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

AMICUS CURIAE BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER AND URGING REVERSAL

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QUESTIONS PRESENTED

1. Did the Seventh Circuit violate this Court's precedent on harmless error 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 of trial counsel's statements that his client would lose the case and should plead guilty for their truth) on this jury at all?

2. Did the Seventh Circuit violate Mr. Vasquez's Sixth Amendment right to a jury trial by determining that Mr. Vasquez should have been convicted without considering the effects of the district court's error on the jury that heard the case?

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INTEREST OF AMICUS CURIAE[1]

Amicus National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.

NACDL was founded in 1958. It has a nationwide membership of 11,000 and an affiliate membership of almost 40,000. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in its House of delegates.

NACDL files numerous amicus briefs each year in this Court and other courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. Of particular significance here, NACDL has submitted a number of briefs in this Court defending the Sixth Amendment right to jury trial, including in *Sullivan v. Louisiana*, 508 U.S.

[1] Under Sup. Ct. R. 37.6, counsel for amicus curiae state that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court under Rule 37.2(a).

275 (1993), a seminal harmless error decision that bears heavily on this case.

SUMMARY OF ARGUMENT

1. The Sixth Amendment guarantees the right to trial by jury for serious crimes. The jury trial right bars federal judges from making independent determinations of a defendant's guilt. At the same time, Congress and the Court long ago determined that inconsequential errors found on appeal should not necessitate the expenditure of resources that a retrial entails or the societal cost of freeing a person determined by a jury to have committed a crime. The Court has accommodated both the absolute Sixth Amendment jury trial right and the interest in avoiding unnecessary reversals by insisting that harmless error review focus on the effect of the error on the verdict rendered, rather than on the verdict a hypothetical jury would have rendered in an error-free trial.

2. This Court has recognized two requirements for a harmless error methodology that honors the Sixth Amendment jury trial right. First, the appellate court must search the entire record for objective indications that the error did (or did not) affect the verdict actually rendered. Second, even for nonconstitutional errors the government must bear the burden of demonstrating harmlessness.

3. In scouring the record for objective indications of the error's effect, an appellate court may take into account the strength of the evidence of guilt untainted by the error. But for reasons of

institutional competence and constitutional allocation of factfinding responsibility in criminal cases, appellate judges must view the evidence in the light most favorable to the defense. An appellate court conducting harmless error review must not draw inferences and make credibility determinations in the government's favor; it must consider the entire record and not merely the prosecution's evidence; and it must focus on the effect of the error on the verdict, and not on the different question of whether the properly admitted evidence is sufficient to support the verdict.

4. The court of appeals majority in this case applied a harmless error methodology that trenches upon petitioner's Sixth Amendment right to trial by jury. The majority failed to scour the record for indicia of the error's effect on the jury; it drew inferences and made credibility determinations in favor of the prosecution, rather than viewing the evidence in the light most favorable to the defense; and it focused on the prosecution case and did not consider the entire record. Under a harmless error review that honors petitioner's right to have his guilt determined by a jury, reversal is required.

ARGUMENT

I. TO SAFEGUARD THE SIXTH AMENDMENT JURY TRIAL RIGHT, THIS COURT HOLDS THAT HARMLESS ERROR REVIEW MUST ASSESS THE EFFECT OF THE ERROR ON THE VERDICT ACTUALLY RENDERED.

The Sixth Amendment guarantees the right to trial by jury for serious crimes. The jury trial right bars federal judges from making independent determinations of a defendant's guilt. "[A]lthough a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the State, no matter how overwhelming the evidence." *Sullivan v. Louisiana*, 508 U.S. 508 U.S. 275, 277 (1993). The right to a 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); *see United States v. Gaudin*, 515 U.S. 506, 510-11 (1995).

At the same time, Congress and the Court long ago determined that inconsequential errors found on appeal should not necessitate the expenditure of resources that a retrial entails or the societal cost of freeing a person determined by a jury to have committed a crime. *See, e.g.,* 28 U.S.C. § 2111; Fed. R. Crim. P. 52(a); *Kotteakos v. United States*, 328 U.S. 750, 757-59 (1946); *Bruno v. United*

States, 308 U.S. 287, 294 (1939). The Court has thus determined that most errors--even constitutional errors--are subject to harmless error analysis, and that errors found to be harmless do not require reversal of a conviction. *See, e.g., Arizona v. Fulminante*, 499 U.S. 279, 306-12 (1991).

The Court has accommodated both the absolute jury trial right and the interest in avoiding the societal cost of unnecessary reversals by insisting that harmless error review focus on the effect of the error on the verdict rendered, rather than the verdict a hypothetical jury would have rendered in an error-free trial. As a unanimous Court explained in *Sullivan*:

> 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. That must be so, because to hypothesize a guilty verdict that was never in fact rendered--no matter how inescapable the findings to support that verdict might be--would violate the jury-trial guarantee.

