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

REPLY BRIEF FOR THE PETITIONER

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A. Respondent provides no reason to deviate from this Court's long line of harmless-error cases that require a reviewing court to focus on whether the error affected the jury's verdict.

Respondent portrays the issue here as nothing more than a dispute about applying a settled standard to a set of facts, ignoring the lower-court conflict regarding how to determine if a trial error is harmless. That conflict is the reason this case is here and it is where Petitioner begins because it provides the needed context to understand the correct analysis and why the court of appeals erred. As Petitioner's opening brief explained, the lower courts conceptualize the harmless-error test in two contradictory ways:

- Under the first view, courts of appeals determine whether the error affected the jury's verdict by examining the entire trial record, with a focus on the prejudicial nature of the error viewed in relation to the properly-admitted evidence. Judge Harry Edwards, in his seminal article on harmless error, called this the "effect-on-the-verdict approach." Harry T. Edwards, *To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. Rev. 1167, 1171 (1995).

- Under the second view, courts of appeals decide harmlessness by determining whether, in a trial absent the error, a jury would have convicted the defendant anyway, which requires courts to focus strictly on the government's case to look for what is usually labeled "overwhelming evidence" of guilt rather than looking at the prejudicial nature of the erroneously-admitted evidence. Judge Edwards called this the "guilt-based approach." *Id.*

By failing to mention the lower-court conflict, Respondent implicitly denies there is anything to clarify and recites a test that borrows from both the effect-on-the-verdict approach—see, e.g., Resp. 20-21 ("harmlessness requires consideration of the impact of the error on the jury's verdict in relation to all else that happened" (internal quotation marks and citation omitted))—and the guilt-based approach—*id.* at 19 ("appellate courts [must] review the record to form a judgment whether, absent the error, the ultimate outcome likely would have been the same"). But an approach that asks whether an error affected a jury's verdict differs conceptually from an approach that asks whether the defendant, in an error-free trial, would have been convicted anyway. The former attempts to discern whether the prejudicial nature of the error influenced the jury's verdict, in light of the evidence presented; the latter ignores the nature of the error and instead attempts to determine whether, in the court's view, the defendant was guilty and, consequently, that any retrial would end in a conviction. Put another way, if under the effect-on-the-verdict approach the

government cannot show that the error did not "substantially influence[] the jury's decision," *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995), a court would find that an error was not harmless, even if the trial's outcome would likely have been the same absent the error; the guilt-based approach, on the other hand, is only concerned with whether a trial's outcome, in the reviewing court's view, would be the same.

Respondent's apparent belief that the standards are conceptually compatible is not shared by appellate judges around the country. For example, Judge Jon Newman has flagged the two approaches—"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"—and noted that the approaches are "conceptually distinct." *United States v. Peck*, 102 F.3d 1319, 1326 (2d Cir. 1996) (Newman, J., concurring) (citing Edwards, *supra*, at 1187, 1199-1203). State appellate judges have also noted the dueling tests. After a justice on the Washington Supreme Court pointed out the "vastly different tests" in conducting harmless-error review, *State v. Evans*, 633 P.2d 83, 86 (Wash. 1981) (Brachtenbach, C.J., concurring), the court expressly rejected an approach that would attempt to determine whether "the tainted evidence . . . could have contributed to the fact finder's determination of guilt" (the effect-on-the-verdict approach) in favor of a standard that would strip the error from the trial and determine if there was overwhelming evidence of guilt (the guilt-based approach), *State v. Guloy*, 705 P.2d 1182, 1191

(Wash. 1985).[1] Thus, appellate judges recognize that the tests conceptualize harmless-error analysis in fundamentally incompatible ways.

