No. 14-____

In the Supreme Court of the United States

BENNIE KELLY, Warden,

Petitioner,

v.

WILLARD McCARLEY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MICHAEL DEWINE
Attorney General of Ohio

ERIC E. MURPHY*
State Solicitor
Counsel of Record
SAMUEL PETERSON
Deputy Solicitor
MARY ANNE REESE
Assistant Attorney General
30 East Broad Street
17th Floor
Columbus, Ohio 43215
614-466-8980

Counsel for Petitioner Bennie Kelly, Warden

QUESTIONS PRESENTED

This case asks how a federal court reviewing a habeas petition under 28 U.S.C. § 2254 should analyze a state court's harmless-error finding. In *Fry v. Pliler*, 551 U.S. 112, 114 (2007), the Court held that, "when [a] state appellate court fail[s] to recognize [a constitutional] error and [does] not review it for harmlessness," a federal court should assess the prejudicial impact of the error under the substantial-effect test from *Brecht v. Abrahamson*, 507 U.S. 619 (1993). Courts have divided over how to apply *Fry* when a state court *has* reviewed a constitutional error for harmlessness. As a result, one court recently commented that "this field may be ripe for Supreme Court review." *Connolly v. Roden*, 752 F.3d 505, 511 n.7 (1st Cir. 2014).

The questions presented are:

1. What standards should a federal habeas court apply when reviewing a state court's determination that a constitutional error was harmless beyond a reasonable doubt under *Chapman v. California*, 386 U.S. 18 (1967)?

2. Did the Sixth Circuit err by granting habeas relief based on its *de novo* review of the habeas petitioner's claim and on its "grave doubts" over whether the alleged constitutional error influenced the jury's verdict?

LIST OF PARTIES

The Petitioner is Bennie Kelly, the Warden of the Grafton Correctional Institution.

The Respondent is Willard McCarley, an inmate currently imprisoned at the Grafton Correctional Institution.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

OPINIONS BELOW

The Sixth Circuit's opinion, *McCarley v. Kelly*, 759 F.3d 535 (6th Cir. 2014), is reproduced at Pet. App. 1a. The opinion of the District Court for the Northern District of Ohio, *McCarley v. Hall*, No. 5:09-cv-2012, 2012 WL 1970243 (N.D. Ohio May 31, 2012), is reproduced at Pet. App. 33a. The magistrate's Report and Recommendation, *McCarley v. Hall*, No. 5:09-cv-2012, 2011 WL 7975213 (N.D. Ohio Aug. 24, 2011), is reproduced at Pet. App. 58a. The Ohio Supreme Court's decision declining jurisdiction on direct appeal, *State v. McCarley*, 888 N.E.2d 1115 (Ohio 2008), is reproduced at Pet. App. 96a. The Ohio Ninth District Court of Appeals' decision on direct appeal, *State v. McCarley*, No. 23607, 2008 WL 375842 (Ohio Ct. App. Feb. 13, 2008), is reproduced at Pet. App. 97a.

JURISDICTIONAL STATEMENT

The Sixth Circuit entered its judgment on July 10, 2014. The Warden timely invokes the Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the U.S. Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

Section One of the Fourteenth Amendment to the U.S. Constitution provides in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

The Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") provides in relevant part:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

28 U.S.C. § 2254(d).

INTRODUCTION

This case raises an important question that has split the circuit courts regarding how various standards for measuring harmless error apply in federal habeas proceedings. In *Chapman v. California*, 386 U.S. 18 (1967), the Court held that a state court on *direct appeal* may find a constitutional error harmless only if the court can declare that "it was harmless beyond a reasonable doubt." *Id.* at 24. Later, in *Brecht v. Abrahamson*, 507 U.S. 619 (1993), and *O'Neal v. McAninch*, 513 U.S. 432 (1995), the Court held that a federal court reviewing a state conviction on *collateral review* should find that an error was not harmless if the court was "in grave doubt about whether" the error "had 'substantial and injurious effect'" on the verdict. *O'Neal*, 513 U.S. at 436. Then came AEDPA, which prohibited federal courts from granting relief unless a state-court decision was an unreasonable application of clearly established federal law. 28 U.S.C. § 2254(d)(1).

The Court has twice confronted how *Brecht*'s substantial-effect test (as explained in *O'Neal*) interacts

with AEDPA's unreasonable-application test. In *Mitchell v. Esparza*, 540 U.S. 12 (2003) (per curiam), the state court had found an error harmless and this Court asked whether the court's analysis unreasonably applied *Chapman* under § 2254(d)(1). *Id.* at 18. Next, in *Fry v. Pliler*, 551 U.S. 112 (2007), the Court held that federal habeas courts should apply *Brecht*'s substantial-effect test when the state courts have not identified the alleged error or considered its harmlessness. *Id.* at 114, 120. The *Fry* Court suggested that *Brecht*'s substantial-effect test "obviously subsumes" AEDPA's analysis concerning whether a state court unreasonably applied *Chapman*. *Id.* at 120.

Since *Fry*, "disagreement both between and within the various circuit courts" has arisen over the harmless-error standards that apply when a state court *has* reviewed an error for harmfulness, leading the First Circuit to opine that "this field may be ripe for Supreme Court review." *Connolly v. Roden*, 752 F.3d 505, 511 n.7 (1st Cir. 2014). The Seventh Circuit has held that "*Fry* did not overrule *Esparza*," and that federal courts should first ask whether the state court's decision unreasonably applied *Chapman* before turning to an independent harmless-error analysis under *Brecht*. *See Johnson v. Acevedo*, 572 F.3d 398, 404 (7th Cir. 2009) (Easterbrook, J.). Many other courts disagree, holding that *Esparza*'s "'unreasonable application of *Chapman*' standard does not survive *Fry*" and that courts need only apply *Brecht*. *Wood v. Ercole*, 644 F.3d 83, 93-94 (2d Cir. 2011). This conflict warrants the Court's time.

The split takes on added urgency because the view of some circuits is at odds with this Court's post-*Fry*

cases. It is not clear that a federal court's "grave doubts" over whether an error affected the jury's verdict—all that is needed under *Brecht*, *see O'Neal*, 513 U.S. at 436—necessarily shows that a state court's harmlessness finding was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement," *Harrington v. Richter*, 131 S. Ct. 770, 786-87 (2011). That is especially true given the Court's recent cases clarifying that AEDPA relief is reserved for those rare situations where "a State's criminal justice system has experienced [an] 'extreme malfunctio[n].'" *Burt v. Titlow*, 134 S. Ct. 10, 16 (2013) (citation omitted).

