No. 22-___

IN THE

Supreme Court of the United States

DARRELL HEMPHILL,

Petitioner,

v.

STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari
to the Court of Appeals of New York

PETITION FOR A WRIT OF CERTIORARI

Claudia Trupp
Matthew Bova
CENTER FOR
APPELLATE LITIGATION
120 Wall Street,
28th Floor
New York, NY 10005

Jeffrey L. Fisher
Counsel of Record
Pamela S. Karlan
Easha Anand
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081
jlfisher@stanford.edu

QUESTION PRESENTED

Whether the improper admission of the out-of-court statement by the alternative suspect in *Hemphill v. New York*, 142 S. Ct. 681 (2022), was "so unimportant and insignificant" as to be harmless under *Chapman v. California*, 386 U.S. 18, 22 (1967).

RELATED PROCEEDINGS

People v. Hemphill, 103 N.Y.S.3d 64 (App. Div. 1st Dep't 2019)

People v. Hemphill, 35 N.Y.3d 1035 (2020)

Hemphill v. New York, 142 S. Ct. 681 (2022)

People v. Hemphill, 38 N.Y.3d 1182 (2022)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Darrell Hemphill respectfully petitions for a writ of certiorari to review the judgment of the New York Court of Appeals.

OPINIONS BELOW

The opinion of the New York Court of Appeals is reported at 38 N.Y.3d 1182 and is reprinted in the Appendix to the Petition ("Pet. App.") at 1a-5a. A prior decision of the New York Court of Appeals is reported at 35 N.Y.3d 1035 and is reprinted at Pet. App. 6a-12a. The opinion of the Appellate Division of the New York Supreme Court, First Judicial Department is reported at 103 N.Y.S.3d 64 and is reprinted at Pet. App. 13a-33a. The relevant proceedings of the New York Supreme Court are unpublished.

JURISDICTION

The decision of the New York Court of Appeals was issued on July 21, 2022. Pet. App. 1a. On September 6, 2022, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including November 18, 2022. *See* No. 22A260. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISION

The Fourteenth Amendment to the U.S. Constitution provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

After unsuccessfully prosecuting Nicholas Morris for a homicide, the State of New York charged petitioner Darrell Hemphill with committing the same crime. Hemphill's trial hinged on who actually fired the 9-millimeter handgun that shot and killed the victim. Petitioner maintained that the State was right the first time: It was Morris. In response, the State introduced a statement by Morris (who did not testify) asserting that the gun he possessed at the crime scene was a .357 magnum—thereby suggesting he could not have been the shooter. The jury convicted petitioner of second-degree murder, and the court sentenced him to prison for a term of twenty-five-years-to-life.

Last Term, this Court held that the introduction of Morris's statement violated petitioner's Sixth Amendment right to confront witnesses against him. *Hemphill v. New York*, 142 S. Ct. 681 (2022). But despite the New York courts' previous determination that introducing Morris's statement had been "reasonably necessary" to enable the prosecution to "rebut" petitioner's defense, *id.* at 686 (citation omitted), the New York Court of Appeals held on remand that the statement's erroneous admission was harmless beyond a reasonable doubt. Petitioner now brings the case back to this Court.

A. Factual background

1. In April 2006, two men—Ronnell Gilliam and a companion—got into a fistfight with several other people on a street in the Bronx. Shortly after, Gilliam's companion opened fire with a 9-millimeter handgun, and a stray bullet struck and killed a child in a passing car. *Hemphill*, 142 S. Ct. at 687; Pet. App. 2a.

One witness told the police that Gilliam's best friend, Nicholas Morris, "had been at the scene" with him. *Hemphill*, 142 S. Ct. at 687; J.A. 126-27.[1] Within hours of the shooting, police searched Morris's home and recovered a live 9-millimeter cartridge on his nightstand, as well as other guns and ammunition for a .357 magnum revolver. J.A. 110, 123-24. The police arrested Morris the next day. They observed bruises on his knuckles consistent with fistfighting. *Hemphill*, 142 S. Ct. at 687.

Around the same time, three eyewitnesses independently identified Morris from a police lineup as the shooter. *Hemphill*, 142 S. Ct. at 687. A fourth eyewitness identified Morris in a photo array as "look[ing] like the shooter." Pet. App. 28a. Others did not identify the shooter but said that he wore some sort of blue top (perhaps a "short-sleeved shirt or polo," or a sweater) and had a tattoo on his right forearm. *Hemphill*, 142 S. Ct. at 687; Pet. App. 15a, 19a.

Meanwhile, Gilliam surrendered to the police. Confirming the eyewitness accounts, Gilliam said that Morris was his companion at the fight and had been the shooter. *Hemphill*, 142 S. Ct. at 687.

During a subsequent interview, police allowed Gilliam to speak on the phone to Morris, who was calling from jail. Telling Morris that he would "make it right," Gilliam changed his story. J.A. 174-75. Recanting his identification of Morris as the gunman, Gilliam asserted for the first time that petitioner—Gilliam's cousin, who had recently traveled with him

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[1] Citations to the J.A. are to the Joint Appendix in *Hemphill v. New York*, 142 S. Ct. 681 (2022) (No. 20-637).

to North Carolina—was the one who shot the victim. Pet. App. 19a, 29a.

2. Investigators "did not credit" Gilliam's revised allegation. *Hemphill*, 142 S. Ct. at 687. Instead, the State indicted Morris for the homicide and for possession of the 9-millimeter handgun, pointing principally to the strength of the eyewitness identifications and the physical evidence recovered from Morris's apartment. *Id.*; J.A. 6. The State also apparently believed that a sweater the police had found in Gilliam's apartment was the blue top Morris had worn while committing the crimes. In its opening statement at trial, however, the State did not reference the sweater. J.A. 4-17. Instead, the State focused on the fact that numerous eyewitnesses "separately and independently" reported that they "saw only one man with a gun, the defendant" Nicholas Morris. *Id.* 6, 13.

Before the parties submitted any evidence, they agreed to a mistrial. *Hemphill*, 142 S. Ct. at 687. The State explained that, upon learning from the defense that DNA found on the blue sweater did not match Morris, it intended to "reinvestigate" certain aspects of the case. Morris Tr. 241-42; Pet. App. 14a.[2]

By this time, Morris had spent over two years in jail. Pet. App. 14a. In lieu of trying him again for murder, the State offered Morris a deal: If he pleaded guilty to possessing a firearm at the scene of the shooting, the State would request that the homicide

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[2] Citations to "Morris Tr." refer to the trial of Nicholas Morris in *People v. Morris*, No. 1674-2006 (N.Y. Sup. Ct.). Citations to "Tr." refer to Mr. Hemphill's trial.

charge be dismissed. *Hemphill*, 142 S. Ct. at 687; J.A. 35-38.

To effectuate this plea bargain, Morris could have pleaded guilty simply to possessing the 9-millimeter gun, as charged in the indictment—or to possessing a gun without specifying the particular type at all.[3] Instead, Morris offered an allocution in which he specifically asserted that "the loaded operable firearm" he possessed at the scene of the shooting was a .357 revolver—a different caliber firearm than the murder weapon. J.A. 22, 35-36; *Hemphill*, 142 S. Ct. at 686-87. Even though there was scant evidence to support Morris's claim, J.A. 30, the prosecution and trial judge accepted it as "a truthful explanation of what happened," *id.* 38.

3. Three years later, police determined that DNA on the blue sweater found in Gilliam's apartment matched petitioner. Pet. App. 14a-15a. No eyewitness ever identified the sweater as the particular blue top worn by the shooter. *Id.* 29a & n.4. Nor did any eyewitness (save Gilliam, in his revised allegation) ever identify petitioner, instead of Morris, as the gunman. Nevertheless, in 2013, after two more years had passed, the State charged petitioner with the 2006 shooting. *Id.* 15a.

B. Procedural history

1. *The trial.* At petitioner's trial, the State abandoned the theory it had espoused at Morris's trial. Instead of contending that Gilliam acted with only one

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[3] The caliber of firearm illegally possessed is immaterial under the relevant state statute; the statute speaks only of possessing a "loaded firearm." N.Y. Penal Law § 265.02(4) (repealed 2006) (codified as amended at § 265.03(3) (2022)).

companion, the State now maintained that Gilliam had acted with two others (Morris and petitioner), and that petitioner shot the victim. J.A. 356.

To support this new theory, the State presented testimony from Gilliam, who agreed to testify at petitioner's trial as part of a plea bargain of his own. Under the deal, Gilliam received a sentence of five years in prison, avoiding a term of at least twenty-five years for his involvement in the murder. J.A. 165. Gilliam had previously mentioned only a single weapon in his accounts of the shooting. But Gilliam now claimed that there were two guns at the scene. *Id.* 178-79. He claimed that Morris had a .357 and that petitioner had the 9-millimeter. Tr. 980-81.

Petitioner contended that the State had been right the first time—that Morris was Gilliam's sole companion and the shooter. Pet. App. 2a. In support of this claim, petitioner "elicited undisputed testimony from a prosecution witness that police had recovered 9-millimeter ammunition from Morris' nightstand." *Hemphill*, 142 S. Ct. at 686. Petitioner also explained that eyewitnesses to the crime had identified Morris, not him, as the shooter.

In response, the State moved to introduce Morris's plea allocution. J.A. 101, 105-06, 138. The State also disclaimed any intention to call Morris to the stand. After a trip to Barbados, Morris had been denied re-entry to this country and, in any event, was "not willing" to appear in court, where he would have been subject to cross-examination. J.A. 139, 142-44.

Petitioner objected that admitting Morris's allocution without putting him on the stand would violate the Sixth Amendment's Confrontation Clause. J.A. 160-61. The trial court overruled petitioner's

objection. It acknowledged that petitioner's third-party defense that Morris was the shooter was "appropriate," "fair," and even a "necessary argument to make." *Id.* 120, 185. But invoking a New York evidentiary rule known as "opening the door," the trial court reasoned that Morris's allocution was "reasonably necessary" to allow the State "to rebut [petitioner]'s theory that Morris committed the murder." *Hemphill*, 142 S. Ct. at 686 (citation omitted). Indeed, the trial court judge explained that the allocution went "to the heart of this case." J.A. 120.