The closest Respondent comes to justifying the peaceful co-existence of both standards is its cryptic statement that this Court's "decisions demonstrate that a court's determination of harmlessness can properly rest on the conclusion that the admissible evidence of guilt is sufficiently strong, such that the prejudicial effect of erroneously-admitted evidence can be deemed not to have altered the outcome." Resp. 29. If Respondent means to merely say that, if the evidence of guilt is strong enough, that can outweigh the prejudicial effect of a particular error, that is true; a strong government case is a factor—just not the *only* factor—in determining harmlessness under the effect-on-the-verdict approach. On the other hand, if Respondent means to say that if its case is strong enough, there is no need to analyze how prejudicial an error might have been because any error committed at trial will necessarily be harmless—the guilt-based approach—nothing in this Court's decisions supports that view.[2]

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[1] Likewise, some lower-court decisions have explicitly adopted the effect-on-the-verdict approach and rejected the guilt-based approach. See *Gov't of the V.I. v. Martinez*, 620 F.3d 321, 337 (3d Cir. 2010); *Wilson v. Mitchell*, 498 F.3d 491, 504 (6th Cir. 2007); *United States v. Cunningham*, 145 F.3d 1385, 1388 (D.C. Cir. 1998).

[2] Respondent cites *Milton v. Wainright* and *United States v. Hasting* as cases where this Court focused exclusively on the strength of the government's evidence. Resp. Br. 28. However, in *Milton*, 407 U.S. 371, 375-76 (1972), the Court considered the error's effect, finding that the details of the erroneously-admitted evidence "were essentially the same as those given in the prior confessions not challenged." In *Hasting*, 461 U.S. 499, 510-11 (1983), the Court noted the error and considered the

See Pet. Br. 16-33. Rather, this Court examines the weight of the government's evidence against the error's prejudicial nature; the only time this Court focuses strictly on the government's case to determine if an error affected the jury's verdict is in the rare case where the error concerned evidence regarding an uncontroverted element of the offense, in which case there could be no prejudice from the error, given that the element at issue was undisputed and any error, by definition, could not have affected the jury's verdict. See *Neder v. United States*, 527 U.S. 1, 18 (1999).

Even the States' *amicus* brief acknowledges that lower courts have applied two distinct tests, both of which it urges this Court to adopt. See States' Amicus Br. 5-6. In trying to justify the guilt-based approach, the States demonstrate why this approach raises serious Sixth Amendment concerns. The *amici* chide Petitioner for never "even claim[ing] [on appeal] that he is factually innocent of the crimes for which he was convicted." *Id.* at 7-8. Not only has Petitioner always maintained his innocence, he was under no obligation to argue his innocence to the court of appeals or this Court. This Court explained almost seven decades ago: "[I]t is not the appellate court's function to determine guilt or innocence," as "[t]hose judgments are exclusively for the jury . . . ." *Kotteakos*, 328 U.S. at 763. By advocating for a guilt-based approach, and a silent overruling of *Kotteakos*, *amici* would permit convictions based on a verdict affected by erroneously-admitted evidence as long as an appellate court thought the defendant

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likely impact on the jury of both the government's evidence and the defendants' "totally inconsistent theories" of defense. This Court did not focus exclusively on the government's evidence.

guilty. That is not the criminal justice system set up by the Framers, who would be surprised to learn that appellate judges would decide a defendant's guilt on a cold record—something that they are ill-equipped to do.[3] The Constitution allocated guilt-determinations to juries, not judges. That is what motivated this Court in *Kotteakos* to adopt the effect-on-the-verdict approach. See 328 U.S. at 763. When a defendant is convicted only after a jury's verdict is infected by judicial error and appellate judges find the error harmless because the evidence suggests to *them* that the defendant is guilty, the jury's function has been wholly removed. This creates serious Sixth Amendment concerns,[4] which are eliminated by adopting the effect-on-the-verdict approach, see Pet. Br. 33-42. See also Edwards, *supra*, at 1192-93 (arguing that the guilt-based approach is "inconsistent with the constitutional framework of our judicial system," whereas the effect-on-the-verdict approach ensures that "there is no invasion of the province of the jury").

