

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term 2011

(Argued: April 24, 2012 Decided: October 10, 2012)

Docket No. 11-1650

NORCOTT CORBY,

Petitioner-Appellee,

-- v. --

DALE ARTUS and ERIC T. SCHNEIDERMAN,¹

Respondents-Appellants.

B e f o r e : WINTER, WALKER and CABRANES, Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York (Laura T. Swain, Judge) granting a writ of habeas corpus to petitioner-appellee. The district court held that the New York Court of Appeals erred in concluding that the state trial court permissibly barred cross-examination of the main prosecution witness on the issue of whether she had accused petitioner-appellee of the crimes in question only after being told that petitioner-appellee had accused her. On appeal, respondents-appellants, New York authorities, argue that petitioner-appellee's Confrontation Clause rights were not violated and that even if they were, any violation was harmless. We agree that no Confrontation

¹ The Clerk of the Court is directed to amend the official caption as set forth above to reflect the substitution of the current New York Attorney General. See Fed. R. App. P. 43(c)(2).

1 Clause violation occurred and therefore REVERSE the judgment of the
2 district court.

3 KAREN SCHLOSSBERG, Assistant
4 District Attorney (Alan Gadlin,
5 Assistant District Attorney, on the
6 brief), for Cyrus Vance, Jr.,
7 District Attorney, New York County,
8 NY, for Respondents-Appellants.
9

10 ALAN S. AXELROD, Legal Aid Society,
11 New York, NY, for Petitioner-
12 Appellee.
13

14 JOHN M. WALKER, JR., Circuit Judge:

15 Respondents-appellants are the Superintendent of New York's
16 Clinton Correctional Facility and the Attorney General of the State
17 of New York (together, the "State"). The State appeals from a
18 judgment of the United States District Court for the Southern
19 District of New York (Laura T. Swain, Judge) granting a writ of
20 habeas corpus to petitioner-appellee Norcott Corby, a New York
21 state inmate by virtue of his New York state convictions for
22 second-degree murder and first-degree robbery. The district court
23 determined that the state trial court violated Corby's
24 Confrontation Clause rights when it prohibited him from cross-
25 examining the prosecution's principal witness about whether she had
26 accused Corby of the crimes at issue only after being told that
27 Corby had accused her. The district court held that the New York
28 Court of Appeals misapplied U.S. Supreme Court precedent in
29 upholding the trial court's ruling and that this error was not
30 harmless.

1 On appeal, the State contends that Corby's Confrontation Clause
2 rights were not violated at his trial and that even if they were,
3 any violation was harmless. We agree with the State that no
4 Confrontation Clause violation occurred and therefore REVERSE the
5 judgment of the district court.

6 BACKGROUND

7 The factual and procedural history of this case is set forth
8 in the prior opinions of the district court and state courts. See
9 Corby v. Artus, 783 F. Supp. 2d 547, 550-53 (S.D.N.Y. 2011); People
10 v. Corby, 6 N.Y.3d 231, 232-34 (2005); People v. Norcott, 15 A.D.3d
11 14, 15-18 (1st Dep't 2004). For present purposes, it suffices to
12 summarize the background for this appeal as follows:

13 I. Factual Background

14 Corby was tried and convicted by a jury in New York Supreme
15 Court for second-degree (felony) murder and first-degree robbery,
16 see N.Y. Penal Law §§ 125.25(3), 160.15(2), in connection with the
17 death of Yousef Mohammed. Mohammed was a drug dealer from San
18 Francisco who had traveled to New York City to sell heroin to
19 Corby. He was killed in the apartment of Xanderia Burnett, who was
20 the prosecution's principal witness against Corby, and the only
21 witness who testified directly about the events surrounding
22 Mohammed's death.

23 Burnett testified as follows: She agreed to let Corby -- who
24 previously had dated her mother and whom she had not seen in years
25 -- use her Upper Manhattan apartment to conduct his drug deal with

1 Mohammed in exchange for \$1500. On the night of the deal, she saw
2 Corby and two of his associates go into a back room in her
3 apartment, presumably where Mohammed was waiting. When they
4 emerged, Burnett saw Mohammed lying on a bed, dead, with his hands
5 tied behind his back and blood pouring out of his head. At Corby's
6 instruction, Burnett helped Corby and his associates steal drugs
7 from Mohammed's hotel room, remove Mohammed's body from her
8 apartment and clean up the blood. After the murder, Corby
9 continued to stay at Burnett's apartment for several months. He
10 threatened to kill her and her family if she reported him.

