No. 11-1094

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL MARTEL,

Petitioner,

v.

RICHARD RAYMOND TUITE,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Pursuant to 18 U.S.C. § 3006A(d)(7) and Rule 39 of this Court, respondent, Richard Raymond Tuite, asks leave to file the attached Brief in Opposition to Petition for Writ of *Certiorari* without prepayment of fees or costs and to proceed *in forma pauperis*. Respondent was represented by counsel appointed pursuant to 18 U.S.C. § 3006A on appeal.

Respectfully submitted,

Dated: April 6, 2012

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MICHAEL MARTEL,

Petitioner,

v.

RICHARD RAYMOND TUITE,

Respondent.

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

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

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QUESTION PRESENTED

In this habeas corpus case, the court of appeals held that a constitutional violation found by the state court did not constitute harmless error under the more forgiving *Brecht v. Abrahamson*, 507 U.S. 619 (1993) standard. At petitioner's urging, the court of appeals also held that, under the standard of review set forth in the Antiterrorism and Effective Death Penalty Act ("AEDPA"), *see* 28 U.S.C. § 2254(d), the state court's application of the *Chapman v. California*, 386 U.S. 18 (1967) harmless beyond a reasonable doubt standard was unreasonable. The question presented is:

Whether, when considering a habeas corpus petition, a federal court must apply AEDPA/*Chapman* review in addition to *Brecht* review in order to find that a constitutional error in a state court trial was not harmless, and whether this case is an appropriate vehicle to decide that question given that the federal court of appeals applied both standards.

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INTRODUCTION

Respondent, Richard Raymond Tuite, respectfully submits this Brief in Opposition to the Petition for a Writ of *Certiorari*. The question presented by petitioner asks whether a federal court entertaining a habeas corpus petition must review a state court's *Chapman v. California*, 386 U.S. 18 (1967) harmless error analysis for AEDPA reasonableness in addition to applying the *Brecht v. Abrahamson*, 507 U.S. 619 (1993) test. This Court has already answered that question: "it certainly makes no sense to require formal application of *both* tests (AEDPA/*Chapman* and *Brecht*) when the latter obviously subsumes the former." *Fry v. Pliler*, 551 U.S. 112, 120 (2007) (emphasis in original).

Given *Fry*, it should come as no surprise that the federal courts of appeals agree that only a *Brecht* review is required because that standard "subsumes" AEDPA/*Chapman* review. In short, there is no conflict requiring clarification from this Court, and therefore review should be denied. Indeed, this case is particularly unworthy of review because, to satisfy petitioner, the lower court applied both AEDPA/*Chapman* and *Brecht* review and explained that its result was the same under both tests.

STATEMENT OF THE CASE

Respondent was charged in San Diego County, California with the murder of a 12-year old girl, who was found stabbed to death in her bedroom.

App. 105. The morning after her death, the police detained respondent, a mentally ill man, because the previous evening he had been walking up to homes in the neighborhood asking for "Tracy." App. 105-11. Respondent agreed to go to the police station, where police questioned him, took hair samples, fingernail scrapings, and photographs, and impounded his clothes. App. 111. Initial testing did not reveal that respondent had any connection to the crime. App. 111.

Meanwhile, the police focused on the victim's older brother and two of his friends. App. 111. Police arrested them when they confessed during lengthy interrogations and a knife believed to have been used to kill the victim was linked to them. App. 105-06, 111. Almost a year later, DNA testing revealed that the victim's blood was found on respondent's shirt. App. 114. As a result, charges against the brother and his friends were dismissed, and respondent was tried for the murder. App. 115.

The prosecution's theory was that respondent had a history of bizarre behavior, particularly approaching homes with his search of "Tracy," and he had been found with a knife on other occasions. He was in the neighborhood, and the victim's blood was found on his shirt. Thus, he must have snuck into the victim's home and stabbed her to death. The boys' statements amounted to false confessions that were coerced by harsh interrogation tactics.

The defense's theory was that the brother and his friends were responsible, as established by the confessions, which were consistent with the physical evidence at the scene. App. 116-21. Furthermore, a prosecution expert confirmed that the blood on respondent's shirts was transferred there due to the improper and sloppy handling of the evidence. App. 118-20. And, it was simply improbable that respondent, a mentally ill man, could have entered and exited the home and committed the crime without any of the other family members noticing and without leaving any trace evidence. App. 120-21.