The primary way Respondent engages with

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[3] As Petitioner's opening brief pointed out, Pet. Br. 43, the spate of DNA exonerations over the past decade validate the serious concerns that reviewing courts are poorly suited to determine whether a defendant is obviously guilty. See Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 107 (2008); see also Edwards, *supra*, at 1192 (arguing that "[c]oncern over the institutional competency of the appellate courts also strongly counsels against the practice of focusing solely on the question of factual guilt").

[4] Respondent claims that *Neder* forecloses Petitioner's Sixth Amendment argument. Resp. Br. 37. To the contrary, *Neder* itself recognizes the Sixth Amendment concerns involved in harmless-error analysis. 527 U.S. at 19 ("Of course, safeguarding the jury guarantee will often require that a reviewing court conduct a thorough examination of the record").

Petitioner's description of the harmless-error test is to contend that the analysis is objective, not subjective. See Resp. 21-22, 31-32. But Petitioner never argued for a subjective consideration of the jury's unknowable thought process; rather, he contended that this Court should continue to review the entire trial record to determine whether the error affected the verdict. See, e.g., Pet. Br. 19. Moreover, the fact that the analysis is objective does not mean—as Respondent contends, see Resp. 31-32—that a reviewing court should not take cues from the jury in determining whether a particular error was harmless. In evaluating whether an error was harmless, this Court has relied on objective jury behavior, such as the length of deliberations, see *Parker v. Gladden*, 385 U.S. 363, 365 (1966), a jury's note about an instruction, see *Francis v. Franklin*, 471 U.S. 307, 326 (1985), and the difficulty a jury had in reaching a verdict, see *Krulewitch v. United States*, 336 U.S. 440, 444-45 (1949). See also *Fry v. Pliler*, 551 U.S. 112, 124-25, n.4 (2007) (Stevens, J., dissenting) (relying on jury behavior to evaluate harmlessness). As this Court implicitly recognized in those cases, a jury's objective indications can provide evidence of whether an error influenced the verdict.

Respondent's discussion of harmless error reflects the confused approach many lower courts have used—taking quotes from this Court's decisions out of context and advocating a guilt-based approach that this Court has never embraced. See Pet. Br. 14-26. Respondent mostly offers this Court sound bite quotes from cases without providing an overarching, coherent test to resolve the lower-court dispute. Thus, Respondent's brief asks this Court to affirm

the confused status quo. Petitioner asks that this Court reject Respondent's invitation, reject the guilt-based approach, and make clear that:

> In reviewing for harmless error, a reviewing court must ask, "Do I, the judge, think that the error substantially influenced the jury's decision?" *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995). That means the court must determine whether the error at issue "contributed to the verdict," *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963), which cannot be done by simply "stripping the erroneous action from the whole" of the evidence and determining whether the court thinks the defendant would be convicted in an error-free trial, *Kotteakos v. United States*, 328 U.S. 750, 763 (1946). This analysis requires courts to look at the entire trial record and examine the nature of the error to determine "what effect the error had or reasonably may be taken to have had upon the jury's decision." *Id.* at 764. The strength of the government's case is one factor—but not the sole factor—in determining whether an error is harmless.

B. The Seventh Circuit applied the guilt-based approach, focusing strictly on the government's evidence.

Respondent's defense of the lower court's harmless-error analysis vividly demonstrates the need for this Court to clarify the controlling standard.

According to Respondent, "the court of appeals stated the correct standard of harmlessness," when the court wrote that it needed to determine if a "'reasonable jury would have reached the same verdict without the challenged evidence.'" Resp. 13 (quoting Pet. App. 16A). But that is not the correct standard. The majority articulated the guilt-based approach to harmless error, which meant that it would ignore the prejudicial nature of the error and simply determine whether the court believed Petitioner would be convicted in an error-free trial. This was consistent with the Seventh Circuit's rejection of the effect of the error test. *Lanier v. United States*, 220 F.3d 833, 839 (7th Cir. 2000).