508 U.S. at 279 (emphasis in original). The Court added: "The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty." *Id.* at 280; *see, e.g., Kotteakos*, 328

U.S. at 763-64 ("[I]it is not the appellate court's function to determine guilt or innocence. Nor is it to speculate upon probable reconviction and decide according to how the speculation comes out."); *id*. at 764 ("[T]he question is, not were [the 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. 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.").[2]

The challenge for an appellate court, as *Sullivan* suggests, is to identify those errors which had no effect on the jury's verdict without the court substituting itself for the factfinder in violation of the Sixth Amendment. The difficulty in determining an error's effect on the "guilty verdict actually rendered" is particularly acute because of the entrenched policy, embodied in Fed. R. Evid. 606(b), against inquiring into jurors' deliberations. The ban on evidence of deliberations in Rule 606(b) means

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[2] In *Neder v. United States*, 527 U.S. 1 (1999), the Court arguably deviated from the insistence in *Sullivan* and *Kotteakos* on preserving the jury's role in finding guilt. But *Neder* must be seen in light of its extraordinary facts. As the five-Justice majority took pains to point out, the petitioner in *Neder* did not contest the element at issue (materiality in a false tax return prosecution), and the evidence ($5 million in omitted income) established it beyond a shadow of a doubt. *See id*. at 16-17. Indeed, Justice Stevens, concurring in the judgment, concluded that the jury necessarily found the element of materiality in finding that the defendant omitted the income from the return. *See id*. at 26 (Stevens, J., concurring). In our view, *Neder* should be overruled, for the reasons stated in the dissent. *See id*. at 30-40 (Scalia, J., dissenting, joined by Souter & Ginsburg, JJ.) At a minimum the decision should be limited to its unique facts.

that any assessment of the impact of an error on the jury must rely on circumstantial rather than direct evidence of the error's effect.

II. THE COURT'S HARMLESS ERROR METHODOLOGY REQUIRES CONSIDERATION OF THE ENTIRE RECORD, WITH THE BURDEN OF PROOF ON THE GOVERNMENT.

This Court has recognized two components to a harmless error methodology that honors the Sixth Amendment jury trial right. First, the appellate court must search the entire record for objective indications that the error did (or did not) affect the verdict. Second, even for nonconstitutional errors the government must bear the burden of demonstrating harmlessness.[3] If the appellate court is left in doubt about the effect of the error after examining the entire record, it must reverse. Only strict compliance with both components ensures that a finding of harmless error on appeal will not effectively substitute the appellate judges' factfinding for the jury's verdict.

A. The Appellate Court Must Search the Entire Record for Indications of the Effect of the Error.

To determine the effect of the error on the jury's verdict, the appellate court must scour the record for objective indications of the error's impact.

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[3] It is settled, of course, that the government must prove the harmlessness of constitutional errors beyond a reasonable doubt. *See, e.g., Chapman v. California*, 386 U.S. 18 (1967).

Those indicia may vary depending on the type of error. For example, this Court has identified several non-exclusive factors to consider in determining whether an error in restricting cross-examination is harmless, including "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986). To cite another example, when a jury receives an erroneous supplemental instruction and then convicts, this Court has considered evidence of the jury's confusion on the point at issue and the length of deliberations before and after the erroneous instruction in assessing harmlessness. *See Bollenbach v. United States*, 326 U.S. 607, 611-14 (1946).

When (as here) the error involves the improper admission of evidence, this Court and the courts of appeals have found that indications of the error's effect on the verdict may include the following circumstances (among others):

- The prosecution's reference to the improper evidence in opening and closing, *see, e.g.*, *Fulminante*, 499 U.S. at 297-98; *Satterwhite v. Texas*, 486 U.S. 249, 260 (1988); *Chapman v. California*, 386 U.S. 18, 25 (1967);

- the prosecution's use of the evidence at trial (for example, in questioning prosecution witnesses, cross-examining defense witnesses, or obtaining the introduction of other evidence), *see, e.g., id.* at 300; *Fahy v. Connecticut*, 375 U.S. 85, 88-89 (1963);

- the inflammatory (or innocuous) nature of the improperly admitted evidence, *see, e.g., Fulminante*, 499 U.S. at 296-97;

- the effect of the improperly admitted evidence on the conduct of the defense, *see id.* at 91;

- the length and difficulty of jury deliberations, *see, e.g., Krulewitch v. United States*, 336 U.S. 440, 444-45 (1949);[4]

- statements the trial attorneys or the trial judge made about the importance of the evidence, *see, e.g., Fulminante*, 499 U.S. at 297;

- the strength of the properly admitted evidence (discussed in more detail in Part III below); and

[4] *See also, e.g., United States v. Varoudakis*, 233 F.3d 113, 126 (1st Cir. 2000) (longer jury deliberations "weigh against a finding of harmless error," because "[l]engthy deliberations suggest a difficult case"); *Gibson v. Clanon*, 633 F.2d 851, 855 (9th Cir. 1980) ("The state's case against [the defendants] is a strong one. Nevertheless, if the jury had readily accepted [the] eyewitness testimony, it seems unlikely they would have deliberated so long to reach a verdict.").

