403-05 (1991).

A court may not base its determination solely on the strength of the evidence that remains after excising the erroneously admitted evidence. Rather, the government must prove "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman,* 386 U.S. at 24; *see also Yates* 500 U.S. at 403. That is, an error is harmless if there exists "no reasonable possibility" that it contributed to the verdict. *Chapman,* 386 U.S. at 24; *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963).

B. There Is No Reasonable Possibility That the Snippet of a Plea Allocution, Which Did not Inculpate Petitioner and Was Wholly Cumulative of Other Evidence, Contributed to the Verdict.

Petitioner draws much attention to the prosecutor's and trial court's remarks about the *potential* value of Morris's plea allocution. *See* Pet. 14-15. But at trial, petitioner argued that the "evidence concerning Morris's possession of a .357 is irrelevant" and "not probative of anything." "[I]t seems to be entirely irrelevant whether or not [Morris] says that he possessed the .357." Joint App. 105-07, *Hemphill v. New York*, 142 S. Ct. 681 (2022) (No. 20-637) ("JA."). Petitioner's position below is telling.

Of course, the significance of the allocution must be assessed in context of the evidence the jurors *actually* heard—and not based on what the parties or the trial court forecasted. Here, the New York Court of Appeals reviewed the record and correctly determined that—as petitioner argued at trial—Morris's plea admission had little or no probative value on the question of petitioner's guilt.

In his plea statement, Morris mentioned only his own conduct and spoke of only a single act: at the time and place of the shooting, he possessed a loaded .357 firearm. JA.207-09. Morris did not refer to the shooting, the earlier altercation, or any other events of the day. Morris did not mention anyone else's conduct or even place anyone else was at the scene of the shooting.

Consequently, as petitioner seems to acknowledge (Pet. 15), Morris's brief statement about his own conduct did not tend to incriminate petitioner. Morris's admission that he possessed a .357 did not suggest anything about anyone else's involvement in the shooting. It was not evidence that petitioner was guilty of any crime, much less of killing the two-year-old victim. Even when "linked with [other] evidence," Morris's statement did not incriminate petitioner as the shooter. *See Richardson v. Marsh*, 481 U.S. 200, 207-08 (1987).

Furthermore, Morris's statement that he possessed a .357 was cumulative. First and foremost, Gilliam testified that Morris had a .357. Tr.980-82. The allocution, therefore, did not provide any new information to the jury.

Petitioner nevertheless asserts that the allocution could not have been harmless because it corroborated Gilliam's account of the shooting (Pet. 17). Yet, as explained below, a mountain of evidence corroborated Gilliam's testimony. And as for Morris's possession of a .357, there was undisputed proof that, within hours of the shooting, police searched Morris's apartment and found three rounds of .357 ammunition on the nightstand next to Morris's bed. JA.123-24. That evidence independently corroborated Gilliam's account that Morris possessed a .357.

In short, Morris's plea allocution was cumulative evidence on an unimportant point. It could not have made a difference in the jury's verdict. *See Harrington*, 395 U.S. at 253-54 (confessions of two non-testifying co-defendants corroborating that defendant was at the crime scene were harmless beyond a reasonable doubt based on

the overwhelming proof of guilt and the relatively minor impact of the statements).

Schneble v. Florida, 405 U.S. 427 (1972) is instructive. There, the petitioner confessed that he had strangled the victim before the accomplice shot and killed her. The State also admitted an out-of-court statement by a non-testifying accomplice that "tended to corroborate certain details of petitioner's confession." *Id.* at 431. Although the admission of the accomplice's statement was a *Bruton*[2] error, that error was nonetheless harmless beyond a reasonable doubt. *Id.* at 432.

In *Schneble*, this Court observed that, without the petitioner's confession, "the State's case against [him] was virtually non-existent," and that the remaining evidence was inadequate to support a conviction for murder or any other crime. *Id.* at 431. Nevertheless, the admission of the accomplice's statement which "tended to corroborate certain details" of petitioner's confession was harmless because the details of the confession were themselves internally consistent and corroborated by other objective evidence. *Id.* Here, too, as demonstrated below, the critical details of Gilliam's account were internally consistent and corroborated by other objective, independent evidence.

Arizona v. Fulminante, 499 U.S. 279 (1991) lends no support to petitioner's position (Pet. 16) and, in fact, highlights an important distinction. *Fulminante* addressed the harmlessness of a coerced confession. A defendant's own confession, however, "is like no other evidence" and "is probably the most probative and damaging evidence

2. *Bruton v. U.S.*, 391 U.S. 123 (1968).

that can be admitted against him." *Id.* at 296 (quoting *Bruton*, 391 U.S. at 139-40). Morris's plea allocution—limited in scope as it was—did not have the same impact as Fulminante's full confession. As explained, Morris's admission that he possessed a different gun than the one used to shoot the victim had no bearing on petitioner's guilt. Fulminante's wrongly admitted confession, by contrast, was comprehensive in scope, corroborated many details of the second confession, and was the "*only* corroborating evidence" of Fulminante's motive and state of mind. 499 U.S. at 299 (emphasis in original).