"The State, in its closing, cited Morris' plea allocution and emphasized that possession of a .357 revolver, not murder, was 'the crime [Morris] actually committed.'" *Hemphill*, 142 S. Ct. at 688 (quoting J.A. 356). In other words, because a 9-millimeter bullet killed the victim, the State insisted that Morris's allocution showed that he could not have possessed the "murder weapon." J.A. 355-56.

The jury's deliberations lasted "multiple days." *Hemphill*, 142 S. Ct. at 688. Among other things, the jury repeatedly requested to see headshots of Morris and petitioner. J.A. 364, 368. The jury also requested copies of the testimony of one of the eyewitnesses who initially identified Morris as the shooter. *Id.* 364-65. Eventually, the jury found petitioner guilty of second-degree murder. The court sentenced him to a term of twenty-five-years-to-life in prison. Pet. App. 6a.

2. *Proceedings on appeal*

a. Petitioner appealed his conviction, renewing, among other arguments, his Confrontation Clause claim. The State defended the trial court's decision to admit Morris's allocution. Specifically, the State contended that "when [petitioner] pursued a third-

party culpability defense stating Morris possessed the same caliber weapon that killed the victim, he opened the door for the People to admit evidence that Morris possessed a different caliber weapon." Supp. App. to Br. in Opp. 208a, *Hemphill v. New York*, 142 S. Ct. 681 (2022) (No. 20-637) ("*Hemphill I* BIO App.").[4]

The Appellate Division agreed with the State and affirmed. The panel recognized that a nontestifying witness's allocution "would normally be inadmissible" under the Confrontation Clause. Pet. App. 21a. But a majority of the panel held that petitioner had "created a misleading impression that Morris possessed a 9 millimeter handgun, which was consistent with the type used in the murder, and introduction of the plea allocution was reasonably necessary to correct that misleading impression." *Id.* 22a.

Justice Manzanet-Daniels dissented on the grounds that the State's evidence was legally insufficient—even with the allocution—to support petitioner's conviction. Pet. App. 27a. She stressed that, within two days of the shooting, three of the four eyewitnesses had identified Morris as the gunman. *Id.* 28a. She also emphasized that the only witness to claim petitioner was the shooter was Gilliam, who initially said that Morris had committed the crime, admitted to lying at various points during the investigation, and testified against petitioner "to avoid a murder sentence" of his own. *Id.* 28a-29a, 29a n.2.

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[4] Citations to this document are to the hard copy as filed in this Court, which petitioner assumes remains accessible. The document is posted as "Other" on this Court's online docket entry for the Brief in Opposition. But the posting appears to be an earlier draft and is not paginated the same as the ultimate filing.

b. The New York Court of Appeals affirmed. As relevant here, it held that "the trial court did not abuse its discretion by admitting evidence that the allegedly culpable third party pled guilty to possessing a firearm other than the murder weapon." Pet. App. 7a.

c. Petitioner sought certiorari in this Court, renewing his Confrontation Clause claim. The State opposed review, arguing in part that any error in admitting Morris's allocution was harmless. Br. in Opp. 30-32, *Hemphill v. New York*, 142 S. Ct. 681 (2022) (No. 20-637). Petitioner replied that the State's harmless-error argument was baseless. Cert. Reply at 9, *Hemphill v. New York*, 142 S. Ct. 681 (2022) (No. 20-637).

This Court granted certiorari and reversed. The Court accepted the trial court's determination that Morris's allocution was "reasonably necessary" to enable the prosecution "to rebut [petitioner]'s theory that Morris committed the murder." *Hemphill*, 142 S. Ct. at 686 (citation omitted). But the Court held that the Confrontation Clause still rendered the allocution inadmissible. No matter how "reliab[le] or credib[le]" testimonial hearsay may appear on its face, the Clause guarantees defendants the right to test the witness's veracity "in the crucible of cross-examination." *Id.* at 691-92 (citation omitted).

The Court did not address the State's harmless-error contention. Instead, the Court remanded to allow the state courts "initially to assess the effect of [the] erroneously admitted evidence." *Hemphill*, 142 S. Ct. at 693 n.5 (citation omitted).

3. *Subsequent proceedings*. On remand, the New York Court of Appeals held that the improper

admission of Morris's allocution was harmless. The court acknowledged that "[t]he primary disputed issue" in this case was who "fired [the] 9-millimeter firearm" that killed the victim. Pet. App. 2a. And the court recognized that Morris's allocution "supported a conclusion that Morris possessed a *.357 magnum revolver* on the day in question." *Id.* 4a (emphasis added). Yet the court declared that "'there is no reasonable possibility' that the erroneously admitted plea allocution 'might have contributed to [petitioner's] conviction.'" *Id.* (quoting *People v. Crimmins*, 36 N.Y.2d 230, 237 (1975), which, in turn, cites *Chapman v. California*, 386 U.S. 18 (1967)). According to the court, "[t]he plea allocution neither exculpated Morris nor inculpated [petitioner] as the shooter." *Id.* The court further asserted that "the prosecutor's reliance on the [allocution] was exceedingly minimal" and added that Gilliam had also testified that Morris possessed a .357 magnum. *Id.*

The Court of Appeals also maintained that there was "other, overwhelming evidence of petitioner's guilt." Pet. App. 4a. In particular, the court pointed to Gilliam's testimony that petitioner was the shooter; evidence purportedly indicating that petitioner "fled" to North Carolina after the killing; and the fact that petitioner's DNA was found on the blue sweater police found in Gilliam's apartment. *Id.* 2a-3a. Finally, the court suggested that petitioner's appearance matched eyewitness descriptions of the gunman. *Id.* In a footnote, the court conceded that three of those witnesses actually identified Morris, not petitioner, as the shooter. *Id.* 4a n.*. But the court discounted those specific averments during police lineups as "misidentifi[cations]" and speculated that news coverage "potentially bias[ed]" their recollections. *Id.*

REASONS FOR GRANTING THE WRIT

The New York Court of Appeals' harmless-error holding is patently erroneous. Because petitioner maintained at trial that Nicholas Morris fired the 9-millimeter handgun that killed the victim, Morris's statement suggesting he did not possess the murder weapon was bound to contribute to the verdict. This is especially so because, contrary to the Court of Appeals' assertion, the other evidence against petitioner was not "overwhelming." Far from it. Several eyewitnesses identified Morris as the shooter; physical evidence supported these identifications; and the State itself initially charged Morris with the crime. The Court of Appeals attempted in various ways to discount these facts. But its reasoning resembles review for sufficiency of the evidence (itself a disputed issue earlier in this case), not an analysis of whether a constitutional error at trial potentially contributed to a guilty verdict.

This Court should not allow the Court of Appeals' erroneous decision to stand. The harmless-error doctrine is among the most important doctrines in criminal law; indeed, the value of constitutional criminal procedure rights depends on it. The Court of Appeals' holding also contravenes this Court's own earlier decision in this case, which recounts the facts and procedural history in terms starkly inconsistent with the decision on remand. Finally, the stakes here are significant: Petitioner stands convicted of second-degree murder and is serving a prison sentence of twenty-five-years-to-life. To preserve the integrity of this Court's earlier decision in this case, as well as the criminal justice system more generally, this Court should grant certiorari and reverse.

I. The New York Court of Appeals' harmless-error holding is patently erroneous.

When the prosecution in a state criminal prosecution is the "beneficiary" of a "trial error" of constitutional magnitude, the court must reverse the defendant's conviction unless the prosecution proves that the error was "harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967); *see also United States v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006) (distinguishing "trial error" from "structural defect"). To carry this burden, the prosecution must demonstrate that "there is [no] reasonable possibility that the evidence complained of might have contributed to the conviction." *Chapman*, 386 U.S. at 24 (quoting *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963)).

Under the *Chapman* standard, "[a]n error in admitting plainly relevant evidence which possibly influenced the jury" adverse to the defendant cannot be considered harmless. *Chapman*, 386 U.S. at 23-24. The conviction can be sustained only if the improperly admitted evidence is "so unimportant and insignificant," *id.* at 22, that the guilty verdict "was surely unattributable to the error," *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993). That rule is not remotely satisfied here.

A. The improper admission of Morris's allocution plainly contributed to the jury's guilty verdict.

1. Where, as here, the defendant plausibly claims that someone else committed the offense with which he is charged, the improper admission of a statement by the alternative suspect suggesting that the

alternative suspect did not commit the crime is not harmless.

a. As the New York Court of Appeals acknowledged, "[t]he primary disputed issue" in this case "was the shooter's identity." Pet. App. 2a. Petitioner presented a third-party culpability defense, asserting that Morris, not petitioner, shot the victim. *Id.* Accordingly, the prosecution explained to the jury that "the main question, the only real question put to you is very simple: Who did it, Nick Morris or Darrel [sic] Hemphill?" J.A. 305.

Furthermore, substantial evidence pointed toward Morris as the shooter. Within 48 hours of the killing, "[t]hree witnesses identified Morris as the shooter out of a police lineup." *Hemphill*, 142 S. Ct. at 687; Pet. App. 28a. Another eyewitness from the neighborhood, after viewing a photo array, stated that Morris "look[ed] like the shooter," and still another identified Gilliam and Morris as the two men she had seen during the fistfight prior to the shooting. Pet. App. 28a. Finally, Gilliam himself initially identified Morris as the shooter. *Hemphill*, 142 S. Ct. at 687.

In addition to all of these identifications, the police determined that the murder weapon was a 9-millimeter handgun. And within hours of the shooting, investigating officers found live 9-millimeter ammunition on Morris's nightstand. *Hemphill*, 142 S. Ct. at 687. Police also "observed bruising on [Morris's] knuckles consistent with fist fighting." *Id.* Given the eyewitness testimony that the same individual who was involved with Gilliam in the fistfight was the gunman, Pet. App. 2a, this bruising reinforced petitioner's claim that Morris was the shooter.