11 Approximately a week after the murder, New York police
12 officers discovered Mohammed's body in a gutter. They found
13 Burnett's contact information in Mohammed's hotel room and
14 Detective John Bourges, who was in charge of investigating
15 Mohammed's death, visited Burnett's apartment. Burnett, who
16 testified that Corby threatened to kill her son if she spoke to
17 Bourges about the murder, claimed to know nothing about it.

18 In April 1996, Corby was sentenced to prison on an unrelated
19 parole violation. Burnett testified that the following January,
20 after she learned that Corby was being released, she moved with her
21 family to Philadelphia because she still feared him. She admitted
22 to having stolen money that Corby left behind in her apartment.

23 In April 1998, following his release from prison, Corby met
24 with Agent Robert Hom of the DEA, seeking to become a paid
25 informant. He also sought the DEA's help in tracking down Burnett,

1 who, he explained, had stolen from him. Hom refused the offer and
2 suggested that Corby report the theft to local authorities, which
3 Corby declined to do. About a week later, Corby returned and
4 provided Hom with specific information about certain drug-related
5 crimes. In particular, he told Hom that he had distributed heroin
6 for Yousef Mohammed and that Burnett "might have been involved" in
7 Mohammed's death. Corby claimed that he had been in Burnett's
8 apartment with Burnett, Mohammed and another, that he left to visit
9 his parole officer, and that Mohammed was dead when he returned.
10 While Corby admitted to helping dispose of Mohammed's body, he
11 claimed not to have been involved in the murder itself. Hom
12 relayed this conversation to Detective Bourges.

13 In July 1998 -- more than two years after Mohammed's murder --
14 Bourges and another detective paid Burnett another visit, this time
15 at her Philadelphia residence. Burnett claimed not to recognize a
16 photograph of Mohammed. Bourges then told Burnett that he had
17 spoken with Corby and that Corby had accused Burnett of murdering
18 Mohammed. This statement was incorrect for two reasons: Corby had
19 met with DEA Agent Hom, not Bourges, and Corby had only said that
20 Burnett "might have been involved" in Mohammed's murder. But,
21 after hearing about Corby's alleged accusation, Burnett began
22 crying and accompanied the detectives to the local precinct, where
23 she was given Miranda warnings. There, for the first time, Burnett

1 implicated Corby in Mohammed's death. Corby was arrested several
2 months later.²

3 While the foregoing account of Corby's April 1998 interview
4 with Hom and of Bourges's subsequent visit to Burnett's
5 Philadelphia residence was elicited at a pretrial hearing, not all
6 of this information was made explicit to the jury at Corby's trial.
7 Specifically, although the jury learned that Corby had spoken with
8 the DEA about Mohammed's murder, and that Bourges later discussed
9 that meeting with Burnett, the jury never was explicitly told that
10 Corby claimed that Burnett "might have been involved" in Mohammed's
11 murder or that Bourges later told Burnett (incorrectly) that Corby
12 had accused her of the crime.

13 **II. Corby's Trial and the Cross-Examination at Issue**

14 In November 1998, a New York grand jury indicted Corby for
15 second-degree murder and first-degree robbery in connection with
16 Mohammed's death. In March 2000, Corby was tried by a jury in New
17 York Supreme Court for these crimes, convicted on both counts and
18 sentenced to concurrent prison terms of 25 years to life and 12 1/2
19 to 25 years, which he is currently serving.

20 At trial, Corby's lawyer cross-examined Burnett -- the sole
21 testifying witness to the murder -- about her personal history, her
22 account of Mohammed's murder and her accusation of Corby. In
23 particular, counsel focused on Burnett's delayed implication of

² Bourges did not arrest Corby's associates because he ultimately was unable to locate them.