While Respondent notes that the court stated that it would "'look[] at the evidence as a whole,'" see Resp. 30 (quoting Pet App. 16A), Respondent neglects to mention that, in the next sentence, the court wrote, "What was the evidence?," and then discussed the government's evidence and *nothing else*, thereby elucidating what it meant by "evidence as a whole." See Pet. App. 16A. The court even viewed the evidence in the light most favorable to the government, assuming things were true—for example, that Petitioner told Cruz "tell him we got the money," Pet. App. 16A—that Petitioner vigorously challenged during cross-examination. See

also Roger J. Traynor, THE RIDDLE OF HARMLESS ERROR 28 (1970) (noting that reviewing courts "all too often" apply harmless error only by assuming that the jury "believed all properly admitted evidence against [the defendant] and disbelieved all evidence in his favor"). After its one-sided discussion of the evidence, the court ended its analysis by stating that, "[t]his evidence"—*i.e.*, only the government's evidence, viewed in the light most favorable to the government—"would have moved the jury to convict Vasquez without a nudge from anything it heard in the government's rebuttal case." Pet. App. 16A.

In other words, this was a case where "the weight of the evidence against a defendant [was] not just one factor playing into the harmless-error analysis but rather the *sole* criterion by which harmlessness [was] gauged," something Judge Edwards explained has become common in lower courts applying the guilt-based approach. Edwards, *supra*, at 1187 (emphasis added). As a result, for the majority, it was *irrelevant* that any juror who found a defense witness (Marina) credible would have voted to acquit Petitioner. And it was equally *irrelevant* that the erroneously-admitted evidence in this case was, as the dissent described, "just about as prejudicial as one could expect to encounter," Pet. App. 26A—a characterization never disputed by the majority. The lower court did exactly what this Court has said courts should not do: "look at the printed record, resolve conflicting evidence, and reach the conclusion that the error was harmless because [the court] think[s] the defendant was guilty." *Weiler v. United States*, 323 U.S. 606, 611 (1945).

This case illustrates how courts have stretched the decision in *Harrington v. California*, 395 U.S. 250, 254 (1969), to invent the guilt-based approach. See Pet. Br. 20-22. In *Harrington*, this Court focused on the strength of the government's case—which this Court called "overwhelming"—because the erroneously-admitted evidence established something (presence at the scene) that the defendant himself had already admitted and which was not an issue in the case. 395 U.S. at 254. To determine whether the error was harmless, the Court first had to consider the error's effect. It was only after identifying that the erroneously-admitted evidence was cumulative that this Court was able to say that the error did not "affect[] . . . substantial rights." *Id.* Thus, courts have not only misread *Harrington* to create a harmless-error test that allows them to avoid determining whether an error affected the jury's verdict, but they are also watering down the "overwhelming" standard such that cases like this one, where not only is the evidence not overwhelming—notably, neither Respondent nor the court of appeals claimed that the evidence meets that standard—but the case involves a highly prejudicial error that went to the heart of a hotly disputed case.

The lower court decision perfectly captures the dangers of the guilt-based approach. Courts examine the strength of the government's case, decide the defendant is probably guilty, sometimes use the phrase "overwhelming evidence," and then declare any error, no matter how pernicious, to be harmless, without even analyzing its effect. But, as this Court noted in *Kotteakos*, "the question is not were [jurors] right in their judgment, regardless of

the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision." 328 U.S. at 764. Petitioner asks that this Court re-affirm that standard and repudiate the guilt-based approach.

C. Respondent's contentions about the weight of the evidence are unsupported by the record and exemplify the problems with a guilt-based approach to harmless error.

The harmless-error analysis advocated above focuses on the effect of the error in the trial that actually took place. In looking at what happened at the trial, the burden of showing that an error is harmless is on the government and the proper allocation of that burden can be outcome-determinative. *Gamache v. California*, 131 S.Ct 591, 593 (2010) (stating that "allocation of the burden of proving harmlessness can be outcome determinative") (Sotomayor, J., statement respecting denial of certiorari). Respondent's fact analysis is flawed because it effectively shifts the burden by asking this Court to resolve disputes about credibility and to view the evidence in the light most favorable to the government.

