NO. 11-199

IN THE SUPREME COURT
OF THE UNITED STATES

ALEXANDER VASQUEZ,

Petitioner,

- v -

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Seventh Circuit

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Seventh Circuit violate this Court's harmless-error precedent when it focused its harmless-error analysis solely on the weight of the untainted evidence without considering the potential effect of the error (the erroneous admission, for the truth of the matter asserted, of trial counsel's statements that his client would lose the case and should plead guilty) at all?

2. Did the Seventh Circuit violate Mr. Vasquez's Sixth Amendment right to a jury trial when it determined that Mr. Vasquez should have been convicted instead of considering the effect of the district court's error on the jury's verdict?

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The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 635 F.3d 889 and reprinted at Pet. App. 2A-29A.

JURISDICTION

The court of appeals entered judgment on March 14, 2011. Rehearing was denied on May 10, 2011. The petition was filed on August 8, 2011, and granted on November 28, 2011. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment, 28 U.S.C. § 2111, and Federal Rule of Criminal Procedure 52(a) are reproduced at App. 1.

STATEMENT OF THE CASE

1. The Underlying Incident

In August 2008, Alejandro Diaz, a DEA informant, arranged a cocaine purchase with Carlos Cruz. J.A. 36-38. On August 5th, Diaz met with Cruz and his buyer, Joel Perez, at a gas station in Arlington Heights, Illinois. J.A. 40-42, 190. Cruz and Perez rode to the meeting in Cruz's car. J.A.194-95. At the meeting, Diaz told them to follow him to

another location to view the cocaine. J.A. 213. Instead of following Diaz, Perez walked toward his car, a Bonneville, which was parked in a nearby parking lot, and got in the passenger seat. Petitioner, Perez's cousin, was in the driver's seat. J.A. 50-51, 218-23.

At that point, six officers ran toward the vehicle, some with guns drawn. J.A. 127. According to an agent, Petitioner reversed the vehicle as agents approached, collided with law enforcement vehicles parked less than a car-length behind, and drove toward the lot's exit with Perez in the passenger seat. J.A. 73-74. Shortly thereafter, agents located the Bonneville in a nearby Wal-Mart lot. J.A. 339. Petitioner and Perez were found at a McDonald's and arrested after a brief pursuit. J.A. 339-41, 354-57, 364-67. Inside the Bonneville, officers located $24,000 in a compartment where the airbag should have been. J.A. 123-24.

Cruz and Perez pled guilty to drug conspiracy. J.A. 14, 459.

2. The Trial

Petitioner proceeded to trial on charges of conspiring to possess with intent to distribute cocaine and attempting to possess with the intent to distribute cocaine. Pet. App. 5A. His defense was that he was an innocent bystander who was picking up his cousin, Perez, as a favor to Perez's wife; he had no knowledge about any drug deal. J.A. 646-47, 681.

The government's main witness, Cruz, testified pursuant to a plea agreement. J.A. 163.

Without the agreement, Cruz believed he would face a ten-year mandatory minimum sentence. J.A. 251-52. With the agreement, he believed his sentence would be cut by more than half, to about four years. J.A. 253. Cruz admitted that the reduced sentence was the reason he testified. J.A. 253.

According to Cruz, the cocaine deal was supposed to be between him, Perez, and Diaz only. J.A. 242-44. Cruz had never spoken to Petitioner and had no expectation that Petitioner would be there on August 5th. J.A. 241-49. Indeed, Petitioner was not mentioned on any of the consensually-recorded phone calls about the transaction. J.A. 122. Cruz testified that no money was to be brought to the meeting. J.A. 240-43. The meeting's purpose was for Perez to inspect the cocaine. Purchase would occur another time. *Id.*

Cruz testified that his interaction with Petitioner was brief and occurred immediately before his arrest. It was then that, as Cruz was standing next to the Bonneville, Perez said, "We've got the money here." J.A. 223. Cruz claimed that, immediately thereafter, Petitioner, who was in the car, repeated the same words. *Id.* According to Officer Chupik, however, Cruz never mentioned this statement to agents until a few days before trial, J.A. 389, even though Cruz had met with agents repeatedly about the case during the year following his arrest, see J.A. 265-68, 389. Cruz denied not telling the police earlier. J.A. 271.

Cruz's credibility was also otherwise undercut. He openly admitted that he "lied" when he first talked with agents by claiming that he met Petitioner before the meeting in Arlington Heights

when, in truth, he had never met him before. J.A. 255-57. He admitted that he lied because he was trying to tell the agents "what they want[ed] to know at that time." J.A. 257. During closing, the government conceded that Cruz had lied, both about what he said immediately after his arrest and about whether he had been read his Miranda rights. J.A. 703.

In addition to Cruz's testimony, the government presented evidence of Petitioner's six-year-old conviction for delivery of a controlled substance, J.A. 320, in which Petitioner and Perez sold cocaine to an informant. During the delivery, Petitioner personally spoke to, accepted money from, and provided cocaine to an informant. J.A. 321-23. He did none of those things in this case. J.A. 114.

The government elicited evidence about Petitioner's flight through the testimony of Cruz and Officers Chupik and Hayes. J.A. 73-74, 232-33, 330-32. Via cross-examination and admission of photos, Petitioner identified inconsistencies in their descriptions, showing the possibility that the police may have caused the collision of the vehicles. J.A. 128-35, 237-40, 381-84, 395-97, 664-68. Officer Chupik also testified that Petitioner was on parole at the time he fled. J.A. 127-28.

The government presented a phone record summary chart that showed numerous phone calls between Perez and Petitioner. J.A. 87-95. Petitioner identified calls omitted from the government's chart and presented a chart of his own and testimony that, as family, he and Perez regularly exchanged calls. J.A. 99-113, 385-88.

Petitioner put on witnesses to support his innocent bystander defense. Mayra Vasquez, Alexander Vasquez, Jr., and Alexander Jason Vasquez—each related to Petitioner—all testified that, while the car was titled in Mayra's name, see J.A. 324, the Bonneville was owned and regularly driven by Perez, not Petitioner, and that Petitioner drove a different car. Petitioner introduced corroborating records. J.A. 399-403, 408-10, 420-22.

Petitioner then called Marina Perez, Perez's wife, to explain the innocent reason for Petitioner's presence in the Bonneville at the scene. Mrs. Perez testified involuntarily pursuant to subpoena. J.A. 424. She testified that on August 5th she was shopping with her husband and son. They drove the Bonneville. J.A. 426-28. After completing their shopping, they drove to Petitioner's residence to help him with his disabled mother (Perez's aunt). J.A. 428-31. Shortly thereafter, Perez received a call and told his wife he was leaving with a friend. J.A. 431. She wanted him to stay and they argued. J.A. 431-32. Perez was picked up by an unknown individual around 4:00 p.m. J.A. 432, 436. Perez asked Mrs. Perez to pick him up in Arlington Heights when he called her. He gave her the Bonneville keys. J.A. 432.

Angry with her husband, Mrs. Perez asked Petitioner if he would pick Perez up in Arlington Heights if she stayed with his mother. J.A. 434-35. Petitioner agreed. J.A. 435. After realizing that Perez's Bonneville was blocking his vehicle in the garage, Petitioner returned to the house and Mrs. Perez gave him the keys to the Bonneville. J.A. 435-39. According to Mrs. Perez, it was mere happenstance that Petitioner was the one who

responded to Perez's request to be picked up.

During cross-examination, government counsel did not impeach Mrs. Perez's testimony despite a continuance to collect her thoughts. J.A. 445-49. Over the weekend, the government reviewed hours of recorded jail calls between Mr. and Mrs. Perez. Government counsel then moved for a one-day continuance to prepare to recall Mrs. Perez and play recordings. The continuance was granted over objection and the jury was sent home without hearing any evidence that day. J.A. 458-70.

The recordings included Mr. and Mrs. Perez recounting statements allegedly made by *Petitioner's trial counsel*, which were either conveyed directly to Mrs. Perez or conveyed to Mr. Perez by Petitioner. These included counsel telling Petitioner that "everyone is going to lose" at trial and that Petitioner should plead guilty. J.A. 769, 771. Over objection, the court admitted the recordings for their truth. J.A. 517-18. During his examination of Mrs. Perez, government counsel thrice repeated Petitioner's attorney's purported statement that, if they went to trial, "everyone was going to lose." J.A. 533-34. After the jury heard on three separate occasions that Petitioner's attorney thought Petitioner would lose at trial, they heard it a fourth time: the government admitted and played the recordings through another witness after Mrs. Perez left the stand. J.A. 565-73.

In closing, both parties repeatedly referenced Mrs. Perez and the erroneously-admitted recordings. J.A. 644-46, 680-91, 710-17. The government specifically asked the jury to rely on the recordings as proof that Mrs. Perez lied. J.A. 644-46, 716-18.

The court gave the jury cautionary instructions regarding flight evidence and prior bad act evidence. J.A. 722, 724-25. Deliberations began on September 2, 2009, and reconvened at 9:00 a.m. on September 3rd. J.A. 737. At 10:30 a.m. on September 3rd, the jury sent a note requesting transcripts of Mrs. Perez's "testimonies," J.A. 739; in response, the court instructed the jury to rely on their memory, J.A. 741. The jurors deliberated until 4:35 p.m., a total deliberation time of over eight hours. J.A. 744.

The jury convicted Petitioner of conspiracy to possess with intent to distribute cocaine and acquitted him of attempting to possess with intent to distribute cocaine. J.A. 745. Petitioner was sentenced to 20 years incarceration. J.A. 2 (Dkt.152).

3. The Court of Appeals' Decision

On appeal, Petitioner argued that the district court committed reversible error by admitting the recordings for their truth. The Seventh Circuit agreed that the admission of the recordings was error, but the majority found the error harmless and affirmed Petitioner's conviction. J.A. 4.

