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 OF TEXAS, ALABAMA, ARIZONA, COLORADO, DELAWARE, FLORIDA, HAWAI'I, ILLINOIS, INDIANA, KENTUCKY, LOUISIANA, MAINE, MICHIGAN, NEBRASKA, SOUTH CAROLINA, WISCONSIN, AND WYOMING AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE

The amici curiae States have an interest in promoting a harmless-error jurisprudence that respects the finality of their criminal convictions and preserves the States' scarce prosecutorial resources.

STATUTE AND RULE INVOLVED

28 U.S.C. § 2111 states:

> 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.

FED. R. CRIM. P. 52(a) states:

> Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

STATEMENT

Petitioner Alexander Vasquez was convicted of drug offenses after the trial court erroneously admitted recordings of a telephone conversation between a defense witness and one of Vasquez's co-defendants. Petitioner contends that on that tape, a defense witness states that Vasquez's lawyer had urged him to enter a blind guilty plea because, in the lawyer's view, "everybody is going to lose" if they go to trial. The Seventh Circuit affirmed the conviction after concluding that this evidentiary error was harmless. *See United States v. Vasquez*, 635 F.3d 889 (7th Cir. 2011).

SUMMARY OF ARGUMENT

There are two ways by which the government can show that a trial error is "harmless." One is to demonstrate that the evidence of guilt is so strong that no reasonable jury would have acquitted absent the error. Consider a case in which an involuntary confession is erroneously admitted into evidence. Although this error could be highly prejudicial if the remaining evidence of guilt is thin, the prosecution can establish "harmless error" if the properly admitted evidence of guilt is so overwhelming that the error could not have changed the jury's verdict. *See, e.g., Arizona v. Fulminante*, 499 U.S. 279, 311-312 (1991).

Another way to demonstrate harmless error is by focusing not on the evidence of guilt at trial but on the inherent insignificance of the error. If, for

example, an indictment mistakenly omits an element of the crime, or if an evidentiary ruling allows the introduction of irrelevant but nonprejudicial evidence, then these types of errors will have no marginal effect on a jury's deliberations. These errors will be harmless even in cases in which the evidence of guilt leaves room for debate.

Each of these approaches provides an independent and sufficient means for the government to show the absence of a causal link between the error and the judgment. Vasquez therefore presents this Court with a false dilemma—both in his petition for writ of certiorari and in his brief on the merits. There is no need for this Court to bless only one of these as the "correct" approach to harmless error, while discarding the other as mistaken. These approaches to harmless error can and do co-exist—which is precisely why, as Vasquez noted in his petition for writ of certiorari, "there are no cases in which one circuit explicitly cites another circuit's decision and disagrees with it." *See* Pet. at 4.

By asking this Court to choose between these approaches, Vasquez wants this Court to repudiate a perfectly valid method of establishing harmless error. This Court should decline the invitation and affirm the Seventh Circuit's judgment.

ARGUMENT

The Government Can Establish Harmless Error *Either* By Relying On The Admissible Evidence Of Guilt *Or* By Showing That The Error Had No Influence On The Jury.

Errors that occur at trial can be harmless in one of two ways. Some errors are deemed harmless because the error only adds to an already-overwhelming case for guilt. The error may be significant—as in the case of a wrongfully admitted confession. But if the admissible evidence of guilt would have pushed any reasonable jury past the tipping point, then the error does not affect "substantial rights" under 28 U.S.C. § 2111 or FED. R. CRIM. P. 52(a). These types of errors are akin to medical malpractice committed on a patient who dies of natural causes during the operation, or a defender in football who "interferes" with a receiver when the pass is clearly uncatchable. In these situations, there is no causal link between the wrongdoing and the outcome—even though this type of error might be outcome-determinative in a different set of circumstances.

Other errors are harmless because they are too trifling or technical to have affected a reasonable jury's consideration of the case. In these situations, the government can establish harmless error without asking the court to review the independent evidence of guilt; the error is harmless because it made no marginal contribution to the jury's decision.