This Court should thus clarify what the proper harmless-error standard is and provide lower courts guidance by conducting the analysis in this case. Once the correct analysis is done, Respondent cannot meet its burden to establish that there is a "fair assurance" the non-constitutional error here did not influence the jury's verdict. See *O'Neal*, 513 U.S. at

438 (quoting *Kotteakos*, 328 U.S. at 764-65).

1. The error in this case was very prejudicial.

Respondent attempts to minimize the error's prejudicial nature by making arguments to this Court that the jury never heard. This attempt to recast the evidence in a different light on appeal demonstrates the problem with the government's analysis. It is not Petitioner's burden to prove that the jury relied on the erroneously-admitted evidence; it is Respondent's burden to prove that they did not. To meet that burden, Respondent must focus on the trial that actually took place.

The error was admitting two statements made by defense counsel for the truth of the matters asserted: "Everyone is going to lose," J.A. 585, and "[Defense counsel] is telling [Petitioner] about a blind plea also," J.A. 771. Allowing a jury to infer that a defendant's own attorney thought he was guilty is "just about as prejudicial as one could expect to encounter in a trial." Pet. App. 27A. Respondent attempts to minimize these prejudicial statements through creative interpretation.

According to Respondent, "the statement 'everybody is going to lose' does not convey the belief that 'everybody is guilty.'"[5] Resp. Br. 49. But this is

[5] Respondent contends that this statement does not show that counsel believed Petitioner guilty at the time of trial. Resp. Br. 50. This argument assumes that counsel did not know about Mrs. Perez's exculpatory testimony until after saying "everybody is going to lose." That supposition is false. At trial Mrs. Perez testified that counsel already knew what happened at the time he made that statement. J.A. 548-49.

entirely inconsistent with the government's position before the jury. During its examination of Mrs. Perez, the government presented the statement "everyone is going to lose" as an admission by Petitioner's attorney of Petitioner's guilt.

> Q: And you said that the defendant attorney was saying that everybody was going to lose, didn't you?
>
> A: No. The defense attorney was telling me that my husband was –
>
> Q: It's a simple question. And you said that the defense attorney was saying that everybody is going to lose, didn't you?
>
> A: That my husband was fucked, That that was what I remember, yes.
>
> Q: And you said that the defense attorney was saying that everybody was going to lose, didn't you?
>
> A: I don't remember that. I just remember worrying about my husband. I don't recall everybody was going to lose. I remember that my husband would lose.

J.A. 533-534. As is evident in this exchange, the government's theory was that defense counsel supposedly believed everyone—Mr. Perez *and* Petitioner—was going to lose and said as much to Mrs. Perez. If the statements meant what Respondent now argues for the first time in this Court, trial counsel's insistence on emphasizing the statement and refusing to accept the witness's suggestion that it did not refer to Petitioner losing the case—going so far as to cut off the witness—would be senseless. After this exchange, the government played the call to demonstrate that, according to Mrs. Perez, Petitioner's attorney did say, "*everyone* is going to lose." J.A. 585 (emphasis added). Indeed, the dissent also interpreted the testimony to mean that Petitioner's counsel thought his own client would lose at trial. Pet. App. 28A.

Respondent's arguments regarding the second prejudicial statement ("He [defense counsel] is telling him [Petitioner] about a blind plea also," J.A. 771) are similarly misdirected. Respondent asks this Court to interpret this statement as referring to Petitioner's attorney discussing *Perez* entering a plea. Resp. 48. The purpose of harmless-error analysis is not to make subtle arguments about word choice.[6] At trial, this call was not heard in a vacuum. After hearing that counsel told a witness his client would lose the case, a reasonable juror would certainly conclude that, when that attorney discussed a guilty plea with his client, he was

[6] Respondent's interpretation is unlikely. The word *also* suggests that the blind plea they are discussing is in addition to something else. If they were only talking about one plea (Perez's), the use of *also* would be nonsensical.

referring to his client entering that plea.