1 Corby in Mohammed's murder. Corby's lawyer confronted Burnett with
2 her original claim to law enforcement that she knew nothing of
3 Mohammed's murder. He elicited that Burnett did not accuse Corby
4 of this crime until after Bourges visited her in Philadelphia and
5 told her (incorrectly) that Bourges -- rather than Agent Hom -- had
6 met with Corby. And he established that, after Bourges told
7 Burnett about that meeting, Bourges took Burnett to the local
8 precinct and gave her Miranda warnings.

9 The trial court, however, sustained the prosecution's
10 objection when Corby's attorney began to inquire into what Bourges
11 had told Burnett about the substance of Corby's alleged meeting
12 with Bourges. The trial judge and counsel for both sides then
13 engaged in a lengthy colloquy over what Corby's lawyer hoped to
14 elicit from Burnett and why. Corby's lawyer explained that he
15 wanted the jury to learn that Bourges told Burnett that Corby had
16 accused her of murdering Mohammed and that it was only then that
17 Burnett accused Corby of the crime. The defense's theory was that
18 Burnett and another had murdered Mohammed, and that when Burnett
19 learned of Corby's accusation against her, she acquired a strong
20 motive to lie and shift the blame falsely to Corby. Counsel
21 explained that he wanted to craft the cross-examination question to
22 identify Corby as the source of the accusation against Burnett
23 because Burnett would have feared that the police would find such
24 an accusation credible, as it would have come from an "individual
25 who was there, and saw [Burnett] do it." Appendix ("A.") 104.

1 Later, however, Corby's attorney proposed a compromise in which he
2 would leave Corby's name out and ask Burnett only whether Bourges
3 had told her that someone -- without specifying who -- had accused
4 her of the murder.

5 The trial court agreed with the prosecution that the sought
6 cross-examination was improper. It noted that, up to that point in
7 the trial, it had given Corby's lawyer "every latitude" in cross-
8 examining Burnett. Id. at 110. And, while Corby had the right to
9 offer evidence that Burnett had killed Mohammed and that she
10 therefore had a motive to falsely accuse Corby, the issue was how
11 Corby could introduce such evidence. The judge concluded that the
12 line of questioning sought by Corby's attorney invited the jury to
13 speculate about whether Corby in fact had accused Burnett. The
14 trial court was worried that, by cross-examining Burnett as to what
15 Bourges said Corby had said, Corby's attorney was trying to
16 introduce to the jury through cross-examination (1) Corby's defense
17 that Burnett had killed Mohammed, and (2) Corby's statement
18 implicating her in the crime. The judge said he found this
19 troublesome because Corby's implication of Burnett was unreliable
20 (Corby had made it self-servingly while seeking the DEA's help in
21 tracking down Burnett) and Bourges told Burnett something different
22 from what Corby had told DEA Agent Hom. The trial court was
23 worried that introducing such an accusation this way was unduly
24 prejudicial to the government because the prosecution could not

1 cross-examine Corby, who was protected by the Fifth Amendment and
2 did not testify, as to the accusation's veracity.

3 The trial court ruled that, while Corby's lawyer could ask
4 Burnett whether Bourges had told her that he had spoken with Corby
5 about Mohammed's murder, counsel could not inquire into the
6 substance of what Bourges claimed Corby had said. It further
7 observed that if Corby wanted to introduce an accusation against
8 Burnett, he could take the stand himself and be subject to cross-
9 examination on the accusation. The trial court rejected Corby's
10 lawyer's compromise suggestion that he be allowed to ask Burnett
11 whether Bourges had said that some unidentified person had accused
12 Burnett of the murder. In the judge's view, counsel still was
13 trying to introduce an accusation that was made in unreliable and
14 self-serving circumstances without permitting cross-examination of
15 that accusation.

16 Following the trial court's ruling, Corby's lawyer continued
17 his cross-examination of Burnett, which included the following
18 exchange:

19 Q. What actually happened was, after Bourges confronted
20 you with information, he then asked you to come with him
21 to a police station; right?

22
23 A. I broke down in my kitchen.

24
25 Q. Yes.

26
27 A. Right after that.