Vasquez, however, is mistaken to suggest that this is the *only* permissible means for the government to establish harmless error under 28 U.S.C. § 2111 and FED. R. CRIM. P. 52(a). Either of these approaches is a valid means of establishing that the jury would have reached the same verdict absent the error, and each of these approaches finds support in the decisions of this Court.[1] *Compare Harrington v. California*, 395 U.S. 250 (1969) ("[A]part from [the inadmissible confessions] the case against [defendant] was so overwhelming that we conclude that this violation of Bruton was harmless beyond a reasonable doubt . . . ."), *with Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946) ("If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a

[1] It is important to note that neither of these approaches to harmless error is more government-friendly in the abstract. Vasquez argues for the second approach because the error in his case will more likely be found harmful if this Court disregards the "overwhelming evidence" test and focuses solely on whether the error had a marginal effect on the jury's deliberations. But cases can be found in which the criminal defendant embraces the "overwhelming evidence" approach to harmless error, while the government tries to establish harmlessness by emphasizing the error's lack of effect. *See, e.g., Brecht v. Abrahamson*, 944 F.2d 1363, 1370 (7th Cir. 1991), *aff'd,* 507 U.S. 619 (1993).

constitutional norm or a specific command of Congress.").

The touchstone for harmless-error analysis is whether "the jury verdict would have been the same absent the error." *Neder v. United States*, 527 U.S. 1, 17 (1999). Yet Vasquez contends that an error can be deemed harmful *even when* the admissible evidence establishes an overwhelming case for guilt. Vasquez would have this Court preclude a finding of harmlessness for any error that "influenced the jury," which (in Vasquez's view) should include errors that influence the jury by contributing to an already-overwhelming case for guilt. Pet. Br. at 9. Although Vasquez does not say this explicitly, he seems to believe that an error can "influence the jury" or "contribute to" a conviction even when it does not make a difference in the jury's ultimate decision—perhaps by reducing the number of hours that the jury spends deliberating, or buttressing the jurors' confidence in a verdict that they would have been certain to reach with or without the error.

That is not a sensible approach to harmless error. New trials impose costs, and Vasquez does not explain the benefits to be gained from re-trying a criminal defendant when the admissible evidence of guilt was so overwhelming that no reasonable factfinder could have voted to acquit. Vasquez does not even claim that he is factually innocent of the crimes for which he was convicted—either in his

petition for certiorari or his brief on the merits.[2] He therefore cannot claim that a new trial is likely to produce a more accurate outcome on the question of guilt or innocence. And the retrials required under Vasquez's theory of harmless error will cause many guilty criminals to go free. It is always difficult to re-try criminal defendants years after the original trial, as memories fade and witnesses die or become harder to locate. Retrials also divert scarce prosecutorial resources away from other trials, which will lead to suboptimal plea bargains or foregone prosecutions in other cases.

Vasquez would be on stronger footing if the Sixth Amendment forbids appellate courts to base a harmless-error determination on the overwhelming evidence of a defendant's guilt. But the Sixth Amendment secures only the right to a "*trial* . . . by an impartial jury." U.S. CONST. amend. VI (emphasis added). It does not govern the standards by which an appellate court decides whether to overlook or

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[2] Vasquez carefully avoids any claim of actual innocence in his papers in this Court. *See, e.g.*, Brief on the Merits at 50 ("*[T]he defense argued that* Petitioner had a reason to flee that had nothing to do with Perez's drug deal.") (emphasis added); *id.* at 52 ("[S]ubstantial confusion regarding how the flight occurred . . . permitted defense counsel to forcefully argue that, to keep Perez from fleeing the police vehicles may have initiated the collision with the Bonneville before it moved at all.") (citation omitted); *id.* at 54 ("[Mrs. Perez's] testimony provided an innocent explanation for Petitioner's presence in the Bonneville at the scene of Perez's drug deal.").

order a new trial in response to an evidentiary error. There is no constitutional right even to appeal a criminal conviction. *See McKane v. Durston*, 153 U.S. 684, 687 (1894). If the Sixth Amendment can co-exist with a regime in which trial-court evidentiary errors cannot be appealed at all, it logically follows that the Sixth Amendment allows the States and the federal government to limit appellate relief to a subset of those errors—errors that have some probability of altering the outcome of a trial. *Sullivan v. Louisiana*, 508 U.S. 275 (1993), invoked the Sixth Amendment only because the defendant's *trial* had failed to produce a "jury verdict within the meaning of the Sixth Amendment" on account of the defective reasonable-doubt instruction. *Id.* at 280. *Sullivan* has no bearing on cases in which the trial and verdict comport with the Sixth Amendment, and some other error causes an appellate court to ponder whether a reversal of conviction is warranted. Vazquez does not (and cannot plausibly) argue that every nonconstitutional evidentiary error "vitiates all the jury's findings" under *Sullivan*. *Id.* at 281.

CONCLUSION

The judgment of the Seventh Circuit should be affirmed.

Respectfully submitted.

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