To support its theory, the defense called Supervisory Special Agent Mary Ellen O'Toole of the FBI's Behavioral Analysis Unit. App. 120. O'Toole testified that she had been an FBI agent for 23 years and had worked on approximately 5,000 homicide scenes. O'Toole had conducted a crime scene analysis of the victim's residence for the district attorney's office when it was prosecuting the brother and his friends and reached a conclusion consistent with their commission of the crime.

O'Toole concluded that the victim was targeted and not a victim of opportunity. She opined that the offender engaged in significant planning to attack her. She explained that very little forensic evidence was recovered from the scene, and there was no loss of control of the victim. She further opined that the

injuries were limited to a small area of the victim's body, and there was no escalation of violence. Furthermore, because there were no missing weapons from the home, the assailant must have planned to have the weapon on him and planned the murder in a way to minimize any evidence being linked to him.

O'Toole further opined that the assailant was knowledgeable, comfortable, and familiar with the home, particularly given the pets in the home and the lack of evidence of forced entry. She explained that the door to the home was found locked from the inside and that there were no other realistic points of departure by which a stranger would be able to exit. She testified that it was a controlled and organized crime scene, particularly given the fact that the victim had kept a messy room that would be difficult for an assailant to navigate. She also believed that there was a good possibility that there were multiple attackers.

In its rebuttal, the prosecution called retired FBI agent Gregg McCrary. App. 121. The defense sought to cross-examine McCrary with a letter he had written to the International Criminal Investigative Analysts Fellowship about a purported "ethical" violation by O'Toole. App. 138-41. McCrary wrote that O'Toole was undermining the prosecution of respondent, the "true killer," and that the San Diego County Sheriff's Office and the Attorney General were shocked and dismayed by her proposed testimony, which they viewed as an "attempt to

obstruct justice." *Id.* McCrary expressed his hope that "cooler, more rational thinking will prevail and Ms. O'Toole will not testify." *Id.* In a hearing outside the presence of the jury, McCrary admitted that the Sheriff's and Attorney General's Offices had not stated that they viewed O'Toole as attempting to obstruct justice. *Id.* The trial court, however, ultimately ruled that respondent could not cross-examine McCrary about the letter. *Id.*

McCrary testified that he did not agree with O'Toole's process, methodology, or conclusions. He disagreed that the murder was organized or planned, and opined that it was frenzied. He testified that the crime scene revealed that the murder was "spontaneous" and poorly planned. McCrary also opined that the crime scene suggested a single assailant, not multiple assailants.

The dispute between O'Toole and McCrary was an example of how hotly disputed the trial was, and, not surprisingly, the jury found that it was an extremely close case. The jurors struggled during lengthy deliberations in which they sent numerous notes asking questions and requesting read-backs. One of the first jury notes asked: "May a lack of physical evidence of defendant at the crime scene . . . be a determining factor in creating reasonable doubt?"

After approximately a week of deliberations, the jury advised that it could not agree on the blood evidence and announced that it was deadlocked. The

trial court ascertained that there was a split of 8-4 (it appears that this was the split as to whether the jury was deadlocked) and individually polled the jury. The foreperson and the first five jurors stated that they believed the jury was hopelessly deadlocked. When the next juror polled stated that further deliberations "could" possibly result in a decision, the trial court instructed the jury to continue deliberations. The jury deliberated for another week and ultimately acquitted respondent of murder and convicted on the lesser offense of voluntary manslaughter, a verdict that neither party argued for during summations.

On direct appeal, the California Court of Appeal held that the trial court's decision to exclude cross-examination of McCrary based on the letter constituted a Sixth Amendment violation. App. 142-44. The court explained that the letter "bore directly on McCrary's credibility and reliability by indicating McCrary had a personal interest in convicting [respondent], whom he referred to as 'the true killer.'" App. 143-44. The court stated that the "letter also demonstrated McCrary had prejudged [respondent]'s case and was acting more as an advocate for the prosecution than as a forensic expert." App. 144.

