No. 12-6908

In the Supreme Court of the United States

October Term, 2012

SAMUEL ARTURO ACOSTA-RUIZ, PETITIONER,

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether a court of appeals must consider what effect a constitutional error had on a jury's verdict, before it may find that the error was harmless beyond a reasonable doubt.

No. _____

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v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Samuel Arturo Acosta-Ruiz asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on July 23, 2012.

PARTIES TO THE PROCEEDING

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed.

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A copy of the opinion of the court of appeals, *United States v. Acosta-Ruiz*, No. 11-50444, unpub. op. (5th Cir. July 23, 2012), is attached to this petition as Appendix A.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit were entered on July 23, 2012. This petition is filed within 90 days after entry of judgment. *See* SUP. CT. R. 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment provides, in relevant part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury[.]"

FEDERAL STATUTE INVOLVED

Title 28 United States 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 INVOLVED

Federal Rule of Criminal Procedure 52(a), "Harmless Error," provides: "Any error defect, irregularity, or variance that does not affect substantial rights must be disregarded."

STATEMENT

Petitioner Samuel Arturo Acosta-Ruiz was convicted after a jury trial of conspiracy to transport, and transporting, undocumented immigrants, in violation of 8 U.S.C. § 1324(a)(1)(A)(ii), (B)(ii), and 8 U.S.C. § 1324(a)(1)(A)(v)(I), (B)(i). The district court exercised jurisdiction under 18 U.S.C. § 3231.

A smuggler brought Samuel Acosta from Mexico into the United States illegally and led him, along with other undocumented immigrants, into the brush along the border, where they all became lost. Acosta's wife, Daniela Guerrero, lived in Dallas, Texas. Once Acosta determined that he was near Carrizo Springs, Texas, he telephoned Guerrero and asked her to drive south and pick him up. Other immigrants who had also contracted with the smuggler got into the vehicle that Acosta's wife drove, after begging Acosta not to leave them stranded in the brush. Acosta and his wife went to trial before a jury on charges that they conspired to transport, and did transport, undocumented immigrants within the United States, with intent to further their illegal presence in this country.

Trial Evidence. Acosta testified in his own defense at trial, to explain how his companions had come to be riding in his wife's compact sports utility vehicle (SUV). Acosta was worried about the men who accompanied him because they were all "doing very badly physically" after traveling through the brush on foot for many days without food. App. B. Because of their poor physical condition, and "because they insisted for me please to take them," Acosta convinced his wife to give them a ride. *Id.* He "didn't want something to end up happening to them like them dying or something." *Id.* Acosta's defense was that he only meant to help

the men by assuring their welfare—he did not intend to further their illegal presence in the United States.

Over Acosta's objection, the Government's introduced deposition testimony of the illegal immigrants named in the indictment, Juan Osvaldo Lopez-Garcia and Jose Gabriel Mendez-Parra.[1] While both Lopez and Mendez described the physical deprivations and hardships they suffered during their days of hiking through the brush, neither described their ordeal in as stark and desperate terms as Acosta had.

In their depositions, Lopez and Mendez explained that they, along with an acquaintance nicknamed "Connie," contracted with a guide—or "coyote"—in Mexico to be smuggled into the United States in early February 2010. The men traveled by bus from Dolores Hidalgo, Guanajuato, in Mexico, to a town near the Rio Grande River. After crossing the river, Connie, Lopez, and Mendez, along with other smuggled immigrants, wandered lost through the brush for four or five days. They were cold and had nothing to eat.

The immigrants were all short on food, as the coyote had told them that they would only walk in the brush for about a day before someone came to pick them up to travel into the interior of the United States. These arrangements had fallen through, however, and after walking for so many days without food, Mendez, Lopez, and Connie left the larger group of aliens who were being led by the coyote

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1. Acosta argued that introduction of the deposition testimony violated his Sixth Amendment right to confront the witnesses against him at trial because the Government had failed to show that Lopez and Mendez were unavailable. *See Crawford v. Washington*, 541 U.S. 36, 53–54 (2004).

and his helpers.[2] Acosta and another man chose to break away from the coyote and join this smaller group.

After wandering through the brush on their own for three or four hours, Connie and Mendez struck out in search of food. They found an abandoned trailer that had some water and a map—but no food. The map helped the men determine that they were near Carrizo Springs. Having figured out where he was, Acosta called his wife with his cell phone and told her that he had separated from the group of smuggled immigrants and had run out of food and water. After speaking with his wife, Acosta told the other men that she was coming to get him.

The men asked whether Acosta's wife could pick them up as well, since they had no one to come for them. Acosta did not say anything when the men asked for a ride. According to Mendez, it seemed that Acosta did not want to take them along. But the men all insisted, asking Acosta repeatedly to take them along. They begged him not to leave them stranded in the brush, without food or transportation. Acosta never told the men they could go with him and his wife, but when Guerrero arrived, all of the men got into the compact SUV she drove, and Acosta did not tell them to get out. Mendez and Lopez understood that Acosta's wife would take them to Austin, or to a city near there.

About 20 minutes to an hour after they had gotten into the SUV Acosta's wife drove, law enforcement officers stopped it and discovered that her passengers were undocumented immigrants. Neither Mendez nor Lopez even knew Acosta's or his wife's name. It appears, however, that they were able to identify Guerrero as the

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2. Lopez and Mendez said that Acosta was neither the coyote nor one of his helpers.

van's driver, and Acosta as her husband—the man who had been lost with them in the brush.