Indeed, those circuits that have applied *de novo* *Brecht* review without AEDPA deference have been criticized for "land[ing] yet another blow to our AEDPA jurisprudence by concluding that we review a state court's harmless error analysis under an exceptionally nondeferential standard." *Ayala v. Wong*, 756 F.3d 656, 722 (9th Cir. 2014) (Ikuta, J., dissenting from denial of rehearing en banc). Such fresh review fundamentally conflicts with AEDPA's overarching purpose to "'further the principles of comity, finality, and federalism.'" *Duncan v. Walker*, 533 U.S. 167, 178 (2001) (citation omitted).

This case proves the point. Respondent Willard McCarley was convicted of murdering a woman in front of her small child. The child's statements implicating McCarley were introduced, but the child did not testify at his second trial. The state court found any potential error harmless, Pet. App. 109a-10a; a magistrate judge and district court agreed given the "overall

strength of the prosecution's case." Pet. App. 52a; *see* Pet. App. 90a. The Sixth Circuit disagreed, finding that McCarley's inability to "cross-examine [the child] was the critical error." Pet. App. 30a. It did so based on a *de novo* review, Pet. App. 24a, and based only on "grave doubts" over whether the alleged error affected the verdict, Pet. App. 25a.

Yet the child *did* testify at McCarley's first state trial. Because the child could not remember making the statements at issue, McCarley's brief on the state appeal called that testimony (the absence of which the Sixth Circuit found to be harmful here) a mere "formality." Doc.7-2, Exhibits 1-41, at 148, PageID#246. And the Sixth Circuit did not discuss much of the evidence referenced by the state court, such as one witness's testimony that McCarley had said "he had killed someone and that when you kill someone 'you don't remember their eyes,'" Pet. App. 107a, or another's testimony that McCarley had been angered over the victim's child-support action and made threats that she "'wouldn't live to see the court date.'" *Id.* Thus, the standard-of-review question is likely outcome-dispositive in this case, making the case an ideal vehicle to consider that question.

STATEMENT OF THE CASE

McCarley was twice convicted of the murder of Charlene Puffenbarger, the mother of one of his children. Pet. App. 99a. Puffenbarger was murdered in her home, her body discovered by a neighbor on January 20, 1992. Pet. App. 98a. She had been beaten, strangled, and suffocated with a pillow, with several scalp lacerations, defensive wounds on her hands, and a leather belt wrapped around her neck. *Id.* Puffen-

barger's two young sons were home during the murder; the three-year-old son, D.P., witnessed her death. Pet. App. 98a-99a.

When the police arrived at Puffenbarger's home, D.P. pointed to the officers and stated: "It was him. He hurt mommy." Pet. App. 98a. D.P. made similar statements days later. His grandmother, Phyllis Puffenbarger, saw D.P. talking about the murder with a picture of his mother. He said into a toy telephone: "I am going to get the belt. A policeman. . . . My mom seen the policeman. Gun. . . . Policeman hit my mommy. Put tape on her. . . ." Pet. App. 49a. D.P. had tears in his eyes when he made these statements. Pet. App. 99a.

Because of D.P.'s statements, Phyllis Puffenbarger contacted the police and, at their suggestion, took D.P. to see Dr. Dawn Lord, a child psychologist. *Id.* Dr. Lord recorded the substance of her interviews with D.P. in three letters to detectives between January and June 1992. Pet. App. 6a-11a. The first letter described in some detail D.P.'s memory of the murder, detailing how two men came to the house and that one man had been wearing a uniform. Pet. App. 6a-8a. The letter also indicated both that D.P. said that a man named "Tim" had beaten his mother, and that Dr. Lord had confirmed with D.P.'s grandfather that his mother had known a man named Tim Greene. Pet. App. 7a-8a.

In the second letter, Dr. Lord notes that D.P. again said that two men came to the house and that both were wearing some form of uniforms. Pet. App. 9a. His mother knew them and let them in without a struggle. *Id.* They talked for a while and then began

to argue until one of the men started beating his mother. *Id.* This letter also describes various pictures that Dr. Lord presented to D.P. in which the child identified McCarley as the man who hit his mother. *Id.* The letter concluded that, due to D.P.'s young age, it was not possible to "definitely state who murdered [D.P.'s] mother," but only to take D.P.'s "impressions of the situation and use them in order to obtain further information." Pet. App. 10a.

In the third letter, Dr. Lord described again how D.P. told her that one of the two men hit his mother, that he was trying to help his mother, and that one man got a belt from his mother's closet and hurt his mother with it. *Id.*

McCarley went uncharged for the murder for years. Several years later, in December 1995, police officers visited McCarley's home on an unrelated matter. Pet. App. 99a. One officer observed a deputy sheriff's jacket and cap in McCarley's garage. *Id.* That officer, who had investigated Puffenbarger's death, recalled D.P's statements about the "police" hurting his mother. *Id.* The officers thus confiscated the sheriff's jacket and cap. *Id.*

Years later, police were able to obtain DNA evidence from the murder scene. In May 2004, a grand jury indicted McCarley for murdering Puffenbarger. Pet. App. 99a.

I. THE STATE PROCEEDINGS

Two separate juries found McCarley guilty of the murder. A state appellate court reversed his first conviction, but affirmed his second.

A. A Jury Convicts McCarley For Puffenbarger's Murder, But His Initial Conviction Is Reversed On Appeal

1. An initial jury convicted McCarley of Puffenbarger's murder. Pet. App. 119a. At the time of trial, Dr. Lord had no recollection of the interviews she conducted with D.P. back in 1992. Pet. App. 122a. The trial court nevertheless permitted her to read her three letters to the jury. *Id.*

D.P. (who was a teenager by the time of McCarley's trial) testified and was subject to cross-examination. Doc.7-2, Exhibits 1-41 at 114, PageID#212. D.P. remembered little. He had no recollection of the events surrounding his mother's murder or of his conversations with his grandmother or Dr. Lord. *See id.* According to McCarley's appellate brief, D.P.'s "taking the stand at trial was merely a formality for the prosecution knowing that [he] remembered nothing about the prior identification and could not identify Mr. McCarley now as his mother's killer." Doc.7-2, Exhibits 1-41, at 148, PageID#246.