Despite all this, petitioner posits that Morris's plea allocution must have been important because the prosecutor sought its admission. Pet. 14. But early in the trial, when the prosecutor raised the issue, no one could have known whether the allocution would prove important, cumulative, or irrelevant. Neither the court nor the prosecutor could have known, for example, whether Gilliam—petitioner's cousin—would give the jurors the full account of what had occurred. That was a particular concern here because petitioner had a history of trying to manipulate witnesses, including Gilliam. Petitioner's sister-in-law, too, who initially was cooperative, later became reluctant and was deemed hostile. Tr.417-21.

What matters is that, in the end, Morris's allocution proved unimportant. As explained below, eyewitness observations of the shooter's appearance and attire, coupled with DNA evidence, fully corroborated Gilliam's testimony that petitioner was the shooter—and amounted to overwhelming proof of guilt. By comparison, Morris's plea statement was cumulative and inconsequential.

That is why, as the state court observed, the prosecutor's reliance on the allocution was, in the end, "exceedingly minimal." Pet. App. 4a. Indeed, on summation, the prosecutor's mention of it amounted to only a few transcript lines. The prosecutor told the jurors only that Morris admitted to possessing a .357 and took responsibility for the crime he committed. JA.356.

For these reasons, there is no reasonable possibility that the plea allocution contributed to the verdict.

C. There Was Overwhelming Proof That Petitioner, Not the Third Party, Was the Shooter.

At trial, petitioner maintained that the shooter was Morris and, to support that contention, relied "primarily on Morris's initial prosecution for the crime." Pet. App. 2a. What the government *believed* when it initially charged Morris with murder, however, was not *evidence*. Hence, it was irrelevant to the determination of petitioner's guilt, and it is likewise irrelevant to this Court's harmless error review. Instead, what matters is the trial evidence. And based on the trial evidence, New York's highest court correctly determined that "there was overwhelming evidence that [petitioner], not Morris, was the shooter." *Id.*

Initially, petitioner's cousin Ronnell Gilliam unequivocally testified that petitioner, and not Morris, was the shooter. Tr.979-80. Gilliam explained that after the altercation with the Hispanic family, Gilliam called Morris for help. Gilliam also called petitioner and asked him to return to the scene. Tr.978-79. Within minutes, petitioner returned, exited his girlfriend's car, and, over

Gilliam's protest to "hold up," opened fire just a "few feet" from Gilliam. Tr.979, 997-1000. Morris, by contrast, was just arriving when the bullets began to fly. Tr.1001.

Gilliam also explained what happened to the murder weapon and why the blue sweater ended up in his apartment. After the shooting, Gilliam, petitioner, and Morris retreated to Gilliam's apartment. Morris handed Gilliam a .357 magnum revolver. Petitioner gave Gilliam a nine-millimeter firearm and the sweater he had been wearing that day. Petitioner instructed Gilliam to discard all three items. Tr.980. Gilliam disposed of the two firearms but forgot to dispose of the sweater. Tr.981.

Significantly, Gilliam was uniquely positioned to know the shooter's identity. Gilliam was a key figure in both the altercation and the shooting; he had a ringside seat to the shooting and its aftermath. Gilliam also had longstanding relationships with both petitioner and Morris. Tr.350-51; Tr.987-88. Therefore, there was no possibility of mistaken identity. Gilliam's account of the shooting was direct and compelling proof of petitioner's guilt.

Yet the jurors did not have to rely on Gilliam's account alone, because there was abundant and powerful independent corroborative proof confirming Gilliam's trial testimony. The jury heard from 28 other witnesses, including a host of neutral eyewitnesses, experts, police officers, friends, and other family members. And the witnesses were corroborated by more than 120 exhibits, including photographs, reports, and ballistics evidence.

For example, Gilliam testified that petitioner wore a blue sweater when he shot David, while Morris wore a

black t-shirt. Tr.998, 1051. DNA evidence linked petitioner to the telltale blue sweater, which the police found in Gilliam's apartment mere hours after the shooting. And eight independent eyewitnesses confirmed that the shooter wore a light-blue sweater. Tr.260, 267; Tr.350-51; Tr.442, 447-48, 451; Tr.840, 862-63; Tr.877; Tr.1081; Tr.1092-93; Tr.1160, 1172. Only one described the garment as a blue shirt rather than a sweater but added the significant detail that it had an "alligator" logo. Tr.809.