- the results of previous trials in the same matter, *e.g., Krulewitch*, 336 U.S. at 445, particularly when the improperly admitted evidence marks a difference between a first trial that produced a hung jury and a retrial that produced a conviction, *see, e.g., Kennedy v. Lockyer*, 379 F.3d 1041, 1056 & n.18 (9th Cir. 2004) (gang testimony was excluded at first trial, which resulted in mistrial, and admitted at the second trial, which resulted in conviction; court concludes that error in admitting the evidence was prejudicial).

Other circumstances as well may bear on whether the error affected the verdict that the jury returned. The critical point is that the appellate court must search the *entire* record for *any* indication that the error affected the verdict.

B. The Government Has the Burden of Proving Harmlessness.

After a close examination of the entire record, the appellate court may be unsure whether the error affected the verdict. In such cases, the court should reverse the conviction. Put differently, the risk of non-persuasion rests on the government; if it cannot show, based on the record, that the error did not affect the verdict, both the Sixth Amendment jury trial right and the underlying right at issue require reversal and a new trial at which a jury untainted by the error can determine the defendant's guilt. As this Court has explained, the inquiry is "whether the error itself had substantial influence [on the verdict].

If so, *or if one is left in grave doubt*, the conviction cannot stand." *Kotteakos*, 328 U.S. at 765 (emphasis added); *see, e.g., O'Neal v. McAninch*, 513 U.S. 432, 436 (1995) (adopting same approach in habeas context); *see also United States v. Olano*, 507 U.S. 725, 741 (1993) (under Fed. R. Crim. P. 52(a), the government "bears the burden of showing the absence of prejudice").

III. THE APPELLATE COURT MUST ASSESS THE STRENGTH OF THE EVIDENCE WITH DUE CONSIDERATION FOR THE JURY'S ROLE AS FACTFINDER.

In scouring the record for objective indications of the error's effect--and thus determining whether the government has established harmlessness--an appellate court may take into account the strength of the evidence of guilt untainted by the error. But for two reasons--one practical and one a matter of constitutional command--appellate judges conducting harmless error review must view the evidence in the light most favorable to the defense.

The practical reason for this approach is simple: appellate judges, unlike jurors, are not in the courtroom when the evidence is presented. Appellate judges thus cannot observe "the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985). They cannot observe shifty eyes, or nervous swiveling, or a flushed face, or a sweaty brow. Nor can appellate judges reading a transcript understand the courtroom dynamics that affect credibility

determinations. A muttered sentence that draws derisive snickers from the jury has the same weight in a transcript as a confident assertion that draws nods of agreement. Even a document may have a strikingly different effect when presented to a jury in the courtroom through a sponsoring witness than when reviewed in the cloister of an appellate judge's chambers. Appellate judges who attempt to assess the weight to be given a witness' testimony or the significance to be afforded a particular document engage in a task they lack the institutional competence to perform.

The constitutional reason to view the evidence in the light most favorable to the defense is equally simple: the Sixth Amendment categorically assigns the factfinding function to the jury, rather than to judges--"a fundamental reservation of power in our constitutional structure." *Blakely*, 542 U.S. at 306. Appellate judges

> are 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. That would be to substitute our judgment for that of the jury and, under our system of justice, juries alone have been entrusted with that responsibility.

Weiler v. United States, 323 U.S. 606, 611 (1945). In light of this constitutional allocation of responsibility, appellate judges may not weigh the evidence

and make their own assessments of credibility and probative value.

These restrictions on judicial factfinding, and especially on *appellate* factfinding, produce three related principles that must guide appellate judges in assessing the evidence as part of harmless error review.