In addition to playing the material witnesses' videotaped depositions, the Government presented the testimony of a Border Patrol agent who interviewed Acosta after his arrest. Agent Armando Ontiveros spoke with Acosta, who, like his companions, was dirty, disheveled, and wearing tattered clothing, as though he had been walking in the brush for some time. According to Ontiveros, who saw Acosta and his companions after they had been resting for about an hour, the men did not appear to be on the verge of collapse. Agent Sergio Garay also testified that the men appeared tired, but were not at the point where they needed medical attention.[3]

Acosta told Ontiveros that his wife was the driver of the SUV, and said that he had convinced her to drive to Carrizo Springs from Dallas to pick him up. When Acosta telephoned Guerrero, he did not tell her about the other men who were with him because he was worried that she would not come to get him. Those men had also called their relatives, but were unsuccessful in getting anyone to pick them up.

Jury Argument. Acosta's defense attorney argued that the Government had failed to prove that Acosta transported Lopez and Mendez with the intent to further their illegal presence in the United States—an essential element of the conspiracy and transportation charges. She contended that Acosta agreed to give the men a

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3. The immigrants had been riding in the SUV for approximately an hour, and perhaps longer, before the agents saw them. Lopez estimated that they had been driving no more than an hour before Crystal City police stopped them, and Mendez estimated the time as 15 to 20 minutes. After the stop, police telephoned Border Patrol agents, who had to drive about 15 miles to reach the stopped vehicle.

ride only because they had been without food for five days, were exposed to the elements, and Acosta was afraid they might die if he left them behind.

To rebut this argument, the prosecutor argued that none of the witnesses said anything about anyone being on the verge of dying. He contended that, in fact, Lopez's and Mendez's deposition testimony said just the opposite—they did not say anyone was about to die, no one had an emergency, and no one was on the verge of physical collapse.

Jury Request for Lopez's and Mendez's Testimony, and Verdict. During its deliberations, the jury asked for a DVD player. The only trial exhibits that were admitted as DVDs were the depositions of Lopez and Mendez. The district court provided the jury with a DVD player and a television so that it could review that deposition testimony. Afterwards, the jury convicted Acosta on all charges.

Appeal. On appeal, Acosta argued, among other things, that the admission of Lopez's and Mendez's deposition testimony at his trial violated his Sixth Amendment confrontation rights, because the Government failed to show that the men were unavailable to testify. The Fifth Circuit Court of Appeals affirmed Acosta's convictions without reaching this issue.[4] The court instead held that any arguable error was harmless. App. A. at 8–9. Citing its published precedent in *United States v. Barraza*, 655 F.3d 375, 382 (5th Cir. 2011), *cert. denied*, 132

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4. The court also refrained from ruling on whether the Government was permitted to rely on the representation of its attorney to establish its good faith efforts to procure an absent witness's testimony, as was done here. App. A at 8 n.3. It noted, however, that "a combined lack of testimony and/or documentary evidence . . . presents great practical difficulties for . . . a reviewing court" in determining a Sixth Amendment issue like that presented by Acosta's case. *Id.*

S. Ct. 1590 (2012), the court ruled that "[a]n error is harmless if this court after a thorough examination of the record is able to conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error." *Id.* at 7 (quoting *Barraza*).

The court of appeals did not assess the impact of the deposition testimony on the jury's verdict. *See* App. A at 8–9. Instead, it reviewed the other trial evidence against Acosta and ruled that "the only conclusion that could be drawn was that Acosta's transportation was with the intent to further their unlawful presence." *Id.* at 9. For that reason, the court "conclude[d], beyond a reasonable doubt, that absent the playing of Lopez's and Mendez's videotaped deposition testimony during trial, the jury would have nonetheless found Acosta guilty." *Id.* at 8.

REASON FOR GRANTING THE WRIT

THE COURT SHOULD GRANT CERTIORARI TO CLARIFY THE STANDARD OF REVIEW FOR HARMLESS CONSTITUTIONAL ERROR—A STANDARD THAT HAS CAUSED CONFUSION AND DISAGREEMENT AMONG THE COURTS OF APPEALS, SERIOUSLY THREATENING THE SIXTH AMENDMENT'S GUARANTEE OF THE RIGHT TO TRIAL BY A JURY.

In *Chapman v. California*, this Court articulated the standard for reviewing whether constitutional error is harmless. 386 U.S. 18, 22–24 (1967). That standard, the Court ruled, is "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Id.* at 23 (quoting *Fahy v. Connecticut*, 375 U.S. 85, 86–87 (1963)). Constitutional error may be considered harmless only if the government can "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman*, 386 U.S. at 24. Such review is consistent with the Sixth Amendment's "jury-trial guarantee," as the reviewing court must ask "what effect" the

constitutional error "had upon the guilty verdict in the case at hand." *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993).