In fact, petitioner's own grandmother, who went to the police on her own initiative, confirmed that petitioner wore a light blue sweater the day of the shooting. Tr.602-03; Tr.727-28. Thus, there was overwhelming proof that petitioner, and not Morris, was the man in the blue sweater who fired the fatal shot.

One witness, Michelle Gist, knew petitioner, Morris, and Gilliam even before the shooting. Gist saw the initial altercation and the moments after the shooting. She corroborated Gilliam's account of those events. Gist also identified petitioner as the assailant who wore a light blue sweater. Tr.351-52. Thus, although Gist did not see the shooting and could not herself identify the shooter, she confirmed that petitioner wore the blue sweater, cementing the proof of his guilt.

The manner in which the blue sweater was recovered also confirmed that it was the garment worn by the shooter. After Gilliam disposed of the guns, he called his apartment and asked his brother to get rid of the sweater. Tr.984 Police who were at the apartment overheard the call. Tr.667; Tr.1494. Detective Ronald Jimick was directed to a closet and found a light blue, cable-knit sweater with an alligator logo that smelled of burnt

gunpowder. Tr.663-64, 667, 741; Exhibit 84 [photograph of sweater]).[3] Notably, Gilliam and his brother led the police to the sweater at a time when Gilliam was still helping petitioner avoid detection, before Gilliam decided to cooperate with authorities.

The blue sweater matched the description that the witnesses had provided, right down to the alligator logo and vertical cable-knitting. Tr.1081 ("knitted"); Tr.809 ("alligator logo"); Tr.1160 ("embroider[y] going down"). Subsequent testing revealed that DNA evidence recovered from inside the collar matched petitioner's DNA. Tr.524; Tr.567.

In addition to the incriminating sweater, the many eyewitness descriptions of the shooter matched petitioner and did not resemble Gilliam or Morris. The witnesses described the shooter as taller and thinner than the other two men. Tr.257-60; Tr.441-42; Tr.803-10; Tr.839-40; Tr.875-77. The shooter, witnesses agreed, had a tattoo on his arm. Members of the Hispanic family noticed the tattoo during the physical altercation. Tr.270 (describing tattoo on forearm); Tr.808, 823 (same); Tr.862 (witness describing he could see tattoo because "sweater was lift up"). All the witnesses agreed that Gilliam, at 400 pounds, was not the shooter. Additionally, Morris, who weighed almost 240 pounds, had a prominent scar down the right side of his face and no tattoo on either arm. Accordingly, Morris did not fit the descriptions of the shooter. *See* Pet. App. 27a-28a (repeated reference to shooter being "slim").

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3. Gunshot residue tests were inconclusive. Tr.667, 741; Tr.1102-10, 1113-14, 1117.

Petitioner, by contrast, matched the descriptions: a tall, thin, African American man with a tattoo on his arm. Tr.421-26 (petitioner's sister-in-law evasively describing petitioner's tattoo as somewhere on arm); Tr.435 (petitioner displaying tattoo on upper right arm); Tr.704-05, 720, 752 (Det. Jimick describing petitioner's pedigree information, including tattoo); Tr.988 (Gilliam describing tattoo on petitioner's upper right arm).

Although no trial witness identified the "particular sweater" found in Gilliam's apartment as the one worn by the shooter (Pet. 23), the evidence supported no other reasonable conclusion. Notably, too, the trial occurred almost ten years after the shooting. Thus, any witness would have been hard-pressed to identify the sweater recovered from Gilliam's apartment as the very same one that the shooter wore. Moreover, the only witness who was asked if he recognized the sweater testified that the sweater found in Gilliam's apartment "look[ed] similar" to the one worn by the shooter (Tr.283-84)—further confirming that the sweater containing petitioner's DNA was the genuine article.

Petitioner contends that the state court's analysis of the sweater evidence is "out of joint," because petitioner's tattoo was on his upper right shoulder, and if he had worn the sweater as the witnesses described, the sleeves would have covered his tattoo. *See* Pet. 23-24. But at least one witness recalled that the assailant's sleeves were rolled up. Tr.862. Moreover, petitioner's sister-in-law, a reluctant witness, confirmed that in 2006, petitioner had a tattoo with numbers on his arm, similar to the tattoo the witnesses described. Tr.421-26. The sister-in-law, however, did not know if, at the time of trial, petitioner

still had that same tattoo. Tr.426. By then, more than nine years after the shooting, petitioner could have removed a tattoo from his forearm, leaving only the one on his upper arm. In any event, any discrepancy about the location of the tattoo on his arm in no way diminishes that the witnesses saw a tattoo during the scuffle and that only petitioner, and not Morris, had one.

Furthermore, as noted, the police recovered three .357 caliber cartridges (JA.123-24) from Morris's apartment which independently buttressed Gilliam's account that Morris had a .357 magnum on the night of the shooting. This gave the jury yet another reason to credit Gilliam's testimony.