In fact, so strongly did the evidence indicate that Morris was the gunman that the State itself originally charged Morris with possessing a 9-millimeter gun and with killing the victim. *Hemphill*, 142 S. Ct. at 687. And even after the State dropped those charges in exchange for Morris's plea to possessing a firearm at the scene, the New York courts continued to agree there was evidence indicating that Morris was the actual shooter. The trial court acknowledged here that petitioner's third-party defense was a "fair argument," J.A. 120—indeed, "under the circumstances of this case probably a necessary argument to make," *id.* 185. And the New York Court of Appeals recognized that "there was evidence of third-party culpability." Pet. App. 6a.

b. Against this backdrop of petitioner's serious third-party guilt defense, the State offered Morris's allocution "to rebut [petitioner]'s theory that Morris committed the murder." *Hemphill*, 142 S. Ct. at 686. As the State itself put it, "Morris' plea allocution was admitted as evidence that he possessed a .357—*not a .9mm*—on the date, time, and location where the victim was killed." *Hemphill I* BIO App. 205a (emphasis added). Morris's allocution, in other words, "g[ave] rise to the inference that he did not fire the .9mm bullet that killed the victim. This directly refuted defendant's defense that Morris was the shooter." *Id.*

The trial court, for its part, explicitly and repeatedly recognized the importance of the allocution, explaining that the allocution went "to the heart of this case." J.A. 120; *see also id.* 161 (explaining that the allocution was "central to the issue . . . being litigated in this trial"). If true, the

allocution "refut[ed] the claim that Morris was, in fact, the shooter." *Id.* 185; *see also id.* 105-06 (same); *id.* 119 (noting that the allocution "answers an argument that [defense counsel] made that Nick Morris is the shooter with the nine-millimeter"); *id.* 184 (observing that the allocution indicated that petitioner "may have possessed a different firearm than Morris and that Morris' firearm cannot be connected to this shooting"). Indeed, the trial judge made clear that the prosecution's case would have been "substantially weakened" without the allocution. *Id.* 121.

3. Despite all of this, the New York Court of Appeals declared that "there is no reasonable possibility" that admission of Morris's allocution "might have contributed to [petitioner's] conviction." Pet. App. 4a (citation omitted). None of the three reasons the court advanced for this startling assertion has merit.

First, the Court of Appeals asserted that Morris's allocution "neither exculpated [him] nor inculpated [petitioner] as the shooter." Pet. App. 4a. As explained above, however, the notion that Morris's allocution did not "exculpate[]" him flatly contradicts the record, procedural history, and this Court's opinion. The very reason the State introduced the allocution was to respond to petitioner's suggestion that Morris was the shooter. That is why the State itself explained that the allocution "tend[ed] to *exculpate* Morris as the shooter and rebut defendant's third-party culpability defense." *Hemphill I* BIO App. 209a-210a (emphasis added).

To be sure, Morris's allocution did not also directly "inculpate[] [petitioner] as the shooter." Pet. App. 4a. But where the jury's task is to determine whether the prosecution has proven that the defendant—and not

an alternative suspect—is guilty, evidence that exculpates the alternative suspect works great harm to the defense. *See Richardson v. Marsh*, 481 U.S. 200, 208 & n.3 (1987) (even if evidence is not inculpating "on its face," it still "harm[s]" the defendant where it is incriminating when linked with other evidence at trial). That is precisely what happened here. Everyone agreed that the child was killed by a 9-millimeter bullet. So excluding Morris as the potential shooter—on the ground that he supposedly possessed a .357 at the scene, not a 9-millimeter—left petitioner as the only remaining suspect.

Second, the Court of Appeals reasoned that the allocution's admission did not contribute to the verdict because "Gilliam had already testified" that "Morris possessed a .357 magnum revolver on the day in question." Pet. App. 4a. This reasoning is equally flawed.

This Court has repeatedly held that evidence that reinforces an important witness's testimony on a disputed issue is not harmless. For example, in *Arizona v. Fulminante*, 499 U.S. 279 (1991), this Court held that the erroneous admission of the defendant's confession to a fellow inmate was not harmless even though the prosecution had introduced a second confession containing all of the same material but through a different, less reliable witness. The Court explained that, absent exposure to the first confession, the jury might have found the witness who testified to the second confession "unbelievable." *Id.* at 298. That is, "the jury might have believed that the two confessions reinforced and corroborated each other." *Id.* at 299; *see also Satterwhite v. Texas*, 486 U.S. 249, 259-60 (1988) (similar reasoning).

Similarly here, the plea allocution's admission was not harmless because Gilliam was an important yet unreliable witness whose testimony required corroboration to be believed. Gilliam changed his story three times and admitted at trial that he had lied to the police and prosecutors. J.A. 178-81. During his first meeting with the police, he identified Morris as the shooter. Pet. App. 29a. Then, after Morris called Gilliam from jail, Gilliam recanted and instead claimed that petitioner was his sole accomplice and the shooter. *Id.* 29a & n.3. Years later, Gilliam asserted that he, Morris, and petitioner were all involved in the altercation, but that petitioner was the shooter, while Morris merely possessed a .357 magnum. *Id.* 29a. Gilliam himself admitted during trial that these shifting stories were not the product of faulty memory but instead that "[d]uring th[e] investigation [he] lied repeatedly to the district attorney and detectives." J.A. 177; *see also id.* 170 (admitting he lies to protect himself and others).

The jury also knew that Gilliam faced a twenty-five-year sentence for his participation in the crime and gave his testimony at petitioner's trial as part of a cooperation agreement under which he received a sentence of only five years in prison. J.A. 165. Because Gilliam was a participant in the offense and gave his testimony in exchange for leniency, New York law required the jury to view his testimony "with utmost caution" and "a suspicious eye." *People v. Berger*, 52 N.Y.2d 214, 218-19 (1981); *see also Lilly v. Virginia*, 527 U.S. 116, 131-33 (1999) (plurality opinion) (summarizing case law holding that accomplice confessions that "shift or spread blame" are "inherently unreliable"); *Lee v. Illinois*, 476 U.S. 530, 541 (1986) ("[W]hen one person accuses another of a

crime under circumstances in which the declarant stands to gain by inculpating another, the accusation is presumptively suspect.").

In light of these realities, the State itself emphasized at closing that Gilliam's credibility as a witness hinged on whether his testimony was "corroborated." J.A. 352. "There's only one reason you should believe any witness at a trial," the prosecution continued, "because he or she is corroborated. Corroboration is a magic word in every courtroom in this courthouse." *Id.* And Morris's allocution was the *only* evidence to corroborate Gilliam's claim that Morris possessed a .357, and not a 9-millimeter, at the crime scene. What is more, it offered corroboration in the form of a sworn statement that had previously been accepted as the truth by a court of law. *See id.* 38, 40, 156, 161.

Third, the New York Court of Appeals asserted that the State's reliance on Morris's allocution was "exceedingly minimal." Pet. App. 4a. The importance of the allocution, however, spoke for itself. In light of petitioner's claim that Morris was the shooter, Morris's statement suggesting he possessed only "a .357-magnum revolver, not the 9-millimeter handgun" used in the killing, *Hemphill*, 142 S. Ct. at 686, must have commanded the jury's attention regardless of any extra argumentation by the prosecution.

In any event, the State relied on the allocution in much more than an "exceedingly minimal" way. As this Court highlighted, "[t]he State, in its closing, cited Morris' plea allocution and emphasized that possession of a .357 revolver, not murder, was 'the crime [Morris] actually committed.'" 142 S. Ct. at 688 (quoting J.A. 356). Indeed, the State's whole theory

was that introducing Morris's allocution was "reasonably necessary" to refute petitioner's third-party defense. *Id.* at 686, 688 (citation omitted); *see also* J.A. 101, 110-11, 116-17, 139. And the New York courts endorsed this theory, holding that introducing the plea allocution was "reasonably necessary to correct th[e] misleading impression" that Morris possessed the murder weapon. Pet. App. 22a (Appellate Division); *see also id.* 7a (Court of Appeals).

There is no way to square the New York courts' prior holding that the admission of the allocution was necessary to rebut petitioner's third-party defense with the Court of Appeals' declaration that the allocution could not have contributed to the verdict. Nor did the Court of Appeals even try to do so.

B. The other evidence against petitioner was not even remotely overwhelming.

Apart from its analysis of Morris's allocution, the New York Court of Appeals also asserted that "the evidence of [petitioner]'s guilt was overwhelming." Pet. App. 1a. This Court, of course, has long "admonished . . . against giving too much emphasis to 'overwhelming evidence' of guilt" in harmless-error review. *Harrington v. California*, 395 U.S. 250, 254 (1969) (citation omitted). Even so, any fair reading of the record demonstrates that the evidence against petitioner was far from overwhelming. Multiple eyewitnesses identified Morris as the shooter, and the jury deliberated for "multiple days" and repeatedly asked to see headshots of Morris and petitioner. *Hemphill*, 142 S. Ct. at 687-88; J.A. 364, 368. Indeed, the State's evidence was so thin that one appellate justice found it "was insufficient to support [petitioner]'s conviction." *Hemphill*, 142 S. Ct. at 689;

see also Pet. App. 27a-33a (Manzanet-Daniels, J., dissenting).

1. To begin, almost all the evidence to which the New York Court of Appeals pointed existed at the time the State charged Morris with the shooting. At that time, the State presumably believed that *Morris*, not petitioner, fired the fatal shot. Not surprisingly, therefore, this body of evidence fails to point overwhelmingly to petitioner.

The Court of Appeals first summarized Gilliam's testimony. Pet. App. 2a-3a. But for the reasons stated above, this testimony was highly suspect. *See supra* at 16-18. Indeed, when Gilliam changed his story to implicate petitioner, investigators "did not credit" his account and instead charged Morris with the killing. *Hemphill*, 142 S. Ct. at 687. The jury here was also instructed to view Gilliam's testimony skeptically and told that the testimony could support a guilty verdict only if "corroborated by other evidence." Tr. 1696. And the jury seemingly did view Gilliam's testimony with suspicion. J.A. 364 (jury requesting to review Gilliam's cooperation agreement).

The Court of Appeals next asserted that petitioner "fled" to North Carolina shortly after the shooting and "eva[ded] authorities by use of an alias." Pet. App. 3a-4a. These assertions, however, ignore evidence cutting the other way. Shortly after the shooting, petitioner retained an attorney and made himself available to the police. J.A. 94. Police also knew where petitioner and his family resided in North Carolina, and he even returned to New York for business multiple times. *Id.* 293-95.