28
29 Q. You began to cry?

30
31 A. Then I went to the precinct.

1
2 Q. Then you were asked to accompany the detective to the
3 precinct; right?

4
5 A. Yes.

6
7 Q. In a police car? You went to the precinct; right?

8
9 A. Yes.

10
11 . . .

12
13 Q. [The police detectives] sat you down, right?

14
15 A. Yes.

16
17 Q. They told you they wanted to talk to you; is that
18 right?

19
20 A. Yes.

21
22 Q. And then they read you your Miranda rights; right?

23
24 A. Yes.

25
26 Q. They told you that anything you said could be used
27 against you; right?

28
29 A. Yes.

30
31 Q. And that's the first time you told any police officer
32 that Norcott Corby was involved in this case; right?

33
34 A: Yes.

35 Id. at 137-39.

36 **III. Procedural Background**

37 Corby challenged his conviction, first through the New York
38 state appellate courts and now through federal habeas review.

39 **A. Direct Appeal**

40 Among Corby's points on direct appeal, he argued that the
41 trial court had violated his Confrontation Clause rights under the

1 U.S. Constitution by precluding him from asking Burnett whether
2 Detective Bourges told her that Corby had accused her of Mohammed's
3 murder before she first implicated Corby.

4 In December 2004, the Appellate Division rejected Corby's
5 argument. People v. Norcott, 15 A.D.3d 14 (1st Dep't 2004). The
6 panel majority stated that "a strong argument" could be made that
7 the trial court properly exercised its discretion in excluding the
8 testimony, but that it was not necessary to decide the issue
9 because any error was harmless, given that Burnett's "motive to lie
10 was abundantly clear to the jury." Id. at 23. The dissent,
11 however, would have overturned the conviction because, in its view,
12 Corby's right of cross-examination was "eviscerated" because the
13 trial court had prevented Corby from asking the "key question" of
14 what prompted Burnett to "change her mind," i.e., to point the
15 finger at Corby after more than a year of not doing so. Id. at 34
16 (Andrias, J., dissenting). It opined that this question was
17 probative of Burnett's "motive to fabricate evidence against" Corby
18 not only to "divert attention from her admitted participation," but
19 also "in revenge for [Corby] allegedly implicating her." Id. at
20 32.

21 In December 2005, the New York Court of Appeals affirmed the
22 decision of the Appellate Division. People v. Corby, 6 N.Y.3d 231
23 (2005). Unlike the state intermediate court, the Court of Appeals
24 reached the question of whether the trial court had erred, and
25 determined that it had not. The Court of Appeals held that the

1 ruling was a proper exercise of the trial judge's discretion and
2 that Burnett's motive to lie and to implicate Corby was apparent
3 notwithstanding the challenged evidentiary ruling. It reasoned
4 that "[a]ny additional evidence of Burnett's bias or motive to lie
5 . . . would have been cumulative and of little probative value,"
6 whereas Corby's requested cross-examination "would have caused jury
7 speculation and confusion as to the truth of [the] purported
8 accusation." Id. at 236. In dissent, Judge George Bundy Smith
9 concluded that the trial court's ruling was erroneous. Like the
10 dissenter in the Appellate Division, he determined that the trial
11 court's ruling prevented Corby from eliciting that Burnett had a
12 specific motive to retaliate against Corby for his alleged
13 accusation by pointing the finger back at him. Id. at 239-40 (G.B.
14 Smith, J., dissenting).

15 **B. This Habeas Petition**

16 Following the New York Court of Appeals's affirmance of his
17 conviction, Corby filed a 28 U.S.C. § 2254 petition in the district
18 court for a writ of habeas corpus. The magistrate judge's report
19 and recommendation to the district court concluded that the New
20 York Court of Appeals's ruling was "in harmony with Supreme Court
21 jurisprudence." Corby v. Artus, No. 06 Civ. 15291 (LTS) (KNF),
22 2008 WL 8430550, at *10 (S.D.N.Y. Sept. 10, 2008). The district
23 court disagreed. Like the dissenting opinions from the state
24 appellate courts, the district court believed that "the exclusion
25 of evidence regarding the alleged accusation eliminated a specific,

1 prototypical ground for bias from the jury's consideration":
2 retaliation bias. Corby v. Artus, 783 F. Supp. 2d 547, 556
3 (S.D.N.Y. 2011). The district court concluded that the state trial
4 court had exceeded its discretion by prohibiting "all inquiry into
5 [this] one prototypical form of bias." Id. at 557. It went on to
6 conclude that the error was not harmless, id. at 557-59, and
7 therefore granted the writ. The State appeals.