The court further reasoned that "McCrary's unusual attempt to dissuade O'Toole from testifying revealed a bias in favor of the prosecution and a bias against O'Toole." App. 144. And, the court explained that "[t]he letter also

revealed McCrary's tendency to exaggerate; his statement that the sheriff's office and the prosecuting agency viewed O'Toole as obstructing justice was not only a gross overstatement but was also unreliable because no one from the sheriff's office had talked to him about O'Toole's upcoming testimony." App. 144.

The California Court of Appeal, however, held that the error was harmless. App. 144-47. The "primary basis" for its conclusion was its finding that the conflicting opinions of O'Toole and McCrary were not important. App. 145. The court characterized the conflict between their testimony as merely being a dispute about whether to "label" the crime scene "organized" or "disorganized," and therefore it would not have affected the verdict. App. 146. The court also reasoned that the "central evidence" against respondent was the blood evidence, and the exclusion of the McCrary letter had no impact on that issue. App. 146.

Respondent pursued his Sixth Amendment claim in the California Supreme Court, which summarily denied review, and in a federal habeas corpus petition in the Southern District of California. App. 23. The district court denied the petition, App. 40, but granted a certificate of appealability on the harmlessness issue, and the Ninth Circuit reversed. Applying *Brecht*, the court found that there was "at least 'grave doubt' as to whether the confrontation clause error at issue had a substantial and injurious effect or influence on the verdict . . . ." App. 4.

The Ninth Circuit explained that the state court failed to consider numerous relevant factors. App. 8-9. It reasoned that the state court ignored the jury's lengthy deliberations, deadlock, and compromise verdict, which was difficult to square with the prosecution's theory of the case. App. 9. The state court also treated the blood evidence as dispositive but ignored "the contradictions between the earlier and later test results and the alternative contamination explanation offered by the defense." App. 9. Nor did the state court consider weaknesses in the prosecution's case, such as the fact that respondent left no trace evidence and there was no realistic explanation as to how he exited the house because "the door commonly used to enter and exit the home was found deadbolted from the inside the morning after the murder, and the other doors did not appear to have been used to enter or exit the house . . . ." App. 9. The Ninth Circuit also explained that the state "court ignored the weight that McCrary's testimony likely carried, given its strategic presentation." App. 10. The prosecution used him at the end of the trial and repeatedly emphasized his testimony and his neutrality throughout closing arguments. App. 10-13.

The Ninth Circuit also addressed petitioner's argument "that, instead of or in addition to our analysis under *Brecht* concerning whether the confrontation clause error caused actual prejudice, AEDPA requires us to analyze

whether the state appellate court's determination was unreasonable under *Chapman* . . . ." App. 14. The court quoted *Fry* and explained that it makes no sense to apply both tests because *Brecht* review "subsumes" AEDPA/*Chapman* review. App. 14. Nevertheless, the court indulged petitioner's request and held that "the state court *Chapman* harmless error ruling was unreasonable." App. 14.

Judge Callahan dissented. App. 15-18. She too relied on the *Brecht* standard and did not appear to find any merit in the state's AEDPA/*Chapman* argument. App. 15. She simply disagreed that the error had a substantial effect on the verdict. She reasoned that impeachment with the letter could have "cut both ways[,]" App. 15, and, although not "cumulative," McCrary's testimony was "relatively unimportant." App. 16. She recognized "the improbabilities of the commission of the crime," but stated that "the prosecution had a workable theory on how it was done," and the blood evidence was sufficiently strong. App. 17-18.

ARGUMENT

Petitioner contends that this Court should grant review to determine whether a federal court must apply AEDPA/*Chapman* harmless error review in addition to *Brecht* harmless error review. This case, however, is an inappropriate vehicle to resolve this question because the court of appeals, at petitioner's urging, explicitly found that reversal was required under both tests. Furthermore, this

Court has already resolved the question presented by petitioner in the recent *Fry* decision. In accordance with *Fry*, the federal courts of appeals have all recognized that *Brecht* review "subsumes" AEDPA/*Chapman* review, and therefore there is no conflict among the circuits in need of resolution. Finally, any question about whether the lower court reached the correct conclusion as to the harmlessness of the Sixth Amendment violation is not fairly encompassed within the question presented by petitioner, and this Court does not generally review case-specific, harmless error findings, particularly those contained in an unpublished opinion; in any event, the lower court's harmless error determination was correct.