2. On appeal in state court, McCarley argued, among other things, that the trial court unduly bolstered Dr. Lord's credibility by making encouraging statements about her in front of the jury. Pet. App. 120a-26a. At the time, Dr. Lord's license had been suspended, and she was nervous about whether her testimony would violate the terms of her suspension. Pet. App. 122a. The court said it was "well aware . . . of your long-standing reputation in the community" and "certainly hope[d] you get reinstated one of these days." *Id.* The court of appeals found that those comments "were not made to persuade the jury or as a re-

sult of bias, rather they were made out of empathy for Dr. Lord's situation and to calm her fears of reprimand from the psychology board for testifying." Pet. App. 122a-23a. Nevertheless, it concluded that the comments were prejudicial. Pet. App. 123a. It thus remanded for a second trial. Pet. App. 126a.

B. Another Jury Convicts McCarley For Puffenbarger's Murder, And The State Courts Uphold His Second Conviction

1. On remand, a second jury again convicted McCarley of Puffenbarger's murder. Pet. App. 99a. He was sentenced to life imprisonment with the possibility of parole after 20 years. Pet. App. 100a.

At the second trial, the prosecution called as witnesses D.P.'s grandmother (Phyllis Puffenbarger), Dr. Lord, and various police officers. As before, these individuals testified about statements that D.P. had made regarding his mother's murder; the police added that they had found a police jacket and cap at McCarley's home. Pet. App. 49a-51a. As before, Dr. Lord testified that she had no recollection of her conversations with D.P. *See* Doc.7-5, 2007 Tr. Vol. III at 196-205, PageID#1009-18. She instead was permitted to read her letters to the jury. *Id.* Although D.P. had testified at McCarley's first trial, *see* Doc.7-2, Exhibits 1-41 at 114, PageID#212, nobody called him to testify at McCarley's second trial.

The prosecution also introduced DNA evidence gathered from the belt used to strangle Puffenbarger. Pet. App. 111a. McCarley, or a paternal member of McCarley's family (such as his son who lived with Puffenbarger), could not be excluded as the major DNA contributor. *Id.*

In addition, several witnesses testified about McCarley's threats against Puffenbarger in the days before her murder. Puffenbarger and McCarley had been arguing over a child-support suit that she filed against him concerning D.P.'s younger brother. Pet. App. 107a-08a. One witness met with Puffenbarger after such a fight. The witness recalled that Puffenbarger "was 'really upset' and . . . that '[McCarley] threatened [her] and said that [she] wouldn't live to see the court date.'" Pet. App. 107a. Another testified that McCarley told him that "'he would kill [Puffenbarger] first before he would pay child support.'" *Id.* Similarly, a witness saw a man, which other testimony showed was likely McCarley, grab Puffenbarger by the wrist outside her apartment in the days before the murder. Doc.7-5, 2007 Tr. Vol. III at 224-26, PageID#1037-39. Still another saw Puffenbarger, just days before her murder, shaken and crying as the result of a confrontation with McCarley. Doc.7-5, Tr. Vol. III at 255-58, PageID#1068-71.

The mother of McCarley's first child also testified that McCarley had threatened her over a similar child-support issue. Pet. App. 111a. McCarley was unhappy with her pregnancy and "'threatened to beat [her] up until the baby died.'" *Id.* He also told her he did not want to pay child support and that she should get out of his life, describing himself as "'a bomb with a fuse next to a lit match' who 'might do something he was going to regret.'" *Id.*

Finally, the prosecution introduced evidence of other statements that McCarley had made related to Puffenbarger's murder and his trial. One witness testified that, following his testimony at McCarley's first

trial, McCarley scared him by threatening that, "if [he] knew what was good for [him], [he] would withdraw [his] statement." Doc.7-6, 2007 Tr. Vol. IV at 351, PageID#1172. Another witness testified that, in the years following Puffenbarger's murder, McCarley told the witness "that he had killed someone and that when you kill someone 'you don't remember their eyes.'" Pet. App. 107a.

2. McCarley appealed his conviction for aggravated murder, but the state appellate court affirmed. As relevant here, it rejected McCarley's claim that Dr. Lord's testimony violated his Sixth Amendment right to confront the witnesses against him because D.P. did not testify at the second trial. The state court expressed doubt that admission of Dr. Lord's testimony violated the Confrontation Clause. Pet. App. 109a. It nevertheless determined that, even if a constitutional error had occurred, any error was harmless. Pet. App. 109a-10a.

The court recognized that, "[o]n harmless error analysis, we inquire whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." Pet. App. 109a (internal quotation marks omitted) (citing *Chapman v. California*, 386 U.S. 18, 23 (1967)). The court found no such reasonable possibility because "the record reflects that D.P. made other statements that were similar, if not identical, to the ones that he made to Dr. Lord." *Id.* It recounted D.P.'s actions upon the police arrival at the scene in which he pointed to an officer and said: "'It was him. He hurt mommy.'" *Id.* It also pointed to similar statements D.P. made to his grandmother after the murder. *Id.* Because the court found that these

other statements were properly admitted as excited utterances, it held that D.P.'s statements to Dr. Lord were merely "corroborative" and thus harmless. Pet. App. 110a.

McCarley appealed to the Ohio Supreme Court, again alleging a Confrontation Clause violation. The Ohio Supreme Court declined to exercise jurisdiction and dismissed McCarley's appeal. Pet. App. 96a.

II. THE FEDERAL HABEAS PROCEEDINGS

A. After the state courts affirmed McCarley's murder conviction, he filed a habeas petition in the District Court for the Northern District of Ohio under 28 U.S.C. § 2254. Both a magistrate judge and a district judge rejected McCarley's request for relief.