8 **DISCUSSION**

9 The sole claim before us is whether the New York Court of
10 Appeals erred in upholding the state trial court's limitation of
11 Corby's cross-examination of the prosecution's principal witness,
12 Burnett. Corby argues that the state trial court's ruling deprived
13 him of his Sixth Amendment right to confront witnesses against him
14 and that the Court of Appeals misapplied Sixth Amendment precedent
15 in concluding otherwise.

16 **I. Right of Cross-Examination**

17 "The Confrontation Clause of the Sixth Amendment guarantees
18 the right of an accused in a criminal prosecution 'to be confronted
19 with the witnesses against him.'" Delaware v. Van Arsdall, 475
20 U.S. 673, 678 (1986) (quoting U.S. Const. amend VI). It affords a
21 defendant "a meaningful opportunity to cross-examine witnesses
22 against him in order to show bias or improper motive for their
23 testimony." Brinson v. Walker, 547 F.3d 387, 392 (2d Cir. 2008).
24 "[A] criminal defendant states a violation of the Confrontation
25 Clause by showing that he was prohibited from engaging in otherwise

1 appropriate cross-examination designed to show a prototypical form
2 of bias on the part of the witness.” Van Arsdall, 475 U.S. at 680.

3 The right of cross-examination, however, is not absolute.
4 “[T]he Confrontation Clause guarantees an opportunity for effective
5 cross-examination, not cross-examination that is effective in
6 whatever way, and to whatever extent, the defense might wish.”

7 Delaware v. Fensterer, 474 U.S. 15, 20 (1985) (per curiam)
8 (emphasis omitted). A trial judge retains “wide latitude” to
9 restrict cross-examination “based on concerns about, among other
10 things, harassment, prejudice, confusion of the issues, the
11 witness’ safety, or interrogation that is repetitive or only
12 marginally relevant.” Van Arsdall, 475 U.S. at 679; see also
13 Watson v. Greene, 640 F.3d 501, 510 (2d Cir. 2011) (the “decision
14 to restrict cross-examination will be reversed only when the court
15 has abused its broad discretion” (internal quotation marks
16 omitted)). “To determine the propriety of cross-examination, as
17 with other determinations of admissibility of evidence, courts
18 balance prejudice versus probative value.” Watson, 640 F.3d at
19 510.

20 **II. Standard of Review**

21 We review a district court’s ruling on a petition for a writ
22 of habeas corpus de novo. Overton v. Newton, 295 F.3d 270, 275 (2d
23 Cir. 2002).

24 A federal habeas application by a state inmate may not be
25 granted regarding a claim that was “adjudicated on the merits” in

1 state court unless that adjudication resulted in either “a decision
2 that was contrary to, or involved an unreasonable application of,
3 clearly established Federal law, as determined by the Supreme Court
4 of the United States,” or “a decision that was based on an
5 unreasonable determination of the facts.” 28 U.S.C. § 2254(d)(1),
6 (2). Corby contends that his petition falls in the former category
7 because the New York Court of Appeals unreasonably applied the
8 Supreme Court’s Confrontation Clause jurisprudence in affirming the
9 state trial court’s limitation of his cross-examination of Burnett.
10 See, e.g., Williams v. Taylor, 529 U.S. 362, 409-13 (2000); Cotto
11 v. Herbert, 331 F.3d 217, 247-48 (2d Cir. 2003).