A. This Case Is An Inappropriate Vehicle To Resolve The Question Presented By Petitioner

As framed by petitioner, the question presented is: "May a federal court grant habeas corpus relief to a state prisoner without determining that the state court's 'harmless beyond a reasonable doubt' ruling was objectively unreasonable?" The court of appeal, however, *did* find that the state court's *Chapman* analysis was unreasonable. It explained that petitioner's insistence on AEDPA/*Chapman* review in addition to *Brecht* review was at odds with *Fry*, but it nonetheless entertained petitioner's request to engage in an additional AEDPA/*Chapman* review and found that the state court's *Chapman* determination was unreasonable under the AEDPA. App. 14.

Petitioner complains that the unpublished opinion did not explain why the state court's *Chapman* analysis was unreasonable, *see* Pet. 22-24, but the memorandum specifically referred to the several pages of analysis provided on the harmless error question leading up to the conclusion, which explained that the state court ignored several important factors. App. 8-14. Petitioner never explains how that lengthy analysis did not adequately cover AEDPA/*Chapman* review, and therefore petitioner's complaint appears to amount to a meaningless charge that the unpublished memorandum did not reprint that analysis all over again.

Ironically, just this week, this Court dismissed a harmless error case, after full briefing and oral argument, as improvidently granted. *See Vasquez v. United States*, ___ S. Ct. ___, 2012 WL 1069093 (Apr. 2, 2012). Similarly, this case is an ill-suited vehicle to address a purported legal dispute about the applicable harmless error standard because any such dispute was irrelevant to the decision of the lower court. Indeed, the Ninth Circuit applied the test that petitioner has requested, and it still found that relief was warranted. For this practical reason alone, the petition should be denied. *See Gamache v. California*, 131 S. Ct. 591, 593 (2010) (four Justices concurring in denial of *certiorari* because it is inappropriate to grant writ where dispute about harmless error standard would not have altered lower court's decision).

In sum, faced with a record-bound determination made in an unpublished opinion, petitioner has attempted to create a worthy legal issue for review by raising a purported dispute that has no meaningful difference in this case, or any habeas corpus case for that matter. As demonstrated by the recent resolution of *Vasquez*, this Court should not venture down this road to nowhere.

B. This Court Has Already Resolved The Question Presented, And There Is No Conflict Among The Circuits

This Court has already resolved the question presented by petitioner, and it has done so unanimously and within the last five years. Given the recency and unanimity of this Court's analysis, the question presented by petitioner is particularly unworthy of review.

Under *Chapman*, 386 U.S. at 24, the prosecution must demonstrate that a constitutional trial error was harmless beyond a reasonable doubt in order to sustain a conviction. The *Brecht* standard, however, only permits a federal court to grant habeas corpus relief if it finds that a trial error had a substantial and injurious effect on the verdict, or "actual prejudice." *Brecht*, 507 U.S. at 631, 637. In *Fry v. Pliler*, 551 U.S. 112, 120 (2007), this Court stated that AEDPA/*Chapman* review is "more liberal" or friendly to the defendant than *Brecht* review. As a result, this Court stated that "it certainly makes no sense to

require formal application of *both* tests (AEDPA/*Chapman* and *Brecht*) when the latter obviously subsumes the former." *Id.* at 120 (emphasis in original).

Contrary to petitioner's assertions, this language is not dicta. The petitioner in *Fry* made a similar argument to that advanced by petitioner here: that AEDPA's focus on whether the state court was unreasonable required this Court to abandon the *Brecht* test and hold that habeas relief is required if the state court unreasonably applied the *Chapman* standard. The statement quoted above was part of this Court's explanation of why this argument failed. And this analysis is contained in Part II-A of the opinion, which set forth the *unanimous* view of this Court. In short, this Court has directly addressed the question presented by petitioner and done so in a manner consistent with the lower court's decision.