In the years since *Chapman* was decided, however, the courts of appeals—and at times this Court—have articulated the standard for harmless-constitutional-error review differently, focusing appellate review on the weight of the evidence against the accused, rather than on the effect of the constitutional error itself on the jury's verdict. *See, e.g.*, *Harrington v. California*, 395 U.S. 250, 254 (1969) ("the case against Harrington was so overwhelming that we conclude that this [constitutional] violation . . . was harmless beyond a reasonable doubt"); *United States v. Hale*, 685 F.3d 522, 539 (5th Cir. 2012) (constitutional error "would be harmless error due to the overwhelming evidence supporting the jury's verdict"), *petition for cert. filed* (No. 12-377) (U.S. Sept. 24, 2012); *United States v. Vargas*, 689 F.3d 867, 875–76 (7th Cir. 2012) ("An error is harmless if the untainted incriminating evidence is overwhelming.") (internal quotation marks and citation omitted). This different standard of review threatens the Sixth Amendment's jury-trial guarantee because it permits the appellate court to second-guess the jury by considering whether the weight of the evidence justifies the accused's conviction, rather than focusing on whether the jury's verdict was influenced by the constitutional error.

Commentators have noted these disparate approaches. *See, e.g.*, Brent M. Craig, *"What Were They Thinking?"—A Proposed Approach to Harmless Error Analysis*, 8 FLA. COASTAL L. REV. 1, 14 (2006) (discussing "pure *Chapman* test" versus "the 'overwhelming evidence' test of *Harrington*"); Jason M. Solomon, *Causing Constitutional Harm: How Tort Law Can Help Determine Harmless Error in Criminal Trials,* 99 NW U. L. REV. 1053, 1055 (2005) ("conventional wisdom

on harmless-error doctrine is that there are two different and irreconcilable approaches that judges use in determining harmless error which are reflected in two coexisting lines of Supreme Court cases"); Gregory Mitchell, Comment, *Against "Overwhelming" Appellate Activism: Constraining Harmless Error Review*, 82 Calif. L. Rev. 1335, 1339 (1994) (appellate courts "evaluate harmless error under one of two distinct tests or a hybrid of the two"). And they have noted that the appellate court's choice of standard—effect on the jury's verdict, or the weight of the evidence against the defendant—often determines the outcome of the appeal. *See, e.g.*, Solomon, at 1069 (empirical analyses show weighing evidence results in more findings of harmlessness, while considering effect of the error results in fewer findings of harmlessness); Craig, *id.* at 14 ("pure *Chapman* test . . . increases the likelihood of reversal for the defendant," while "the 'overwhelming evidence' test . . . decreases the likelihood of reversal").

Apparently because of the confusion and unfairness caused by the use of disparate tests, this Court last term granted certiorari in a case presenting questions similar to those posed by Acosta's case. *See Vasquez v. United States*, 132 S. Ct. 759 (2011) (granting certiorari).[5] After oral argument in *Vasquez*, certiorari was dismissed as improvidently granted, 132 S. Ct. 1532 (2012) (per curiam), perhaps because it was unclear what test the Seventh Circuit actually applied in that case. *See* Sean O'Neill et al., *United States Supreme Court Update*, 24 App. Advoc. 623, 629 (2012) (observing that oral argument questions suggested Vasquez's proposed

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5. The questions presented focused on the Seventh Circuit's use of a harmless error analysis that considered the weight of the evidence against Vasquez, rather than considering the effect of trial error on the jury's verdict. Petition for a Writ of Certiorari, *Vasquez*, 132 S. Ct. 759 (No. 11-199).

test was similar to the test put forth by the Government, and that it was unclear which test the Seventh Circuit applied). Acosta's case, however, clearly presents the issue that has caused confusion and conflict among the courts of appeals—whether a court of appeals must consider the effect of a constitutional error on the jury's verdict before it may declare that error harmless beyond a reasonable doubt.

A. The Fifth Circuit Failed to Consider the Effect of Any Constitutional Error on the Jury's Verdict in Acosta's Case—a Failure That Changed the Outcome of the Court's Harm Analysis.

Acosta argued on appeal that the admission of videotaped deposition testimony by two men he was accused of transporting violated his Sixth Amendment right to confront the witnesses against him at trial. App. A at 6–7. "Even assuming *arguendo* that" this was constitutional error, the Fifth Circuit ruled that such error would be harmless because "absent the playing of Lopez's and Mendez's videotaped deposition testimony during trial, the jury would have nonetheless found Acosta guilty." *Id.* at 8. The court reached this conclusion by applying its published precedent on harmless constitutional error—precedent that required the court of appeals itself to review the record and determine whether the jury's verdict would have been the same, absent constitutional error. *See id.* at 7–8 (citing *United States v. Barraza*, 655 F.3d 375, 382 (5th Cir. 2011), *cert. denied*, 132 S. Ct. 1590 (2012)).

Had the court of appeals instead considered the effect of the constitutional error on the jury's verdict, as this Court's *Chapman* precedent requires, the court's conclusion would have been different. That is because Lopez's and Mendez's testimony played a key role in the case against Acosta, whose defense was that he

did not intend to further their illegal presence in the United States. Instead, Acosta contended that he convinced his wife to give the men a ride because he did not want to leave them behind in the brush—he was worried about their welfare, and concerned that they might die.

For the most part, Mendez and Lopez did not put their situation in such stark and desperate terms. Indeed, the prosecutor argued to the jury that it should reject Acosta's defense because neither Lopez nor Mendez said that anyone was near death; neither said that anyone had an emergency; and they did not testify that anyone was on the verge of physical collapse. In light of the emphasis that the prosecutor placed on this evidence there was at least a reasonable possibility that the deposition testimony might have contributed to Acosta's convictions. *See Chapman*, 386 U.S. at 23 (the question to be addressed on harmless-error review is "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction") (internal quotation marks and citation omitted).