12 **III. Analysis**

13 We agree with the analysis of the New York Court of Appeals
14 that the state trial court did not abuse its discretion in limiting
15 Corby’s cross-examination of Burnett. See Corby, 6 N.Y.3d at 235-
16 36. Corby was able to show that Burnett had a motive to lie to
17 deflect the investigators’ attention from herself, given her deep
18 involvement in the events surrounding Mohammed’s murder: the murder
19 occurred in her apartment and she helped steal drugs from the
20 victim, remove the body from the apartment and clean up the blood.
21 And the evidence of Burnett’s hostility towards Corby -- her
22 testimony that he had threatened her and her family, and her
23 admission that she had stolen from him -- established that, to the
24 extent she would falsely accuse anyone, Corby was “the most
25 plausible candidate.” Id. at 235. Thus, any additional evidence

1 of Burnett's motive to falsely shift blame to Corby would have been
2 cumulative and of little additional probative value, but would have
3 been unduly prejudicial to the prosecution for the reasons stated
4 at sidebar by the state trial court. The limitation of Corby's
5 cross-examination of Burnett therefore was not an abuse of
6 discretion.

7 Corby, however, argues that, even if the jury heard some
8 evidence of Burnett's motive to lie and to implicate him, the state
9 trial court's ruling had the effect of prohibiting all inquiry into
10 "retaliation bias," i.e., Burnett's alleged motivation to retaliate
11 against Corby for his alleged accusation against her by pointing
12 the finger back at him. For this argument, Corby relies on the
13 Supreme Court's statement in Van Arsdall that:

14 [A] criminal defendant states a violation of the
15 Confrontation Clause by showing that he was prohibited
16 from engaging in otherwise appropriate cross-examination
17 designed to show a prototypical form of bias on the part
18 of the witness, and thereby to expose to the jury the
19 facts from which jurors could appropriately draw
20 inferences relating to the reliability of the witness.

21
22 475 U.S. at 680 (internal quotation marks and modification
23 omitted). The Appellate Division dissent, Norcott, 15 A.D.3d at
24 32, 35 (Andrias, J., dissenting), the New York Court of Appeals
25 dissent, Corby, 6 N.Y.3d at 238-39 (G.B. Smith, J., dissenting),
26 and the district court, Corby, 783 F. Supp. 2d at 554, all were
27 persuaded by this retaliation-bias argument and relied on Van
28 Arsdall in concluding that Corby's conviction should be overturned.
29 For two reasons, we disagree with their conclusion.

1 **A. Corby Failed to Argue Retaliation Bias at Trial**

2 At the sidebar regarding Corby's cross-examination of Burnett,
3 Corby's lawyer did not argue that the sought cross-examination
4 would be relevant to prove retaliation bias. Instead, he contended
5 that (1) he wanted to ask about the relayed accusation against
6 Burnett to prove that she had a motive to shift blame away from
7 herself, and (2) he wanted the jury to know that the accusation
8 came from Corby because in that case, Burnett's motive to lie would
9 be greater, as she would fear that the authorities would believe an
10 accusation coming from someone who had witnessed the events in
11 question. Later, Corby's lawyer even proposed a compromise that
12 would have foreclosed any retaliation argument: he would forgo
13 specifying that Corby was the person who had accused Burnett if he
14 could ask only whether some unidentified person had accused her.
15 Because the retaliation-bias argument was not presented to the
16 trial judge, it could not have been an abuse of that judge's
17 discretion not to rule in Corby's favor on this basis. See Fuller
18 v. Gorczyk, 273 F.3d 212, 222 (2d Cir. 2001).

19 In a subsequent motion, made to and denied by the state trial
20 court after Burnett was dismissed as a witness, Corby "request[ed]
21 that either Ms. Burnett be recalled for further cross-examination
22 solely with regard to [her motive to lie], or that a mistrial be
23 granted." Supplemental Appendix 3. One statement in that motion
24 -- specifically, the second sentence of the following passage --
25 arguably implied the retaliation-bias theory of relevance:

1 [W]ere the jury to hear that the defendant was accusing
2 her, then the jurors would have a fact from which they
3 could infer that she has a specific motive to cast blame
4 on another. Were the Jury to hear that it was the
5 defendant who was accusing her, then the jurors would
6 have a fact from which they could infer that Ms. Burnett
7 has a particular motive to lie against this defendant.
8 Were the jury to hear that the defendant was accusing
9 her, and that the Detective was confronting her with this
10 material, then the jurors would have a fact from which
11 they could infer that she has a motive to avoid being
12 investigated herself.