Additionally, as the Appellate Division recognized, the proof included "overwhelming evidence demonstrating petitioner's consciousness of guilt" Pet. App. 19a. Just after the shooting, petitioner fled to North Carolina where he lived under an assumed name. He also tried to frame Morris—cajoling his cousin to implicate Morris in the crime.

While evidence of flight may sometimes be ambiguous (Pet. 20-21), here, the exceptional quantity and quality of proof from eyewitness, detectives, and a private attorney, detailed petitioner's extraordinary efforts to avoid prosecution.

First, on the night of the shooting, petitioner left for North Carolina with his girlfriend and one of his children. Tr.984-85, 1002-03. Once there, he moved to a different hotel or home each night. At one point, when petitioner thought a friend had implicated him to the police, he

relocated to a different hotel in the middle of the night. Tr.1006. Notably, petitioner owned a music studio in New York (Tr.1447), and his girlfriend had worked as a paramedic in New York for nearly 20 years. Tr.784-85. By relocating such a distance, they forfeited established positions despite a lack of job prospects. Eventually, petitioner leased a residence under the false name of "Darrel Davis" Tr.940-42. And yet, despite all these efforts, detectives ultimately tracked petitioner down, and he was extradited from North Carolina to New York. Tr.524; Tr.534-35; Tr.737.

Second, petitioner tried to frame Morris. Petitioner falsely told Gilliam that Morris had implicated Gilliam in the shooting—and, by doing so, convinced Gilliam to falsely implicate Morris. Petitioner also hired an attorney to represent Gilliam, at least for as long as Gilliam did what petitioner wanted. Tr.1008-09.

Third, Gilliam candidly testified at trial that, initially, he lied to the police about Morris's role because petitioner had misled him and because he was scared Tr.1012-13. Later, when Gilliam learned that Morris had never implicated him as the shooter, Gilliam returned to the police with petitioner's brother and told them the truth: that petitioner, not Morris, was the shooter. Tr.1013-18.

Petitioner asks this Court, in conducting harmless error review, to disregard this overwhelming proof of guilt. Instead, petitioner posits that because he "plausibly claim[ed]" that Morris "committed the offense with which he is charged," the admission of a statement suggesting Morris did not commit the crime is not harmless. Pet. 12-13. This analysis, however, does not accord with this Court's precedents.

In fact, as petitioner acknowledges (Pet. 12), the admission of Morris's plea allocution is harmless if the there is no "reasonable possibility" that it "might have contributed to the conviction." *Chapman*, 286 U.S. at 24. And, of course, to determine whether the error could reasonably have affected the verdict, a reviewing court must weigh the strength of the trial proof against the impact of the challenged evidence. That petitioner's guilt was overwhelmingly proven—by eyewitness testimony, DNA evidence, and his precipitous flight—is critical to that analysis, as New York's high court recognized.

Importantly too, the plea allocution was cumulative of Gilliam's testimony.

Petitioner argues that the allocution was significant because "substantial evidence" supported his third-party culpability defense, and the allocution undermined the defense by "suggesting" that Morris "did not commit the crime." Pet. 12-13. The state court, however, reasonably rejected these claims.

Initially, as the New York Court of Appeals recognized, petitioner's argument that Morris was the shooter was *not* supported by "substantial evidence" Pet. 13. Indeed, powerful proof—independent of Morris's redacted plea allocution—disproved petitioner's claim. For example, the witnesses described the shooter as "slim." Pet. App. 27a-28a. Morris, at 240 pounds, was anything but. No one described the shooter as having a prominent scar, yet Morris had one. Tr.1629 (prosecutor's summation describing Morris's arrest photo in evidence).

Eyewitnesses described a tattoo on the shooter's arm; yet Morris had no tattoos at the time. Indeed, Morris displayed his tattoo-less arms to news reporters the night of the shooting Tr.681-82; Exhibit 101 (News 12 broadcast); Exhibit 104 (photos). By contrast, petitioner had a tattoo on his arm that resembled the one described.

Moreover, as discussed, the blue sweater—which was linked to the shooting and recovered from Gilliam's apartment shortly after the crime—contained petitioner's DNA, not Morris's. Tr.555, 559, 566-67. This was a key factor that led the prosecutors to reinvestigate the case. Notably, too, unlike petitioner, Morris neither fled nor attempted to manipulate a witness. Instead, Morris surrendered to police the day after the shooting, on camera. Tr.681-82; Exhibit 101.

The evidence that led the police initially to suspect Morris proved, in retrospect, to be weak. *Firs*t, there was no evidence linking the single round of nine-millimeter ammunition recovered from Morris's apartment to the murder. And, of course, police also found three .357 bullets at Morris's residence, which supported Gilliam's account that Morris had a .357.