The majority based its harmlessness determination solely on its view that, in a trial without the erroneously-admitted recordings, Petitioner would have been convicted due to the strength of the untainted evidence. Pet. App. 17A-18A. In so doing, the majority relied, in part, on the facts that Petitioner did not testify and that his codefendants pled guilty. Pet. App 11A-12A. The majority also cited flight evidence, prior conviction

evidence, and Cruz's testimony about Petitioner saying, "We got the money." Pet. App. 17A-18A. The majority did not address the error's effect, the defense evidence, the government's emphasis of the erroneously-admitted recordings, the jury's request for transcripts of Mrs. Perez's "testimonies," or the split-verdict.

Judge Hamilton dissented. He noted that the purpose of harmless-error analysis is "not to become in effect a second jury." Pet. App. 24A (internal quotation marks omitted). He then proceeded to consider the evidence with a focus on the error's effect. *Id.* He examined the entire record and noted the relative weakness of the government's case against Petitioner, the impeachment of Cruz, the significance of Mrs. Perez's testimony, the intensity of the government's desire to admit the recordings, the government's emphasis on the recordings, the split-verdict, and the error's potential impact. Pet. App. 24A-29A. He found that the error could not be harmless.

This Court granted Petitioner's petition for certiorari on November 28, 2011.

SUMMARY OF ARGUMENT

Petitioner's jury heard erroneously-admitted evidence that Petitioner's own lawyer said he would lose if he went to trial and that he should plead guilty. The majority below determined this error harmless. But it did so without considering the error's effect.

Since the enactment of the first harmless-error statute, this Court has consistently applied the same mode of harmless-error analysis. That analysis requires consideration of an error's effect in the context of the entire record. The goal is to determine whether the error influenced the jury. The Court has repeatedly warned against any form of harmless-error analysis that asks only whether the defendant would have been convicted in an error-free trial. The proper question is whether the jury's verdict was uninfluenced by error.

Courts like the majority below have misinterpreted this Court's harmless-error jurisprudence. Focusing on isolated statements in a few cases, these courts have subverted the original purpose of the harmless-error analysis and adopted a test that focuses solely on whether there was overwhelming independent evidence of guilt. This "overwhelming evidence" test strips the error out of the trial and then asks judges to speculate how an error-free trial would come out. However, this test cannot be squared with this Court's consistent application of a harmless-error rule that focuses on an error's potential impact on the jury's verdict.

The Sixth Amendment right to a jury trial also compels the use of a harmless-error test that takes an error's effect into account. When a judge asks only whether the defendant would be convicted in a trial without error, that judge is making a guilt determination. This Court has held that the jury-trial right requires that guilt determinations be made by juries, not judges. Thus, any harmless-error analysis based on a court's assessment of whether a hypothetical, error-free trial would yield conviction violates the Sixth Amendment.

In this case, the majority below applied a harmless-error test that this Court has never endorsed. The majority failed to consider the error's potential effect on the jury and the weight of the evidence in the context of the entire record. As the dissent observed, the government's case against Petitioner was far from overwhelming. It was based largely on circumstantial evidence and hotly contested on every important point. Moreover, through the testimony of Marina Perez, Petitioner presented evidence of actual innocence, which the government could not disprove. With no legitimate means of challenging Mrs. Perez's testimony, the government utilized recordings, erroneously admitted for their truth, which indicated that Petitioner's trial attorney said he would lose at trial and should plead guilty. The government emphasized the statements repeatedly in questioning, played the recordings themselves, and referenced them in closing argument. Under any test, this significant error was not harmless.

ARGUMENT

I. BECAUSE THE MAJORITY FAILED TO CONSIDER THE ERROR'S EFFECT ON THE JURY, IT VIOLATED RULE 52(A) AND 28 U.S.C. § 2111.

The purpose of harmless-error analysis has always been to preserve a jury's verdict, not to supplant it. The relevant statutes and this Court have consistently required courts to conduct a thorough review of the entire record before declaring an error harmless. The purpose of this review is not for the reviewing court to become "in effect a second jury," but instead to determine whether the error may have affected the jury's verdict. *Neder v. United States*, 527 U.S. 1, 19 (1999). Indeed, a contrary rule would raise serious Sixth Amendment concerns.

At times, the Court has variously phrased the harmless-error test, resulting in misinterpretations by some courts. However, an examination of the Court's jurisprudence as a whole reveals an analysis with a singular purpose: to ensure that errors with no real effect on a trial do not result in reversal. This purpose was expressed in the original harmless-error statute, in the Court's subsequent interpretations, and in the rule's current form. The mode of analysis and standard of persuasion (or level of certainty)[1]

[1] For constitutional errors on direct appeal, courts ask whether it is beyond a reasonable doubt that the error did not affect the jury. *Chapman v. United States*, 386 U.S. 18, 24 (1967). For constitutional errors on collateral review and for non-constitutional errors, courts ask whether there is fair assurance

may change depending on the nature of the error, but the inquiry at its core remains the same: Can the reviewing court say that the error did not affect the jury's verdict?

The majority below departed from this analysis because it did not consider the error's effect on the jury. Instead, it stripped the error from the trial and decided whether an average jury would still have found the defendant guilty. Pet. App. 17. Because this analysis violates this Court's harmless-error precedent, the decision must be reversed.

A. Both This Court And Congress Have Required That Courts Conducting Harmless-Error Review Consider The Effect Of The Error.

The first harmless-error statute was passed in 1919. It provided: "On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." 28 U.S.C. § former 391 (1919). Thereafter, the Court decided a series of cases that established the proper mode of harmless-error analysis. Those cases held that the purpose of the harmless-error rule was to determine the error's effect, not to make an independent assessment of

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that the error did not have a substantial and injurious effect. *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993). Thus, the ingredients of the analysis are identical; but the level of confidence required varies.

guilt.

The original cases interpreting the harmless-error rule confined findings of harmlessness to errors concerning extremely minor or technical matters. In *Bruno v. United States*, the Court noted that the rule "was intended to prevent matters concerned with the mere etiquette of trials and with the formalities and minutiae of procedure from touching the merits of the verdict." 308 U.S. 287, 294 (1939).

Even as the rule was expanded to embrace more substantial errors, the Court carefully noted that it was "not authorized to look at the printed record, resolve conflicting evidence, and reach the conclusion that the error was harmless because we think the defendant was guilty." *Weiler v. United States*, 323 U.S. 606, 611 (1945). To do so "would be to substitute our judgment for that of the jury." *Id.* The Court warned that despite the rule's important purpose—to encourage confidence in the justice system by not overturning verdicts based on inconsequential errors—a court could not supplant the jury's judgment with its own:

> From presuming too often all errors to be "prejudicial," the judicial pendulum need not swing to presuming all errors to be "harmless" if only the appellate court is left without doubt that one who claims its corrective process is, after all, guilty.

Bollenbach v. United States, 326 U.S. 607, 615 (1946). This is because "the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure

and standards appropriate for criminal trials." *Id.* at 614.

Kotteakos v. United States remains the seminal case explaining the purpose and proper mode of harmless-error analysis. 328 U.S. 750 (1946). In *Kotteakos*, the court of appeals had found that the district court erred by trying separate conspiracies together. *Id.* at 752. However, it had held that that the error was not prejudicial because "guilt was so manifest." *Id.* at 755. This Court reversed, holding that the error was not harmless. *Id.* at 774. In doing so, the Court carefully analyzed the harmless-error rule.

The Court explained that the contemporary harmless-error rule "grew out of widespread and deep conviction ... that courts of review, 'tower above the trials of criminal cases as impregnable citadels of technicality.'" *Id.* at 759. Thus, the purpose of the rule was "to substitute judgment for automatic application of rules." *Id.* Colloquially phrased, the harmless-error rule instructed "[d]o not be technical, where technicality does not really hurt the party whose rights in the trial and in its outcome the technicality affects." *Id.* at 760.

Kotteakos is full of warnings for courts conducting harmless-error analysis. First, "it is not the appellate court's function to determine guilt or innocence." *Id.* at 763. And courts cannot "speculate upon probable reconviction and decide according to how the speculation comes out." *Id.* The Court made clear that a reviewing court's opinion of the evidence's weight is an inescapable component of the analysis, but it cannot be "the sole criteria." *Id.* at 764. According to the Court, "the crucial thing is the

impact of the thing done wrong on the minds of other men, not on one's own, in the total setting." *Id.* The Court noted that the importance of this distinction is paramount "when the sense of guilt comes strongly from the record." *Id.*

In making a harmless-error determination, courts must consider "all that happened" and must do so "without stripping the erroneous action from the whole." *Id.* at 765. "That conviction would, or might probably, have resulted in properly-conducted trial is not the criterion of [harmless-error inquiry]." *Id.* at 776; *Bihn v. United States*, 328 U.S. 633, 638-39 (1946) (noting that it is not "enough for us to conclude that guilt may be deduced from the whole record").

In the years following *Kotteakos*, the Court repeatedly emphasized that the proper focus of the harmless-error inquiry is the effect on the jury. See *Fiswick v. United States*, 329 U.S. 211, 218 (1946) ("[w]e cannot say with fair assurance in this case that the jury was not substantially swayed by the use of these admissions against all petitioners"); *Carpenters v. United States*, 330 U.S. 395, 408 (1947) (reversing a conviction because there was "no way of knowing here whether the jury's verdict was based on facts within the condemned instructions").

After this succession of cases consistently applying the harmless-error rule, Congress reenacted the harmless-error statute in 1949. See 28 U.S.C. § 2111. When Congress reenacts a statute after the court has developed an established interpretation, this Court presumes that Congress is aware of settled judicial interpretations of the statute, *Lirillard v. Pons*, 434 U.S. 575, 580 (1978),

and intended to adopt those interpretations. *Keene Corp. v. United States*, 508 U.S. 200, 212 (1993).