At any rate, under New York law, evidence of evasion has "limited probative force." *People v.*

Yazum, 13 N.Y.2d 302, 304 (1963); *see also Illinois v. Wardlow*, 528 U.S. 119, 125 (2000) (noting that "there are innocent reasons for flight from police and that, therefore, flight is not necessarily indicative of ongoing criminal activity"). And the jury here was instructed to this effect. Tr. 1684. Consequently, any evidence of flight could not provide overwhelming evidence of guilt.

The Court of Appeals lastly referenced various eyewitness accounts of the shooting. In particular, the court stated that several eyewitnesses "identified the shooter as a tall, slim, black man" and that petitioner is "tall and slim." Pet. App. 3a. This, however, distorts the record. One eyewitness described the shooter as "tall" and "skinny." J.A. 330-31. But that witness identified Morris, not petitioner, as the shooter. *Id.* Other witnesses testified simply that the shooter was "tall*er*" and "slimm*er*" than Gilliam. *Id.* 135, 236, 256 (emphasis added). That comparison points no more to petitioner than to Morris: Both petitioner and Morris were considerably taller and slimmer than Gilliam, who weighed about 400 pounds, *id.* 9, 12.

The Court of Appeals also claimed that "several" eyewitnesses "identified [petitioner] as the shooter." Pet. App. 3a. This is incorrect. In actuality, Gilliam (whose testimony was exceptionally unreliable, *see supra* at 16-18) was the *only* witness who said petitioner was the shooter. *Id.* 28a. And three eyewitnesses independently identified Morris—who "does not resemble" petitioner—as the shooter. *Id.* In a brief footnote, the Court of Appeals tried to brush aside this evidence, pointing to the "chaotic circumstances of the shooting" and speculating that eyewitnesses may have been "potentially bias[ed]" by

later news coverage. *Id.* 4a n.*. The State, however, presented these identifications as accurate when it charged Morris. *See* J.A. 6 (stressing, in the State's opening in Morris's trial, that three eyewitnesses "independently and separately identified that man, Nicholas Morris" as the shooter). And in fact, the eyewitnesses had about ten minutes in broad daylight to observe the shooter before he returned and pulled the trigger. Pet. App. 27a-28a.[5]

The New York Court of Appeals' slanted tour of the record recalls *Wearry v. Cain*, 577 U.S. 385 (2016) (per curiam), where this Court reversed the Louisiana Supreme Court's holding that certain withheld evidence was immaterial under *Brady v. Maryland*, 373 U.S. 83 (1983). This Court chastised the Louisiana court for "emphasiz[ing] reasons a juror might disregard new evidence while ignoring reasons she might not" and for "failing even to mention" other pieces of potentially exculpatory evidence. 577 U.S. at 394. Likewise here, the New York Court of Appeals imagined every reason a juror might have voted to convict, while ignoring powerful exculpatory evidence. This approach might be appropriate when a court reviews a conviction for sufficiency of the evidence and

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[5] To make matters worse, the Court of Appeals discounted the eyewitness identifications of Morris on the ground that "the shooter's face was partially obscured." Pet. App. 4a n.*. Yet in the same breath, the Court of Appeals found the eyewitness testimony telling because Morris "had a large scar down the side of his face—an identifying characteristic not mentioned by any eyewitness." *Id.* 4a. The Court of Appeals cannot have it both ways. If the shooter's face was sufficiently visible that witnesses should have noticed Morris's scar, it was also sufficiently visible that witnesses' multiple identifications of Morris as the shooter cannot be so easily discounted.

considers the evidence "in the light most favorable to the prosecution" to determine whether a rational juror could have convicted, *Musacchio v. United States*, 577 U.S. 237, 243 (2016) (citation omitted). But it simply will not do for harmless-error review.

2. The only evidence highlighted by the Court of Appeals that postdates the State's charging of Morris was the discovery of petitioner's DNA on the blue sweater recovered from Gilliam's apartment. Pet. App. 2a. But the court's focus on that sweater is misplaced.

Recall that Gilliam and petitioner are cousins. People often leave clothing at their family members' homes. Moreover, the DNA test indicated only that petitioner had worn the sweater at some point prior to the testing. J.A. 270. The test did not determine when or where he wore it. *Id.*

Nor is it necessarily suspicious that petitioner was allegedly "wearing a blue sweater on the day of the shooting." Pet. App. 3a. No witness testified that petitioner was wearing the particular sweater found in Gilliam's apartment. Nor did any witness identify the sweater "as the one worn by the shooter." *Id.* 29a. In fact, as this Court recognized, witnesses disagreed over whether the shooter was even wearing a sweater. "Eyewitnesses had described the shooter as wearing a blue shirt *or* sweater." *Hemphill*, 142 S. Ct. at 687 (emphasis added); *see also* J.A. 254 ("[The shooter] was wearing a golf shirt, a blue golf shirt. . . . [I]t had three buttons on top.").

The Court of Appeals' blue-sweater theory is also out of joint with its emphasis on eyewitness testimony saying that the shooter had a tattoo. *See* Pet. App. 3a. The only tattoo petitioner has is on his "upper right arm." *Id.*; *see also* J.A. 265 ("upper shoulder"). Yet if

the shooter had been wearing this blue sweater, the garment's long sleeves would have prevented witnesses from seeing an upper-shoulder tattoo. J.A. 95. Indeed, to show his tattoo at trial, petitioner had to remove his shirt entirely. *Id.* 374.

The Court of Appeals bent over backwards to explain away this discrepancy, surmising that the shooter's sleeves "may have been rolled up," enabling the witnesses to "ca[tch] glimpses" of a shoulder tattoo. Pet. App. 3a. Again, this approach (at best) considers the evidence in the light most favorable to the prosecution—the exact opposite of the approach the court should have taken. *See Chapman*, 386 U.S. at 24. The Court of Appeals' speculation also ignores a basic fact: Witnesses suggested the shooter had a tattoo on his "right forearm," Pet. App. 15a, not his upper arm.

II. This Court should correct the New York Court of Appeals' error.

A. The harmless-error doctrine is important and too-often misapplied.

The harmless-error doctrine is "almost certainly the most frequently-invoked doctrine in all criminal appeals." Daniel Epps, *Harmless Errors and Substantial Rights*, 131 Harv. L. Rev. 2117, 2119 (2018); *see also* William M. Landes & Richard A. Posner, *Harmless Error*, 30 J. Legal Stud. 161, 161 (2001) (the doctrine is "probably the most cited rule in modern criminal appeals"). Harmless-error review is also "one of the most significant tasks of an appellate court, as well as one of the most complex." Roger J. Traynor, The Riddle of Harmless Error 80 (1970). Yet over thirty years have passed since the Court assessed

whether improperly admitted evidence was harmless. *See Arizona v. Fulminante*, 499 U.S. 279 (1991).

Meanwhile, the doctrine has "remain[ed] surprisingly mysterious" and challenging for lower courts to apply consistently. Epps, *supra*, at 2120. Worse yet, "there are worrying signs that reviewing courts are currently bungling" harmless-error analyses, and some courts now find constitutional errors harmless "with remarkable frequency." Justin Murray, *A Contextual Approach to Harmless Error Review*, 130 Harv. L. Rev. 1791, 1793-94 (2017); *see also id.* at 1793 n.10 (collecting empirical studies); *Anthony v. Louisiana*, 143 S. Ct. ___, ___ (2022) (slip op. at 11-13) (Sotomayor, J., dissenting from the denial of certiorari) (state appellate court "failed to apply" the proper standard and focused instead on "the sufficiency of the evidence"). Such profligate use of the harmless-error doctrine reduces constitutional rights to protections in name only—"ghosts that are seen in the law but are elusive to the grasp." *The Western Maid*, 257 U.S. 419, 433 (1922).

Petitioner's case throws into relief "how malleable harmless error is in practice and how powerful a tool it can be for a court that wishes to affirm . . . a decision below," Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 Va. L. Rev. 1, 7 (2002). Rarely will a murder trial feature such compelling evidence that another individual committed the offense. And the improperly admitted evidence here spoke directly to this issue. If the New York Court of Appeals truly believed the error here harmless, that simply underscores just how important it is for this Court to step in to correct that misunderstanding.

B. This is the right case to provide a fresh demonstration of how harmless-error review should operate.

1. Applying the harmless-error doctrine requires an assessment of a case's overall record and the particular circumstances under which the evidence at issue was improperly admitted. Petitioner recognizes that the Court does not often undertake such analyses. But the Court does periodically review fact-intensive applications of doctrines that determine liability and criminal punishment. *See, e.g.*, *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4 (2021) (per curiam) (qualified immunity); *Taylor v. Riojas*, 141 S. Ct. 52 (2020) (per curiam) (same); *Mays v. Hines*, 141 S. Ct. 1145 (2021) (per curiam) (prejudice prong of ineffective-assistance-of-counsel doctrine); *Shinn v. Kayer*, 141 S. Ct. 517 (2020) (per curiam) (same).

There is good reason to do so here as well. Indeed, this Court has already considered the record in this case and the manner in which the State introduced and relied upon Morris's allocution. *See Hemphill v. New York*, 142 S. Ct. 681 (2022). And the statement of facts and procedural history in that opinion go a long way toward showing why the New York Court of Appeals' harmless-error holding is unsupportable. In that respect, this case offers a particularly economical opportunity to provide guidance regarding this important constitutional doctrine.

2. The case also presents this Court with a scenario in which the integrity of its own prior decision is at stake. In this Court's initial decision in this case, this Court stressed that the State introduced Morris's allocution to "rebut" petitioner's defense and to prove that "possession of a .357 revolver, *not murder*, was

'the crime that [Morris] actually committed.'" 142 S. Ct. at 686, 688 (emphasis added) (citation omitted). Yet the Court of Appeals stated the allocution did not "exculpate[] Morris." Pet. App. 4a. These two findings are flatly incompatible.

This Court also explained that the State "emphasized" Morris's allocution at trial, and that the trial court even found the allocution was "reasonably necessary" to enable the State to push back against petitioner's third-party defense. 142 S. Ct. 688 (citation omitted). Yet the Court of Appeals characterized the State's reliance on the allocution as "exceedingly minimal." Pet. App. 4a. The Court should not allow its own understanding of a case's record to be swept aside so easily.