First, unlike when determining sufficiency of the evidence, *e.g., Jackson v. Virginia*, 443 U.S. 307 (1979), appellate judges making harmless error assessments may not view the evidence in the light most favorable to the prosecution, *see, e.g., United States v. Hands*, 184 F.3d 1322, 1330 n.23 (11th Cir. 1999). Thus, for example, appellate judges may not make credibility determinations or draw inferences in the government's favor. To the contrary, appellate judges must recognize the possibility that jurors may disbelieve a prosecution witness because of impeachment, the witness' demeanor, or the inherent implausibility of the witness' testimony. *See, e.g., Fulminante*, 499 U.S. at 298-99; *United States v. Kaiser*, 609 F.3d 556, 567 (2d Cir. 2010) (error prejudicial where government's case relied on cooperators, whose credibility the jury had "ample reason . . . to question"); *cf. Van Arsdall*, 475 U.S. at 684 (in assessing whether erroneous limitation of cross-examination is harmless, court must "assum[e] that the damaging potential of the cross-examination were fully realized").[5]

[5] *See also, e.g., United States v. Manning*, 23 F.3d 570, 575 (1st Cir. 1994) (given that prosecution and defense witnesses both "gave a plausible account," neither of which was "*inherently* unlikely to be true . . . and given the further fact that we are

To protect the Sixth Amendment jury trial right, appellate judges assessing the strength of the evidence for harmless error purposes should afford the defendant the benefit of the doubt in much the way they do in assessing the sufficiency of the evidence to support a defense jury instruction. *See, e.g., Mathews v. United States*, 485 U.S. 58, 63 (1988). As the Ninth Circuit has explained,

> [A] defendant is entitled to an instruction concerning his theory of the case if the theory is legally sound and evidence in the case makes it applicable, even if the evidence is weak, insufficient, inconsistent, or of doubtful credibility. A defendant needs to show only that there is evidence upon which the jury could rationally sustain the defense. Where, as here, factual disputes are raised, this standard protects the defendant's right to have questions of evidentiary weight and credibility resolved by the jury.

United States v. Kayser, 488 F.3d 1070, 1076 (9th Cir. 2007) (quotations and citations omitted). In assessing the evidence for harmless error purposes, appellate courts likewise should view the evidence in the defendant's favor to the extent the jury rationally could have done so.

(continued…)

precluded from making independent credibility determinations on appeal," error cannot be found harmless (emphasis in original)).

Second, and relatedly, appellate judges must examine "the record as a whole," not merely those portions that favor the government. *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993); *see, e.g., Krulewitch*, 336 U.S. at 444-45 (considering entire record and finding that erroneous admission of hearsay was not harmless); *Kotteakos*, 328 U.S. at 764 (harmless error inquiry "must take account of what the error meant to [the jurors], not singled out and standing alone, but in relation to all else that happened").[6] The record as a whole includes evidence the defense elicits on cross-examination of government witnesses and evidence the defense presents in its case.

Third, the inquiry is not "merely whether there was enough [evidence] to support the result apart from the phase affected by the error." *Kotteakos*, 328 U.S. at 765; *see id.* at 767 (rejecting argument that error is harmless "if the evidence offered specifically and properly to convict [the] defendant would be sufficient to sustain his conviction" absent the error). The question instead is whether, in light of the entire record, including the strength of the evidence, the government has established that the error did not affect the jury's verdict. *See Satterwhite*, 486 U.S. at 258-59 ("The

[6] *See also, e.g., Hands*, 184 F.3d at 1329 ("We determine whether an error had substantial influence on the outcome by weighing the record as a whole . . . ."); *Taylor v. United States*, 414 F.2d 1142, 1144-45 (D.C. Cir. 1969) (rejecting government contention that on harmless error review the court should view the evidence in the light most favorable to the government; harmless error analysis requires court to "look to all the evidence, defense and prosecution alike, and bring our judgment to bear upon the question of whether it is clear to us" that the error was harmless).

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." (quotation omitted)); *Fahy*, 375 U.S. at 86 ("We are not concerned here with whether there was sufficient evidence on which petitioner could have been convicted without the evidence complained of.").

IV. THE COURT OF APPEALS' HARMLESS ERROR APPROACH IGNORED THIS COURT'S METHODOLOGY AND VIOLATED PETITIONER'S SIXTH AMENDMENT JURY TRIAL RIGHT.

For the reasons outlined at pages 44-63 of the petitioner's brief, the court of appeals majority applied a harmless error methodology that violates the principles outlined above and trenches upon petitioner's Sixth Amendment right to trial by jury. The majority failed to scour the record for indicia of the error's effect on the jury; it drew inferences and made credibility determinations in favor of the prosecution, rather than viewing the record in the light most favorable to the defense; and it focused on the prosecution case and did not consider the entire record. Upon an assessment that honors petitioner's right to have his guilt determined by a jury rather than by appellate judges, the error in admitting evidence of his lawyer's opinion that he would be convicted cannot be deemed harmless.

CONCLUSION

The conviction should be reversed.

Respectfully submitted,

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