13
14 Id. at 7-8. We conclude, however, that this single statement, read
15 in the context of this passage and buried in counsel's motion, was
16 not sufficient to alert the trial judge to a new theory of
17 retaliation-bias relevance. The motion was backward-looking -- it
18 argued that the trial court had "created error of Constitutional
19 dimension," id. at 3, and that the "restriction [imposed] was
20 fundamental error," id. at 4. To that end, it reiterated the
21 arguments advanced at the sidebar, and nowhere suggested that it
22 was advancing a new theory of relevance. The state trial judge was
23 not required to read between the lines of counsel's motion to
24 divine a previously unasserted legal theory, and it would undermine
25 our system of federalism to disturb a state-court conviction on
26 federal habeas review based on that judge's failure to do so.

27 **B. The Desired Testimony Was Admitted by Implication**

28 Furthermore, and in any case, our precedent makes clear that
29 the facts Corby sought to elicit from Burnett were effectively
30 before the jury at his trial.

1 In Bruton v. United States, 391 U.S. 123 (1968), the Supreme
2 Court held that a defendant's right to confront witnesses includes
3 the right not to have the incriminating hearsay statements of non-
4 testifying co-defendants admitted against him. In Mason v. Scully,
5 16 F.3d 38 (2d Cir. 1994), we held that the Bruton principle must
6 be applied to exclude testimony when an arresting officer would
7 testify that after a conversation with a co-defendant, he went
8 looking for the defendant, because that testimony implies that the
9 co-defendant had accused the defendant. Id. at 42-44; see also
10 Ryan v. Miller, 303 F.3d 231, 250 (2d Cir. 2002) ("The relevant
11 question is whether the way the prosecutor solicited the testimony
12 . . . ma[d]e obvious to the jury the content of the conversation --
13 an accusation against [the defendant] -- and the source . . . even
14 though it did not directly state this information.").

15 Here, without objection, Corby's lawyer elicited from Burnett
16 the very information that would require exclusion under Mason and
17 Ryan because it demonstrates the accusation; namely, that (1)
18 Detective Bourges claimed to have met with Corby and discussed
19 Mohammed's murder, (2) Bourges proceeded to track down Burnett in
20 Philadelphia and tell her about his purported conversation with
21 Corby, and (3) at that point, Burnett broke down in tears and was
22 taken in a police car to the police station, where she was given
23 Miranda warnings. As recognized by Mason and Ryan, the plain
24 implication of this chronology was the substance of that which
25 Corby argues he was unable to present to the jury: that Burnett

1 believed Corby had implicated her in Mohammed's murder when she
2 first accused him. It therefore cannot be said that Corby was
3 precluded from "expos[ing] to the jury the facts from which the
4 jurors could appropriately draw inferences relating to the
5 reliability of" Burnett, Van Arsdall, 475 U.S. at 680, specifically
6 as to whether she accused him in retaliation for his accusation
7 against her. Consequently, there was no violation of Corby's
8 Confrontation Clause rights.

9 * * *

10 Because we hold that no constitutional violation occurred, we
11 need not consider whether any error was harmless. We note,
12 however, that the district court applied an incorrect harmless
13 error standard (harmless beyond a reasonable doubt) in this case.
14 Corby, 783 F. Supp. 2d at 557-58. While the test on direct appeal
15 is whether a constitutional error was harmless beyond a reasonable
16 doubt, see Chapman v. California, 386 U.S. 18, 24 (1967), in
17 deciding federal habeas claims by state prisoners, because of the
18 deference we afford to state courts, we "find an error harmless
19 unless it had substantial and injurious effect or influence in
20 determining the jury's verdict." Fry v. Pliler, 551 U.S. 112, 116
21 (2007) (citations and internal quotation marks omitted).

22 CONCLUSION

23 We have considered all of Corby's arguments on appeal and find
24 them to be without merit. The district court's order granting
25 Corby's petition for a writ of habeas corpus is REVERSED.