NO. 11-199

IN THE SUPREME COURT
OF THE UNITED STATES

ALEXANDER VASQUEZ,

Petitioner,

- v -

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT

The Government's argument against granting the petition in this matter is two-fold: First, the Government argues that this Court's precedent and the precedent in the Circuit Courts of Appeals are entirely consistent on the issue of the appropriate mode of harmless-error analysis. Resp. 8-9. Second, the Government argues that the Seventh Circuit's decision below does not implicate the Sixth Amendment right to trial by jury. Resp. 14-15. Neither is accurate.

I. There is Significant Discord Both Between and Within the Circuit Courts of Appeals Over the Proper Mode of Harmless Error Analysis.

The Government acknowledges that this Court has "alternatively articulated the harmless-error standard." Resp. 8. It further concedes that the Courts of Appeals "have used a variety of verbal formulations to describe the harmless-error inquiry." Resp. 11. But, according to the Government, these variations and alternatives are mere distinctions without a difference.

Contrary to the Government's attempt to minimize the confusion surrounding the proper mode of analysis, petitioner is not alone in his characterization of the state of the law. As noted in the original petition, there is a wealth of support for the position that two different standards have developed, not only in secondary sources, but also in circuit court opinions throughout the country. See Pet. 13-14.

One of the Government's own arguments demonstrates the confusion. According to the Government, there is universal agreement that a court may focus solely on the overwhelming weight of the evidence to find an error harmless. Yet, the Government acknowledges that "[t]he overall strength of the Government's case is not always the only factor in the harmless-error analysis." Resp. 9. In Confrontation Clause cases dealing with limitations on cross-examination, the Government would allow courts to "appropriately consider such factors as the importance of the witness's testimony, whether the testimony was cumulative, the presence or absence of corroborating or contradicting testimony, and the extent of cross-examination otherwise permitted." Resp. 9-10.

This idea is culled from *Delaware v. Van Ardsall*, but has never been limited to the context of limitations on cross-examination. 475 U.S. 673 (1986) In fact, this Court has cited *Van Ardsall* in several cases outside the realm of Sixth Amendment violations. In *Neder v. United States*, a case the Government relies on extensively, the Court held that "the harmless-error inquiry must be essentially the same" for confrontation cases like *Van Ardsall*, cases dealing with "[t]he erroneous admission of evidence," and cases involving the omission of an element from a jury instruction. 527 U.S. 1, 18 (1999). This Court has never indicated that it created a different harmless error test only for Confrontation Clause violations. The Government's observations about *Van Ardsall*, then, are not based on any substantive difference in the law, but instead are a symptom of the same confusion noted by scholars and courts for decades. Thus, this is an area where this

Court's clear guidance is necessary.

In his original petition, petitioner noted several circuits that had rejected the idea of focusing the harmlessness inquiry solely on the weight of the evidence. According to the Government, these same circuits have "routinely found errors to be harmless based solely on the strength of the evidence." Resp. 13. As petitioner argued in his original petition, the conflicts in the modes of analysis exist both within and between the different Circuit Courts of Appeals. The fact that, even with in a single circuit, courts apply different tests aggravates the problem as opposed to diffusing it.

Many of the cases the Government cites as relying solely on the strength of the Government's evidence fall into one of two categories: (1) cursory dispositions that amount to alternative holdings; and (2) cases that actually assist in demonstrating the confusion. For better or worse, it has become the practice of many circuit courts of appeals to explore whether an error occurred, determine that it did not occur, and then hold that, alternatively, any such error was harmless. When this happens, courts rarely devote any significant time to the issue of harmlessness. Whether or not such a practice is appropriate is an issue for another day (or petition). The fact that, in some cases, with little discussion, courts have found errors to be harmless focusing on overwhelming evidence does not mean that it is appropriate to do so in every case regardless of the circumstances, especially not in a case like this one where even the majority referred to it as a "close" case. Pet. App. 16A.

These cases where the harmless error decision, a decision which ultimately decides whether a defendant's rights will be vindicated or sacrificed, is made in a few short sentences with a vague reference to overwhelming evidence demonstrate the need for clear, consistent guidance on the proper analysis.

This practice exists in every circuit addressed by the Government, but the first case cited by the Government as an example demonstrates the point. The Government points to *United States v. Gabayzadeh* as an example of a case where that court found an error harmless based solely on the weight of the evidence. No. 06-5466-cr, 2011 WL 2519539 (2d Cir. June 27, 2011). However, the Court in *Gabayzadeh* actually found that there was no error, but noted that "in any event" the error was harmless due to the overwhelming evidence of guilt. *Id.* This alleged harmless error analysis was accomplished in one sentence after the court had already determined that no error occurred. Many of the Government's cited cases are nearly identical.[1]

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1 See *United States v. Rivera-Rodriguez*, 617 F.3d 581, 595 (1st Cir. 2010) (issuing a conditional, cursory harmless-error ruling: "[e]ven if the district court abused its discretion here, which we seriously doubt, any purported error was harmless in light of the other overwhelming evidence against Muñiz-Massa"); *United States v. Paulino*, 445 F.3d 211, 219 (2d Cir. 2006) (same: "even if we were to conclude that Adolfo Paulino's statements had not been sufficiently probative to warrant admission as non-hearsay evidence, Christian Paulino would not be entitled to reversal of his conviction because any