Second, the bruises on Morris's knuckles hours after the shooting (Tr.721, 752) could have come from a different episode and did not bear on whether Morris had fired the murder weapon.

Third, the lineup identifications of Morris by three members of the Hispanic family (Santiago, Gonzalez, and Vargas), were, upon reflection, unreliable. Tr.684, 695, 697. For one thing, they were cross-racial identifications made

by strangers who had never before seen the shooter. *See People* v. *Boone*, 91 N.E.3d 1194, 1197 (N.Y. 2017) ("Social scientists have found that the likelihood of misidentification is higher when an identification is cross-racial"); *see also* Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 Psychol., Pub. Pol'y, & L. 3, 15 (2001). Additionally, witnesses observed the shooting during a fast-paced, chaotic, harrowing incident. Beyond that, the shooter's face was partially obscured by a brimmed hat. Tr.445-48; Tr.1028; Tr.1094-95. Accordingly, the ability of the witnesses to make a reliable identification was open to question.

Moreover, the lineup's composition contributed to the mistaken identifications. The participants were seated. Morris's size and hair were masked by garbage bags and a hat that covered all but his face. Tr.696. Thus, the witnesses who viewed the lineup could not evaluate Morris's body-type—which was far different from the shooter's.

Significantly, two other witnesses did not identify Morris as the shooter. Garcia viewed the lineup but did not make an identification. Tr.697; Tr.819. And Baez, who viewed a photo array, stated only that Morris "looks like the shooter." Tr.781.

Additionally, the lineup identifications were tainted because the witnesses had prior exposure to Morris as a suspect. Two witnesses—Gonzalez and Santiago—saw Morris on TV the night before the lineup. In fact, at the time of the broadcast, both witnesses noticed that Morris looked heavier than the shooter (Tr.461, 466-67; Tr.844)—casting additional doubt on their lineup identifications.

A third family member, Castro, also saw the broadcast and thought that Morris was not the shooter. Tr.280-83. And a fourth, Vargas, saw a photograph of Morris and a newspaper article identifying him as the suspect early the next morning before he viewed the lineup. Tr.885-86. Ultimately, as the prosecutors concluded upon reinvestigation, the three witnesses who identified Morris were—understandably—mistaken given the circumstances surrounding the identifications.

Under these circumstances—and given the compelling evidence that petitioner, not Morris, was the shooter—the initial lineup identifications of Morris cannot be viewed as "substantial" evidence supporting a third-party culpability defense. Pet. 13.

Notably, too, the state court was right to conclude that Morris's allocution was harmless for another reason: it "neither exculpated Morris nor inculpated [petitioner]." Pet. App. 4a. First, as explained above, and as petitioner strenuously argued at trial, the allocution did not implicate him. In fact, it said nothing about who fired the fatal shot.

Nor did the allocution exculpate Morris. *See* Pet. 15. True, Morris pled guilty to possessing a gun that was not the murder weapon. But Morris did not deny responsibility for the shooting; he simply did not address it at all. Thus, the allocution said nothing about whether Morris also had a nine-millimeter gun or fired the fatal shot. Indeed, the jurors learned that hours after the shooting, police recovered a nine-millimeter bullet from the nightstand next to Morris's bed. JA.123-24. And, at petitioner's request, the jurors did not learn that the murder charge against Morris had been dismissed. JA.196, 204-09. This

allowed petitioner to press his third-party culpability defense without interference from the court, even though it was soundly refuted by the evidence.

Likewise, the fact that the prosecutor introduced the plea allocution to rebut petitioner's theory that Morris was the shooter (*see* Pet. 14) does not mean that it affected the jury's verdict. It simply means that the allocution was merely relevant. As discussed, the third-party culpability defense was thoroughly disproved by evidence independent of the allocution, including Gilliam's testimony, the DNA evidence, the shooter's build and tattoos, and petitioner's flight immediately after the crime. Pet. App. 2a-5a. Morris's plea allocution was surplusage: icing on a cake that—in retrospect—would have been better left uniced.

Thus, notwithstanding that Morris's allocution met the extremely low threshold for admissibility—it was merely relevant evidence consonant with Gilliam's testimony that Morris possessed a gun other than the murder weapon (Pet. 12-13, 15-16)—there is no reasonable possibility that without the allocution, the jury would have credited petitioner's tenuous third-party defense.

Additionally, the plea allocution included statements by Morris's attorney insisting that Morris was pleading guilty against his "strong advice" only to get out of jail that same day, as there was not enough evidence to charge Morris with possessing a .357. JA.207. To be sure, for confrontation purposes, these statements were not a substitute for cross-examination. The court admitted them, however, as a counterbalance to the allocution. And indeed, the lawyer's comments minimized the allocution's impact on the verdict.