When taken for the truth, these statements operate as admissions of guilt by Petitioner's own attorney. The statements and the inferences the jury likely drew from them—inferences the government itself drew in front of the jury—were incredibly prejudicial. Any juror that took these statements for their truth would necessarily disregard Petitioner's closing argument and could have convicted based on the statements alone.

2. Respondent overstates the strength of its case.

In assessing the strength of the government's evidence, the goal is not to determine whether the evidence makes it likely that the defendant was guilty, nor even to determine whether the evidence shows beyond a reasonable doubt that the defendant was guilty. The goal is to determine whether the evidence goes so far above proof beyond a reasonable doubt that the Court can say with fair assurance that the particularly pernicious error at issue did not influence the jury's verdict.

Respondent's analysis of the government's evidence reflects an insistence on viewing the evidence in the light most favorable to the government.[7] This failure to recognize the proper allocation of the burden of proof is also evident in

[7] This is similar to the majority's analysis, which credited Cruz's testimony without even mentioning the powerful attacks on his credibility. Respondent now admits that Cruz's testimony could have been reasonably disregarded. Resp. Br. 43.

Respondent's excessive reliance on drawing general inferences from circumstantial evidence in favor of the government.

Respondent's analysis of the phone records attempts to present the evidence in the light most favorable to the government. According to Respondent, the phone records "strongly suggested that Perez kept Petitioner informed" of the drug deal's progress. Resp. 39. Respondent points out that between 4:26 on August 4 (when Diaz contacted Cruz) and 5:30 on August 5, Petitioner and Perez exchanged 38 calls. *Id.* Respondent fails to point out that Perez and Petitioner, close friends and cousins, spoke frequently, and exchanged more calls on days before Perez knew of the cocaine deal. With no drug deal to discuss, Perez and Petitioner exchanged *47* telephone calls on August 2 and *41* on August 3. J.A. 659. Thus, Respondent asks this Court to draw the inference most favorable to a finding of guilt despite contrary evidence in the record.

Respondent also indicates that calls between Cruz and Perez "were followed within minutes by a phone conversation between Perez and [Petitioner]." Resp. 39. This is inaccurate; after Cruz first discussed the deal with Perez, J.A. 754, Perez made 19 calls to various persons before speaking to Petitioner over an hour later. *Id.* The conversations between Cruz and Perez continued to be followed by calls to persons other than Petitioner. J.A. 755-57. Put simply, Respondent puts far more weight on the phone records than they can credibly bear.

Respondent's analysis also relies heavily on circumstantial evidence such as flight evidence and prior crimes evidence. Because of the dangers of placing too much emphasis on these forms

circumstantial evidence, this Court has always focused on more direct, fact-specific evidence of guilt when finding an error harmless—evidence not present in this case. See *Harrington*, 395 U.S at 354 (noting that the case against defendant "was not woven from circumstantial evidence"); See also *Milton*, 407 U.S. at 372 (noting that the defendant confessed four times); *Schneble v. Florida*, 405 U.S. 427, 430-431 (1972) (noting that defendant gave minutely detailed confession).

Respondent suggests that Petitioner's flight demonstrated his guilt, but also admits that this Court views flight evidence skeptically. Resp. 41-43. Respondent claims that an innocent parolee would simply "surrender to sort matters out with law enforcement," Resp. 42. However, Petitioner was not faced with officers calmly asking him to answer questions, but with multiple officers running at him, pointing guns, and slamming into the vehicle. J.A. 126-28.

A parolee could easily panic and try to escape when confronted by the intense situation facing Petitioner. The district court instructed the jury to consider whether feelings of guilt illustrated by flight 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. Since Petitioner had reason to panic even without knowledge of the drug transaction, a rational jury could have followed the instruction and determined the flight evidence inconclusive.