In this instance, not only did Congress reenact the statute, it explicitly indicated its intention to recodify the former rule. See Fed. R. Crim. P. 52 Advisory Committee Notes ("This rule is a restatement of existing law"); *United States v. Lane*, 474 U.S. 438, 454 (1986) (recodification of harmless-error without the word "technical" "did not alter the substantive legal test"). The House Report accompanying the bill specifically noted that it was incorporating "the harmless error provisions of [28 U.S.C. § 391]." H.R. Rep. No. 352, at 18, 81st Cong. (1st Sess. 1949). Thus, it is presumed that Congress intended 28 U.S.C. § 2111 to maintain this Court's initial interpretation in *Kotteakos*.

B. This Court's Analysis In Every Case Applying The Harmless-Error Rule Since The Enactment of 28 U.S.C. § 2111 Has Been Consistent With *Kotteakos*.

Following the reenactment of the harmless-error statute, the Court continued to apply the effect-on-the-error test announced in *Kotteakos*. See *Stewart v. United States*, 366 U.S. 1, 9 (1961) (reversing conviction based on prosecutor's improper comment where "it [was] apparent that the jury's awareness of petitioner's failure to testify at his first two trials could have affected its deliberations"). It has never strayed from this analysis even when it has expanded the number of errors subject to the analysis.

In *Fahy v. Connecticut*, 375 U.S. 85 (1963), and *Chapman v. United States*, 368 U.S. 18 (1967), this Court expanded the application of harmless error to constitutional errors. In doing so, the Court kept the inquiry's focus on the error's effect on the jury that heard the case. The *Fahy* Court inquired "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." 375 U.S. at 86-87. In *Chapman*, the Court similarly noted that, "like the federal harmless-error statute," the constitutional rule requires reversal where there was "an error in admitting plainly relevant evidence which possibly influenced the jury." 368 U.S. at 23-24.

In *United States v. Hasting*, the Court considered whether a prosecutor's comment on the defendant's failure to testify was harmless. 461 U.S. 499, 502 (1983). The Court focused its analysis on the jury that heard the case. "A reviewing court must begin with the reality that the jurors sat in the same room day after day with the defendants and their lawyers" *Id.* at 510. The Court assessed the evidence presented and found that "it could hardly have escaped the attention of the jurors" that the defense "presented patently and totally inconsistent theories." *Id.* at 512. Thus, the Court found the error harmless because it could not have affected the jury. *Id.*

In *Arizona v. Fulminante*, the Court held that the wrongful admission of a confession could be harmless. 499 U.S. 279, 295 (1991). But, the Court found that the error in *Fulminante* was not harmless. *Id.* at 297. The Court noted that the prosecutor emphasized the erroneously-admitted

confession, *id.* at 298, and that the error led to the admission of other prejudicial evidence, *id.* at 300. These considerations demonstrate the Court's focus on the error's effect. Prosecutorial emphasis of an error would be irrelevant to an inquiry that simply asked whether the defendant would have been convicted without error. Yet, the Court has repeatedly considered this factor in harmless-error analysis. See, *e.g.*, *Brecht v. Abrahamson*, 507 U.S. 619, 626 (1993) (noting infrequency of state's references to defendant's post-Miranda silence in finding error harmless).

In *O'Neal v. McAninch*, the Court phrased the inquiry as "Do I, the judge, think that the error substantially influenced the jury's decision?" 513 U.S 432, 436 (1995). Again, consistent with *Kotteakos*, the Court focused on the error's impact on the jury that heard the case.

Unfortunately, *Kotteakos*'s command is not always easy to follow when reviewing courts believe the defendant guilty. The temptation to supplant the jury's deliberation with the court's has led to a variety of harmless-error analyses including the overwhelming-evidence test, which is inconsistent with *Kotteakos.*

C. Courts That Apply The Overwhelming-Evidence Test Have Misinterpreted This Court's Precedent.

Despite this Court's consistent application of a harmless-error test that requires consideration of an error's effect, some lower courts have misread

language in this Court's opinions to allow an alternative test.[2] This alternative test ignores the nature and effect of the error and instead looks at the remaining evidence to determine whether it is so overwhelming that the defendant surely would have been convicted absent the error. This is the "overwhelming-evidence test."

The difference between the tests is significant. A court applying the effect-on-the-verdict test must review the entire record to determine the nature and effect of the error. The scope of this inquiry includes the extent to which the error was emphasized and whether the jury's verdict or conduct indicates that the error was influential. On the other hand, a court applying the overwhelming-evidence test has no need to consider the nature and effect of the error because it asks only whether the untainted evidence was sufficient to assure conviction.

The overwhelming-evidence test can be traced to language in two cases: *Harrington v. United States*, 395 U.S. 250 (1969), and *Schneble v. Florida*, 405 U.S. 427 (1972). Neither of these cases, however, created an "overwhelming-evidence" rule. Rather, in both cases, the Court repeated the familiar rule of *Kotteakos* and *Chapman*, but, while applying it, made statements that some courts took out of

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[2] See Roger A. Fairfax, Jr., *Harmless Constitutional Error and the Institutional Significance of the Jury*, 76 Fordham L. Rev. 2027, 2037 (2008) (noting authorities finding two tests); *United States v. Peck*, 102 F.3d 1319, 1326 (2d Cir. 1996) (Newman, CJ concurring) (noting the uncertainty present in "most cases" of "whether the reviewing court is to consider the effect of the error on the jury or predict what verdict would have been rendered in the absence of the error").

context.

In *Harrington*, the Court considered whether a *Bruton* violation was harmless under the *Chapman* standard. 395 U.S. at 252. The Court made clear that *Harrington*'s holding was not intended to modify that standard in any way. "We do not depart from *Chapman* nor do we dilute it by inference. We reaffirm it." *Id.* at 254. Despite this plain admonition, some courts have read *Harrington*'s language to permit harmlessness determinations based solely on the court's finding of overwhelming evidence. See, *e.g.*, *United States v. Holmes*, 620 F.3d 836, 844 (8th Cir. 2010) ("[e]vidence erroneously admitted ... is harmless ... as long as the remaining evidence is overwhelming").

The language in *Harrington* that the lower courts have misinterpreted stated: "It is argued that we must reverse if we can imagine a single juror whose mind might have been made up because of [the codefendants'] confessions and who otherwise would have remained in doubt and unconvinced. We of course do not know the jurors who sat. Our judgment must be based on our own reading of the record and on what seems to us to have been the probable impact on the minds of an average jury." *Harrington*, 395 U.S. at 254. The Court went on to conclude that "apart from [the codefendants' confessions] the case against Harrington was so overwhelming that we conclude that this violation of *Bruton* was harmless beyond a reasonable doubt." *Id.*

Taken out of context, these statements have been read by certain courts of appeals to allow courts to simply guess whether a reasonable jury would have convicted in a trial without error. However, a

closer look at *Harrington* reveals a much narrower holding.

First, *Harrington* was decided based on its unique facts. The Court noted that its decision was tied to those facts: "We granted the petition for certiorari to consider whether the violation of *Bruton* was on these special facts harmless error under *Chapman*." *Id.* at 252; see also *id.* at 253 ("we conclude on these special facts [the error was] ... harmless"); and at 254 ("[o]ur decision was based on the evidence in this record").

Second, the Court's reference to "the minds of an average jury" did not announce a new rule. Obviously, a reviewing court will consider how an error would affect an average jury. Such considerations are inescapable since there is seldom direct proof of the jury's impression of evidence.[3] Nonetheless, the *Harrington* Court attempted to determine whether the error influenced the jury that heard the evidence by examining the error's nature. It did not hypothesize an error-free trial and a hypothetical jury's reaction thereto. It is one thing to inquire how the error as presented would affect a reasonable person—often that is a reviewing court's best means of determining an error's probable effect. It is quite another thing to ask whether a jury that did not hear the error would convict. Nothing in *Harrington* can be read to allow a reviewing court to hypothesize an error-free trial and ignore the error's potential effect or specific indications that it influenced the jury's decision.

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[3] There is, however, such proof in this case. See *infra* at 55-57, 62-63.

Third, *Harrington*'s reference to "overwhelming evidence" did not create a new test. Although *Harrington* referred to the evidence as "overwhelming" when finding the erroneous admission of codefendants' statements harmless, it also noted that the evidence was cumulative, and the facts it established uncontested. In fact, *Harrington* referenced *Chapman*'s warning against "giving too much emphasis to 'overwhelming evidence' of guilt." *Id.* at 253. *Harrington* is nonetheless sometimes cited as typifying the "overwhelming evidence" standard. See Gregory Mitchell, *Against "Overwhelming" Appellate Activism: Constraining Harmless Error Review*, 82 Cal. L. Rev. 1335, 1343 (1994) (citing *Harrington* as source of the overwhelming-evidence test).

Harrington's holding was based more on the cumulative nature of the erroneously-admitted evidence than on the fact that the Court believed other evidence "overwhelming." The inadmissible statements in *Harrington* placed the defendant at the scene of the crime. But the defendant himself "agreed he was there." 395 U.S. at 253. The Court focused on the error's nature and found that the "[erroneously-admitted] evidence, supplied through [codefendants'] confessions, was of course cumulative" and, hence, unlikely to impact the verdict. *Id.* at 254.

Many courts, including this one, have explicitly incorporated consideration of whether erroneously-admitted evidence is cumulative into harmless-error analysis. See *Delaware v. Van Arsdall,* 475 U.S. 673, 684 (1986) ("whether such an error is harmless depends on [among other factors]

whether the testimony was cumulative"); *Brown v. United States,* 411 U.S. 223, 231 (1973) (finding error harmless because it was cumulative); *Wray v. Johnson*, 202 F.3d 515, 526 (2d Cir. 1998) (including "whether the wrongly admitted evidence was ... cumulative" in list of harmless error factors). If erroneously-admitted evidence is cumulative of a defendant's own admission, a jury has no reason to rely on it. See *Wray*, 202 F.3d at 526 (cumulative evidence "is less likely to have injuriously influenced the jury's verdict").