The magistrate's Report and Recommendation treated the state court's decision as denying McCarley's Confrontation Clause claim on the merits. Pet. App. 86a. The Report found that the state court's holding that the statements at issue were non-testimonial was not an unreasonable application of clearly established law. Pet. App. 87a. It also concluded that, even if there had been an error, it "did not have a 'substantial and injurious effect or influence in determining the jury's verdict.'" Pet. App. 90a (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1993)). It reached this conclusion based on "the overall strength of the prosecution's case." *Id.*

The district court likewise found that McCarley was not entitled to habeas relief. Pet. App. 34a. It held that, while Dr. Lord's testimony about D.P.'s statements violated the Confrontation Clause, "given [the] corroborative nature of evidence at issue and

[the] overall strength of the prosecution's case . . . the resultant error was harmless as it had no substantial and injurious effect or influence in determining the jury's verdict." Pet. App. 52a-53a. Starting with D.P.'s statements to Dr. Lord concerning a man in a uniform, the court found them "cumulative of testimony provided by three other witnesses," D.P.'s grandmother and two police officers (all of whom McCarley cross-examined). Pet. App. 51a.

The district court also rejected McCarley's reliance on Dr. Lord's statements that D.P. identified his picture. Pet. App. 52a. It noted that the "evidence of [McCarley's] DNA at the scene certainly implicate[d] him" directly, and that D.P.'s statements "cannot be said to have outweighed or substantially influenced the jury's decision or provided a more compelling case for the prosecution." *Id.* That was especially so, the district court held, because Dr. Lord's letter downplayed D.P.'s identification, noting that it was not possible to state who murdered D.P.'s mother based on his statements. *Id.*

B. A Sixth Circuit panel reversed the district court, and granted McCarley a conditional writ of habeas corpus. Pet. App. 1a.

The court initially held that the state court's harmless-error finding did not constitute an adjudication "on the merits" of McCarley's Confrontation Clause claim. Pet. App. 17a. So it reviewed the claim de novo. *Id.* The court found a Confrontation Clause violation because the police sought out Dr. Lord to speak to D.P. to determine if he remembered anything for their investigation. Pet. App. 22a-23a. It thus viewed her sessions with D.P. as "more akin to police interroga-

tions than private counseling sessions," and held that D.P.'s statements to her were testimonial because they were not made to address an ongoing emergency. Pet. App. 23a.

Having found a Sixth Amendment violation, the court next concluded that the violation was not harmless. Pet. App. 24a-30a. Reviewing the harmless-error question de novo, Pet. App. 24a, the court asked: "'Do I, the judge, think that the error substantially influenced the jury's decision?'" Pet. App. 24a (quoting *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995)). In this review, the court relied on five factors: "'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 . . . the overall strength of the prosecution's case.'" Pet. App. 25a (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)). Applying the five *Van Arsdall* factors, the court was left with "grave doubts as to whether the Sixth Amendment violation at McCarley's second trial influenced the jury's decision." Pet. App. 25a.

Starting with the first factor, the court could not "overstate[]" the importance of Dr. Lord's letters. *Id.* The prosecution relied on them throughout its case. During closing argument, for example, it read the letters and pointed out that D.P. twice identified McCarley. Pet. App. 26a-27a. As for the second factor, the court noted that, while some information in the letters was "duplicated" by other testimony, it was not cumulative. Pet. App. 27a. The other testimony "paint[ed]

a clear picture of the crime, but only when considered in light of Dr. Lord's testimony." Pet. App. 28a. The court said the third and fourth factors favored the State: "[T]here was significant corroboration of D.P.'s statements," *id.*, and "McCarley had a full opportunity at trial to cross-examine all of the prosecution's witnesses save for D.P," Pet. App. 28a-29a. Finally, the court rejected the district court's holding that the State had a strong case without Dr. Lord's letters. Pet. App. 29a. Its case was entirely circumstantial, and the DNA evidence found on the belt could have come from McCarley's young son (who lived with Puffenbarger) or from McCarley's father (who often visited her house). *Id.*

The court ended by reiterating its "grave doubts" about whether the introduction of Dr. Lord's letters substantially affected the jury verdict. *Id.* It reversed the denial of McCarley's habeas petition, and remanded with instructions to grant a conditional writ requiring the State to retry McCarley a third time or release him. Pet. App. 30a.

In a short concurrence, Judge Daughtrey would have found that the state court's determination qualified as a "merits" decision subject to AEDPA's constraints, but that it was an unreasonable application of *Crawford v. Washington*, 541 U.S. 36 (2004). Pet. App. 31a. The concurrence added that "there can be no doubt that the state court unreasonably applied settled federal constitutional law in concluding that McCarley was not prejudiced by the admission of the challenged testimony." Pet. App. 32a.

After the Sixth Circuit issued its decision, it granted the Warden's request for a stay of the mandate so

that he could file a petition for a writ of certiorari. This petition followed.

REASONS FOR GRANTING THE WRIT

For several reasons, the Court should grant the petition for writ of certiorari to review the Sixth Circuit's decision. *First*, the lower courts need guidance on the standards for federal review of state decisions finding constitutional errors harmless under *Chapman v. California*, 386 U.S. 18 (1967). *Second*, the need for that guidance is illustrated by the growing split that has developed on those standards. *Third*, the petition raises a recurring issue implicating important federalism concerns. *Fourth*, this case provides an ideal vehicle to consider the harmless-error question.

I. THE COURT'S GUIDANCE IS NEEDED ON THE PROPER INTERACTION BETWEEN AEDPA AND THE *BRECHT* HARMLESS-ERROR STANDARD

A. In *Chapman*, the Court established the harmless-error standard applicable for state courts reviewing constitutional errors on *direct appeal*. 386 U.S. at 24. *Chapman* concluded "that before 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." *Id.* After *Chapman*, this Court (in *Brecht v. Abrahamson*, 507 U.S. 619 (1993)) and Congress (in AEDPA) adopted reduced harmless-error standards for federal courts reviewing state convictions on *collateral review*.

The Brecht Standard. Before AEDPA, the Court reduced the harmless-error standard for collateral review. *Brecht* held that federal courts could not grant relief on collateral review of a state conviction unless a

constitutional error "'had substantial and injurious effect or influence in determining the jury's verdict.'" 507 U.S. at 631 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). The Court adopted this reduced standard because of the limited purposes of federal habeas review, and because of that review's federalism and comity costs. *Id.* at 635. While relaxed, *Brecht* still required federal courts to undertake an independent review when determining whether an error was harmless. *See id.* at 642 (Stevens, J., concurring). When the "federal judge in a habeas proceeding [was] in grave doubt about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict,' that error [was] not harmless." *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995). In other words, *Brecht* required "[a] judge to ask directly, 'Do I, the judge, think that the error substantially influenced the jury's decision?'" *Id.* at 436-37. If the judge was in equipoise on that question, *Brecht* "plac[ed] the risk of doubt on the State." *Id.* at 439.