Petitioner contends that this Court's unanimous instruction in *Fry* conflicts with *Mitchell v. Esparza*, 540 U.S. 12 (2003) and *Harrington v. Richter*, 131 S. Ct. 770 (2011). *See* Pet. 11-15. Petitioner does not explain how *Fry* and *Esparza* are inconsistent. Indeed, *Esparza* is cited prominently in the relevant paragraph of *Fry* quoted above, *see Fry*, 551 U.S. at 119, and therefore it is hard to discern how this Court could have unintentionally or mistakenly created a conflict. Moreover, the per curiam opinion in *Esparza* simply held that the state court's conclusion that any purported error failed to prejudice the defendant was not

objectively unreasonable. *See Esparza*, 540 U.S. at 18-19. The alleged error at issue in *Esparza* was raised as part of an ineffective assistance of counsel claim. *Id.* at 14-15. Thus, the inquiry was whether there was prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), and the interplay between *Brecht* and AEDPA/*Chapman* review was not at issue. This Court essentially said as much in *Fry*. *See Fry*, 551 U.S. at 119 ("*Esparza* . . . had no reason to decide the point").

Petitioner's reliance on *Richter* is similarly misplaced, as that decision also involved an ineffective assistance of counsel claim. In *Richter*, this Court discussed the standards for showing deficient performance and prejudice under AEDPA/*Strickland*. This Court explained that "[t]he standards created by *Strickland* and § 2254(d) are both 'highly deferential,' and when the two apply in tandem, review is 'doubly' so." *Richter*, 131 S. Ct. at 788 (citations omitted). Here, the underlying standard urged by petitioner (the *Chapman* standard) is not highly deferential. Indeed, it is the most defendant-friendly prejudice standard of them all. Thus, there is no "doubly" deferential standard in play. In any event, the ineffective-assistance opinion in *Richter* did not in any way purport to address whether both AEDPA/*Chapman* and *Brecht* review are required.

While there is no explicit conflict between *Fry* on the one hand and *Esparza/Richter* on the other, there is also no implicit or underlying tension.

Petitioner argues that *Esparza* and *Richter* stand for the proposition that the state court ruling must be objectively unreasonable, not just incorrect. *See* Pet. 14. But *Fry* makes clear that if a federal court determines that an error is not harmless under the *Brecht* standard, then, by definition, the state court's contrary determination under the more defendant-friendly *Chapman* standard was objectively unreasonable. In other words, in such a situation, the state court's *Chapman* determination was not just incorrect, it was way off the mark.

In another attempt to create a conflict in this Court's precedent, petitioner contends that the analysis in *Fry* was based on the mistaken assumption that "*Brecht* gives, or inevitably gives, more protection to the state judgment than does AEDPA/*Chapman*." Pet. 13. Specifically, petitioner contends that the gloss on *Brecht* review articulated in *O'Neal v. McAninch*, 513 U.S. 432 (1995) actually makes that standard more favorable to the defendant than AEDPA/*Chapman* because "the *Brecht/O'Neal* standard is both subjective and de novo." Pet. 13. Petitioner's contention is based on a misreading of *O'Neal*.

In *O'Neal*, the lower court opinion stated that a "habeas petitioner must bear the 'burden of establishing' whether the error was prejudicial" under *Brecht*. *O'Neal*, 513 U.S. at 436. This Court explained that couching the question in terms of a burden of proof was not clear "conceptually" and therefore held that

in the rare situation when a federal court is in "grave doubt" or "equipoise" as to the harmfulness of an error under the *Brecht* standard, it should conclude that the error was not harmless. *Id.* at 436-37.

Just as the "burden of proof" terminology was not helpful to determining the correct outcome in *O'Neal*, petitioner's use of terminology such as "de novo review" is not particularly helpful to resolution of the issue presented. It is true, in a sense, that a federal court may technically conduct a *Brecht* analysis de novo, as the state court will have normally applied *Chapman* review, and therefore the federal court is applying the *Brecht* standard in the first instance. But, of course, that does not mean that the *Brecht* standard is more favorable to a defendant than the AEDPA/*Chapman* standard. To the contrary, *Fry* makes clear that it is more difficult for a habeas petitioner to convince a federal court applying the *Brecht* standard in the first instance than it is for a petitioner to establish that a state court's *Chapman* determination was unreasonable under deferential review.