3. Finally, the stakes here are significant. Petitioner stands convicted of second-degree murder and has been sentenced to twenty-five-years-to-life in prison. Yet from the start, petitioner has maintained he is actually innocent. The State initially agreed, determining—based on nearly all of the same evidence the Court of Appeals surveyed below—that someone else committed the crime. Even when the State assembled additional evidence and made its strongest possible case against petitioner, a justice in the Appellate Division found the evidence so weak that no reasonable jury could have voted to convict. Pet. App. 27a (Manzanet-Daniels, J., dissenting). Under these circumstances, petitioner should not be relegated to spending potentially the rest of his life in prison without a trial that respects his constitutional rights.

* * *

The New York Court of Appeals' decision is so demonstrably incorrect that this Court may wish to

consider summary reversal. Alternatively, this Court may prefer plenary review as an occasion to provide fuller guidance regarding the harmless-error doctrine. Whatever mode of redress the Court prefers, the vital point is that petitioner's conviction must be reversed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Claudia Trupp
Matthew Bova
CENTER FOR APPELLATE LITIGATION
120 Wall Street, 28th Floor
New York, NY 10005

Jeffrey L. Fisher
Counsel of Record
Pamela S. Karlan
Easha Anand
STANFORD LAW SCHOOL SUPREME COURT LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081
jlfisher@stanford.edu

November 18, 2022

APPENDIX

APPENDIX A

STATE OF NEW YORK
COURT OF APPEALS

MEMORANDUM

This memorandum is uncorrected and subject to revision before publication in the New York Reports.

No. 82 SSM 12

The People &c.,

Respondent,

v.

Darrell Hemphill,

Appellant.

[DECIDED July 21, 2022]

Claudia Trupp, for appellant.
Paul A. Anderson, for respondent.

MEMORANDUM:

Upon reargument, following remand from the Supreme Court of the United States, the order of the Appellate Division should be affirmed.

The sole question now before us is whether the admission at defendant Darrell Hemphill's trial of third party Nicholas Morris's plea allocution, in violation of defendant's Confrontation Clause rights under the Sixth Amendment, is harmless beyond a reasonable doubt (*see Hemphill v New York*, 595 US __, __, 142 S Ct 681, 693 n 5 [2022]). For the following reasons, we hold that the evidence of defendant's guilt was overwhelming and that the error was harmless.

Defendant was convicted by a jury of murder in the second degree for the shooting death of a two-year-old bystander. The People presented evidence that Ronnell Gilliam and another man had a street altercation with a family. The man with Gilliam then returned to the scene and fired a 9-millimeter firearm at the family group, missed, and fatally struck the child victim. The primary disputed issue was the shooter's identity.

The People originally prosecuted Morris, an associate of Gilliam, for the murder. However, forensic testing of a blue sweater matching eyewitness descriptions of the shooter's attire, recovered from a plastic bag hidden in a closet in defendant and Gilliam's grandmother's apartment, provided a single-source DNA profile matching defendant's DNA, not that of Morris. The People consented to a mistrial after concluding that, based on the DNA and other evidence, Morris was not the shooter. Morris pleaded guilty to possession of a .357 magnum firearm in exchange for dismissal of the murder indictment and immediate release. The People then prosecuted defendant for the murder.

At trial, defendant maintained that the shooter was Morris, relying primarily on Morris's initial prosecution for the crime. However, there was overwhelming evidence that defendant, not Morris, was the shooter. Gilliam, pursuant to a cooperation agreement, testified that defendant was the shooter. According to Gilliam, defendant ran off shortly after the fight, and Gilliam telephoned both defendant and Morris. Before Morris arrived, defendant returned, pulled out a gun, and started shooting. After the shooting, Gilliam and defendant ran to their

grandmother's nearby apartment and met up with Morris. Morris and defendant each gave Gilliam a firearm for disposal: defendant, the 9-millimeter used in the shooting and Morris, a .357 magnum revolver. Defendant gave Gilliam his blue sweater and told him to "get rid" of it. Gilliam disposed of the firearms, but not the sweater, and then fled to North Carolina with defendant. Defendant called Gilliam to report that Morris had identified Gilliam as the shooter and arranged for an attorney to accompany Gilliam to the police to falsely identify Morris as the shooter. When Gilliam learned that Morris did not identify him, Gilliam recanted and informed the police that defendant was the shooter.

Defendant is tall and slim and has a tattoo on his upper right arm. Eight eyewitnesses identified the shooter as a tall, slim, black man wearing a blue sweater, and several identified defendant as the shooter. Gilliam, defendant's grandmother, and another eyewitness who knew defendant before the incident, testified that defendant was wearing a blue sweater on the day of the shooting. The blue sweater found in the grandmother's home and the DNA match were admitted into evidence. Descriptions from various eyewitnesses that the shooter had a tattoo on his arm provided additional evidence of defendant's guilt. Although witnesses described the sweater as having long sleeves, several nevertheless caught glimpses of the shooter's tattoo, which one witness testified was because the sleeves may have been rolled up. In contrast, the consistent witness testimony at trial was that Morris did not match the

description of the shooter.[*] He weighed 240 pounds, had no tattoos, and had a large scar down the side of his face—an identifying characteristic not mentioned by any eyewitness. Given the explicit testimony by Gilliam and additional eyewitnesses identifying defendant as the shooter, the physical evidence matching the eyewitness descriptions and linking defendant to the blue sweater, and proof of defendant's flight from New York shortly after the shooting and his evasion of authorities by use of an alias, the evidence of defendant's guilt was overwhelming.

Further, "there is no reasonable possibility" that the erroneously admitted plea allocution "might have contributed to defendant's conviction" (*People v Crimmins*, 36 NY2d 230, 237 [1975]). The plea allocution neither exculpated Morris nor inculpated defendant as the shooter, thus allowing defendant to argue to the jury that Morris was the perpetrator. Indeed, it merely supported a conclusion that Morris possessed a .357 magnum revolver on the day in question, and Gilliam had already testified to that alleged fact. Finally, the prosecutor's reliance on the plea was exceedingly minimal. Under these circumstances and in light of the other, overwhelming evidence of defendant's guilt, the error

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[*] That three witnesses initially misidentified Morris as the shooter does not compel a different conclusion, given the chaotic circumstances of the shooting and the fact that the shooter's face was partially obscured. Additionally, several of these witnesses had seen coverage of the shooting on television and in print media—including photographs of Morris—thereby potentially biasing their identifications.

below was "harmless beyond a reasonable doubt" (*id.* at 237, citing *Chapman v California*, 386 US 18 [1967]).

On review of submissions pursuant to section 500.11 of the Rules, upon reargument, following remand from the Supreme Court of the United States, order affirmed, in a memorandum. Chief Judge DiFiore and Judges Rivera, Garcia, Wilson, Singas, Cannataro and Troutman concur.

Decided July 21, 2022

APPENDIX B

STATE OF NEW YORK
COURT OF APPEALS

MEMORANDUM

No. 66 SSM 5

The People &c.,

Respondent,

[DECIDED June 25, 2020]

v.

Darryl Hemphill,

Appellant.

Submitted by Claudia Trupp, for appellant.
Submitted by Noah J. Chamoy, for respondent.

MEMORANDUM:

The order of the Appellate Division should be affirmed.

Defendant appeals from the judgment of Supreme Court, Bronx County convicting him after trial of murder in the second degree and sentencing him to twenty-five years to life in prison. The defense was third-party guilt. On appeal, defendant renews his challenges to the sufficiency of the evidence, the integrity of the grand jury proceedings and various trial rulings.

While there was evidence of third-party culpability, a rational jury nevertheless could have concluded that defendant was guilty (*see People v Danielson*, 9 NY3d 342, 349 [2007]). The jury was

free to reject defendant's claims about the witnesses' initial identifications of someone else as the shooter (*cf. Ando v Woodberry*, 8 NY2d 165, 171 [1960]). Contrary to defendant's claim that the indictment should be dismissed based on the prosecutor's failure to alert the grand jury to exculpatory evidence that implicated another, the People were not obligated to present evidence that someone else was initially identified as the shooter (*see People v Mitchell*, 82 NY2d 509 [1993]; *People v Lancaster*, 69 NY2d 20, 25-26 [1986]).

With respect to the other claims raised by defendant, we note that trial courts possess broad discretion to make evidentiary rulings and control the course of cross-examination (*see People v Rouse*, 34 NY3d 269, 278-279 [2019]; *People v Jones*, 24 NY3d 623, 629 [2014]). Here, the trial court did not abuse its discretion by admitting evidence that the allegedly culpable third party pled guilty to possessing a firearm other than the murder weapon. Nor did the court abuse its discretion in its treatment of a controversy concerning counsel's attempt to impeach a witness with her prior grand jury testimony. Notably, counsel failed to request that the witness be recalled for questioning relating to the particular appearance on which counsel relied. Similarly, the trial court acted well within its discretion in admitting photographs of the victim's body as not simply introduced to inflame the jury (see *People v Stevens*, 76 NY2d 833, 835 [1990]), and in determining that their relevance was not outweighed by danger of undue prejudice to defendant (*see People v Primo*, 96 NY2d 351, 355 [2001]). The trial court's other evidentiary rulings were similarly

within the court's discretion, as was the court's denial of defense counsel's same-day oral request to adjourn sentencing to investigate grounds for a possible motion to set aside the verdict (*cf. People v Spears*, 64 NY2d 698, 699-700 [1984]).

Defendant's remaining contentions are unpreserved or without merit.

FAHEY, J. (dissenting):

I would reverse. The trial court abused its discretion in denying defense counsel's request to call as a witness the court reporter in a 2007 grand jury proceeding.

I.

The underlying events began with a street fight in March 2016 between two men, including trial witness Ronnell Gilliam, on the one side, and a group of three men and two women, including trial witness Brenda Gonzalez, on the other. Gilliam's accomplice was described by eyewitnesses as a thin black man wearing a blue shirt or sweater. After the fight broke up, a slim black man in a blue top returned to (or arrived on) the scene with a gun and opened fire. The gunfire killed a two-year-old passenger in a minivan that happened to be in the vicinity.

An eyewitness named Michelle Gist, who had observed the initial fight, but not the shooting, told the police that Gilliam and his best friend Nicholas Morris had been at the scene. Morris was arrested, and ammunition consistent with the type of bullets used in the shooting was found at his apartment. Gonzalez and two of her companions identified

Morris in a lineup as the shooter. Meanwhile, at Gilliam's apartment, the police had found a blue sweater inside a plastic bag.