An exhaustive analysis of every case the Government cites for this position is unnecessary and impractical at this point in the litigation. The fact that these cursory dispositions appear to run contrary to the many cases which explicitly reject the idea that a harmlessness finding can be based solely on a look at the strength of the Government's untainted evidence only highlights the need for clarification on this vital issue. See *Gov't of the V.I. v. Martinez*, 620 F.3d 321,

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such evidentiary error would properly be deemed harmless"); *United States v. Gregoire*, 638 F.3d 962 (8th Cir. 2011) (same: "the district court did not abuse its discretion . . . . Moreover, given the overwhelming evidence . . . we agree with the Government that any instruction error as to count 1 was harmless"); *United States v. Ginyard*, 44 F.3d 648 (D.C. Cir. 2006) (same: "[i]n light of the remand, we do not address appellants' other challenges to their convictions, except to note, given the likelihood of a new trial, that any error in admitting prior crimes evidence under Federal Rule of Evidence 404(b) was harmless in light of the overwhelming nature of the Government's evidence"); *United States v. Hicks*, 575 F.3d 130 (1st Cir. 2009) (same: "Even if there was an error in the admission of the three prior felony convictions (and a majority of the panel does not suggest that there was), that error was harmless in light of the other overwhelming evidence against appellant"); *United States v. Diaz*, 637 F.3d 592 (5th Cir. 2011) (same: "Agent De La Cruz's testimony was admissible opinion testimony under Federal Rule of Evidence 701. Even if the district court did err in some way, though, it was a harmless error in light of the remaining overwhelming evidence").

337 (3d Cir. 2010) (holding that "the relevant question . . . 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"); *Wilson v. Mitchell*, 498 F.3d 491, 504 (6th Cir. 2007) (noting that the proper analysis looks to "whether the error had an actual impact on the verdict . . . and not . . . whether a hypothetical new trial would likely produce the same result).

Several of the cases the Government cites do not support its argument at all. Another case the Government claims as an example of a court finding harmless error solely on the strength of the Government's case is *United States v. Price*, 13 F.3d 711 (1994). However, that case demonstrates the importance of looking to factors that reveal the jurors actual thought process, as opposed to hypothesizing based upon the courts view of the weight of the evidence. *Id.* In *Price*, the Third Circuit explicitly relied upon the fact that the jury returned a split verdict in finding that an error was not harmless:

> Although, of course, a jury may return inconsistent verdicts, the jury's acquittal of Williams on the substantive count of selling cocaine to Mead, despite Mead's explicit testimony to the contrary, suggests that the jury found the Government's case through Mead's testimony was not totally persuasive.

Id. at 730. Similarly, *United States v. Cole*, another case the Government cites as looking only to the weight

of the evidence, explicitly explored the implications of the fact that the defendant was acquitted on three of the charges. 631 F.3d 146, 155 (4th Cir. 2011).

The Government cites *United States v. Christie*, as another example of a court relying solely on overwhelming evidence. 624 F.3d 558 (3d Cir. 2010). But *Christie* does not and cannot stand for that proposition. In *Christie*, the Third Circuit explicitly focused on the effect of the error, noting that the inadmissible testimony "span[ed] only fifteen lines in the transcript of an eight day trial." *Id.* at 571. The Court also noted that the testimony was "not mentioned in the Government's closing." *Id.* Thus, *Christie* falls in the category of cases analyzing the effect of the error, not cases relying solely on the weight of untainted evidence.

II. Whether an Improper Harmless Error Analysis Focusing Exclusively on Overwhelming Evidence of Guilt Implicates the Sixth Amendment Right to a Jury Trial is an Open Question.

The Government contends that the argument that a hypothesized jury verdict would violate the jury trial guarantee was put to rest in *Neder*. The Government points to language in *Neder*, which held that a jury instruction that omits an element is still subject to harmless error analysis. 527 U.S. at 15. To be sure, the Court did appear step back from some of the language in *Sullivan*. *Id.* However, the Court reaffirmed that an improperly conducted harmless error inquiry could implicate the Sixth Amendment:

"safeguarding the jury trial guarantee will often require that a reviewing court conduct a thorough examination of the record." *Id.* at 19.

This case presents an entirely different problem from *Neder*. Here, it is not the fact that the majority below engaged in harmless error analysis that violated the right to a jury trial Petitioner does not contend the error was structural. Instead, in this case, the manner in which analysis was conducted created the Sixth Amendment violation. The majority below focused exclusively on the weight of the untainted evidence without considering whether the wrongly admitted evidence might have had an effect on the verdict actually rendered. It did this despite clear indications from both the Government and the jury that this was a close case (the Government's references to the erroneously admitted evidence in closing argument and the jury's split verdict) and that the improperly admitted evidence was central to the jury's determination (the request for transcript containing wrongfully admitted testimony). The majority hypothesized about an errorless trial that did not occur and based its harmless error analysis on that hypothesis alone. Conducting the harmless error analysis in that manner violated the Sixth Amendment.

This case and the differing analyses of the majority and dissent present a unique opportunity to clarify the correct mode of harmless error analysis. Such a clarification would aid in the resolution of tens of thousands of cases each year and would promote consistency in cases where everyone agrees rules have been broken and rights have been violated.

CONCLUSION

Petitioner requests that this Court grant the petition for a writ of certiorari and set forth a clear framework for applying the harmless error analysis that comports with Sixth Amendment's jury trial guarantee.

Respectfully submitted,

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