At the end of the day, petitioner's third-party culpability defense rested primarily on the fact that police and prosecutors initially *believed* that Morris was the shooter. *See* Pet. 2; *see also* Pet. App. 2a. After evaluating the evidence as it developed however, they realized that petitioner, not Morris, was the killer. Hence, petitioner is wrong to assert that he was charged with murder because the prosecution of Morris was "unsuccessful." Pet. 2. Rather, before evidence was presented to a jury, the government—in furtherance of its mandate to pursue justice with integrity—re-evaluated the proof, realized Morris was not the shooter, and dropped the murder charge against Morris, thereby avoiding a wrongful conviction. This was good prosecutorial work. *See* Jon B. Gould, Julia Carrano, Richard A. Leo, & Katie Hail-Jares, *Predicting Erroneous Convictions*, 99 Iowa L. Rev. 471 (Jan. 2014). The state charged petitioner with murder five years later, *after* it obtained the critical DNA results.

Once again, what the authorities initially believed was not *evidence*—and it certainly was not "substantial" evidence supporting a defense. Pet. 13. As discussed, the evidence implicating Morris was, upon closer inspection, flawed, and the evidence of petitioner's guilt was overwhelming. That is why the prosecutors dismissed the murder charge against Morris—and why petitioner was ultimately convicted by a Bronx jury. Moreover, it explains why the admission of the plea allocution was harmless. With or without the allocution, in light of all the evidence presented at trial, no reasonable juror would—or should—have concluded that Morris was the shooter.

Finally, the argument of an amicus that the allocution was not harmless because the state's case hinged on

Gilliam's testimony merits a brief response. According to the amicus, accomplices are "inherently unreliable" and are "incentivized" to give false testimony. Innocence Project et. al, Br. 2, 8-12. The amicus, however, paints with too broad a brush.

To be sure, the testimony of an accomplice—like that of any other witness—should be carefully scrutinized. But while accomplices might sometimes have a motive to "curry favor" with the prosecution, this Court has never described accomplice testimony as inherently unreliable. Indeed, an accomplice—as a participant in the charged crime—is in a position to know details that are unknown to others. This is precisely why prosecutors must sometimes rely on accomplices. An accomplice's account, therefore, "is not to be summarily discarded, but to be judged of by confirming or opposing circumstances as well as by his character and the influences that may invest him." *Valdez v. United States*, 244 U.S. 432, 441 (1917).

In fact, while New York requires corroboration of an accomplice's testimony (N.Y. Crim. Proc. Law § 60.22), the federal constitution does not. *See e.g.*, *United States v. Whitlow*, 815 F.3d 430, 436 (8th Cir. 2016). This is so even when an accomplice testifies pursuant to a cooperation agreement. *Id.*; *accord Valdez*, 244 U.S. at 411 (accomplice testimony should not be discarded even though accomplices might "break[] down and confess[]" because they are "awed by the penalties"). Further, when accomplice testimony is strong or well corroborated, it can render a trial error harmless. *See, e.g., United States v. Terry*, 729 F.2d 1063, 1071 (6th Cir. 1984); *United States v. Bishop*, 492 F.2d 1361, 1365-66 (8th Cir. 1974).

Here, as discussed, Gilliam's testimony was credible and well corroborated. Additionally, he had no motive to "curry favor" with prosecutors by implicating petitioner. After all, the police had no reason to suspect that Gilliam was the shooter. Hence, whether or not he cooperated, Gilliam was never going to face the same consequences as the man who pulled the trigger. In fact, when Gilliam first talked to the police, he had not been charged with a crime.

Additionally, Gilliam gained nothing by recanting his original statement identifying Morris as the shooter. To the contrary, he had much to lose. Gilliam forfeited the services of the lawyer that petitioner had hired for him (Tr.951-54, 961) and exposed himself to potential criminal liability for falsely implicating Morris. Furthermore, although the police had no independent proof linking Gilliam to any gun and had not arrested him (Tr.728-29), Gilliam nonetheless voluntarily went to the police with petitioner's brother and admitted that he had disposed of the murder weapon. Tr.1017-18. Only then was Gilliam arrested and charged. *Id.* Finally, cooperating with the authorities meant that Gilliam became known as a snitch, which in his view, was only slightly better than being known as a pedophile. Tr.1020. In the end, Gilliam owned his missteps and his crimes and, in so doing, proved to be a genuine and compelling witness. The circumstances here, therefore, demonstrate that he was credible.

In sum, the proof of petitioner's guilt was truly overwhelming, and Morris's plea allocution did nothing more than guild the lily. The state court appropriately determined, therefore, that the admission of the allocution was harmless beyond a reasonable doubt, as there was no reasonable possibility of a different verdict.

II. THE *CHAPMAN* TEST IS WELL SETTLED AND STRAIGHTFORWARD.

Review by this Court is also unwarranted because petitioner identifies no novel or unsettled question of law. This is unsurprising, because the *Chapman* rule is well settled, straightforward, and not in dispute.