Courts applying the overwhelming-evidence test also frequently cite *Schneble v. Florida*. But, *Schneble*, like *Harrington*, faithfully applied the *Kotteakos* and *Chapman* standard. It correctly announced the test: whether "there is a reasonable possibility that the improperly admitted evidence contributed to the conviction." 405 U.S. 427, 432 (1972). But, the Court went on to explain, "[i]n this case, we conclude that the 'minds of the average jury' would not have found the State's case significantly less persuasive had the testimony ... been excluded." *Id.* (quoting *Harrington*, 395 U.S. at 254).

Taken out of context, the reference to "the minds of the average jury" can be read to endorse ignoring the trial that took place and instead relying on the court's hypothetical evaluation of an error-free trial. But *Schneble*'s holding renders that interpretation impossible.

The error in *Schneble* was the admission of a codefendant's confession in violation of *Bruton*. In holding that error harmless, the Court noted that Schneble himself gave a "minutely detailed" confession. 405 U.S. at 430. The confession was

"completely consistent with the objective evidence." *Id.* The Court noted that the erroneously-admitted statement "at most tended to corroborate certain details of petitioner's comprehensive confession." *Id.* at 431.

The Court emphasized that the jury's verdict was necessarily based upon that confession. According to the Court, without Schneble's confession, "the State's case [] was virtually non-existent." *Id.* Because the jury convicted the defendant, the Court "concluded that petitioner's confession was considered by the jury." *Id.* at 432. Consequently, the codefendant's corroborative confession was cumulative. Knowing this, the court concluded that the erroneously-admitted cumulative evidence did not influence the jury. Thus, the Court's analysis hinged on the erroneously-admitted evidence's cumulative nature and lack of impact on the jury, not on the existence of overwhelming independent evidence.

When a jury convicts, it proceeds analytically from the presumption of innocence to finding guilt beyond a reasonable doubt. Harmless-error analysis aims to insure that the error does not sway this process. With erroneously-admitted cumulative evidence, there is less reason to believe that the jury relied on it because it could rely upon other admissible evidence establishing the same facts. Where erroneously-admitted evidence is not cumulative and bears on an important issue, juries are more likely to assign it independent significance.

After *Schneble*, the Court never phrased the harmless-error inquiry as whether "the 'minds of an average jury' would not have found the State's case

significantly less persuasive [absent the error]." The Court has only referenced an analysis of whether "the minds of an average jury" would have found the untainted evidence sufficient to convict one other time—to disapprove of the analysis.

In *Satterwhite v. Texas*, the Court applied harmless-error analysis in the context of death penalty sentencing. 486 U.S. 249 (1988). The court of appeals had found that erroneous admission of a psychiatric report "was harmless because 'the properly admitted evidence was such that the minds of an average jury would have found the State's case [on future dangerousness] sufficient ... even if Dr. Grigson's testimony had not been admitted.'" *Id.* at 258. This Court rejected this analysis: "The question, however, is not whether the legally admitted evidence was sufficient to support the death sentence, which we assume it was, but rather, whether the State has proved 'beyond a reasonable doubt' that the error complained of did not contribute to the verdict obtained." *Id.* at 258-259.

Despite the Court's repudiation of standards focusing narrowly on what an average jury would have done absent the error, the Seventh Circuit uses that standard frequently.[4] The majority below demonstrated its use of the forbidden

[4] See, *e.g.*, *United States v. Thorton*, 642 F.3d 599, 605 (7th Cir. 2011) (asking whether the "average juror" would find evidence "significantly less persuasive" absent the error); *United States v. Yarrington*, 640 F.3d 772, 780 (7th Cir. 2011) (same); *United States v. Hicks*, 635 F.3d 1063, 1073 (7th Cir. 2011) (same); *United States v. Spagnola*, 632 F.3d 981, 988 (7th Cir. 2011) (same).

"overwhelming-evidence"[5] test by not mentioning the error's nature, its potential effect, or the fact that the jury returned a split-verdict. As this Court's precedent demonstrates, an inquiry that concludes that the untainted evidence "*would have* moved the jury to convict [the defendant] without a nudge from [the error]," (emphasis added) is insufficient. Pet. App. 17A. Thus, the Seventh Circuit applied the wrong test.

D. Cases Involving Omitted Elements Or Instructional Errors Do Not Support The Position That Overwhelming Evidence Is Dispositive In The Harmless-Error Inquiry.

Because instructional errors can affect the scope and nature of a jury's inquiry, such errors can complicate harmless-error analysis. For instance, if a jury is instructed that it can presume an element of an offense when if finds particular facts (*Sandstrom* error), it is difficult to determine whether the instruction substantially influenced the jury's verdict. Similarly, if a jury did not reach a decision on an element because it was omitted, determining how the omission of the element affected the jury is necessarily speculative. The special influence that jury instructions have on jury determinations has led the Court to hold that at least one instructional error—a defective reasonable doubt instruction—is structural. *Sullivan v. Louisiana*, 508 U.S. 275

5 The majority below did not use the phrase "overwhelming evidence," but it applied the test in effect.

(1993).

The Court's analysis of instructional errors is consistent with the harmless-error analysis this Court has consistently applied since the rule's inception. Only in the rare circumstance of an omitted element has the Court asked whether the jury would have returned the same verdict absent the error. When it has done so it has required that the omitted element be uncontroverted and incontrovertible before finding the omission harmless. In such cases, it is fair to say that the error did not influence the jury. *Neder*, 527 U.S. at 17.

1. Instructional Errors That Narrow The Jury's Inquiry

"An erroneous presumption on a disputed element of the crime renders irrelevant the evidence on the issue because the jury may have relied upon the presumption rather than upon that evidence." *Connecticut v. Johnson*, 460 U.S. 73, 86 (1983). And where a jury "may have failed to consider evidence [on an element], a reviewing court cannot hold that the error did not contribute to the verdict." *Id.* The Court has been clear that when it appears that the jury may not have considered evidence on a disputed element, "[t]he fact that the reviewing court may view the evidence of intent as overwhelming is then simply irrelevant." *Id.*

> To allow a reviewing court to perform the jury's function of evaluating the evidence of intent, when the jury never may have performed that function,

> would give too much weight to society's interest in punishing the guilty and too little weight to the method by which decisions of guilt are made.

Id.

Thus, where a jury is given an erroneous presumption instruction, the inquiry remains the same: Did the error (*i.e.*, the presumption) affect the verdict? *Yates v. Evatt*, 500 U.S. 391, 404-05 (1991). In *Yates*, the Court reviewed a decision of the Supreme Court of South Carolina finding the use of an erroneous instruction to be harmless because the court believed "it is beyond a reasonable doubt that the jury would have found it unnecessary to rely on the erroneous mandatory presumption regarding the element of malice." *Id.* at 399. The Court found that this was the wrong standard because "[e]nquiry about the necessity for reliance … does not satisfy all of *Chapman*'s concerns." *Id.* at 407. The Court found it insufficient to say that the verdict would have been the same absent the error:

> [Enquiry about the necessity for reliance] can tell us that the verdict could have been the same without the presumptions, when there was evidence sufficient to support the verdict independently of the presumptions' effect. But the enquiry will not tell us whether the jury's verdict did rest on that evidence.

Id. at 407.

In this situation, the reviewing court "must ask what evidence the jury actually considered in

reaching its verdict." *Id.* at 404. The reviewing court then weighs the probative force of that evidence against the probative force of the presumption standing alone (*i.e.*, the error's effect). *Id.* at 404-05. Only through this comparison can a court assure itself that an erroneous presumption did not influence the jury. *Id.*

Even instructional errors that preclude consideration of an element (either through a mandatory presumption or an omitted element) can in some rare situations be harmless. *Id.* at 87; *Rose v. Clark*, 478 U.S. 570, 580 (1986). But such errors are only harmless in cases where it is certain that the error did not affect the verdict. *Rose*, 478 U.S at 580-581.

Mandatory presumptions can be harmless where the predicate facts for the presumption "conclusively establish [the element], so that no rational jury could find [the predicate facts], but [] not [find the element itself]." *Rose*, 478 U.S. at 580-81; see also *Pope v. Illinois*, 481 U.S. 497, 504 (1987) (Scalia, J., concurring) (holding misdescribed element harmless because no rational juror could have found the misdescribed element without also implicitly finding the correct element). In such situations it is impossible that the error affected the jury.

Similarly, in *Neder*, the Court held that the omission of an element of the offense could be harmless error in limited circumstances. 527 U.S. 1; see also *Washington v. Recueno*, 548 U.S. 212, 220 (2006) (holding *Apprendi* error is subject to harmless-error analysis). However, the omission of an element can be harmless only where the omitted

element is uncontroverted and incontrovertible. *Neder*, 527 U.S. at 17.

The element at issue in *Neder* was materiality. The Court rejected the argument that the omission of an element was structural error, finding that "[i]n this situation, where a reviewing court concludes beyond a reasonable doubt that the omitted element was *uncontested and supported by overwhelming evidence*, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found harmless." *Id.* (emphasis added).

Thus, *Neder*'s holding was that where the Court can categorically rule out an effect on the jury because an element is uncontested, an omitted element can constitute harmless error. *Neder* was carefully confined to the facts of that case. The Court repeatedly emphasized the fact that the missing element was uncontested, thereby focusing on the trial that actually occurred.[6]

The facts are also important. The Court noted that many courts of appeals had held that "any

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[6] See *id.* at 15 ("petitioner does not suggest that he would introduce any evidence bearing upon the issue of materiality if so allowed"); at 16 (noting that evidence "incontrovertibly establishes" materiality); at 17 ("Neder did not argue to the jury—and does not argue here—that his false statements of income could be found immaterial"); at 17 ("omitted element was uncontested and supported by overwhelming evidence"); at 18 ("omitted element is supported by uncontroverted evidence"); at 19 ("defendant did not, and apparently could not, bring forth facts contesting the omitted element").

failure to report income is material." *Id.* at 16. In *Neder*, the defendant was found guilty of failing to report over $5 million in income. *Id.* It could be fairly said that finding the willful failure to report $5 million in income necessarily entails a finding of materiality. See *id.* at 26 (Stevens, J., concurring) ("[t]he jury verdict, therefore, was not merely the functional equivalent of a finding on any possible materiality issue; it necessarily included a finding on that issue").