Gilliam turned himself in and spoke with the police. He identified Morris as the shooter. Later, Gilliam returned to the police station, recanted his identification of Morris, and now stated that the shooter had been defendant Darryl Hemphill. During this second interview, Gilliam received a phone call from Morris.

Grand juries were convened in 2006 and 2007, at which witnesses identified Morris as the shooter. At the 2006 grand jury proceedings, held on the basis of the evidence against Morris, Gonzalez did not identify Morris by name as the shooter. At the 2007 grand jury proceedings, Gonzalez expressly identified Morris by name as the shooter.

Morris went to trial for the killing. After a mistrial and a negative DNA swab of the sweater found in Gilliam's home, the People decided to abandon prosecution of Morris. Then, after the DNA on the sweater was found to match Hemphill instead, defendant was arrested.

At the second trial, Gilliam testified, pursuant to a cooperation agreement, that defendant had been the shooter. Gist identified defendant as the thin black man present at the initial fight, but she was impeached with her prior statements to the police that Morris, not Hemphill, had been at the scene. Gonzalez and the others in her party described the shooter as a tall, thin black man in a blue sweater or shirt, without identifying Hemphill specifically.

Defense counsel cross-examined Gonzalez by, among other things, reading her 2007 grand jury testimony, in which she had testified that there was no doubt in her mind that she had seen Morris fire the shot that killed the child. Counsel momentarily confused the dates of the two grand jury proceedings and asked Gonzalez to recall her "2006" grand jury testimony, in which she had not identified Morris by name as the shooter. Gonzalez denied giving the testimony that defense counsel read to the jury. In addition, defense counsel put broader questions to Gonzalez, such as "Did you ever tell . . . any district attorney that there was no doubt in your mind that Nicholas Morris fired that shot . . .?", to which Gonzalez untruthfully replied, "No I didn't."

The trial court then permitted the People to call the 2006 grand jury court reporter to testify that Gonzalez in 2006 had not been asked the questions and had not given the answers that defense counsel had read in court (when reading from Gonzalez's 2007 grand jury testimony). In response, defense counsel sought to introduce testimony from the 2007 court reporter that the questions had in fact been asked and answered in 2007. The trial court did not grant counsel's request, and instead suggested that defense counsel recall Gonzalez, question her about her 2007 testimony, and then call the 2007 court reporter if necessary. Defense counsel declined this alternative to the request.

On summation, the prosecutor argued that defense counsel had "tried to get Brenda Gonzalez to admit she said things before the grand jury in 2006 she never said" and that the People had called the reporter "to prevent facts from being manipulated." During deliberations, the jury repeatedly asked to

rehear the testimony from the 2006 grand jury reporter. At this point, the parties discussed the fact that the trial court had precluded the defense from calling the 2007 grand jury court reporter, and the trial court told defense counsel, "[o]kay. I understand your position. You have an exception."

II.

Defendant preserved for our review the issue whether counsel should have been permitted simply to call the reporter (see CPL 470.05 [2] ["a party who without success has . . . sought or requested a particular ruling or instruction, is deemed to have thereby protested the court's ultimate disposition of the matter or failure to rule or instruct accordingly sufficiently to raise a question of law with respect to such disposition or failure"]). Indeed, the majority agrees. While it is true, as the majority notes, that "counsel failed to request that [Gonzalez] be recalled for questioning" on her 2007 grand jury appearance (majority op at 2), the majority does not assert that defendant failed to preserve his challenge to the trial court's ruling on calling the court reporter.

III.

The trial court committed reversible error and denied defendant a fair trial by refusing to allow defense counsel to call the 2007 grand jury court reporter, without recalling Gonzalez. This would have enabled the defense to impeach Gonzalez by confirming that she had in fact identified Morris, by name, as the shooter in 2007. Notably, Gonzalez was asked whether she had ever told a district attorney that Morris was the shooter, and denied doing do, even though she had testified as much in 2007. The trial court issued its ruling despite the fact that the

People were permitted to call the 2006 court reporter to testify, in effect, that defense counsel's questioning was disingenuous.

The trial court's refusal to allow defense counsel to correct the record by calling the 2007 court reporter was prejudicial. The ruling left the jury with the impression that the defense had fabricated grand jury testimony, even though it was Gonzalez whose testimony was false. The jury was prevented from learning that Gonzalez had identified Morris as the shooter, by name and under oath, at the 2007 grand jury proceeding. This was error. Although "trial courts have broad discretion to keep the proceedings within manageable limits and to curtail exploration of collateral matters," evidence that tends to show that a witness is fabricating her testimony "is never collateral and may not be excluded on that ground" (*People v Hudy*, 73 NY2d 40, 56 [1988]). Put another way, "there is no risk of diversionary excursions into collateral matters where '[t]he substance of th[e] contradiction goes to a material, core issue in the case' " (*People v Bradley*, 99 AD3d 934, 937 [2d Dept 2012], quoting *People v Cade*, 73 NY2d 904, 905 [1989]).

For these reasons, I dissent.

* * * * * * * * * * * * * *

On review of submissions pursuant to section 500.11 of the Rules, order affirmed, in a memorandum. Chief Judge DiFiore and Judges Rivera, Stein, Garcia, Wilson and Feinman concur. Judge Fahey dissents in an opinion.

Decided June 25, 2020

APPENDIX C

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

The People of the State of New York, Respondent, -against- Darryl Hemphill, Defendant-Appellant.	Ind. No. 1221/13 [ENTERED: June 11, 2019]

Robert S. Dean, Center for Appellate Litigation, New York (Claudia Trupp of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Jordan K. Hummel of counsel), for respondent

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Judgment, Supreme Court, Bronx County (Steven L. Barrett, J.), rendered January 6, 2016, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 25 years to life, affirmed.

Defendant was charged with two counts of second-degree murder in connection with an April 6, 2006 incident in which two-year-old was shot and killed by a stray bullet that had entered his mother's minivan as they were driving on Tremont Avenue in the Bronx.

On the date of the incident, which was Easter Sunday, Ronell Gilliam, along with a black male who was wearing a blue sweater or blue shirt, got into a physical fight with a group of men and women in the

street around Tremont Avenue. At some point shortly after that altercation, the fatal stray bullet was fired. The police interviewed eyewitnesses, including Michelle Gist, who identified Gilliam as one of the men involved. Police searched Gilliam's apartment and found a blue sweater in a plastic bag.

Soon thereafter, the police suspected that Gilliam's best friend, Nicholas Morris, had been with Gilliam and had committed the shooting. Police searched Morris's apartment and found guns and ammunition, including a 9 millimeter cartridge, the type of ammunition used in the shooting. The next day, Morris appeared on a television news broadcast on Bronx News 12, proclaiming his innocence. Morris was arrested, and police observed bruises on his knuckles consistent with his having been in a fistfight. At the time of Morris's arrest, at least three witnesses had identified Morris to police as the shooter.

In 2008, Morris was indicted and the prosecution proceeded to trial against him. However, when Morris's DNA was compared to DNA taken from the blue sweater recovered from Gilliam's apartment in 2006, it was determined that there was no match. Thus, in April 2008, the court declared a mistrial in Morris's case with the prosecution's consent. In May 2008, after having served two years in prison, Morris pleaded guilty, against his counsel's advice, to possessing a .357 caliber gun on the day of the shooting, in exchange for his immediate release from prison.

In 2011, the prosecution obtained the DNA of defendant, Gilliam's cousin, and tested it against the

DNA found on the blue sweater recovered from Gilliam's apartment in 2006. Defendant's DNA was a match for the DNA found on the sweater. Two years later, in 2013, defendant was arrested and indicted.

At defendant's trial in 2015, 29 witnesses testified for the People, including, among others, the group of people that were involved in the altercation before the shooting; Gist, an eyewitness who had known defendant from the neighborhood and saw him during the fight; three other eyewitnesses to the fight and shooting; Gilliam, defendant's cousin and accomplice; members of defendant's family and one of defendant's friends; and certain police officers and experts. Photographs, reports, ballistic evidence from the scene and the blue sweater containing defendant's DNA were admitted at trial. One of defendant's friends testified for the defense.

At the trial, the eyewitnesses all described the shooter as a thin African American man wearing a blue shirt or blue sweater and a hat. Some of the eyewitnesses also testified that they observed that the shooter had a tattoo on his right forearm. At some point after these witnesses testified, defendant displayed to the jury his arms revealing "D.A," defendant's nickname and "10453," a zip code, tattooed on his right arm. Additionally, the video of Morris's interview at the News 12 Bronx office was introduced and played to the jury without sound to show that Morris had no tattoos on his arms.

One of the detectives testified that after the shooting, he spoke to Gist, who had recognized two men involved in the fight, Gilliam and Morris. The detective testified that the police gained access to

Gilliam's apartment, where they recovered from a closet the blue sweater in a plastic bag. He testified that when he opened the plastic bag, he smelled burnt gunpowder residue. However, lab testing of the sweater was inconclusive as to whether it contained gunpowder residue.

Gist testified that she first told police that three people were present at the initial altercation with the other group – Gilliam, Morris and defendant - but that she only saw Gilliam and defendant involved in the fighting. She denied telling the police that only Gilliam and Morris were involved. She identified defendant in court and testified that she knew him from the neighborhood. Defendant's grandmother testified that on Easter Sunday in 2006, the date of the incident, defendant had been wearing a blue sweater.

Police officers testified that when they were searching Gilliam's apartment, an officer overheard a phone call between Gilliam's brother William, who was present in the apartment during the search, and Gilliam, who was evading the police, in which Gilliam asked William if the police were there and told William to get rid of "the shirt."

Gilliam testified as follows. After the shooting, he saw Morris, his brother William, defendant and defendant's girlfriend in the lobby of his apartment building, and defendant took off the blue sweater once inside the apartment and told Gilliam to hold two guns, Morris's .357 caliber and defendant's 9 millimeter. A friend called Gilliam and told him that the police were looking for someone matching his description for a shooting, and Gilliam relayed this

information to defendant. Defendant told him to get rid of the blue sweater and guns, so Gilliam took the guns to a nearby crack house but left the sweater behind in the apartment. Gilliam attempted to go home, but he learned that the police were at his building. When defendant later called to confirm that Gilliam had gotten rid of the sweater, Gilliam told him that he forgot. Gilliam then went to the home of one of defendant's friends, as directed by defendant, where defendant told him they would flee to North Carolina. That night, Gilliam, defendant, defendant's girlfriend and defendant's son went to North Carolina in a blue car. In North Carolina, they stayed in several hotels and homes, changing location each night. Gilliam cut his hair to alter his appearance and threw away his cell phone. Defendant later told Gilliam that he heard that Morris had told police that Gilliam committed the shooting. He told Gilliam to return to New York and to tell police that Morris was the shooter. Defendant promised to hire Gilliam a lawyer. Gilliam then returned to New York.