One amicus alleges that there is a divide among courts about how the *Chapman* harmless error analysis should be applied, asserting that some courts think it suffices to consider only whether the proof was overwhelming, while others consider whether the error likely affected the verdict. Nat'l. Ass'n Crim. Def. Law., Br. 5. But even if there were such a conflict, it would not matter here. As discussed above, the state court properly considered both factors. It assessed the effect of the error on the verdict by considering, as a component of that analysis, the strength of the proof. Thus, this case is a poor vehicle by which to bring clarity to the *Chapman* standard, as any pronouncement would be academic only.

Moreover, no conflict among the lower courts exists. Indeed, to his credit, petitioner does not argue that one does. Instead, petitioner contends that some courts may be misapplying *Chapman*. Pet. 25; *see also* Nat'l. Ass'n for Pub. Def., Br. 3 ("Too often … lower courts invoke *Chapman* only to apply a less demanding standard"). But again, that is a moot point because New York's high court applied the proper standard here.

Indeed, the most petitioner can do is point to the fact that, in assessing harmless error, courts have arrived at different outcomes in different cases. But that reflects

nothing more than the application of the well-established *Chapman* standard to disparate situations. Significantly, this Court has repeatedly denied petitions raising similar allegations of a conflict over *Chapman*'s application. *See Anthony v. Louisiana*, 143 S.Ct. 29 (2022) (No. 21-993); *Pon v. United States*, 142 S.Ct. 482 (2021) (No. 20-1709); *Oliver v. United States*, 138 S.Ct. 57 (2017) (No. 16-8051); *Leaks v. United States,* 576 U.S. 1022 (2015) (No. 14-1077); *Runyon v. United States*, 574 U.S. 813 (2014) (No. 13-254); *Gomez v. United States,* 571 U.S. 1096 (2013) (No. 13-5625); *Demmitt v. United States*, 571 U.S. 952 (2013) (No. 12-10116); *Ford v. United States,* 569 U.S. 1031 (2013) (No. 12-7958); *Acosta-Ruiz v. United States*, 569 U.S. 1031 (2013) (No. 12-6908).[4]

There is, in fact, no legitimate conflict about what *Chapman* means or how it is to be applied. Constitutional harmless error review is familiar. *See United States v. Leonard*, 4 F.4th 1134, 1144 (11th Cir. 2021) ("*Chapman's* test has become routine"); *Hall v. Vasbinder*, 563 F.3d 222, 236 (6th Cir. 2009) (harmless standard of *Chapman* is familiar); *United States v. Brutus*, 505 F.3d 80, 88 (2d Cir. 2007) (same); *Gutierrez v. McGinnis*, 389 F.3d 300, 303 (2d Cir. 2004) (same).

And, this Court has repeatedly reaffirmed *Chapman*'s enduring principles. *See Brown v. Davenport*, 142 S.Ct. 1510, 1518 (2022); *Davis v. Ayala*, 576 U.S. 257, 267 (2015); *Deck v. Missouri*, 544 U.S. 622, 635 (2005); *Neder v.*

4. In *Vasquez v. United States*, 565 U.S. 1057 (2011) (No. 11-199), this Court granted certiorari on a similar question, but then, after oral argument, dismissed the writ as improvidently granted. 566 U.S. 376 (2012). This outcome further supports the conclusion that there is no conflict or confusion requiring resolution by this Court.

United States, 527 U.S. 1, 19 (1999); *Sullivan v. Louisiana,* 508 U.S. 275, 279 (1993); *Yates v. Evatt*, 500 U.S. 391, 402-03 (1991); *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991); *Satterwhite v. Texas,* 486 U.S. 249, 258-59 (1988); *Schneble v. Florida*, 405 U.S. 427, 432 (1972).

The nub of petitioner's complaint—and that of the amicus—seems to be that the state court erred by considering, among other factors, the overall strength of the proof. But as explained, that was appropriate. As this Court has observed, "[i]n some cases the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the codefendant's admission is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error." *Schneble*, 405 U.S. at 430.

Simply put, the strength of the proof is an important component of harmless error analysis. *See Fulminante*, 499 U.S. at 297-300; *Harrington v. California*, 395 U.S. 250, 253-54 (1969) (finding *Bruton* error harmless beyond a reasonable doubt because, among other things, "the case against Harrington was so overwhelming"). Indeed, whether a confrontation error is harmless "depends upon a host of factors," including

> the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, *and, of course, the overall strength of the prosecution's case*.

Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986) (emphasis added).

Petitioner mistakes the court's pointed discussion of the strength of the proof as an indication that it did not adequately assess the impact of Morris's allocution on the verdict. But that is incorrect. After all, to assess the import of wrongly admitted evidence, a reviewing court must necessarily consider the nature and quality of *all* the proof of guilt. That is precisely what the state court did here.