The Court did not simply ask whether there was overwhelming evidence; it repeatedly noted that the evidence was uncontroverted and incontrovertible. *Id.* at 17. And this must be the standard. If the Court lowered the standard in omitted element cases, it would necessitate the introduction of evidence at the appellate level. If an element is omitted, the defendant has no reason to introduce evidence disproving it. Therefore, assessing whether evidence related to the omitted element was "overwhelming" requires the reviewing court to provide the defendant an opportunity to proffer the evidence he would have presented on the element. The only way to avoid this absurd result is to take *Neder* at its word that the holding is based on the fact that the element was uncontroverted and incontrovertible.

In the only other case to apply harmless-error to an omitted element, the Court reached a nearly identical conclusion to that in *Neder*. *Johnson v. United States*, 520 U.S. 461 (1997). In *Johnson*, the Court found a judicial finding of materiality to be harmless error where "[m]ateriality was essentially uncontroverted at trial and has remained so on

appeal." *Id.* at 469. The Court once again focused on the fact that the omitted element was uncontroverted and incontrovertible: "[P]etitioner has presented no plausible argument that the false statement under oath for which she was convicted—lying about the source of tens of thousands of dollars she used to improve her home—was not material to the grand jury investigation." *Id.*

Importantly, the Court in *Neder* was only forced to base its decision on the uncontroverted nature of the element because the instruction did not permit the jury to decide the element. In Petitioner's case, the jury considered evidence as it related to all elements. But it also considered erroneously-admitted evidence. The issues affected by the error in this case were far from uncontroverted. Thus, failure to consider the effect on the jury was error.

2. Instructional Errors That Fundamentally Alter The Jury's Inquiry

The Court has been clear that where the instructions vitiate the jury's findings in their entirety, the error can never be harmless. In *Sullivan*, a unanimous Court held that an erroneous reasonable doubt instruction is structural error. 508 U.S. at 281-82. In reaching this conclusion the Court noted that harmless-error analysis requires "the reviewing court to consider … not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand." *Id.* at 279. This is because harmless-error review

looks "to the basis on which 'the jury *actually rested* its verdict." *Id.* (quoting *Yates*, 500 U.S. at 404-05) (emphasis in original).

> The inquiry ... is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error.

Id. (emphasis in original).

The reasoning in *Sullivan* demonstrates that harmlessness cannot be determined without looking at the error's effect in the context of the trial that actually occurred.

E. Application Of The Overwhelming-Evidence Test Raises Serious Risks Of Sixth Amendment Violation.

The harmless-error analysis announced in *Kotteakos* struck a balance between the desire for efficiency and the commands of the Sixth Amendment. This Court's repeated insistence that reviewing courts not become, in effect, a second jury derives from the concern that improperly conducted harmless-error analysis can violate the Sixth Amendment right to a jury trial. The meaning of the jury-trial right and this Court's precedent establish that a reviewing court violates the Sixth Amendment when it disregards explicit indications from a jury of an error's importance and hypothesizes a trial without the error. Reaffirming a harmless-error test that focuses on the effect of the error would avoid this Constitutional problem. See *Boos v. Berry*, 485

U.S. 312, 331 (1988) ("federal courts have the duty to avoid constitutional difficulties by [narrowly construing statutes] if … fairly possible").

1. The Sixth Amendment Right To A Jury Trial Requires That Guilt Determinations Be Made By Juries, Not Judges.

The right to be tried by a jury is "fundamental to the American scheme of justice." *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). The "most important element" of the right is "to have the jury, rather than the judge, reach the requisite finding of 'guilty.'" *Sullivan*, 508 U.S. at 277. The right "reflect[s] a profound judgment about the way in which law should be enforced and justice administered." *Duncan*, 391 U.S. at 155.

The right to a jury trial protects both defendants and society from the arbitrary decisions of state actors. This is why the "preservation and proper protection" of the jury-trial right "as a protection against arbitrary rule were among the major objectives ... of the Declaration and Bill of Rights of 1689." *Duncan*, 391 U.S. at 151. The reason for the jury-trial right was not the ability of juries to discern truth better than judges. See *id.* at 157 (noting criticism that juries are incapable of determining issues of fact). Instead, the jury was meant as a check on the judicial branch's power. As John Adams wrote, "[a]s the constitution requires that the popular branch of the legislature should have an absolute check, so as to put a peremptory negative upon every act of government, it requires

that the common people should have as complete a control, as decisive a negative, in every judgment of a court of judicature." The Works of John Adams, Second President of the United States 253 (Charles Francis Adams ed., 1850).

The core of the jury-trial right is its limitation of judicial power. The right to jury trial "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary." *Blakely v. Washington*, 542 U.S. 296, 305-06 (2004). In fact, Thomas Jefferson opined that it was more important that the people, through the jury, have control over the judicial branch of government as opposed to the legislative branch. The Papers of Thomas Jefferson 282, 283 (Julian P. Boyd ed., 1958).

The Framers expressed specific concern about legal doctrines that could encroach upon the jury's role and break down the important boundary between judge and jury erected by the jury-trial right. "[W]e often hear in conversation doctrines advanced for law, which, if true, would render juries a mere ostentation and pageantry, and the Court absolute judges of law and fact." Works of John Adams at 253. The jury-trial right was intended to emphasize "the important boundary between the power of the court and that of the jury." *Id.*

The English also believed the jury-trial right to be expansive and worthy of protection

> not only from all open attacks, (which none will be so hardy as to make), but also from all secret machinations, which may sap and undermine it; by introducing new and arbitrary methods of trial …. And however *convenient* these may appear at first, (as doubtless all arbitrary powers, well executed, are the most *convenient*) yet let it be remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern.

Blackstone, Commentaries, v. IV p. 350 (11th ed. 1791). The Founders brought the common law right to jury trial to America, "and interposed barriers on every side against the approaches of arbitrary power." Joseph Story, Commentaries on the Constitution of the United States § 1773 (1833). This was because the Framers feared "that the jury right could be lost not only by gross denial, but by erosion." *Jones v. United States*, 526 U.S. 227, 247-48 (1999).

The Sixth Amendment jury-trial right was "but an enlargement of the language of the Magna Carta," which had been interpreted to secure "the right of trial according to the process and

proceedings of the common law." Commentaries on the Constitution of the United States at § 1783. Thus, the Sixth Amendment right to a jury trial carries with it common-law traditions. "When the American constitutions provide for the trial by jury, they provide for the common law trial by jury; and not merely for any trial by jury that the government itself may chance to invent, and call by that name. It is the thing, and not merely the name, that is guaranteed." Lysander Spooner, An Essay on the Trial by Jury, Boston: John P. Jewett and Company (1852).

In *Apprendi v. New Jersey*, this Court reaffirmed a defendant's right to have every element of an offense proven to a jury beyond a reasonable doubt. 530 U.S. 466 (2000). This means that a judge's power to convict and sentence "derives wholly from the jury's verdict." *Blakely*, 542 U.S. at 306. Thus, the jury-trial right requires that any harmless-error analysis focus "wholly [on] the jury's verdict," not on the judge's independent view of the evidence's weight. *Id.* If the Court could ignore the jury's verdict, "the jury would not exercise the control that the Framers intended." *Id.*

2. This Court Has Held That Specifically-Enumerated Sixth Amendment Rights Require Strict Adherence.

The Court has not been entirely consistent in in its discussion of the jury-trial right in the context of harmless error. In *Van Arsdall*, the Court stated "[t]he harmless error doctrine recognizes the

principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." 475 U.S. at 681. However, more recently the Court has noted that the right to a jury trial is more robust than that. See *Apprendi*, 530 U.S. 466. If the right to a jury trial guarantees nothing more than a fair trial, it provides no more protection than the Due Process Clause. See *Withrow v. Larkin*, 421 U.S. 35, 46 (1975) (a fair trial is a requirement of due process).

This Court has warned against nullifying constitutional rights. In the context of the similar Sixth Amendment rights of confrontation and right to counsel, the Court has made plain that the Constitution means what it says:

> What the Government urges upon us here is what was urged upon us with regard to the Sixth Amendment's right of confrontation—a line of reasoning that abstracts from the right to its purposes, and then eliminates the right. Since, it was argued, the purpose of the Confrontation Clause was to ensure the reliability of evidence, so long as the testimonial hearsay bore "indicia of reliability," the Confrontation Clause was not violated. We rejected that argument … in *Crawford v. Washington*, saying that the Confrontation Clause "commands, not that evidence be reliable, but that

> reliability be assessed in a particular manner: by testing in the crucible of cross-examination."

United States v. Gonzalez-Lopez, 548 U.S. 140, 146-147 (quoting *Crawford v. Washington*, 541 U.S. 36, 62 (2004)).

Allowing appellate speculation about a defendant's guilt (as opposed to a determination of whether error affected the jury) is based upon the same flawed reasoning. The argument is that the purpose of the jury is to reach the right result. So, if the reviewing court can assure itself of the result's accuracy (*i.e.*, that the defendant was guilty), then it is okay to dispense with trial by jury because the purpose has been accomplished. This Court used that forbidden reasoning in dicta in *Rose v. Clark*:

> [T]he thrust of the many constitutional rules governing the conduct of criminal trials is to ensure that those trials lead to fair and correct judgments. Where a reviewing court can find that the record developed at trial established guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed.

478 U.S. at 579; see *id.* at 585 (Stevens, J., concurring) (referring to these statements as "dictum").

The problem with that analysis is two-fold. First, the Constitution requires a particular method of determining guilt and it is inappropriate to "abstract[] from the right to its purposes, and then eliminate[] the right." *Gonzalez-Lopez*, 548 U.S. at

146. Second, the purposes of the jury-trial guarantee extend beyond reaching accurate results. The importance of the jury lies not in its unique ability to determine guilt or innocence where others cannot, but rather in its ability to check judicial power. *Blakely*, 546 U.S. at 296.