Indeed, in the particular circumstances of this case, there can be no doubt that the absent witnesses' testimony contributed to Acosta's convictions. The jury found Lopez's and Mendez's testimony so important—likely because of the emphasis the prosecutor placed on it—that jurors asked to review the testimony during deliberations. That request was granted. Accordingly, the jury itself signaled the importance of that testimony to their verdict.

Viewing the evidence "absent" the improper testimony is not the same as deciding its effect on the verdict, as this case demonstrates. *See* App. A at 8–9. In finding that Acosta would have been convicted even without Lopez's and Mendez's testimony, the Court noted that Border Patrol agents testified that the

immigrants who accompanied Acosta did not seem exhausted or appear weak, and did not ask for water or medical attention. *Id.* at 8. But the agents' observations were made well after the aliens had been picked up in the brush and had rested in Acosta's wife's car.[6] Lopez's and Mendez's assessment of their own physical condition would have carried far more weight with the jury, and thus there was at least a reasonable possibility that their testimony might have contributed to Acosta's convictions.

The court also noted that Acosta did not offer water to his companions and was not taking them to a hospital—but instead to Austin—to find that "the only conclusion that could be drawn was that Acosta's transportation was with the intent to further their unlawful presence." App. A at 9.[7] The *Chapman* standard for harmlessness, however, is not whether other evidence supported Acosta's convictions—or even whether that evidence was sufficient to convict him. Instead, Acosta's convictions may be affirmed only if the reviewing court can conclude "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman*, 386 U.S. at 24. "An error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot . . . be conceived of as harmless." *Id.* at 23–24.

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6. The illegal immigrants had been resting in Guerrero's SUV for about an hour, and perhaps longer, before the agents saw them. Lopez estimated that they had been driving no more than an hour before Crystal City police stopped them, and Mendez estimated the time as 15 to 20 minutes. After that stop, police telephoned agents, who had to drive about 15 miles to reach the SUV.

7. The travelers had water—what they lacked was food for four or five days.

The Fifth Circuit was able to conceive of the error in Acosta's case as harmless because it did not consider the effect of the error on the jury's verdict. The court of appeals' opinion mentions none of the factors that show the importance of Lopez's and Mendez's testimony to the jury's verdict—not the differences between Acosta's and the absent witnesses' testimony, not the prosecutor's emphasis on their testimony, and not the jury's request to review that testimony. Under the test applied by the court of appeals—whether the verdict would have been the same absent the erroneously admitted deposition testimony—the court was not obliged to consider the effect of the constitutional error on the jury's verdict.

B. The Courts of Appeals Are Confused and Disagree About Whether They Must Consider the Effect of Constitutional Error on the Jury's Verdict Before the Error May Be Declared Harmless.

The confusion and disagreement in the courts of appeals is reflected in the majority and dissenting opinions in *United States v. Nash*, 482 F.3d 1209 (10th Cir. 2007). In that case, the Tenth Circuit concluded that admission of out-of-court testimony—*Bruton* error[8]—violated Nash's Sixth Amendment right to confront the witnesses against him. *Id.* at 1218–19. The majority opinion dismissed the constitutional error as harmless by using the same test applied by the Fifth Circuit in Acosta's case: "The test for determining whether the error was harmless is whether the jury would have returned the same verdict absent the error." *Id.* at 1219 (internal quotation marks and citation omitted). In applying that test, the Court "reviewe[d] the record *de novo*" and weighed the evidence against Nash. *Id.* As the dissenting judge complained, this approach diverged from a court of appeals'

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8. *Bruton v. United States*, 391 U.S. 123 (1968).

duty to analyze "the effect of the improper evidence upon the properly admitted evidence." *Id.* at 1221–22 (McKay, J., dissenting).

"By wholly ignoring the significance of the wrongly admitted *Bruton* evidence, the [*Nash*] majority fail[ed] to address the most significant part of the [constitutional-harmless-error] standard." *Id.* at 1222. That same failure occurred in Acosta's case—the court of appeals wholly failed to consider the effect of Lopez's and Mendez's prejudicial testimony on the jury's verdict. As the dissent in *Nash* noted: "Certainly hosts of cases merely rule *Bruton* error harmless due to overwhelming record evidence. . . . [T]o the extent that these decisions are based solely on the presence or absence of 'overwhelming' evidence, they do an injustice to the harmless error standard." *Id.* at 1222 n.1.

The dissent in *Nash* was right. By weighing the evidence against Acosta and Nash, the Fifth and Tenth Circuits departed from *Chapman*'s harmless-constitutional-error rule, which requires the courts of appeals to consider the effect of constitutional error on a jury's verdict. *See also Vargas*, 689 F.3d at 875–76 (Seventh Circuit holding that constitutional "'error is harmless if the untainted incriminating evidence is overwhelming'"). In *Chapman*, this Court reversed the California appellate court precisely because of its "emphasis, and perhaps overemphasis, upon the court's view of 'overwhelming evidence.'" 386 U.S. at 23. *Chapman* directed the appellate courts to consider, instead, "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Id.* (internal quotation marks and citation omitted). While *Chapman* has never been overruled by this Court, the courts of appeals' movement away from

considering the effect of constitutional error on a jury's verdict has, as the dissent in *Nash* pointed out, done an injustice to the harmless error standard.

