No. 13-1479

IN THE

Supreme Court of the United States

AMJAD HOSSAIN KHAN,

Petitioner,

v.

NAYEEM MEHTAB CHOWDHURY,

Respondent.

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

BRIEF IN OPPOSITION

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SUMMARY OF THE ARGUMENT

The district court charged the jury on a single claim of torture, supported independently by the Alien Tort Statute, 28 U.S.C. § 1350 (hereafter the "ATS") and the Torture Victim Protection Act, note following 28 U.S.C. § 1350 (hereafter the "TVPA"). The trial court charged the jury on only one theory, as the standard for torture was the same under both statutes. The verdict that the defendant was liable for torture was sustainable independently under either the ATS or the TVPA.

The Second Circuit Court of Appeals correctly upheld the general jury verdict consistent with the rule articulated in *Maryland v. Baldwin*, 112 U.S. 490 (1884). The court found no error in the evidence presented or in the charge delivered and therefore no influence that might taint the jury's verdict. It found that the inapplicability of the ATS had no impact on the jury verdict. It is respectfully submitted that the outcome would be the same upon review by this Court.

There is no meaningful conflict among the circuit courts as to when a new trial is warranted. The difference among the circuit courts is one of semantics only. All of the circuit courts operate under the rule of law established by this Court. A general verdict rendered upon in multiple theories *presented* to the jury will not stand unless the reviewing court can be assured that the jury did not rely on the discredited theory. The courts express this rule in different ways but subject the cases to the same analysis to ensure the integrity of the verdicts.

The issue is neither compelling nor one having wide-spread significance. As the circuit courts carry out the same principle, albeit with differing language, the results are consistent. Those courts espousing the principle of "automatic reversal" nevertheless examine the substance of the theories, evidence and jury charge to determine if the jury might have been improperly influenced. The lack of controversy over this issue demonstrates that it is not a compelling one, requiring the court's attention. There is no need, and no call by the bench, bar or academia, for the Court to take up this question. Furthermore, the issue does not have wide-spread significance. Relatively few cases have been decided at the circuit court level. Most decisions are finally resolved at the district court level.

This case does not serve as an appropriate vehicle for addressing the claimed conflict among the circuit courts. The case is not typical of those in which the circuit courts have addressed the standard for requiring a new trial. Only one theory was presented to the jury. No error in the admission of evidence or the jury charge occurred. In all respects, this case is self-disqualifying as a test of the issue raised by the petitioner.

STATEMENT OF THE CASE

This case arose out of acts of torture, a single cause of action supported by two statutes at the time the suit was commenced. Under the ATS, the federal courts had recognized a common law cause of action for torture. *Filártiga V. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). In enacting the TVPA, Congress codified the right of an individual to sue to recover damages for torture, in derogation of the *Filártiga* decision. The substantive

elements for torture are indistinguishable under *Filártiga* and the TVPA. Following this Court's decision in *Kiobel v. Royal Dutch Petroleum Co., et al.*, 569 U.S. 12 (2013), the Second Circuit determined that the ATS no longer supported the claim in this case. However, it found that the TVPA remained to support the torture claim and that the jury verdict was unaffected.

The petitioner did not raise an objection to the applicability of the ATS in the District Court. He did not object to the jury charge on the issue of torture. The verdict sheet, to which the petitioner did not object, set forth a single torture theory – torture- while requiring separate findings for the liability and damages for each of the two defendants. The case went to the jury solely upon a single, unchallenged definition of torture. As far as the jury was concerned, the charge did not even mention or distinguish between the two statutes.

The jury found both the petitioner KHAN and co-defendant WORLD-WIDE BENGLADESH HOLDINGS (WBH) liable in separate written findings. They found damages of $1.5 million against each defendant. Significantly, the jury drew a distinction between the two defendants on the issue of punitive damages. The jury awarded punitive damages of $250,000.00 against KHAN but not against defendant WBH.

The petitioner did not distinguish between the ATS and the TVPA in its main brief before the Court of Appeals. The petitioner challenged the sufficiency of the evidence on the issue of torture, but did not assert that there was any difference in torture under the ATS as opposed to the TVPA.

Petitioner did not assert any objection to the general verdict based upon the ATS until the parties were directed to file supplemental briefs in 2013. The petitioner asserted then that the verdict should not stand, "because it was impossible to determine whether the verdict was based upon a valid or invalid theory." Letter Brief of Defendants-Appellants dated May 10, 2013. However, the Petitioner failed to articulate any difference in the evidence, the jury charge or the verdict form, and the Second Circuit was sufficiently convinced that the jury verdict was not affected by the inapplicability of the ATS. The Second Circuit held:

> The general verdict rule does not require that the judgment against defendant be vacated with respect to plaintiff's claim under the Torture Victim Protection Act,106 Stat. 73, note following 28 U.S.C. §1350, because, on the facts of this case, the jury necessarily found defendant Khan liable under that statute in returning a general verdict in favor of plaintiff.

Chowdhury v. Worldtel Bangladesh Holding, Ltd., et al., 748 F.3d 42 (2d Cir. 2014).

The Second Circuit found on the facts of this case that the jury necessarily found Khan liable for torture. Judge Cabranes wrote:

> Under the straightforward circumstances of this case, plaintiff's claim brought under the ATS and his claim under the TVPA both stemmed from the same alleged acts of torture, and Khan can point to no circumstances in

> which the jury could have found him liable under the ATS but not the TVPA.