The AEDPA Standard. After *Brecht* and *O'Neal*, Congress passed the well-known AEDPA standard prohibiting a federal court from granting habeas relief unless a state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1). Under this standard, "'an *unreasonable* application of federal law is different from an *incorrect* application of federal law.'" *Cullen v. Pinholster*, 131 S. Ct. 1388, 1411 (2011) (citation omitted). AEDPA requires federal courts to find an unreasonable (not just an incorrect) application, and thus adopts a "'highly deferential standard for evaluating state-court rulings.'" *Wood-*

ford v. Visciotti, 537 U.S. 19, 24 (2002) (per curiam) (citation omitted).

B. The Court has twice confronted how *Brecht*'s substantial-effect test interacts with AEDPA's unreasonable-application test. In one case the state court had engaged in harmless-error analysis, *see Mitchell v. Esparza*, 540 U.S. 12, 15 (2003) (per curiam); in the other the state court had not done so, *see Fry v. Pliler*, 551 U.S. 112, 114 (2007).

Esparza was a per curiam summary reversal. *See* 540 U.S. at 13. The habeas petitioner argued that the state court violated his right to have the jury find every element beyond a reasonable doubt because the indictment did not charge (and the jury did not find) that he was the "principal" offender. *Id.* at 14. The state court found any error harmless because, since the petitioner was the only individual charged, the jury must have determined he was the murderer. *Id.* at 15. While the Sixth Circuit affirmed the grant of habeas relief, this Court reversed. The Court noted that the relevant question under AEDPA was whether the state court's decision had been an unreasonable application of *Chapman*'s harmless-beyond-a-reasonable-doubt standard. *Id.* at 17-18. Specifically, the Court held that it "may not grant [the] habeas petition . . . if the state court simply erred in concluding that the State's errors were harmless; rather, habeas relief is appropriate only if the [state court] applied harmless-error review in an 'objectively unreasonable' manner." *Id.* at 18. Because the indictment charged only one defendant and because there was no evidence that anyone else was involved with the murder, the Court

found the state court's application of *Chapman* reasonable. *Id.*

After *Esparza*, federal courts split over how to resolve harmless-error questions "when constitutional error in a state-court trial is first recognized by a federal court." *Fry*, 551 U.S. at 120. The Court decided *Fry* to resolve that split. *Id.* The petitioner had been convicted of murder, but argued that the trial court violated his fair-trial rights by excluding evidence that another person committed the murder. *Id.* at 115. The state court found that no error occurred, so this Court "assume[d] that the state appellate court did not determine the harmlessness of the error." *Id.* at 115-16 & n.1.

In that setting, the Court held that *Brecht*'s reduced standard applied even if the state court did not undertake a *Chapman* harmless-error analysis. *Id.* at 116-20. Most relevant here, the habeas petitioner in *Fry* argued that *Brecht* should not apply because AEDPA post-dated it and because *Esparza* did not apply *Brecht* when finding the claim barred under § 2254(d)(1). *Id.* at 119-20. This Court disagreed. It noted that § 2254(d)(1) "set[] forth a precondition" for relief, not an "entitlement to it." *Id.* at 119. And Congress designed AEDPA to make it more difficult to obtain federal habeas relief. *Id.* So the Court found it "implausible" that § 2254(d)(1) would have replaced *Brecht*'s actual-prejudice requirement with the "more liberal AEDPA/*Chapman* standard which requires only that the state court's harmless-beyond-a-reasonable-doubt determination be unreasonable." *Id.* at 120. Finally, the Court stated that "it certainly makes no sense to require formal application of *both* tests (AED-

PA/*Chapman* and *Brecht*) when the latter *obviously subsumes* the former." *Id.* (second emphasis added).

C. Taken together, *Esparza* and *Fry* lead to uncertainty over the relevant standards governing cases where—like here—state courts *have* engaged in *Chapman*'s harmless-error analysis. *Esparza* seems to be the on-point precedent because it involved such a case and applied the AEDPA/*Chapman* test. 540 U.S. at 17-18. Further, *Fry* stressed that the case concerned only whether *Brecht* should apply when a state court did *not* engage in harmless-error review. *See* 551 U.S. at 116 n.1. Cutting the other way, *Fry* suggested that *Brecht*'s substantial-effect test "obviously subsumes" the AEDPA/*Chapman* standard—meaning that if a federal court finds *Brecht* met it would *necessarily* find that a state court unreasonably applied *Chapman* under AEDPA. *Id.* at 120.

The Court should grant review to clarify whether that is true or, indeed, whether AEDPA has, in some respects, modified *Brecht*. It is not clear that a federal court's "grave doubts" over whether an error was harmful—all that is needed to grant relief under *Brecht*, *see O'Neal*, 513 U.S. at 436—shows that the state court's contrary harmlessness finding was "'objectively unreasonable.'" *Renico v. Lett*, 559 U.S. 766, 773 (2010) (citation omitted). After all, the Court's cases *after Fry* clarify just how deferential that AEDPA standard is. "Even a strong case for relief does not mean that the state court's contrary conclusion was unreasonable." *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011). Instead, a petitioner must show that "the state court's ruling on the claim being presented in federal court was so lacking in justification that there

was an error well understood and comprehended in existing law beyond any possibility for *fairminded disagreement*." *Id.* at 786-87 (emphasis added). And courts should "not lightly conclude that a State's criminal justice system has experienced the '*extreme malfunctio[n]*' for which federal habeas relief is the remedy." *Burt v. Titlow*, 134 S. Ct. 10, 16 (2013) (emphasis added).

In addition, the burdens of proof are flipped under *Brecht* and AEDPA. *Brecht* "plac[es] the risk of doubt on the State," *O'Neal*, 513 U.S. at 439, such that a federal court must grant relief if it believes the evidence on the harmlessness issue remains in "equipoise," *id.* at 444. Under AEDPA, by contrast, "[t]he petitioner carries the burden of proof" to establish that the state court unreasonably applied clearly established precedent. *Cullen*, 131 S. Ct. at 1398. Uncertainty precludes AEDPA relief; it does not trigger that relief. *See Burt*, 134 S. Ct. at 17.