Petitioner also complains that the *Brecht/O'Neal* standard "turns upon the individual subjective views of the federal judge . . . ." Pet. 14. It is not clear why petitioner is complaining about a federal judge's "individual" view. This Court has made it quite clear that the fact that "individual" judges may disagree on an issue does not mean that habeas corpus relief is foreclosed. *See Williams v.*

Taylor, 529 U.S. 362, 410 (2000). As recognized in *Williams*, if that were the case, habeas relief could not be granted as long as a federal judge or Justice dissents, and that clearly is not the law. *See, e.g.*, *Lafler v. Cooper*, ___ S. Ct. ___, 2012 WL 932019 (Mar. 21, 2012) (granting habeas corpus relief over dissent of four Justices); *Brewer v. Quarterman*, 550 U.S. 286 (2007) (same); *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007) (same); *Miller-El v. Dretke*, 545 U.S. 231 (2005) (three dissenters); *Wiggins v. Smith*, 539 U.S. 510 (2003) (two dissenters).

Furthermore, petitioner has taken language from *O'Neal* out of context in contending that it requires or even encourages a "subjective" standard. In *O'Neal*, this Court merely clarified that, if after objectively reviewing the record in the case, a federal court is in grave doubt about whether an error was harmless under the *Brecht* standard, it should rule for the habeas petitioner. Indeed, the entire premise of the opinion is that a "record review leaves the *conscientious* judge in grave doubt about the likely effect of an error on the jury's verdict." *O'Neal*, 513 U.S. at 435 (emphasis added). Obviously, a conscientious judge is not a judge who simply acts on his own subjective whims without an objective assessment of the record in the case.

While *Brecht/O'Neal/Fry* do not conflict in any way with *Esparza/Richter* or any of this Court's other precedent, there is also no conflict

among the circuits on the question presented. As even petitioner acknowledges, virtually all of the circuits have recognized that, as explained in *Fry*, *Brecht* review subsumes an AEDPA/*Chapman* analysis. *See* Pet. 16. Indeed, the First, Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits have all clearly expressed that view. *See, e.g.*, *Foxworth v. Amand*, 570 F.3d 414, 435-36 (1st Cir. 2009); *Wood v. Ercole*, 644 F.3d 83, 93-94 (2d Cir. 2011); *Bond v. Beard*, 539 F.3d 256, 275-76 (3d Cir. 2008); *Bauberger v. Haynes*, 632 F.3d 100, 104-05 (4th Cir. 2011); *Burbank v. Cain*, 535 F.3d 350, 356-57 (5th Cir. 2008); *Jaradat v. Williams*, 591 F.3d 863, 869 (6th Cir. 2010); *Toua Hong Chang v. Minnesota*, 521 F.3d 828, 832 (8th Cir. 2008); *Pulido v. Chrones*, 629 F.3d 1007, 1012 (9th Cir. 2010); *Welch v. Workman*, 639 F.3d 980, 992 (10th Cir. 2011); *Vining v. Sec'y, Dep't of Corrections*, 610 F.3d 568, 571 (11th Cir. 2010).

In the face of essentially unanimous lower court authority, petitioner cites the divided opinion in *Johnson v. Acevedo*, 572 F.3d 398, 404 (7th Cir. 2009). But, as even petitioner acknowledges, *see* Pet. 17, the Seventh Circuit has since backed off of *Johnson*, bringing itself in line with all of the other circuits. *See Jones v. Basinger*, 635 F.3d 1030, 1052-53 and n.8 (7th Cir. 2011). In sum, there is no conflict, either in this Court's precedent or the circuits' precedent, and therefore review is inappropriate.

C. This Court Does Not Generally Review Harmless Error Findings, And The Question Presented Does Not Include That Issue; In Any Event, The Court Of Appeals Did Not Err

The question presented by petitioner is limited to the following issue: "May a federal court grant habeas corpus relief to a state prisoner without determining that the state court's 'harmless beyond a reasonable doubt' ruling was objectively unreasonable?" The question presented does *not* ask this Court to conduct its own independent harmless error analysis. Therefore, as in *Fry*, this Court should not reexamine the merits of the lower court's conclusion.