The Court of Appeals for the District of Columbia—unlike the Tenth Circuit in *Nash* and the Fifth Circuit in Acosta's case—has rejected an approach that permits the appellate court to weigh the evidence against a defendant to determine whether constitutional error is harmless. In *United States v. Cunningham*, the court ruled that such an approach would undermine the Sixth Amendment's jury-trial guarantee. 145 F.3d 1385, 1394 (D.C. Cir. 1998). As the court explained: "[r]esting appellate review of constitutional trial errors on a guilt-based inquiry into whether, even absent the error, a reasonable jury might have nevertheless reached a guilty verdict based on the lawful evidence before it would be 'inconsistent with the constitutional framework of our system' which 'grants criminal defendants the right to have juries, not appellate courts, render judgments of guilt of innocence.'" 145 F.3d at 1394 (citation omitted). Instead, the court ruled, the proper test is "whether the Government has shown beyond a reasonable doubt that the error at issue did not have an effect on the verdict, not merely whether, absent the error, a reasonable jury could nevertheless have reached a guilty verdict." *Id.*

As research has shown, the choice of the standard for review of constitutional error—the guilt-based approach that permits the appellate court to weigh the evidence, or the effect-based approach that requires the court to consider the effect of the error on the jury's verdict—makes a difference in the outcome of an appeal. *See* Solomon, 99 Nw. U. L. Rev. at 1069 (comparing and contrasting outcomes depending on which standard of review is employed); Mitchell, 82 Calif. L. Rev. 1349–50 (noting defendants' greater chance of reversal under "*Chapman* test").

The effect-based approach embodied in *Chapman* protects the Sixth Amendment right to a jury trial, as this Court has acknowledged. *See Sullivan*, 508 U.S. at 279 (*Chapman* test consistent with the jury-trial right guarantee). The guilt-based approach, by contrast, permits the appellate court to take the jury's place by deciding whether evidence of a defendant's guilt was strong enough to permit his conviction to stand despite the constitutional error that occurred.

The Fifth Circuit, like the Tenth, has demonstrated confusion about which test is appropriate. In *United States v. Tirado-Tirado*, for example, the Fifth Circuit applied the *Chapman* test to determine that the constitutional error in that case was not harmless, saying: "A defendant convicted on the basis of evidence introduced in violation of the Confrontation Clause is entitled to a new trial unless the admission of that evidence constitutes harmless error, meaning that there is no reasonable possibility that the improperly admitted evidence might have contributed to the conviction." 563 F.3d 117, 126 (5th Cir. 2009) (citing, *inter alia*, *Chapman*, 386 U.S. at 24). In *Barraza*, and in Acosta's case, however, the court weighed the evidence of guilt, rather than considering the effect of the error on the jury's verdict. *See* App. A at 7–9 (reviewing record to conclude that any constitutional error was harmless because "the only conclusion that could be drawn was that Acosta's transportation was with the intent to further [Lopez's and Mendez's] unlawful presence); *Barraza*, 655 F.3d at 382 (weighing evidence to conclude that error was harmless because verdict would have been the same without the error).

As set forth above, the courts of appeals are both confused and disagree about what the standard of review is to determine whether constitutional error is harmless beyond a reasonable doubt. The grant of certiorari in *Vasquez* shows the

importance of the question, and Acosta's case shows that this is an issue that eventually will have to be addressed by this Court. This is an issue that has caused disagreement for over 30 years, since dissenting Justice Brennan declared that *Harrington* overruled *Chapman*. *Harrington*, 395 U.S. at 255 (Brennan, J., dissenting.) *Chapman*, however, has continued to be cited by this Court as setting the standard of review to determine whether constitutional error is harmless beyond a reasonable doubt. *See, e.g., Neder v. United States*, 527 U.S. 1, 15–19 (1999) (applying *Chapman* to constitutional error). This Court should grant certiorari to say whether the courts of appeals must consider the effect of constitutional error on the jury's verdict, as *Chapman* requires.

CONCLUSION

FOR THESE REASONS, Acosta asks that this Honorable Court grant a writ of certiorari.

Respectfully submitted.

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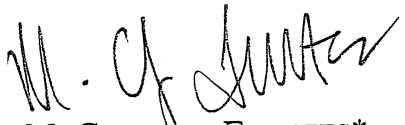

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DATED: October 22, 2012.

APPENDIX A

United States v. Acosta-Ruiz,
No. 11-50444, unpub. op. (5th Cir. July 23, 2012)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
July 23, 2012
Lyle W. Cayce
Clerk

No. 11-50444

UNITED STATES OF AMERICA,

Plaintiff–Appellee

v.

SAMUEL ARTURO ACOSTA-RUIZ,

Defendant–Appellant

Appeal from the United States District Court
for the Western District of Texas
USDC No. 2:10-CR-349-2

Before KING, PRADO, and HAYNES, Circuit Judges.