The manner of review is also different. Under *Brecht*, federal courts make their own "*de novo* examination" divorced from what the state courts have said on the harmless-error subject. 507 U.S. at 642 (Stevens, J., concurring). Such *independent* federal review over a state-court conviction is foreign to AEDPA. Instead, a state-court decision is "entitled to considerable deference under" § 2254(d)(1). *Coleman v. Johnson*, 132 S. Ct. 2060, 2065 (2012).

All told, the uncertainty over the proper standards justifies this Court's review. *Cf. Lopez v. Smith*, __ U.S. __, 2014 WL 4956764, at *4 n.2 (Oct. 6, 2014) (reserving question whether the Ninth Circuit correctly applied *Brecht*). Indeed, as explained immediately be-

low, the circuit courts continue to struggle with this interaction between *Brecht* and AEDPA.

II. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER CIRCUIT COURTS

In light of the questions left open by *Fry*, lower courts have conflicted over its meaning. The conflict has prompted the Second Circuit to say that "[w]here a state appellate court has found that a state trial court committed a constitutional violation but has held that the violation was harmless, the standard of review for a federal court conducting habeas corpus review has not yet been clearly established." *Perkins v. Herbert*, 596 F.3d 161, 175 (2d Cir. 2010). And it has prompted the First Circuit to say that, because of the "disagreement both between and within the various circuit courts, this field may be ripe for Supreme Court review." *Connolly v. Roden*, 752 F.3d 505, 511 n.7 (1st Cir. 2014).

This disagreement has manifested itself in two ways. *First*, it has resulted in a split over what test to apply when reviewing a state court's harmless-error finding. *Second*, it has resulted in a split over the degree of deference, if any, that should be afforded to such a state harmless-error finding.

A. *Split Over The Test*. Circuit courts have split three ways over how to apply *Fry* where, unlike there, a state court *has* engaged in *Chapman*'s harmless-error analysis. Courts have: (1) adopted a two-part test, first applying *Esparza*'s unreasonable-application-of-*Chapman* test and then *Brecht*'s substantial-effect test; (2) held that *Fry* requires application of only *Brecht*'s substantial-effect test; or (3) adopted a flexible approach that allows, but does

not require, courts to look to *Esparza* before *Brecht*. *See Connolly*, 752 F.3d at 510 (discussing various approaches).

On one side of the conflict, in an opinion by Judge Easterbrook, the Seventh Circuit adopted the two-part test. *See Johnson v. Acevedo*, 572 F.3d 398, 404 (7th Cir. 2009). That circuit rejected the notion that a federal court should *immediately* "tackle the [harmless-error] issue independently, using the standard laid down in *Brecht*." *Id.* at 403. It did so because "*Fry* did not overrule *Esparza*." *Id.* at 404. Instead, "[i]f the state court has conducted a harmless-error analysis, the federal court must decide whether that analysis was a reasonable application of the *Chapman* standard." *Id.* If so, *Esparza* makes clear that "the federal case is over and no collateral relief issues." *Id.* If not ("either because the state court never conducted a harmless-error analysis, or because it applied *Chapman* unreasonably"), *Fry* makes clear that "§ 2254(d) drops out of the picture and the federal court must make an *independent* decision, just as if the state court had never addressed the subject at all." *Id.* (emphasis added); *see Kamlager v. Pollard*, 715 F.3d 1010, 1016 (7th Cir. 2013).

Most circuits reject this reasoning, holding that *Fry* overruled *Esparza*'s application of AEDPA/*Chapman* even when the state court has engaged in harmless-error analysis. The Second Circuit has expressly noted that *Esparza*'s "'unreasonable application of *Chapman*' standard does not survive *Fry*." *Wood v. Ercole*, 644 F.3d 83, 93-94 (2d Cir. 2011). As support, it relied on *Fry*'s language that "'it certainly makes no sense to require formal application of *both* tests . . . when the lat-

ter obviously subsumes the former.'" *Id.* at 93 (quoting *Fry*, 551 U.S. at 120). The Third Circuit agrees that "*Fry* instructs us to perform our own harmless error analysis under *Brecht* . . . rather than review the state court's harmless error analysis under the AEDPA standard." *Bond v. Beard*, 539 F.3d 256, 275-76 (3rd Cir. 2008). The Fourth has reached the same conclusion, holding that "*Fry* absolves us of any need to consider both AEDPA/*Chapman* unreasonableness and *Brecht* prejudice." *Bauberger v. Haynes*, 632 F.3d 100, 105 (4th Cir. 2011). The Fifth, Ninth, and Tenth Circuits have adopted the same approach. *See Burbank v. Cain*, 535 F.3d 350, 356-57 (5th Cir. 2008); *Ayala v. Wong*, 756 F.3d 656, 674 & n.13 (9th Cir. 2014) (certiorari pending); *DeRosa v. Workman*, 679 F.3d 1196, 1233 (10th Cir. 2012).

At bottom, these courts reach this result because they have concluded that when "a federal habeas court determines that the *Brecht* standard has been met, it also necessarily determines to be an unreasonable application of *Chapman* a state court's conclusion that the error was harmless beyond a reasonable doubt." *Ayala*, 756 F.3d at 674 n.13. In other words, they find that a federal court with "grave doubts" over an error's harmfulness, *O'Neal*, 513 U.S. at 436, will always also conclude that all other "fairminded jurists" would find that the error was not harmless beyond a reasonable doubt, *Harrington*, 131 S. Ct. at 786.

For its part, the Sixth Circuit has adopted a third, middle position, taking a little bit from both approaches. It agreed with the Seventh that *Fry* did not overrule *Esparza* and that courts may continue to apply the AEDPA/*Chapman* standard. *See Ruelas v. Wolf-*

enbarger, 580 F.3d 403, 412 (6th Cir. 2009). But, unlike the Seventh, it does not *require* application of the AEDPA/*Chapman* standard before *Brecht*. *Id.* ("We believe the [Seventh Circuit] misreads *Esparza* insofar as it thinks that courts must always go through this two-step inquiry."). Instead, "a habeas court remains free to, before turning to *Brecht*, inquire whether the state court's *Chapman* analysis was reasonable. If it was reasonable, the case is over." *Id.* at 413. But, in the Sixth Circuit, a "habeas court may go straight to *Brecht* with full confidence that the AEDPA's stringent standards will also be satisfied." *Id.* at 413. That is what the decision below did. Pet. App. 24a. Since *Ruelas*, both the First Circuit and the Eleventh Circuit have sided with this flexible approach. *See Connolly*, 752 F.3d at 509-11; *Burns v. Sec'y, Fla. Dep't of Corrs.*, 720 F.3d 1296, 1305 (11th Cir. 2013).