3. *Sullivan v. Louisiana* Establishes A Sixth Amendment Limitation On Harmless-Error Analysis.

The Court most clearly discussed the Sixth Amendment's role in harmless-error analysis in *Sullivan*. 508 U.S. 275. It defined the harmless-error inquiry with reference to the jury-trial right: "Consistent with the jury-trial guarantee, the question it instructs the reviewing court to consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand." *Id.* at 279. This language explicitly ties the harmless-error inquiry's focus to the Sixth Amendment right. Therefore, conducting improper harmless-error inquiry violates the Sixth Amendment. This is because "the Sixth Amendment requires more than appellate speculation about a hypothetical jury's action." *Id.* at 280. When a reviewing court hypothesizes a trial that occurred without error as opposed to considering the error's effect on the jury that heard the case, "the wrong entity judge[s] the defendant guilty." *Id.* (quoting *Rose*, 478 U.S. at 578).

The Court backed away from some of *Sullivan*'s language in *Neder*. The *Neder* Court noted

that some of the *Sullivan* reasoning "cannot be squared with our harmless-error cases." 527 U.S at 14. The Court distinguished between cases where an instructional error vitiates all of a jury's findings and cases where the error is the omission or misdescription of an element. *Neder* concluded that the error—omission of the materiality element—was subject to harmless-error analysis. *Id.*

The Court in *Neder* then conducted the harmless-error analysis. In doing so, it noted that, "[o]f course, safeguarding the jury guarantee will often require that a reviewing court conduct a thorough examination of the record." *Id.* at 19. This observation indicates the Court's awareness of the delicate balance that harmless-error analysis strikes.

The Court noted that the "central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence," *id.* at 18 (quoting *Van Arsdall*, 475 U.S. at 681), but also noted that the jury-trial right "was designed 'to guard against a spirit of oppression and tyranny on the part of rulers,' and 'was from the very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties.'" *Id.* (quoting *United States v. Gaudin*, 515 U.S. 506, 510-511 (1995)).

With this tension in mind, the Court delivered a narrow holding: "In a case such as this one, where a defendant did not, and apparently could not, bring forth facts contesting the omitted element, answering the question whether the jury verdict would have been the same absent the error does not fundamentally undermine the purposes of the jury-trial guarantee." *Neder*, 527 U.S. at 19.

Unlike *Neder*, where the absence of a jury finding forced the Court to determine whether the omitted element was uncontested and incontrovertible such that the error did not affect the jury, the instant case included a jury finding on every element. The harmless-error inquiry must focus on that finding, rather than speculative analysis of an error-free trial. The *Neder* Court reached its conclusion because, based on the evidence the jury heard, the defendant did not and could not contest the element. *Id.* at 19. In this case, all elements were contested. Nonetheless, the majority ignored the error's effect despite a record that provided ample grounds for assessing it.

Undoubtedly, harmless-error analysis can be conducted without violating the jury-trial guarantee. However, to do so, the reviewing court must determine that the error did not affect the jury's verdict. When a court looks only to its assessment of whether, absent error, there is overwhelming evidence, it ignores the possibility of an error-influenced verdict and supplants the jury's finding with its own. This Court can avoid this Sixth Amendment problem by reaffirming that harmless-error analysis requires examination of an error's possible effect on the jury that heard the case.

F. The Overwhelming-Evidence Test Raises Serious Fairness Concerns.

This Court's repeated focus on the effect of the error is not arbitrary. There are reasons that appellate courts are reluctant to decide issues of fact. Appellate courts do not see the demeanor or hear the

tone of witnesses who testify. Appellate courts are also not shielded from prejudicial evidence like juries are.

Judges, like juries, can and do get it wrong. Of the first 200 defendants exonerated by DNA evidence, 133 previously had their convictions affirmed in written appellate decisions. In 32% of those 133 decisions, an appellate court found an error to be harmless. Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 107 (2008). In 10% of those 133 decisions, the appellate court found harmlessness because it believed the evidence against the factually innocent defendant was "overwhelming." *Id.*

The Framers likely understood that innocent people would be imprisoned. But they certainly "would not have thought it too much to demand that, before depriving a man of [twenty years] of his liberty, the State should suffer the modest inconvenience of submitting its accusation to the "unambiguous suffrage of twelve of his equals and neighbors, rather than [the best of three] employee[s] of the state." *Blakely*, 542 U.S. at 313-314. The Court's consistent harmless-error jurisprudence reflects that principle.

II. THE WRONGFUL ADMISSION OF PETITIONER'S ATTORNEY'S STATEMENTS THAT PETITIONER SHOULD PLEAD GUILTY AND THAT PETITIONER WOULD LOSE AT TRIAL WAS NOT HARMLESS.

As the foregoing argument demonstrates, this Court has articulated a consistent harmless-error rule. First, the rule requires that courts review the entire record and evaluate the weight of the evidence in context. Second, courts must assess the error's effect. To assess the effect of the error, the court must consider the nature of the error, the importance of the evidence to which the error relates, the parties' emphasis on the error, and any specific indications that the jury relied on the error.

The majority below failed to apply this test. First, the majority did not consider the entire record when assessing the weight of the evidence. And, more importantly, it failed to consider the effect of the error at all. When the proper analysis is applied, the error in this case cannot be considered harmless.

A. When All of The Evidence Is Considered This Was A Close Case.

1. The Majority Considered Factors The Jury Was Instructed Not To Consider.

In harmless-error analysis, it is the jury's opinion of the weight of the evidence that controls, not the reviewing judges'. Thus, it is imperative that

reviewing courts only consider evidence the jury heard and presume that the jury followed the court's instructions.

The majority failed to follow this command when it began its analysis with reference to factors the jury could not have considered. The majority argued that it was important to "look at the big picture," pointing first to the fact that Petitioner's codefendants pleaded guilty. Pet. App. 10A. While that might be a consideration for judges, it is a fact that the jury was instructed to disregard. J.A. 719.

The majority then criticized Petitioner for "elect[ing] to offer something in the nature of an actual affirmative 'defense.'" Pet. App. 11A. The "affirmative 'defense'" was, of course, not an affirmative defense at all, but merely a claim that Petitioner did not commit the crime—a proposition the jury was instructed to presume. J.A. 722. The majority said that this "defense" was harder to prove because Petitioner did not testify. Pet. App. 11A. While such considerations may impact a judge's calculation, juries are instructed that they may draw no inferences whatsoever from the fact that a defendant remains silent. J.A. 722.

The harmless-error inquiry does not ask whether a judge thinks, based on his vast criminal law experience, that the defendant had a "difficult defense to sell."[7] The inquiry asks what weight the jury that heard the case could have assigned the

[7] In reality, a defendant has no obligation to "sell" a defense. The government bears the burden of proof. The mere assertion that the defendant was not guilty does not shift the burden to the defendant to establish innocence.

evidence. In making this inquiry, reviewing courts presume that the jury followed the instructions. *Yates*, 500 U.S. at 403 (referring to the "sound presumption" that jurors "follow the instructions they are given"). By considering factors no jury could consider when determining the evidence overwhelming, the majority improperly substituted its views for the jury's.

2. The Majority Failed To Consider The Evidence In Context.

The majority acknowledged that the issue of harmlessness was "close." But, it believed that the government's evidence, absent the error, "would have moved the jury to convict [] without a nudge from anything it heard in the government's rebuttal case." Pet. App. 17A. This conclusion was only possible because the majority did not consider the evidence in context. The majority failed to consider any of the evidence Petitioner presented at trial and focused almost exclusively on four pieces of the government's evidence: the phone records, the testimony of Carlos Cruz, the flight evidence, and the prior conviction evidence. The majority described this evidence as if it was uncontroverted. The record tells a different story.

a. The Government's Phone Record Evidence Was Contested.

The government presented a phone summary chart showing calls between Perez and Cruz as well as calls between Perez and Petitioner. With its

summary chart, the government argued that calls between Cruz and Perez were followed by calls from Perez to Petitioner—indicating a direct line of communication from Cruz to Perez to Petitioner. According to the government, this pattern indicated Petitioner's involvement in the negotiations and knowledge about the drug deal. J.A. 632-33.

However, the government's chart was incomplete. Petitioner presented a chart showing that, after receiving calls from Cruz, Perez often called other numbers and did not immediately call Petitioner. J.A. 107-12. The government's chart omitted these calls. Thus, the government's chart could not establish a series of back-to-back calls indicating Petitioner's knowledge. All the charts proved was that Perez called Petitioner (among others) at some point after speaking with Cruz. J.A. 751-57.

Phone records and testimony also demonstrated that Perez and Petitioner were both close friends and family. As such, Perez and Petitioner exchanged telephone calls regularly before Cruz ever contacted Perez about the cocaine. J.A. 104-05, 751-57. The phone charts did not show a change in interaction between Petitioner and Perez after Perez learned about the drug deal. Thus, when viewed in context, the phone records constituted unpersuasive circumstantial evidence that Petitioner knew a drug deal was going to occur.

b. Taken As A Whole, Carlos Cruz's Testimony Hurt The Government's Case.

The majority focused on only one small part of Cruz's testimony—his testimony that Petitioner stated "we got the money." But, the remainder of Cruz's testimony supported the defense's theory that Petitioner was not involved.

Cruz testified that, before meeting Perez, he believed that the drug deal would be between only the informant and Perez. Petitioner was not supposed to be involved. J.A. 242-44. Cruz also testified that no one was supposed to bring money. The meeting's purpose was only to inspect the drugs. J.A. 237-43. As the dissent noted, this evidence cut strongly against the government's claim that Petitioner was involved:

> Vasquez was not recorded at all. He was not even mentioned in any of the recorded calls. The agents, the confidential informant, and even Cruz were expecting only a single customer to show up for the meeting. They knew nothing about Vasquez until they saw him arrive in Perez's car at the nearby Denny's parking lot, from where he could see Perez and Cruz. He never got out of the car, and the agents did not hear him talk with anyone.