In *Fry*, the "second sentence of the question presented ask[ed]: 'Does it matter which harmless error standard is employed?'" *Fry*, 551 U.S. at 120. Even so, this Court still rejected the petitioner's request that it review the lower court's application of the *Brecht* standard. This Court explained that the appropriate course was to "read the question presented to avoid these tangential and fact-bound questions . . . ." *Id.* at 121.

Here, the question presented is limited and does not seek a harmless error analysis by this Court. Indeed, petitioner has consolidated two different cases, demonstrating that it seeks a ruling on a legal issue, not a fact-bound review of the records in these two cases. This Court conducts harmless error review "sparingly," *United States v. Lane*, 474 U.S. 438, 450 (1986) (quoting *United*

States v. Hasting, 461 U.S. 499, 510 (1983)), and, as in *Fry*, the question presented should be read to avoid a fact-bound review of *two* extensive records in entirely different cases. Moreover, the body of the petition never contests the Ninth Circuit's *Brecht* analysis and only asserts that the Ninth Circuit erred under petitioner's flawed view of the AEDPA/*Chapman* standard. *See* Pet. 18-20. Thus, as in *Fry*, this Court should not conduct its own *Brecht* analysis.

In any event, the Ninth Circuit's harmless error analysis was sound. A starting point is *Olden v. Kentucky*, 488 U.S. 227 (1988). In finding that a similar Sixth Amendment violation was not harmless in *Olden*, this Court explained: "[A]s demonstrated graphically by the jury's verdicts, which cannot be squared with the State's theory of the alleged crime . . . the State's case against petitioner was far from overwhelming." *Id.* at 233. Similarly, the jury's manslaughter verdict in this case, which came after extensive deliberations and a declaration of deadlock, cannot be squared with the state's theory of the crime.

The careful consideration of the relative strength of the prosecution's case is one of the fundamental differences between the correct harmless error analysis performed below and the fundamentally flawed analysis undertaken by the state court. One court has said that "the strength of the prosecution's case is probably the single most important factor in determining whether [an] error was

harmless." *Cupit v. Whitley*, 28 F.3d 532, 539 (5th Cir. 1994). Yet, one would hardly know that the jury considered this case to be extraordinarily close when reading the petition and the state court's harmless error discussion.

Even the dissent below recognized the "improbabilities" in the prosecution's case and could only describe the prosecution's theory as "workable." App. 17. For example, a major flaw in the prosecution's case was that there appeared to have been no way for respondent to have left the home, as the only potential exit door was found deadbolted from the inside. The dissent asserted that respondent "could" have exited "through one of two different doors[,]" App. 17, but the evidence at trial demonstrated that the deadbolted door was the only realistic point of departure given the condition of the other doors. The dissent and the state court of appeal focused on the blood evidence, but even that evidence was not overwhelming, as the defense had a persuasive contamination theory that was supported by the prosecution's own expert witness. Indeed, the jurors did not view the blood evidence as overwhelming, as their note reporting a deadlock specifically advised that they could not agree on the blood evidence. In short, for virtually every piece of evidence supplied by the prosecution, the defense had a persuasive response.[1]

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[1] For example, in an effort to bolster the prosecution's case, the dissent and the petition assert that candy wrappers similar to ones at the victim's house were

Furthermore, this Court has identified five factors to consider when conducting harmless error analysis in this context: (1) the importance of the witness' testimony in the prosecution's case; (2) whether the testimony was cumulative; (3) the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points; (4) the extent of cross-examination otherwise permitted; and, of course, (5) the overall strength of the prosecution's case. *See Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986). While, as discussed above, the fifth factor demonstrates that the lower court correctly determined that the error was not harmless, the other factors also support that conclusion.

The "primary basis" for the state court's finding was the first factor, as it reasoned that the dispute between McCrary and O'Toole only focused on whether the crime scene should be "labeled" as "organized" or "disorganized," and their testimony was therefore unimportant because it had no impact on the "central evidence" concerning the blood on respondent's clothing. App. 145-46. However, the dispute was much more encompassing than the "label" placed on the organization of the crime scene. One major example is that the two experts disputed whether the crime scene was consistent with a multiple assailant or a single assailant theory. Consistent with the defense theory and the confessions of

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found in respondent's pockets, *see* App. 17; Pet. 4, but the defense diffused this piece of evidence by showing that the wrappers were not from the same candy.

the boys, O'Toole opined that the crime scene suggested multiple assailants, while McCrary opined that the scene suggested a single assailant.