This is the prototypical issue that a jury is uniquely positioned to resolve. While lawyers and judges may think it unwise to flee from law

enforcement to avoid parole revocation, members of the community, using "the common sense judgment of a group of laymen," *Williams v. Florida*, 399 U.S. 78, 100 (1970), might feel differently. Additionally, Respondent wholly failed to address the flight instruction or the significant dispute concerning the details of the flight evidence, J.A. 664-68, thus demonstrating the evidence's limited value.

Like the flight evidence, the prior-crime evidence is general circumstantial evidence that has little to do with the charged crime. Respondent claims that the prior-crime evidence "forcefully undercuts" Petitioner's defense. Resp. 42-43. The government's burden in harmless-error analysis is not to undercut the defense, but to show that its own evidence was so persuasive that the jury would not have been influenced by the error. The scant similarities between the prior crime and the charged offense do not provide strong proof of Petitioner's knowledge, especially when juxtaposed with the stark differences between his behavior during the prior transaction and his behavior in this case, as well as the fact that the earlier transaction took place *six years* prior. See J.A, 321-23, 241-49.

The real persuasive force behind the other-crimes evidence comes from the impermissible use of that evidence to show criminal propensity. The jury was instructed not to consider the evidence for that purpose, J.A. 722, and is presumed to have followed that instruction. Once that prejudicial taint is removed, this six-year-old conviction provides little insight into Petitioner's knowledge in this case.

3. The defense presented a plausible theory of innocence through Marina Perez's testimony.

Respondent has not disputed that, if believed, Marina Perez's testimony would have compelled any reasonable juror to acquit. Thus, Respondent is forced to attack her testimony in order to salvage the claim that the government case was very strong. The government's attacks on Mrs. Perez's testimony amount to three claims: (1) she was biased, (2) she believed Petitioner was guilty, and (3) her testimony was implausible. However, these arguments fail to consider the entirety of the record and instead assume, without proof, that the jury drew every inference in favor of the government.

Respondent's bias argument is that Mrs. Perez believed Petitioner's attorney could help her husband get a lower sentence. But believing that an attorney has good ideas for sentencing is a far cry from committing perjury in the hope of obtaining his assistance. This theory of bias is also undercut by Mrs. Perez's obvious animosity toward defense counsel. J.A. 542. This sort of credibility determination is one a jury is uniquely positioned to make. Only by viewing the evidence in the light most favorable to the government can Respondent ask this Court to disregard her testimony on the basis of a credibility determination made from a cold record.

Respondent's claim that the calls show that Mrs. Perez believed Petitioner guilty relies on an idealized version of the evidence that the jury never heard. Respondent argues that Mrs. Perez told her husband that she believed that "[Petitioner] faced

the same likelihood of conviction as did Perez." Resp. 44. Neither cited call supports this proposition. The call at J.A. 766 involved Mrs. Perez stating that, if *merely going to the scene* makes you guilty, Petitioner was guilty too. J.A. 765-766. The call at J.A. 777 does not mention any belief about Petitioner's guilt. Thus, based on the language of the calls the jury actually heard, it is unlikely they reached the conclusion Respondent urges.

The remainder of Respondent's arguments regarding Mrs. Perez's testimony amount to the assertion that her testimony was not "plausible." For instance, Respondent argues that Mrs. Perez's testimony was unbelievable because it "ma[de] little sense" that her husband asked her to drive the Bonneville containing $23,000 to Arlington Heights. Resp. 44-45. This argument fails to recognize Cruz's testimony that no money would be exchanged at the meeting. J.A. 188-89. Moreover, it is a clear attempt to ask this Court to step into the role of the jury. The likelihood that an individual would ask his wife to pick him up from a drug deal is a question for a jury. A harmless-error finding cannot be based on a Court's determination, on a cold record, about whether an individual is the kind of person who would ask his spouse to pick him up from a drug deal. A reviewing court is in no position to make that assessment.