Pet. App. 23A.

Cruz only identified one statement suggesting Petitioner knew about the drug deal. Cruz testified that, after he walked to the Bonneville, Perez said,

"tell [the informant] we got the money here." Immediately thereafter, Cruz claimed Petitioner, for some unknown reason, repeated the words: "tell him we got the money here." J.A. 223. The majority treated this statement as "undisputed fact." Pet. App. 24A. But, as the dissent noted, "[the] credibility of that key bit of testimony was subject to strong attacks." *Id.*

"On the witness stand, Cruz admitted having lied to the government about Vasquez and several other subjects." Pet. App. 25A. Specifically, after his arrest, Cruz told agents that he had met Petitioner and Perez before he and Perez drove to Arlington Heights to meet the informant. On the stand he admitted that was a lie. J.A. 294. He further admitted that he lied about Petitioner in an attempt to tell the agents "what they want[ed] to know at that time" and get a lesser sentence. J.A. 255-58. As the dissent noted, "Cruz was a cooperating defendant with powerful incentives to help the government." That powerful incentive was a plea agreement that offered Cruz the opportunity to get below a ten-year mandatory minimum sentence and instead get a recommended sentence of 45 months. J.A. 251-53, 272; See *Fulminante*, 499 U.S. at 300 (considering benefits cooperating witness received in finding that error was harmful).

Cruz also admitted that, before cooperating, he signed an affidavit, swearing that agents never read him Miranda rights before taking his confession. J.A. 273. After deciding to cooperate, he claimed that the agents did read him his rights, but that he did not hear them because he was "looking around." J.A. 274-75. Even the government

acknowledged that these were lies. J.A. 703

But the most damaging attack concerned the very testimony upon which the majority relied. On cross-examination Cruz was confronted with the fact that, despite multiple meetings with agents in the year following his arrest, he never mentioned Petitioner saying, "We've got the money" until a few days before trial. Cruz claimed that he told the agents about this statement "way back" when he pled guilty. J.A. 271-72. The government's own Officer Chupik then testified that the first time Cruz ever mentioned Petitioner's "money" comment was a few days before the trial. J.A. 389. It could not have been lost on the jury that the government's cooperator was impeached by the government's own agent. In the end, the jury likely treated this one bit of testimony "as a late and false invention by Cruz." Pet. App 25A.

c. The Flight Evidence Was Inconclusive Because Petitioner Had Reason To Flee Unrelated To The Charged Offense.

When agents ran toward the Bonneville to make the arrest, Chupik testified that Petitioner put the car in reverse, collided with two police vehicles, put the Bonneville in drive, sped at Chupik, and drove the wrong way down a one-way street. J.A. 73-75. The government argued that this proved Petitioner knew about the drug deal. Otherwise, there was no explanation for the flight. J.A. 639-41.

This Court has cautioned that there is a limit

to the weight that can be given to flight evidence. *Wong Sun v. United States*, 371 U.S. 471, 483 n.10 (1963) ("[W]e have consistently doubted the probative value in criminal trials of [flight evidence]"). This is especially true in cases where the defendant presents evidence showing an independent reason for flight, which had nothing to do with the charged conduct.

Petitioner was on parole. J.A. 127-28. Chupik testified that six armed officers ran toward the Bonneville, some with guns drawn, and one of them physically collided with the vehicle's hood. J.A. 127. To a parolee, the approach of armed officers obviously intending arrest creates an incentive to panic and flee independent of any knowledge about a drug deal. For a parolee, arrest means violation and prison time. Hence, the defense argued that Petitioner had a reason to flee that had nothing to do with Perez's drug deal. J.A. 664-65.

The court instructed the jury that "[i]ntentional flight by a person immediately after a crime has been committed is not sufficient by itself to establish the guilt of that person." J.A. 724. The court went on to instruct the jury that they should consider

> whether the defendant intentionally fled from the law enforcement officers, whether this flight occurred because of conscious guilt or for some other purpose, whether any such guilt came from the crime charged in this case or from some other concern, and whether the flight gives any actual insight into whether the defendant committed the

charged crime.

J.A. 725. There was no dispute that Petitioner fled the scene. But, due to Petitioner's parolee status and the concerns that could create, the jury could have relied on this instruction and determined that the flight did not give "any actual insight into whether Petitioner committed the charged crime."

There was also substantial confusion regarding how the flight occurred. Three witnesses testified regarding the flight from the parking lot, each with a different version of events. These inconsistent accounts, along with vehicle photos showing damage that was inconsistent with government witnesses' descriptions, made the flight evidence appear incoherent and unreliable. J.A. 128-35, 237-40, 342-43, 381-84, 395-98. This permitted defense counsel to forcefully argue that, to keep Perez from fleeing, J.A. 664-69, the police vehicles may have initiated the collision with the Bonneville before it moved at all.

In light of the limited probative value of flight evidence generally, the specific cautionary instruction here, and Petitioner's parolee status, the flight evidence was far from conclusive evidence of guilt.

d. The Prior Conviction Evidence Was Not Persuasive.

The final piece of evidence the majority considered was Petitioner's prior conviction. Government evidence showed that, in 2002, Petitioner was convicted for delivery of a controlled

substance. The conviction involved Petitioner and Perez driving to meet an informant in a vehicle with a trap compartment. J.A. 320-23.

The defense pointed out significant differences between Petitioner's conduct in the six-year-old drug transaction and his conduct in this case. In 2002, Petitioner communicated and met directly with the buyer, personally provided the buyer with cocaine, and personally accepted money. In this case, Perez and Cruz were buying cocaine from an informant. J.A. 321-23. Petitioner never spoke to or met Cruz or the seller and never participated in the negotiation. J.A. 241-49. Consequently, the evidence showed that Petitioner's actions when participating in a prior drug transaction were completely different than his actions in this case. The jury was instructed that it could consider the prior conviction only for a limited purpose—an instruction they are presumed to have followed. J.A. 717. Thus, the prior conviction constituted inconclusive circumstantial evidence.

3. The Majority Did Not Consider Marina Perez's Testimony.

The majority did not compare the four pieces of evidence on which it focused with Marina Perez's testimony, undoubtedly the most important testimony in the trial. Mrs. Perez's "testimony provided an innocent explanation for Vasquez's presence on the scene in the car with the hidden money." Pet. App. 24A. She testified that she was with her husband shopping throughout the morning of August 5 and that Petitioner never had access to Perez's Bonneville during that time. J.A. 426-28.

After shopping, Perez drove the Bonneville to Petitioner's residence so Perez could help Petitioner with his disabled mother. J.A. 428-31. Mrs. Perez testified that, while at Petitioner's residence, Perez told her he was leaving to go out with a friend. She wanted him to stay and they argued. Mrs. Perez testified that her husband asked her to bring his Bonneville and pick him up in Arlington Heights later when he called her. Perez left Petitioner's residence with someone who picked him up around 4:00. J.A. 430-32.

Mrs. Perez testified that she was angry with her husband. So, she asked Petitioner if he would pick Mr. Perez up from Arlington Heights if she agreed to stay with his mother. Petitioner agreed. J.A. 433-35. Mrs. Perez testified that, when Petitioner went out to get in his vehicle to pick Perez up, he found Perez's Bonneville parked behind his garage, blocking Petitioner's vehicle in. After discovering this, Petitioner went back into the house and asked Mrs. Perez to move the Bonneville. She testified that, instead of moving the car, she gave Petitioner the keys and told him to take the Bonneville to Arlington Heights. J.A. 436-37.

This testimony provided an innocent explanation for Petitioner's presence in the Bonneville at the scene of Perez's drug deal. Since he initially tried to take his car and only drove the Bonneville by chance, Petitioner could not have knowingly transported the money in the hidden compartment. Without awareness of the money, there was no evidence of Petitioner's knowledge or agreement.

Subsequent to Mrs. Perez's testimony, the

government requested a one-day continuance to review recorded conversations between Mr. and Mrs. Perez and subpoena her. J.A. 1(Dkt.124), 459-70. The recordings included Mr. and Mrs. Perez recounting various statements Petitioner's attorney allegedly made. J.A. 509-21, 759-78. The court granted this continuance over objection and erroneously admitted the recordings for their truth. J.A. 469, 518, 521. Absent the erroneously-admitted recordings, Mrs. Perez's testimony was unimpeached.[8]

When compared to Mrs. Perez's unimpeached testimony, Cruz's significantly impeached testimony could not shift the evidentiary balance in favor of proof of guilt beyond a reasonable doubt; nor could the inconclusive phone record evidence. Absent the erroneously-admitted recordings, that leaves only the prior bad act evidence and flight evidence to overcome Mrs. Perez's testimony. Since the jury was instructed that flight evidence had to be viewed with caution and prior bad act evidence could only be considered for a limited purpose, it is unreasonable to find that such circumstantial evidence could be called overwhelming when compared to Mrs. Perez's testimony. Indeed, the evidence in this case was close. By failing to consider impact of Mrs. Perez's testimony, the majority violated this Court's requirement that harmless-error analysis involve a consideration of the entire record.

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[8] Whether even the erroneously-admitted recordings actually impeached Mrs. Perez's testimony is unclear. The dissent noted that "nothing in the MCC tapes is inconsistent with her testimony." Pet. App 19A.

4. The Majority Failed To Consider Jury Actions Which Demonstrated That This Was A Close Case.

The jury's actions demonstrated that the government's evidence was not overwhelming. First, the jury deliberated for more than eight hours. J.A. 737, 739, 743. This was a simple, one-transaction drug case. Such a lengthy deliberation is inconsistent with the jury deeming the evidence overwhelming.[9] Additionally, the jury's acquittal on Count Two (attempt) demonstrates that this was a close case. That verdict is hard to reconcile with the jury's conviction on Count One (conspiracy). If Petitioner knew about the drug deal and actively helped Perez provide the money, then Petitioner attempted to possess cocaine. See J.A. 642 (government arguing that "All of the evidence . . .not only does it go to that conspiracy charge . . . it also goes to … the attempt").