B. *Split Over Deference.* Whatever a circuit's take on the role of *Brecht* vis-à-vis *Chapman*, the circuits disagree about whether (and to what extent) *Brecht* requires deference to state harmless-error findings. Some defer to the state court's analysis; others apply *de novo* review. This disagreement shows that the issue raises more than an academic debate about proper "nomenclature." It raises a debate with real-world effects over how easy it should be to overturn a state court's harmless-error finding in federal court.

On the one hand, the First Circuit has described the *Brecht* standard as "even more deferential than the ordinary standard of review under [AEDPA]." *Connolly*, 752 F.3d at 506. And the Eleventh Circuit has criticized a district court for "improperly afford[ing] no deference to the [state court's] reliance on the consid-

erable body of evidence mounted against [the petitioner]" when concluding that an error "was not harmless." *Mansfield v. Sec'y Dept. of Corr.*, 679 F.3d 1301, 1309 (11th Cir. 2012). Perhaps most explicitly, a Tenth Circuit panel concluded (albeit in an unpublished decision) that "[w]here a state court rejects a constitutional claim based upon harmless error, we accord that determination deference as we evaluate whether the error had a substantial and injurious effect or influence on the verdict based upon the whole record." *Humes v. Arellano*, 413 F. App'x 68, 71 (10th Cir. 2011) (citation omitted).

On the other hand, the Ninth Circuit has held that "'we apply the *Brecht* test *without regard* for the state court's harmlessness determination.'" *Ayala*, 756 F.3d at 674 (citation omitted; emphasis added). Similarly, the Third Circuit has performed a *de novo* review, "rather than review the state court's harmless error analysis under the AEDPA standard." *Bond*, 539 F.3d at 275-76. And the Sixth Circuit here applied a *de novo* standard, giving no consideration to the state court's contrary harmless-error finding. Pet. App. 24a-30a.

Tellingly, many cases conducting *de novo* review led to dissents criticizing the opinions as "land[ing] yet another blow to our AEDPA jurisprudence by concluding that we review a state court's harmless error analysis under an exceptionally nondeferential standard." *Ayala*, 756 F.3d at 722 (Ikuta, J., dissenting from denial of rehearing en banc). The dissenters have reiterated "*why* the Supreme Court in *Fry* concluded that *Brecht*'s harmless error standard survived passage of AEDPA, and why [lower courts] may appropriately apply it alone . . . ." *Wood*, 644 F.3d at 101 (Living-

ston, J., dissenting). That test is supposed to be *more deferential* than the AEDPA standards clarified by *Harrington*. The circuit courts' *de novo* review seems incompatible with that notion. *See id.* at 102 (noting that, under the majority's reasoning, *Brecht* "did not" subsume AEDPA); *cf. Ayala*, 756 F.3d at 723 (Ikuta, J., dissenting from denial of rehearing en banc) (criticizing panel for "not just de novo legal analysis, but de novo review of the record that piles speculation upon speculation"); *Gongora v. Thaler*, 726 F.3d 701, 712 (5th Cir. 2013) (Smith, J., dissenting from the denial of rehearing en banc) (noting that panel's "gross misapplication of [the *Brecht*] standard evades the Supreme Court's recent habeas instructions").

In sum, the question of "how district courts are to apply § 2254(d)'s 'reasonableness' inquiry in the light of *Fry*'s instruction to" apply *Brecht* is one with which the circuit courts have struggled mightily. *Johnson*, 572 F.3d at 407 (Cudahy, J., concurring). Ultimately, therefore, it is a question worth this Court's time.

III. THIS CASE PRESENTS AN IMPORTANT AND RECURRING QUESTION

The Court should grant the petition for certiorari because the question of how a federal habeas court should review a state court's harmless-error finding is an important and recurring one.

To begin with, the question's importance cannot be overstated; it strikes at the heart of AEDPA. "AEDPA recognizes a foundational principle of our federal system: State courts are adequate forums for the vindication of federal rights." *Burt*, 134 S. Ct. at 15. By limiting federal judicial oversight of state-court decisions, AEDPA "'further[s] the principles of comity, finality,

and federalism.'" *Duncan v. Walker*, 533 U.S. 167, 178 (2001) (citation omitted). "Federal habeas review of state convictions frustrates both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.'" *Harrington*, 131 S. Ct. at 787 (citation omitted). It also "'disturbs the State's significant interest in repose for concluded litigation'" in the state system. *Id.* (citation omitted). For these reasons, the Court has repeatedly reaffirmed AEDPA's demanding nature, and corrected lower courts that had gone astray under it. *See Smith*, 2014 WL 4956764; *White v. Woodall*, 134 S. Ct. 1697 (2014); *Tibbals v. Carter*, 133 S. Ct. 696 (2013); *Metrish v. Lancaster*, 133 S. Ct. 1781 (2013).

If anything, the Court's guidance is more important in this case than in others. The harmless-error question here likely arises far more frequently. That is shown by the many circuit cases confronting the issue. And it is shown by the fact that "'most constitutional errors can be harmless.'" *Washington v. Recuenco*, 548 U.S. 212, 218 (2006) (quoting *Neder v. United States*, 527 U.S. 1, 8 (1999)). As a result, this question about the proper harmless-error test applies not just to the Confrontation Clause claim at issue in this case, but also to the many constitutional claims arising in the habeas context. The frequency with which the question arises magnifies the need for the lower courts to apply the correct standard. And the frequency magnifies the harms to federalism and comity when those courts apply an insufficiently deferential standard.