This Court, therefore, need not grapple here with the possibility that *another* court, in *another* case, might not apply the correct standard, even though *Chapman* is well settled. There was no deviation from the *Chapman* standard here, and there is no genuine split of authority for this Court to resolve.

III. NEW YORK COURTS PROPERLY APPLY THE *CHAPMAN* STANDARD.

This case is also a poor vehicle to review any perceived divide among lower courts in applying the *Chapman* standard, because New York's highest court has fully embraced that standard. A Justice of this Court has so stated. In a 2004 opinion by then-Circuit Court Judge Sotomayor, the Second Circuit observed that New York has "incorporated *Chapman* as the standard for reviewing federal constitutional errors for harmlessness." *Gutierrez v. McGinnis*, 389 F.3d 300, 308 (2d Cir. 2004). Indeed, echoing *Chapman*, New York courts have long held that a constitutional error is harmless if there is "no reasonable possibility that the error might have contributed to

defendant's conviction and that it was thus harmless beyond a reasonable doubt." *People v. Crimmins*, 326 N.E.2d 787, 791 (N.Y. 1975).

New York's high court further explained in *Crimmins* that "two discrete considerations" are relevant to harmless error analysis. *Id.* at 793. The first involves an assessment of "the quantum and nature of proof of the defendant's guilt if the error in question were to be wholly excised." *Id.* The second is "the causal effect which it is judged that the particular error may nonetheless have had on the actual verdict." *Id.* Thus, *Crimmins* instructs, even if the quantum and nature of other proof is truly overwhelming, "the error is not harmless under the Federal test if there is a reasonable possibility that the [error] might have contributed to the conviction." *Id.* Accordingly, *Crimmins* adopted the *Chapman* test wholesale. *See also People v. Deverow*, 190 N.E.3d 1161, 1169 (N.Y. 2022); *People v. Hardy*, 824 N.E.2d 953, 957-58 (N.Y. 2005).

Here, in finding the admission of the plea allocution harmless, the New York Court of Appeals cited both *Crimmins* and *Chapman*. Pet. App. 4a-5a. In that regard, the court concluded that "there is no reasonable possibility that the erroneously admitted plea allocution might have contributed to the defendant's conviction." *Id.* (internal quotations and citations omitted). This is, to the word, an appropriate invocation of the *Chapman* standard.

Moreover, as discussed, the state court did not just pay lip service to *Chapman*. It assessed whether the error could have affected the verdict by reviewing the strength of the proof and the impact of the plea allocution on the trial as a whole. Further, the court observed that

"the prosecutor's reliance on the plea [allocution] was exceedingly minimal." Pet. App. 4a.; *see* JA.356. The state court thus reasonably concluded—for all the reasons discussed above—that the error was harmless beyond a reasonable doubt. This was a garden-variety application of *Chapman*—hardly the sort of matter necessitating intervention by this Court.

Significantly, this was not a review for legal sufficiency where the state court evaluated the evidence in the light most favorable to the People. Pet. 11. Rather, it was a *de novo* assessment of the strength of the proof. And that assessment is well supported by the record.

Notably, too, the state court's review of the nature and strength of the proof was directly responsive to petitioner's attacks on the quality and quantity of the evidence. Pet. App. 2a-4a. Considering petitioner's focus in state court on the supposed lack of overwhelming evidence (Pet. Apr. 4, 2022, Rule 500.11 Letter 2-10), it is unfair now to suggest that the court gave this factor undue consideration.

Finally, although a single, dissenting judge in the New York Appellate Division opined that the trial evidence did not prove petitioner's guilt beyond a reasonable doubt (Pet. 27),[5] this solo dissent does not preclude a harmless error finding, as the Court of Appeals unanimously recognized. Nor does the state court's harmless error determination

5. New York law permits judges of the intermediate appellate courts to reweigh the proof, including determinations of credibility, without deferring to the jury's verdict. *People v. Danielson*, 880 N.E.2d 1, 3-4 (N.Y. 2007).

impugn the integrity of this Court's prior decision. Pet. 26-27. On the contrary, on remand from this Court, the New York Court of Appeals was required to assess whether the confrontation error was harmless by conducting a *de novo* review and independently evaluating the weight and impact of the trial evidence. *Fulminante*, 499 U.S. at 295. And here, as demonstrated, the state court made a reasonable harmless error finding that was well supported by the record. *See Van Arsdall*, 475 U.S. at 684 (concluding that "the determination whether the Confrontation Clause error in this case was harmless beyond a reasonable doubt is best left to the [state] Supreme Court").

CONCLUSION

In sum, this case does not present a novel or unsettled question of law that demands resolution. Nor was the state court's decision an unreasonable application of the *Chapman* standard that warrants error correction. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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