PER CURIAM:*

Defendant–Appellant Samuel Arturo Acosta-Ruiz ("Acosta") was convicted by a jury of transporting illegal aliens in violation of 8 U.S.C. § 1324(a). Acosta raises two issues on appeal: (1) a sufficiency of the evidence challenge to his conviction for the substantive crime of transporting illegal aliens and (2) a Confrontation Clause challenge to the Government's presentation of the videotaped depositions of the two aliens Acosta was charged with transporting. Because we find neither basis presents reversible error, we AFFIRM.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

I. BACKGROUND

A. Factual Background

Acosta began his journey on February 7, 2010 by taking a bus for twelve hours from Dolores Hidalgo, Guanajuato, Mexico to Guerrero, Coahuila, Mexico with twenty-seven other aliens seeking to be smuggled into the United States by a guide he had paid (known as a "coyote"). Once the group, including the guide, arrived in Guerrero on February 8, they rested until nightfall. The guide had told Acosta and the others to pack food for only one day because the plan was for a confederate in the United States to pick the group up and drive them to Dallas after one day of walking through the brush. Things did not, however, go as planned. The guide got lost and the group ended up walking in circles for about nine hours per day for four days. On the fourth day in the brush, Acosta along with four other aliens decided to break away from the larger group.

After wandering for about three hours, the five-person group came upon an abandoned trailer, wherein they found water and a map of the area. Consultation with the map led the group to the conclusion that they were near Carrizo Springs, Texas. At this point, Acosta used the cell phone he had been carrying with him to call his common-law wife in Dallas to have her come pick him up. She agreed. During this conversation, Acosta mentioned nothing about the four others in his group. Acosta allowed the four others use of his cell phone to try to contact people who could pick them up, but all of the other four were unsuccessful at reaching anyone.

With Acosta being the only one able to secure a ride, the other four asked Acosta to take them with him. Initially, Acosta refused to answer them. During the six hours Acosta waited for his wife to arrive, the four continued to ask and pressure Acosta into allowing them to come with him. When his wife was about an hour away from Carrizo Springs, Acosta phoned her again. It was in that conversation that Acosta first disclosed that there were others with him. When

Acosta's wife arrived, Acosta agreed to take the four others to Austin, Texas. Two of the four men got into the trunk of Acosta's wife's hatchback SUV and two others got into the backseat. Acosta got into the passenger's seat, and his wife drove away. Acosta later testified that he only acquiesced because he was worried about the bad physical condition that he perceived the four others to be in, but also admitted that he never considered taking the others to a hospital, stopping for food, or calling the police.

After driving for about twenty minutes, the car carrying Acosta, his wife, and the other four members of the breakaway group was stopped by Crystal City, Texas police. The police officers contacted the United States Border Patrol because they suspected alien smuggling. Border Patrol agents responded and took Acosta, his wife, and the others to the Carrizo Springs station where Agent Armando Ontiveros conducted an interview with Acosta in Spanish, during which Acosta told Ontiveros about how he came into the United States illegally with the other four and eventually came to have them in his wife's car.

B. Procedural Background

Acosta and his wife were both charged with two counts of transporting illegal aliens and one count of conspiring to transport illegal aliens in violation of 8 U.S.C. § 1324(a). Two of the four aliens that Acosta was charged with transporting were removed to Mexico, and two others—Juan Osvaldo Lopez-Garcia ("Lopez") and Jose Gabriel Mendez-Parra ("Mendez")—were detained as material witnesses and deposed pursuant to 18 U.S.C. § 3144. After the Government took Lopez's and Mendez's depositions (with Acosta's counsel present), the Government began expedited removal of Lopez and Mendez. During their depositions, Lopez and Mendez were advised that they might be needed for trial and, if so, that the Government would grant them permission to reenter the United States for this purpose and pay for their travel expenses. They were asked to provide an address and telephone number where they could

be reached in Mexico, which they did. Additionally, according to the prosecutor's representations at a later hearing, Lopez and Mendez were given letters in English and Spanish, which included the name and telephone number of a Border Patrol agent who would meet them at Del Rio, Texas port of entry to help them reenter the United States for trial. Lopez and Mendez were returned to Mexico on April 15, 2010.

On October 13, 2010, the district court issued an order setting the case for trial on November 30, 2010. Two weeks prior to trial, the Government filed a motion to declare Lopez and Mendez unavailable and to allow for the introduction of their videotaped depositions at trial. The Government argued that despite its best, reasonable efforts, it had been unable to secure the witnesses' presence at trial. Specifically, it noted in its motion that Border Patrol agents had unsuccessfully attempted to contact Lopez and Mendez by telephone on ten occasions between April and November 2010. The Government also stated that it had mailed subpoenas to the addresses provided by Lopez and Mendez advising them that their presence was needed at the trial and that their travel expenses would be paid. At the hearing on the motion, the prosecutor explained that Lopez and Mendez were not served with subpoenas at their depositions because the trial date had not been set and that he had no proof that the letters and subpoenas notifying Lopez and Mendez of the trial date had been received by the witnesses, noting that one of the letters had been returned as undeliverable. After an objection, the Government offered to call Border Patrol Agent Jonathan Anfinsen to testify about his efforts in locating Lopez and Mendez, but the district court stated that it was "factually satisfied" with the Government's efforts and declared Lopez and Mendez unavailable.

During Acosta's jury trial, the Government played the videotaped depositions of Lopez and Mendez, in addition to calling two Border Patrol agents as witnesses. Acosta also testified in his own defense. The jury found Acosta

guilty as charged. The district court sentenced him to concurrent terms of sixteen months of imprisonment, with credit for time served, and concurrent terms of three years of supervised release. Acosta timely appealed.