Respondent also focused on Mrs. Perez's testimony that Perez left Petitioner's residence with an unknown individual around 4:00 and was picked up by Cruz approximately one hour later. According to Respondent, this itinerary "makes little sense." Resp. 45. It is unclear why this itinerary does not make sense. It would simply mean Mr. Perez did

something else before Cruz picked him up. Respondent's attempt to parse every detail of the case does not establish the kind of strong evidence that would encourage a jury not to base its verdict on the erroneously-admitted statements that Petitioner's counsel thought he was guilty.

Respondent again gets lost in the minutiae of the testimony when it argues that it is "inherently implausible" that Petitioner would have driven to Arlington Heights without knowing the precise location of the pick-up. Resp. 45 (citing J.A. 593). This argument is based on the assertion that the ""informant did not tell Cruz and Perez about the Shell-station meeting point until they had already arrived next to the station." *Id.* But this assertion is inconsistent with the record. Agent Chupik testified that, on the "morning" of August 5, Diaz placed a call where he was instructed to tell "Cruz and his customers to meet us at the Shell gas station . . . in Arlington Heights." J.A. 40. Thus, Diaz had already told Cruz the location. That explains why the government never made this argument at trial. J.A. 710-716. The argument exemplifies the dangers of improper harmless-error analysis. If courts rely on entirely new arguments thought up by appellate lawyers—rather than on what actually happened at trial—they are displacing the jury's judgment of the evidence with their own interpretations.

The government's analysis is completely one-sided, overlooking, for example, that Mrs. Perez's testimony was entirely consistent with the phone records evidence.[8] Instead of considering the entire

[8] Phone records show Perez/Petitioner calls before 3:30 but none between 3:30 and 4:00 when she testified they were together. They also show calls from Petitioner to Perez at 4:08

record, Respondent has focused on minor and illusory claims of implausibility. The government's response to Mrs. Perez's testimony belies Petitioner's claims of implausibility. If her testimony was "exceedingly implausible," Resp. 44, there would have been no need for the government to scour hours of jail calls over the weekend to try to rebut it. This reaction and the significant time spent addressing her testimony in argument show that trial counsel believed her testimony was both plausible and important. J.A 644-46, 710-17.

Respondent's entire argument regarding Mrs. Perez's testimony smacks of burden-shifting. It was not Petitioner's obligation to prove Mrs. Perez's testimony truthful; it was the government's burden to prove that she was lying. The question is not whether aspects of her testimony are "implausible" in Respondent's opinion. The question is whether the evidence disproved her account beyond a reasonable doubt, and whether it did so in such an overwhelming fashion that the uniquely prejudicial error here had no effect.

Finally, the split verdict demonstrates that the government's evidence was not sufficiently strong to neutralize the error. Respondent argues that the split verdict resulted from jury confusion about the definition of "substantial step." Resp. 35. However, the jury never heard this argument. In closing, the government argued that it was a foregone conclusion that a conviction on conspiracy entailed a conviction on attempt. J.A. 642 ("All of the evidence we've just discussed, not only goes to the conspiracy charge … but it also goes to … the attempt charge"). Similarly,

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and 5:05, when she testified Petitioner called Perez and left to get him. J.A. 756-57, 436, 438, 446.

Petitioner never argued the absence of a substantial step. J.A. 20. Both sides treated the case as if the verdict would be the same on both counts. The question is not what creative explanations for a jury's verdict can be concocted on appeal, but what the jury likely did with the information and arguments before it. There is no reason to believe that the jury based its verdict on an argument it never heard.

In light of the evidence the jury heard, the error at issue was highly prejudicial; the government's case was not particularly strong, and the defense presented a witness that, if believed, would have required the jury to acquit. In these circumstances, the government cannot establish that there is a fair assurance that the error did not influence the jury's verdict.

CONCLUSION

Petitioner's conviction should be reversed.

Respectfully submitted,

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