This case proves the risks to federalism and comity. "Here it is not apparent how the Court of Appeals' analysis would have been any different without AED-

PA." *Harrington*, 131 S. Ct. at 786. The court applied *de novo* review to the harmless-error question, *see* Pet. App. 24a, never discussed the state court's decision, *see* Pet. App. 24a-29a, and granted relief based merely on its "grave doubts" about the harmful effect of the alleged error on the jury's decision, Pet. App. 25a. It reached this result even though the state courts had already expended substantial resources on two separate trials and two separate appeals. Pet. App. 5a-6a. And it reached this result even though the state appellate court had already shown its sensitivity to the prejudicial effects of potential error, reversing McCarley's first conviction because a stray trial-court remark might have influenced the jury. Pet. App. 122a-26a.

Finally, the *Chapman* harmless-error test is as general of a legal rule as they come, because it necessarily encompasses every potential constitutional claim subject to harmless-error review. Under normal AEDPA principles, that would lead to greater, not lesser, deference to state courts. "'The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations.'" *Harrington*, 131 S. Ct. at 786 (citation omitted); *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009). Yet if the Sixth Circuit correctly gave *no* deference to the state court's harmless-error finding, the harmless-error context will likely be the only one in which federal courts conduct *de novo* review of claims that state courts adjudicated on the merits. Such a view opens the door to the type of second-guessing that AEDPA was designed to prohibit.

IV. THIS PETITION PROVIDES AN IDEAL VEHICLE TO CONSIDER THE ISSUE PRESENTED

The Court should grant the petition for certiorari, lastly, because it presents the issue in an ideal factual setting. This is a case where "fairminded jurists" can disagree about whether the claimed error was harmless beyond a reasonable doubt. *Harrington*, 131 S. Ct. at 786. Indeed, it is a case in which fairminded judges *have* disagreed. A unanimous state appellate panel, reviewing all of the evidence submitted at trial and applying *Chapman*, concluded that, if any error occurred, it was harmless. Pet. App. 110a. A federal magistrate found that the error did not have a substantial and injurious effect on the jury, Pet. App. 90a, and a district judge agreed given the "overall strength of the prosecution's case," Pet. App. 52a. On balance, more judges found that the alleged error was harmless (five) than that it might have been harmful (three).

For its part, even the Sixth Circuit conceded that the state court's harmless-error finding had some justification. It concluded that two of the five *Van Arsdall* factors supported the state court's harmlessness finding. Pet. App. 30a. It chose, however, to give greater weight to other factors that (it said) did not favor the State. *Id.* Ultimately, moreover, the court did not conclude that the error did, in fact, substantially affect the verdict. Rather, it granted habeas relief based only on its "grave doubts" about whether the error had done so. Pet. App. 25a, 29a. The court's analysis itself, therefore, shows the court believed the case was a close one.

A few factors illustrate the room for reasonable disagreement. To begin with, all courts agree that

D.P.'s statements to Dr. Lord in many respects "duplicated" statements he made to others about a man in a police uniform committing the murder. Pet. App. 27a; *see* Pet. App. 51a, 109a-10a. And, as for Dr. Lord's statements in her second letter about D.P. identifying McCarley, Pet. App. 9a, the state court could reasonably find that the identification did not affect the outcome. For one, Dr. Lord, the expert psychologist, disclaimed the identification, noting that "it is not possible to definitely state who murdered" Puffenbarger due to "the inherent difficulties in evaluating young children." Pet. App. 10a. For another, in a different letter, Dr. Lord noted that D.P. said an individual named "Tim" had beaten his mother, so D.P.'s statements were inconsistent on the face of the letters. Pet. App. 7a-8a.

In addition, the Sixth Circuit said that McCarley's inability "to cross-examine D.P. was the critical error in the state court proceedings." Pet. App. 30a. But it overlooked that D.P. *did* testify at McCarley's *first* trial, and he was subject to McCarley's cross-examination then. D.P. could not remember speaking with Dr. Lord and had very little memory of the events in question. Doc.7-2, Exhibits 1-41 at 114, PageID#212. Indeed, McCarley's own reply brief on his first appeal called D.P.'s testimony a "formality." Doc.7-2, Exhibits 1-41, at 148, PageID#246. Yet no Confrontation Clause issue would have arisen with the introduction of Dr. Lord's letters if D.P. had testified again. *See United States v. Owen*, 484 U.S. 554, 559-60 (1988); *cf. Yanez v. Minnesota*, 562 F.3d 958, 964 (8th Cir. 2009) (holding that "L.P.'s inability to recall the details of her prior statements or the incidents that led to those statements did not render the admission of the out-of-court

testimonial statements constitutionally defective"); *Cookson v. Schwartz*, 556 F.3d 647, 650-52 (7th Cir. 2009) (rejecting argument that, "although A.C. testified at trial, she was not 'available,' for Confrontation Clause purposes, because she did not remember making the statements"). The absence of a mere "formality" is not the stuff of which harmful error is made.

Finally, while the Sixth Circuit found the prosecution's case "far from 'substantial and overwhelming'" without Dr. Lord's letters, Pet. App. 29a, it did not cite substantial portions of the evidence referenced by the state court and district court. It said, for example, that none of the evidence "included a conclusive identification of McCarley as the murderer." Pet. App. 29a. But the State introduced evidence of McCarley identifying himself as the murderer (or at least a murderer). A witness testified that McCarley told the witness "that he had killed someone and that when you kill someone 'you don't remember their eyes.'" Pet. App. 107a. The prosecution also introduced substantial evidence showing McCarley's motive—his anger over Puffenbarger filing a child-support action against him—and his many threats that Puffenbarger "'wouldn't live to see the court date.'" *Id.*

In short, the state court's decision that Dr. Lord's letters would not have affected the jury's verdict does not illustrate "the 'extreme malfunctio[n]' for which federal habeas relief is the remedy." *Burt*, 134 S. Ct. at 16. Indeed, McCarley received two separate trials in state court in front of two separate juries precisely because those courts were conscientious of his receiving a fair trial. *See* Pet. App. 122a-26a. Accordingly, the standard of review and degree of deference owed to

a state court's harmless-error finding are likely outcome dispositive in this case. That makes it an ideal vehicle to consider this issue.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

MICHAEL DEWINE
Attorney General of Ohio

ERIC E. MURPHY*
State Solicitor
**Counsel of Record*
SAMUEL PETERSON
Deputy Solicitor
MARY ANNE REESE
Assistant Attorney General
30 East Broad Street
17th Floor
Columbus, Ohio 43215
614-466-8980

Counsel for Petitioner
Bennie Kelly, Warden

October 8, 2014