II. DISCUSSION

A. Sufficiency of the Evidence

Under § 1324(a),[1] the Government must establish that: "(1) an alien entered or remained in the United States in violation of the law, (2) [the defendant] transported the alien within the United States with intent to further the alien's unlawful presence, and (3) [the defendant] knew or recklessly disregarded the fact that the alien was in the country in violation of the law." *United States v. Nolasco-Rosas*, 286 F.3d 762, 765 (5th Cir. 2002); 8 U.S.C. § 1324(a)(1)(A)(ii). Specifically, Acosta contends that the Government failed to meet its burden on the second element—move/transport. Although Acosta moved for a judgment of acquittal at the close of the Government's case-in-chief, he failed to renew that motion at the close of all the evidence or file a post-verdict motion. Therefore, our review is for a "manifest miscarriage of justice."[2] *United States v. Dowl*, 619 F.3d 494, 500 (5th Cir. 2010). Under this standard, reversal is only warranted "if the record is devoid of evidence pointing to guilt or contains evidence on a key element of the offense that is so tenuous that a conviction would be shocking." *Id.* (internal quotation marks omitted).

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[1] The statutory text of 8 U.S.C. § 1324(a)(1)(A)(ii) criminalizes the conduct of "any person who knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law."

[2] As we clarified recently in *United States v. Delgado*, 672 F.3d 320 (5th Cir. 2012) (en banc), the articulation of the standard of "manifest miscarriage of justice" is a short-hand "restatement" of the familiar plain-error standard of review in the context of "forfeited insufficiency claims." *Id.* at 331 & n.9; *see also Puckett v. United States*, 556 U.S. 129, 135 (2009).

The most common conduct that would give rise to culpability for transporting illegal aliens is a situation where the defendant who is charged with violating § 1324(a) is the one driving the vehicle with the illegal aliens. *See, e.g.*, *United States v. Tirado-Tirado*, 563 F.3d 117 (5th Cir. 2009). But the statute is obviously broader than this common fact pattern. In fact, our cases reflect that the second element turns on the defendant's control of the means of transportation.

In *United States v. Pineda-Jimenez*, 212 F. App'x 369 (5th Cir. 2007), a case with similar facts to Acosta's, we explained that "[a]lthough [the defendant] was not driving at the time of the stop, the jury could infer that he was in *control* of the operation." *Id.* at 372 (emphasis added); *cf. United States v. Calderon-Lopez*, 268 F. App'x 279, 287 (5th Cir. 2008) (upholding an aiding-and-abetting conviction where defendant was "in charge of the operation"). There, as here, the Government charged both the driver and the passenger of a truck with transporting illegal aliens, and we affirmed both convictions. *Pineda-Jimenez*, 212 F. App'x at 372–73. The evidence of control/leadership against the passenger in that case (Rivas-Alvarez) was that passenger was "carrying a large amount of cash" and the "vehicle had been modified in a manner conducive to smuggling." *Id.* at 372. In light of our precedent and under a "manifest miscarriage of justice" standard of review, we cannot say that the record against Acosta, who arranged the transportation and acquiesced to taking the others to Austin, is devoid of evidence from which the jury could infer control and therefore meet the second element of § 1324(a).

B. Confrontation Clause

The Confrontation Clause "bars the 'admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.'" *Tirado-Tirado*, 563 F.3d at 122 (5th Cir. 2009) (quoting *Crawford v. Washington*;

541 U.S. 36, 53–54 (2004)). A witness is considered unavailable for Confrontation Clause purposes if "the prosecutorial authorities have made a *good-faith effort* to obtain his presence at trial." *Ohio v. Roberts*, 448 U.S. 56, 74 (1980) (internal quotation marks omitted), *overruled on other grounds by Crawford*, 541 U.S. at 60–68; *see also Tirado-Tirado*, 563 F.3d at 123 n.3 (noting that *Crawford* did not change the definition of unavailability for Confrontation Clause purposes and that pre-*Crawford* cases on this point remain good law). The Government "bears the burden of establishing that a witness is unavailable." *Tirado-Tirado*, 563 F.3d at 123. The good-faith effort inquiry is "identical to the unavailability inquiry under [Federal] Rule [of Evidence] 804(a)(5)." *Id.* at 123 n.4; *see* Fed. R. Evid. 804(a)(5)(A) (A witness is unavailable if he "is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure [his] attendance."). The effort required by the Government to procure a witness is, at base, "a question of reasonableness." *United States v. Aguilar-Tamayo*, 300 F.3d 562, 565 (5th Cir. 2002).

Acosta raises two arguments with respect to the Confrontation Clause. First, he contends that it was improper for the district court to rely on the Government's representations in its motion and at the hearing to establish that it had made a good-faith effort to procure Lopez's and Mendez's presence at trial. Second, he contends that, even accepting the Government's representations, the Government insufficiently proved that it had made a good-faith effort under our precedents.

We generally review Confrontation Clause challenges de novo, subject to harmless error review. *United States v. Cantu-Ramirez*, 669 F.3d 619, 631 (5th Cir. 2012). "An error is harmless if this court after a thorough examination of the record is able to conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error." *United States v. Barraza*, 655 F.3d

375, 382 (5th Cir. 2011) (internal quotation marks omitted). Even assuming *arguendo* that Acosta's contentions amount to error,[3] we conclude, beyond a reasonable doubt, that absent the playing of Lopez's and Mendez's videotaped deposition testimony during trial, the jury would have nonetheless found Acosta guilty.