Thereafter, Gilliam met with detectives and identified Morris as the shooter. However, Gilliam testified that this first identification of Morris was untrue and that when he learned that Morris had not implicated him in the crime, as defendant had suggested, Gilliam gave a second, truthful statement to detectives that defendant was the actual shooter, not Morris. Gilliam then made a third statement at the District Attorney's Office with his attorney present that defendant was the shooter and that Gilliam had disposed of the murder weapon. Gilliam was thereafter arrested and charged with hindering prosecution and tampering with physical evidence.

As an initial matter, we find that the verdict was supported by legally sufficient evidence and was not against the weight of the evidence. "A verdict is legally sufficient when, viewing the facts in the light most favorable to the People, 'there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime proved beyond a reasonable doubt'" (*People v Danielson*, 9 NY3d 342, 349 [2007]). "A sufficiency inquiry requires a court to marshal competent facts most favorable to the People and determine whether, as a matter of law, a jury could logically conclude that the People sustained its burden of proof" (*id.*). When assessing a weight of the evidence claim, the appellate court must first ascertain "[i]f based on all the credible evidence a different finding would not have been unreasonable" (*People v Bleakley*, 69 NY2d 490, 495 [1987]). If so, then the court must, "like the trier of fact below, 'weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony'" (*id.*). Although this Court has the authority to set aside the verdict if it determines that the jury "failed to give the evidence the weight it should be accorded," it should not substitute itself for the jury, as "[g]reat deference is accorded to the factfinder's opportunity to view the witnesses, hear the testimony and observe demeanor" (*id.*).

The verdict was supported by legally sufficient evidence and was not against the weight of the evidence because the People proved, through their witnesses and forensic evidence, that defendant was correctly identified as the shooter, the only issue at

trial. First, the People provided evidence that defendant was the shooter with the blue sweater containing DNA matching defendant's DNA and not the DNA of Morris or Gilliam. Several different witnesses testified that the shooter was wearing a blue sweater during the fight and the shooting. Although there were slight variations in the description of that item of clothing, with one witness describing it as a blue short-sleeved shirt or polo, most of the eyewitnesses described it as a blue sweater. Both Gist and defendant's grandmother testified that on the day of the shooting, defendant was wearing a blue sweater. Finally, one of the detectives testified that the bag containing the blue sweater smelled of gunpowder residue when he recovered it from Gilliam's apartment several hours after the shooting and that he overhead Gilliam tell his brother to discard the sweater.

Further, the People provided evidence that defendant was the shooter with the overwhelming evidence demonstrating defendant's consciousness of guilt. This evidence included that defendant fled to North Carolina shortly after the incident with his girlfriend, his son and Gilliam; that the group stayed in several hotels and homes, changing location each night; that defendant leased a residence under a false name; that defendant sent Gilliam to New York to implicate Morris as the shooter; that defendant continued to hide out in North Carolina with his girlfriend, despite the fact that defendant owned a music studio in New York and defendant's girlfriend worked as a paramedic in New York; and that defendant was ultimately apprehended in North Carolina avoiding law enforcement.

Additionally, the People provided evidence that defendant was the shooter with the testimony of multiple witnesses that the shooter had a tattoo on his right arm and showed the jury that defendant did indeed have a tattoo on his right arm. Moreover, the People introduced at the trial the video of Morris's interview at the News 12 Bronx office showing that Morris had no tattoos on his arms.

Finally, the People provided evidence that defendant was the shooter with Gilliam's testimony that he had identified defendant as the shooter and that defendant asked him to get rid of the blue sweater that was later found by police in Gilliam's apartment and that contained DNA matching that of defendant. Additionally, Gilliam provided credible testimony as to why he initially identified Morris as the shooter instead of defendant. He stated that he only identified Morris as the shooter at the behest of defendant after defendant told him that Morris had implicated him in the crime. However, once he learned that Morris had not implicated him in the crime, he told detectives the truth, that defendant was actually the shooter.

The assertion that Gilliam's testimony should be rejected because he was defendant's accomplice and a cooperating witness is without merit. An accomplice's testimony can be used to support a defendant's conviction if it is corroborated by other evidence (*see People v Besser*, 96 NY2d 136, 143-144 [2001]). "Independent evidence need not be offered to establish each element of the offense or even an element of the offense; the People's burden is merely to offer some nonaccomplice evidence 'tending to connect' defendant to the crime charged" (*id.*). In

addition to Gilliam's testimony that defendant was the shooter, the People elicited testimony from other witnesses who identified defendant as being involved in the altercation and testified that the shooter wore a blue sweater, and provided physical and forensic evidence, including the blue sweater found in Gilliam's apartment, which contained defendant's DNA. All of this evidence corroborated Gilliam's testimony and connected defendant to the crime charged.

The fact that Morris was initially mistakenly prosecuted for the murder and that several witnesses initially identified Morris as the shooter does not alter the conclusion that the verdict was supported by legally sufficient evidence. The misidentifications by the witnesses were explained by the circumstances, including that they may have seen Morris's name and face through media coverage of the murder before they made their identifications. Moreover, at the trial, defense counsel emphasized the theory that Morris had committed the shooting and the jury properly rejected that theory based on the trial evidence.

The court properly permitted the People to introduce portions of Morris's plea allocution, in which he pleaded guilty to weapon possession and admitted that at the time and place of the murder, he possessed a .357 caliber handgun. Morris did not testify at defendant's trial and his plea allocution would normally be inadmissible as testimonial hearsay. However, the admission of portions of Morris's plea allocution did not violate defendant's right of confrontation because defendant opened the door to this evidence (*see generally People v Reid*, 19

NY3d 382, 387 [2012]). During the trial, defendant created a misleading impression that Morris possessed a 9 millimeter handgun, which was consistent with the type used in the murder, and introduction of the plea allocution was reasonably necessary to correct that misleading impression.

Defense counsel failed to preserve any claim that the court precluded him from calling the court reporter who transcribed the 2007 grand jury minutes of the testimony of Brenda Gonzalez, a witness to the incident who had attempted to break up the fight between the shooter and her friend, and we decline to review it in the interest of justice. As an alternative holding, we find that the court properly precluded defense counsel from calling the 2007 grand jury reporter.

The facts as they relate to Gonzalez are as follows. Shortly after the shooting, Gonzalez identified Morris in a lineup. She testified as to her interactions with Morris in both a 2006 grand jury proceeding and a 2007 grand jury proceeding. During her testimony in the 2006 grand jury proceeding, Gonzalez did not mention Morris by name. However, during her testimony in the 2007 grand jury proceeding, Gonzalez did mention Morris by name.

At defendant's trial, during cross-examination by defense counsel, Gonzalez testified that she never previously identified Morris by name. Defense counsel then asked if she recalled answering a question in the grand jury "back in 2006" in which she identified Morris by name. Gonzalez responded that she "never said that" and claimed that someone must have inserted Morris's name into the transcript.

Defense counsel then attempted to impeach her by reading from Gonzalez's 2007 grand jury testimony, in which Gonzalez had identified Morris by name. However, defense counsel never questioned Gonzalez about her 2007 grand jury testimony before attempting to impeach her testimony with the 2007 grand jury transcript. The prosecutor objected to defense counsel impeaching Gonzalez with the 2007 grand jury transcript, and the court sustained the objection at that time.

The prosecutor then stated that he was going to call the court reporter who transcribed the 2006 grand jury minutes because those were the only grand jury minutes about which defense counsel questioned Gonzalez and the 2006 grand jury minutes did not make any reference to Gonzalez identifying Morris by name. Defense counsel then admitted on the record that perhaps he had made a mistake as to which grand jury proceeding he questioned Gonzalez about, but he asserted that the difference in dates did not matter. Defense counsel requested that the jury be told that the statements he read and that were attributed to the 2006 grand jury proceeding were actually made by Gonzalez during the 2007 grand jury proceeding. However, the prosecutor refused on the ground that Gonzalez had not been properly confronted with the 2007 transcript because defense counsel never questioned Gonzalez about her 2007 grand jury testimony.

The prosecutor then called the 2006 grand jury reporter, who testified that Gonzalez did not mention Morris at that proceeding. Thereafter, defense counsel made an application to the court to call the 2007 grand jury reporter. The court did not make a

ruling on defense counsel's request. Instead, it advised the parties to prepare to address the issue at some point in the future. For the remainder of the trial, defense counsel never sought to obtain a ruling from the court on whether he could call the 2007 grand jury reporter and he also never made an application to the court to recall Gonzalez as a witness to question her properly about her 2007 grand jury testimony.

During jury deliberations, the jurors requested a portion of the 2006 grand jury reporter's testimony. At that point, defense counsel argued that the jury was left with an inaccurate and unfair impression about Gonzalez's testimony because he was precluded from calling the 2007 grand jury reporter. The court noted defense counsel's "exception."

Based on the foregoing, we find that defendant abandoned and failed to preserve his claim that he was denied the right to call the 2007 grand jury reporter in order to properly confront Gonzalez (*see e.g. People v Martinez*, 257 AD2d 479, 480 [1st Dept 1999], lv denied 93 NY2d 876 [1999]). The court never actually ruled against defendant on the issue of whether he could call the 2007 grand jury reporter. Rather, the court stated that it would have to think about it. However, defense counsel did not seek a subsequent ruling on this issue during the testimonial portion of the trial. It was not until the jury asked a question about the 2006 grand jury reporter's testimony that defense counsel raised the issue again about wanting to call the 2007 grand jury reporter. Defendant's untimely request, during jury deliberations, to call the 2007 grand jury reporter did not preserve his claim (*see e.g. People v Guilliard*,

309 AD2d 673 [1st Dept 2003], *lv denied* 1 NY3d 597 [2004]).

Our alternative holding is that the court properly precluded defense counsel from calling the 2007 grand jury reporter in order to impeach Gonzalez because defendant never properly confronted Gonzalez with her 2007 grand jury testimony before seeking to call the 2007 grand jury reporter. Despite being made aware that he mistakenly questioned Gonzalez about her 2006 grand jury testimony, defense counsel never questioned Gonzalez about her 2007 grand jury testimony and never made an application to the court to recall Gonzalez to question her properly about her 2007 grand jury testimony.