Similarly, if the jury found Cruz's testimony credible, then Petitioner would have been convicted on both counts. Cruz testified that Petitioner said: "*We* have the money." That implicated Petitioner in attempting to possess the cocaine by purchasing it with the money in the Bonneville. Nonetheless, the jury found Petitioner not guilty of attempt. That means that the jury necessarily found Cruz's

9 See *Parker v. Gladden*, 385 U.S. 363, 365 (1966) (finding length of deliberation showed a difference among jurors as to guilt of defendant); see also *State-of-the-States Survey of Jury Improvement Efforts* (April 2007), National Center for State Courts (average length of jury deliberation is four hours).

testimony about Vasquez's alleged "money" statement, on which the majority relied, incredible. The majority's reliance on testimony that the jury found incredible amounts to improperly supplanting jury findings with the court's opinion.

After a lengthy deliberation, the split-verdict brings with it the indication of a compromise. Pet. App. 27A ("the split-verdict certainly has the whiff of a compromise verdict"). Any case involving a split-verdict that could be interpreted as a compromise is not a case involving overwhelming evidence. This is because, when a jury returns two different verdicts on intricately intertwined charges, it is difficult to say that the evidence is overwhelming as to one but not the other. The majority's final conclusion that the "evidence [] would have moved the jury to convict Vasquez without a nudge from anything it heard in the government's rebuttal case," Pet. App. 17A, indicates that the evidence, which was the same as to both counts, was indisputably overwhelming. The jury obviously did not see it that way in light of its acquittal on attempt. Thus, the majority's harmlessness finding amounts to a rejection of the jury's apparent conclusion that the question of guilt was close.

After removing the erroneously-admitted recordings, a full review of the evidence indicates that, in the eyes of the jury that heard the case, the evidence did not appear overwhelming. Thus, even under the erroneous overwhelming-evidence test, the error was not harmless. Nonetheless, the correct test requires inquiry into the error's impact.

B. The Wrongful Admission Of Petitioner's Attorney's Statements That He Would Lose At Trial And Should Plead Guilty Was Extremely Prejudicial.

The majority did not consider the error's effect at all. But, as the dissent demonstrated and this Court's precedent commands, the prejudicial effect of the error must be considered.

1. The Nature Of The Error Was Inherently Prejudicial

The error here placed in the jury's mind the most devastating of notions—the defendant's own lawyer thinks he is guilty. The jury heard trial counsel's purported statement that Petitioner would lose the case. J.A. 769. The Court admitted it for its truth. That means that the jurors were permitted to conclude that, as a matter of fact, Petitioner should lose the case. Thus, the jury was permitted to convict Petitioner based solely on his attorney's statement. The error "was just about as prejudicial as one could expect to encounter in a trial." Pet. App. 26A.

The district court also admitted for its truth counsel's statement that Petitioner should plead guilty. J.A. 771. If that statement is taken for its truth, then it entails the conclusion that Petitioner is guilty and should have pled that way. This statement, if taken as true, could also provide an independent basis for conviction. It is impossible to prove that no juror based her decision on this statement.

The error here is most similar to an

erroneously-admitted confession made after conferring with counsel. The devastating impact of confession evidence is obvious. *Fulminante*, 499 U.S. at 313 (Kennedy, J. concurring) ("If the jury believes that a defendant has admitted the crime, it doubtless will be tempted to rest its decision on that evidence alone, without careful consideration of the other evidence in the case"). "In terms of prejudice, these harpoons are comparable to evidence of a defendant's own withdrawn guilty plea. Such a plea is virtually never admissible because of its powerful force." Pet. App 27A (citing Fed. R. Evid. 410(1) and *Kercheval v. United Sates*, 274 U.S. 220, 223-224 (1927)).

Additionally, the erroneously-admitted statements indicated that trial counsel believed that Petitioner was guilty. Because these statements were admitted for their truth, the district court's error permitted the jury to conclude that counsel's belief was sincere and correct. Counsel was then forced to argue Petitioner's innocence to a jury that had reason to believe he was being disingenuous when he requested acquittal. Consequently, Petitioner lost the ability to be represented by an effective advocate.

Because the district court's error undermined the credibility of Petitioner's attorney, it is impossible to calculate its impact. Any juror who took the erroneously-admitted statements for their truth, as the jury was permitted to do, would disregard anything trial counsel said in his client's defense including the entire closing argument. When an error deprives a defendant of the opportunity for cross-examination, *Van Arsdall* requires courts to assume that the damaging potential of cross-

examination was fully realized. 475 U.S. at 684. When a defendant is deprived of effective closing argument, a similar assumption is warranted. It is impossible to say, with any degree of assurance, that such a pervasive error did not affect the jury.

2. The Error Related To The Most Important Testimony In The Trial.

The government's reaction illustrates the importance of Mrs. Perez's testimony. First, the government attorney conducting cross-examination requested a continuance to collect her thoughts in the midst of examination. J.A. 445. When that continuance produced ineffectual examination, the government spent three days pouring over recorded calls between Mr. and Mrs. Perez and filed an emergency motion for a day-long continuance. J.A. 459-70. The defendant filed written objections. J.A. 1(Dkt.124). On Monday, the jury was sent home without hearing any evidence because of the government's attempt to admit the recordings. J.A. 473. None of that happens in response to unimportant evidence.

The government also sought admission of the recordings despite potential conflicts of interest they created with Petitioner's attorney. J.A. 478-83, 576-77, thereby risking a mistrial. The government does not risk mistrial for unimportant evidence. Its willingness to take these extreme measures demonstrates that "the government believed that Mrs. Perez had seriously weakened its case and that the improper rebuttal evidence strengthened its case

considerably." Pet. App. 27A-28A.

The events above illustrate that both parties viewed the recordings as vital evidence. There is no basis upon which to believe that the jury found these recordings less important than the parties. Nonetheless, the majority indicated that it understood the evidence better than those who saw it first-hand. The majority found that "the safest course" for the government to take would have been to "let Mrs. Perez leave the stand after a short cross-examination." Pet. App. 11A. The prosecutors participating in the trial obviously disagreed. The majority's suggestion that its view of the evidence was more accurate than that of people that heard it demonstrates its willingness to improperly supplant the jury's view with its own.

3. The Government Emphasized The Error.

Furthermore, the government specifically sought to admit statements attributed to Petitioner's counsel, J.A. 516-22, which indicated (1) that Petitioner would lose the case; J.A. 769, and (2) that counsel advised Petitioner to plead guilty. J.A. 771. Petitioner strenuously objected to these admissions. J.A. 509-21. When the district court erroneously ruled that these statements would be admitted for their truth, defense counsel again objected. J.A. 521. Nonetheless, the government did not request a limiting instruction.

The government also emphasized the erroneously-admitted evidence in front of the jury. First, during its examination of Mrs. Perez,

government counsel asked her if Petitioner's attorney said, "everybody was going to lose." J.A. 533. Government counsel repeated that statement three times. J.A. 533-34. Even after Mrs. Perez left the stand, the recordings remained the focus of the trial. The government called a custodian who admitted the recordings and played them. J.A. 566-573, 585.

Government counsel again drew the jury's attention to these erroneously-admitted recordings during closing argument. J.A. 644-46, 716-18. He referenced those recordings as the evidence that disproved Mrs. Perez and asked the jury to rely on them. J.A. 716-18. Defense counsel strenuously argued that the recordings were meaningless. J.A. 679-90. It is impossible to say with fair assurance that an error, repeatedly emphasized throughout the trial, did not affect the jury.

4. The Jury's Actions Demonstrated The Influence Of The Error.

The erroneously-admitted recordings provided the only evidence the government introduced to discredit Mrs. Perez. Without them, they had no way to effectively disprove Petitioner's innocent explanation for his presence in the Bonneville at the scene. There is no doubt, based on the timing of the government's continuance and the significant amount of time that both parties spent on Mrs. Perez's testimony during arguments, J.A. 644-46, 679-90, 710-18, that her testimony appeared vital to the jurors.

Further, the government presented the

recordings in dramatic fashion immediately following an unexpected day-long continuance. For that reason, the jury likely viewed them with an air of importance.

The jury indisputably proved that Mrs. Perez's testimony was central to the deliberations when it sent a note asking for a transcript of her "testimonies." J.A. 739. Ignoring the jury's explicit focus on the testimony impacted by the error demonstrates that the majority did not even attempt to assess the error's impact on the jury that heard the case. Instead, the court supplanted the jury's focus on Mrs. Perez's testimony with its own willingness to ignore it altogether.

The government presented the recordings as a direct refutation of Mrs. Perez's testimony. J.A. 718. The fact that Petitioner was convicted of conspiracy indicates that Mrs. Perez was not fully believed. The only significant means of attack on Mrs. Perez's credibility came from erroneously-admitted recordings. Therefore, there is a substantial probability that these recordings impacted the verdict.

III. The Majority's Decision Violated The Sixth Amendment.

As discussed *supra*, application of the overwhelming-evidence test violates the Sixth Amendment. When a court relies only on overwhelming evidence, it essentially concedes that error might have affected the verdict. Without considering the error's impact, there can be no assurance that it did not. In this case, the majority

indicated that, whatever the error's effect, the other evidence would establish the defendant's guilt in an error-free trial. This is analytically indistinguishable from the majority reversing the conviction, remanding it for new trial, and then directing a verdict of guilty. Such a course violates the Sixth Amendment right to a jury trial. The Sixth Amendment requires actual trial by jury not imagined trial by judge. Yet, the majority ignored the impact of an error in a close case and hypothesized an error-free trial that resulted in conviction. The mere fact that the majority entered its finding of guilt under the guise of harmless error cannot satisfy the Sixth Amendment's requirements.

CONCLUSION

Petitioner's conviction should be reversed.

Respectfully submitted,

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the U.S. Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Title 28 of the U.S. Code Section 2111 provides:

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

Federal Rule of Criminal Procedure 52(a) provides:

> (a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.