While the difference between the multiple assailant and single assailant opinions was important in its own right, it also carried over to the conflicting theories regarding the blood evidence, which the state court placed so much emphasis on. The defense relied on the testimony of Brian Kennedy, one of the prosecution's original experts, who supported the defense's theory that the blood on respondent's shirt was transferred as a result of sloppy crime scene preservation. App. 118-20. Kennedy also opined that there was more than one assailant and that one held the victim's comforter to restrain her while the other stabbed her. Thus, the opinions of O'Toole and Kennedy were connected, as O'Toole's multiple assailant opinion bolstered Kennedy's, and therefore the more likely the jury was to believe O'Toole over McCrary, the more likely it would have believed Kennedy's testimony, which was central to the blood evidence.

The Ninth Circuit, unlike the state court, correctly considered that the prosecution spent a substantial portion of its closing arguments discussing the differences between the two experts' testimony, which in and of itself suggests the importance of the conflict. App. 10-13. And, the jury also apparently found the crime scene evidence to be "important," as one of the very first jury notes asked:

"May a lack of physical evidence of defendant at the crime scene . . . be a determining factor in creating reasonable doubt?"

The Ninth Circuit also correctly concluded that the evidence was not cumulative. Even the dissent below conceded that this factor weighed against a finding of harmless error. App. 16. Furthermore, because each side had dueling experts, one of the main themes during closing arguments for both sides was demonstrating that their experts were more credible. Respondent was deprived of a unique piece of impeachment evidence to use against an expert who the prosecution claimed had impeccable credentials and a total lack of bias. The letter demonstrated that McCrary had a personal interest in the case, was acting more like an advocate for the prosecution, was biased in favor of the prosecution and against O'Toole, and had made gross overstatements, if not outright lies, about the case and O'Toole. App. 143-44. The harm in denying respondent the opportunity to cross-examine McCrary with the letter to show his bias was exacerbated by the prosecutor's closing argument. As detailed by the Ninth Circuit, the prosecutor hammered the defense's inability to impeach McCrary effectively during closing arguments. App. 10-13.

In sum, the trial judge said that this was perhaps the most complicated criminal case that he had seen in his 37 years as a judge and criminal practitioner.

It is therefore not surprising that the jurors struggled during lengthy deliberations, announced a deadlock, and ultimately acquitted respondent of murder and returned a compromise verdict to a lesser manslaughter charge that is hard to square with the facts and law. As difficult as the case may have been, the fact remains that, after a constitutionally flawed trial, respondent was convicted of a homicide even though others confessed to having committed the crime. In a close and vigorously disputed case like this, the answer is not to sweep the constitutional violation under the harmless error rug and be comforted that justice was served by a compromise verdict. Although difficult, the Ninth Circuit arrived at the correct answer, which was to find that the error was not harmless and to grant respondent's habeas corpus petition.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of *certiorari*.

Respectfully submitted,

Dated: April 6, 2012

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No. 11-1094

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL MARTEL,

Petitioner,

v.

RICHARD RAYMOND TUITE,

Respondent.

CERTIFICATE OF SERVICE

I certify that I was appointed to represent respondent, Richard Raymond Tuite, pursuant to 18 U.S.C. § 3006(A) and that I served the enclosed Motion for Leave to Proceed *In Forma Pauperis* and Brief in Opposition to Petition for Writ of *Certiorari* by depositing copies with the U.S. Postal Service, with first-class postage prepaid, and addressed to:

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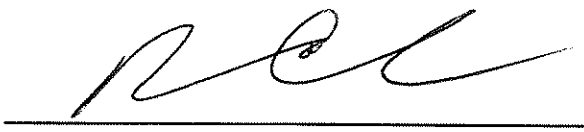
CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the Brief in Opposition to Petition for Writ of *Certiorari* contains 6,317 words, excluding the parts that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 6, 2012.



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