None of the other evidentiary rulings challenged by defendant warrant reversal. These various rulings were provident exercises of the trial court's discretion in admitting and excluding evidence, in which the court exercised its discretion in accordance with the applicable legal standards relating to each issue. We find that none of these rulings deprived defendant of a fair trial, or of his right to present a defense.

Defendant failed to preserve his challenges to the prosecutor's opening statement and summation by failing to object, or by failing to request further relief after the court sustained an objection and gave a curative instruction, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118–119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]).

The court did not violate defendant's right to be present when, following his outburst upon hearing the guilty verdict, it immediately ordered him removed from the courtroom before the jury was polled. Earlier in the trial, the court had warned defendant that any further outbursts by him would result in his removal from the courtroom while his trial continued (*see People v Branch*, 35 AD3d 228, 228-229 [1st Dept 2006], *lv denied* 8 NY3d 919 [2007]).

The court properly declined to dismiss the indictment based on the People's decision not to present evidence to the grand jury about Morris, the person who had originally been charged with the murder. The prosecution has broad discretion in presenting its case to the grand jury and is not obligated to present exculpatory evidence (*People v Mitchell*, 82 NY2d 509, 515 [1993]).

The court properly declined to hold a hearing pursuant to *Franks v Delaware* (438 US 154 [1978]) to address the validity of statements made in the affidavit filed in support of the search warrant for defendant's DNA swab. Defendant failed to show that the affidavit was "knowingly false or made in reckless disregard of the truth" (*People v Tambe*, 71 NY2d 492, 504 [1988]).

The court properly denied defendant's constitutional speedy trial motion after considering the factors enumerated in *People v Taranovich* (37 NY2d 442 [1975]).

The court providently exercised its discretion in denying defense counsel's request for an adjournment of sentencing to allow the defense to further

investigate an alleged jury issue, and the ruling did not result in any prejudice (*see People v Rivera*, 157 AD3d 545 [1st Dept 2018], lv denied 31 NY3d 1016 [2018]).

We perceive no basis for reducing the sentence.

All concur except Manzanet-Daniels, J. who dissents in a memorandum as follows:

MANZANET-DANIELS, J. (dissenting)

I do not believe that defendant's identity as the shooter was proven beyond a reasonable doubt. At a minimum, he is entitled to a new trial. Defendant was prejudiced when he was prevented from cross examining an eyewitness concerning her prior identification of another man, Nicholas Morris, as the shooter, and the prosecution was allowed to elicit testimony from the grand jury reporter in 2006 that left the impression that the witness had never previously identified another man as the shooter. I therefore dissent.

Witnesses had occasion to observe Ronnell Gilliam, a/k/a "Burger," and another man, described as a "taller" and "slimmer" man, in broad daylight, at close range, for a 10-minute period during the initial encounter. Words were exchanged, and the men engaged in a fistfight. When the fight broke up, John Erik gave chase but was unable to catch up with the slender man. When he encountered Gilliam on the way back to his friends, he was threatened that he was "going to get shot for that." The slim man returned in a car with a gun. Witnesses testified that

the slim man pointed the gun at Juan Carlos, who was just emerging from a store, and began shooting.

During a canvass following the shooting, detectives interviewed a witness who saw the altercation but not the initial shooting. She identified Gilliam and Nicholas Morris as the two men she saw.

Three of the four witnesses present identified Nicholas Morris – who does not resemble defendant – as the shooter in a lineup two days after the shooting.[1] Another witness from the neighborhood who viewed a photo array stated that Morris "look[ed] like the shooter."

The eyewitness identifications, together with a 9 millimeter cartridge (of the same type recovered from the victim), recovered during a search of Morris' apartment, furnished probable cause to arrest Morris and charge him with the murder. Morris was observed to have bruising on his knuckles, indicating to detectives that he had recently been in a fight.

Defendant was not arrested until 2013, some seven years after the murder. He was never identified by any of the initial eyewitnesses as the shooter. The only witness who identified defendant as the shooter at trial was Gilliam, the accomplice. Accomplice testimony lacks the inherent trustworthiness of the testimony of a disinterested witness and must be viewed with a "suspicious eye," particularly where, as here, the accomplice hopes to receive immunity or lenient treatment (*see People v Berger*, 52 NY2d 214, 218-219 [1981]). Such testimony must be regarded with "utmost caution"

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[1] The fourth was unable to make an identification.

(*id.* at 219). Not only was Gillam a cooperating witness seeking to avoid a murder sentence,[2] but he also changed his story repeatedly. First, he identified Morris as the shooter. Later, and apparently at the behest of Morris,[3] his best friend, he identified defendant as the shooter. By Gilliam's own admission, he failed to tell the police that Morris had a .357 for fear of "implicating him." He admitted that he lied when he said defendant threw the gun in the river. He testified that he had "come clean" during his third interview with the police, but admitted on cross that he had lied about disposing of the gun in the river himself.

Significantly, while eyewitnesses described the shooter's sweater/shirt as blue, not one of them was able to identify the blue garment in evidence as the one worn by the shooter.[4] The sweater had been turned over by Gilliam's brother during a search of the apartment. The investigating detective testified that he smelled gunpowder when he opened the bag containing the sweater.

Yet Gilliam's brother was never called as a witness, despite being available; no gunpowder or residue consistent with the discharge of a firearm was detected on the shirt, although it was examined

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[2] Gilliam was promised a five-year sentence in exchange for his cooperation.

[3] Witnesses testified that Morris called Gilliam and spoke to him while Gilliam was being interviewed at the police station.

[4] Details also varied by witness, from "polo shirt" to "sweater" and from long-sleeved to short-sleeved. Some described the shirt as having a logo or "embroiderment" design; others did not observe a logo or design.

for trace evidence shortly after the incident; and the detective did not record his observation in the contemporaneous DD-5 report or any of the paperwork in the case, despite what he agreed was its obvious significance.

In its recitation of the events of the day in question, the majority does not sufficiently differentiate the initial, 10-minute encounter from the subsequent, fatal encounter during which the shooter and his friends returned in a car. The sequence of events is critical, however, because none of the eyewitnesses was able to identify defendant as the shooter during the second, fast-moving encounter. They testified only that the shooter wore a blue sweater/shirt. The prosecution thus relied on a theory that the blue-shirted shooter was the same slim man as had been observed during the initial encounter. Enough time elapsed between the encounters, however, that he simply cannot be presumed to be the same person.

The majority also implies that Gist identified defendant as the shooter; however, she did no such thing. Gist admitted that she observed only the initial encounter and did not observe the shooting. Further, during a canvass following the shooting, she identified Gilliam and Morris as the two individuals she saw during the initial encounter.

Defendant was denied his right to confrontation when the court prevented counsel from cross-examining a critical witness to establish that she had identified Morris unequivocally as the shooter in testimony before the grand jury in 2007. The witness had testified before the grand jury twice, in 2006 and

2007; the latter time she identified Morris by name as the shooter. When the witness maintained at trial that she never identified Morris as the shooter before the grand jury, defense counsel attempted to impeach her with prior inconsistent statements she made to the grand jury in 2007. Defense counsel asked the witness whether she wouldn't agree that events were fresh in her mind when she testified before the grand jury in "2006," referring to the incorrect year, but reading verbatim from the transcript of the 2007 proceedings, in which the witness unequivocally identified Morris as the slender man involved in the shooting.

The People asked to call the grand jury reporter from 2006 so that the jury would be left with the mistaken impression that the witness had identified Morris by name as the shooter in 2006. Defense counsel asked that the jury be instructed that the statements he cited during cross-examination of the witness had been made in the 2007 proceedings so as not to leave an unfair impression that the statements had never been made. The prosecutor objected and refused to so stipulate, asserting that defense counsel had "made specific reference to 2006, and that is what is in the record."

The People called the 2006 reporter as a witness, eliciting testimony via extended question-and-answer that left the jury with the distinct impression that the witness had never identified Morris as the shooter, as defense counsel had suggested during his cross examination. This testimony had the effect of vouching for an untruthful witness and subverting what was in fact the truth – that the witness had identified Morris, albeit in 2007 – and left the jurors

with the impression that defense counsel himself was being disingenuous.

When proceedings reconvened, defense counsel again asked that the jury be instructed or informed that the passages he had read were accurate reflections of the witness's testimony before the grand jury in 2007. The prosecutor opposed, asserting that defense counsel had never properly confronted the witness with her 2007 statements. The court was inclined to agree, noting that "because the witness was not impeached by reference expressed to 2007 and because the questions could reasonably be interpreted as being 2006 grand jury testimony, there is no basis for calling the stenographer from 2007."

The court's ruling left the jury with the impression that the witness had never previously identified Morris as the shooter and that the defense was fabricating evidence. The jury indeed appeared to be confused as it twice asked to rehear the 2006 court reporter's testimony concerning the witness's prior testimony.

While the court initially appeared to recognize that it would be unfair for the jury to hear only a portion of the eyewitness's prior testimony, that is exactly what transpired when the court allowed the testimony of the 2006, but not the 2007 court reporter. The prosecutor argued extensively during summation that defense counsel had attempted to mislead the jury when he "tried to get Brenda Gonzalez to admit she said things before a grand jury in 2006 that she never said . . . That's why [the People] had to call the grand jury reporter to prevent the facts from being manipulated." These arguments

were designed to mislead the jury to conclude that the witness had never identified Morris under oath to the grand jury. Indeed, the jury never learned that the witness had identified Morris as the shooter under oath at the 2007 grand jury proceeding. The failure to allow cross-examination of the witness concerning her prior identification of Morris as the shooter deprived defendant of a fair trial, which warrants reversal and remand for a new trial (*see People v. McLeod*, 122 AD3d 16 [1st Dept 2014]).

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 11, 2019

/s/ Susanna Rojas
CLERK