Review of the trial transcript reveals that the only issue Acosta contested was whether by agreeing to let Lopez and Mendez ride with him and his wife before dropping them off in Austin he was transporting them *in furtherance of* their unlawful presence in the United States. Acosta's principal defense was that he agreed to take Lopez, Mendez, and the other aliens only because the others were in dire straits. Agent Sergio Garay testified, however, that, when he first saw the aliens after their car had been stopped by police, they looked "just like any other illegal aliens walking through the brush. . . . [Y]ou could tell they were tired, but not to where they needed medical assistance." Agent Ontiveros similarly testified that the aliens did not appear to be exhausted, did not appear weak, and did not ask for water or medical attention. Although Acosta testified that the breakaway group was weak, in explaining why he eventually acquiesced to taking them, he stated that he felt bad for them and was worried about them. While such testimony could support Acosta's version of events, it also suggests the possibility that after four days of wandering he felt

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[3] Although we do not reach the issue of whether the Government can rely on the representations of its attorney to establish its good faith in procuring a witness's testimony for Confrontation Clause purposes, we note that such reliance is extremely disfavored. Because review of a Confrontation Clause challenge is de novo, *Cantu-Ramirez*, 669 F.3d at 631, and often the question of the reasonableness of the Government's efforts is very fact-intensive, *see, e.g.*, *Tirado-Tirado*, 563 F.3d at 124–25; *Calderon-Lopez*, 268 F. App'x at 289; *United States v. Allie*, 978 F.2d 1401, 1403, 1407 (5th Cir. 1992), a combined lack of testimony and/or documentary evidence entered into the record presents great practical difficulties for us as a reviewing court. As it is the Government's burden to establish that a witness is unavailable, *Tirado-Tirado*, 563 F.3d at 123, introduction of the letters and/or subpoenas sent to the witnesses as well as testimony of or an affidavit from the case agent discussing other measures taken is strongly encouraged.

he "could not just leave them" because of their slim chance of escaping the brush undetected. Moreover, when Acosta's testimony is coupled with the facts elicited by the Government that Acosta did not offer the other aliens any water once inside his wife's car (though the record reflects that Acosta did drink some) and that the destination for dropping off the others was Austin (over three hours away) and not a hospital, the only conclusion that could be drawn was that Acosta's transportation was with the intent to further their unlawful presence. Therefore, any error that Acosta asserts is harmless.

III. CONCLUSION

For the foregoing reasons, we AFFIRM.

APPENDIX B

Excerpts from Samuel Acosta's Trial Testimony

A. Well, once my wife was arriving there to the place she took like six hours to get there and they told me that they would insist.

MR. GYIRES: Objection, Your Honor. Hearsay.

10:42 THE COURT: Sustained.

MS. DOUENAT: I'm going to keep going.

THE COURT: I beg your pardon?

MS. DOUENAT: I'm going to keep going with a separate question, Your Honor.

10:42 THE COURT: Go ahead.

Q. (BY MS. DOUENAT) Were you worried about them?

A. Yes.

Q. Why?

A. Because we were not doing well physically.

10:42 Q. Did you talk to your wife about giving them a ride?

MR. GYIRES: Objection. Calls for hearsay.

THE COURT: The question is did he talk to his wife? You may testify if you talked to your wife. Proceed.

A. I told her I was with some people; but I didn't ask her if

10:43 we could take them.

Q. (BY MS. DOUENAT) When your wife arrived what happened?

A. When my wife arrived I felt like I didn't know what to do, whether to leave them there.

Q. Why were you worried about them?

10:43 A. Because we were doing very badly physically. There was a

gentleman that was older and wasn't doing well.

Q. And that's why you agreed to give them a ride?

A. Well, yes, because they insisted for me to please take them.

10:43 Q. And because you felt bad for them?

A. Yes.

Q. You were worried about them?

A. Yes.

MS. DOUENAT: Pass the witness.

10:44 THE COURT: Mr. Stern, do you have any questions of this witness?

CROSS EXAMINATION

Q. (BY MR. STERN) Describe your wife's reaction when the aliens entered her car.

10:44 MR. GYIRES: I would object if it calls for hearsay. I would ask you to admonish he answer only as to her reaction physically.

THE COURT: Mr. Acosta, just describe her physical reaction, not what she said.

10:45 THE WITNESS: She was surprised.

Q. (BY MR. STERN) Did she look frightened?

A. Yes.

Q. Why were you coming back to be with your wife?

MR. GYIRES: Objection, relevance.

10:45 THE COURT: Isn't this what we talked about yesterday

A. Yes.
Q. Was it you?
A. No.
Q. So you signed papers they put in front of you?
A. Yes.
Q. And this is after a seven-day journey?
A. Yes.
Q. Walking day and night?
A. Yes.
Q. Five days without food?
A. Yes.
Q. The reason you did not want to leave those men there --

MR. GYIRES: Objection, leading.

THE COURT: Don't lead.

Q. (BY MS. DOUENAT) What was the reason you didn't want to leave those men there on the street?
A. Because I didn't want something to end up happening to them like them dying or something.

MS. DOUENAT: May I have a moment, Your Honor?

THE COURT: Sure.

MS. DOUENAT: Pass the witness.

THE COURT: Mr. Stern.

RECROSS EXAMINATION

Q. (BY MR. STERN) Sir, you never offered to drive the car, did you?