In support of the surviving TVPA claim, Judge Cabranes emphasized that the torture charge was based on the TVPA's careful definition:

> In this case, moreover, the District Court took particular care to instruct the jury on the definition of torture in a manner consistent with the one provided by the TVPA, stating that "[t]he severity requirement is crucial in determining whether conduct is torture" and that "an act must be a deliberate and calculated act of an extremely cruel and inhuman nature specifically intended to inflict excruciating and agonizing physical or mental pain or suffering" in order to constitute torture.9 Joint App'x 213. Accordingly, we find that plaintiff's allegations of being subject to electric shock while detained by the RAB were properly actionable as torture under the TVPA.

Id. at 52.

In her concurrence, Judge Pooler aptly summarized the case as follows:

> First, as our opinion makes clear, in this case the plaintiff has a clear avenue of relief available to him in the form of the TVP A. Maj. Op. at [13-20]. Having pursued this avenue for relief for conduct outside of the United States, Chowdhury has vindicated the interests which

> we first identified in the ATS, namely, to hold accountable a torturer, who "has become like the pirate and slave trader before him hostis humani generis, an enemy of all mankind." *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980).

Id. at 57.

ARGUMENT

I. REVIEW OF THE QUESTION PRESENTED BY PETITIONER WILL NOT ALTER THE OUTCOME OF THE CASE

The Second Circuit's ruling is consistent with that line of cases decided by this Court, beginning with *Maryland v. Baldwin*, 112 U.S. 490 (1884). In cases cited by the Petitioner, the circuit courts determined that a new trial was required due to a material error in either the evidence permitted or the law presented to the jury. In this case, the Second Circuit made a clear and well-supported finding that there was no error in the introduction of evidence or the instruction as to the law. It properly concluded that the jury deliberation was not tainted and that there was no basis for a retrial.

Petitioner cites *Maryland v. Baldwin*, supra, as the source of the jurisprudence which forms the basis of his petition. The Court held in that case that, "where error has been committed in the introduction of evidence or in the charge of the court, the verdict cannot be upheld." The *Baldwin* case does not require automatic reversal. Remand is required only where the trial court has erred

in its presentation of the charge or the improper admission of evidence.

Petitioner also cites *City of Columbia v. Omni Outdoor Adver. Inc.*, 499 U.S. 365, 384 (1991) as stating a basis for automatic new trial. This case shows again that a new trial is not automatic. In *City of Columbia*, this Court held that the district court erroneously charged an exception to antitrust liability, which necessitated setting aside the general verdict. The Court did not set aside the verdict automatically; rather it found that meaningful error in the charge required the case to be retried.

Petitioner also cites *Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19, 29-30 (1962) in support of the principle of automatic reversal. However, in the *Sunkist Growers, Inc.* case, the trial court charged on two alternative theories of conspiracy liability, one of which was later determined to be incorrect. This court set aside the verdict, finding that the jury verdict might have been predicated on the invalid theory.

In *United N.Y. & N.J. Sandy Hook Pilots Ass'n v. Halecki*, 358 U.S. 613, 619 (1959), the Court ordered a new trial in a wrongful death case brought against the owners of a vessel. The Court found that due to an erroneous charge of the doctrine of unseaworthiness owners, because it was impossible to determine if the improper charge was influenced by the jury. This error was material, as it presented a theory of liability to the jury that was not valid but might have been considered by the jury as the basis for its verdict.

Finally, in *Exxon v. Baker*, 554 U.S. 471 (2008), a general verdict was set aside where an error in the trial court's instruction made it impossible to tell if the jury was awarding punitive damages for a permissible or impermissible reason.

Petitioner contends that these decisions stand for the principle that a new trial is to be granted automatically in the instance of a general verdict where there are multiple underlying claims. However, the cases stand for the different proposition that a new trial is necessary where there was an error from which it is impossible for the court to determine if the jury was influenced thereby. Whether the error cited was an erroneous charge (*City of Columbia, United N.Y.*) or alternative and inconsistent theories, one of which was impermissible (*Sunkist Growers, Exxon v. Baker*), a new trial was necessitated due to error with respect to the evidence or the jury charge that may have been prejudicial.

If there is no error in the evidence or in the charge, and a single theory of liability, there is no reason to retry a case. Petitioner cites as error that WBH would not be named in a new trial, and this fact alone automatically requires a new trial. This argument does not meet the requirements of *Maryland v. Baldwin.* No evidence presented at the trial would have been excluded. The jury charge would not be substantively different. The charge would not vary in the elements of torture or the permissible defenses. The evidence and law would be the same.

The verdict form required the jury to render separate findings on liability, compensatory damages

and punitive damages for each of the two defendants. The jury found both liable for compensatory damages of $1.5 million. Instructively, the jury held only the individual defendant liable for punitive damages, evincing the jury's understanding that the individual and the corporation were not the same. The Second Court was assured from the specifics of the verdict form that the jury was able to distinguish between the petitioner, an individual, and WBH, the corporate defendant.

Vasquez v. Hillery, 474 U.S. 254 (1986) and *United States v. Gonzalez-Lopez*, 548 U.S. 140, 145 (2006) are not applicable to this argument. In *Vasquez*, the Court overturned a conviction on a petition for a writ of habeas corpus, where the indictment was handed down by a grand jury, the composition of which was racially discriminatory. The Court described the intentional discrimination in the judicial process a "fundamental flaw." Justice Marshall wrote, Like [other cited] fundamental flaws, which never have been thought harmless, discrimination in the grand jury undermines the structural integrity of the criminal tribunal itself, and is not amenable to harmless-error review." *Vasquez v Hillery*, *id*. at 263-64.

The *Gonzalez-Lopez* case arose out of a criminal prosecution in which the defendant argued that his Sixth Amendment right had been violated fundamentally because he was deprived his choice of hired counsel. The Court ruled that this violation was a structural error, which tainted all of the proceedings and warranted a reversal without the harmless error analysis that would have been employed if the issue had been ineffectiveness of counsel. "[Structural defects] defy analysis by `harmless-error' standards because they "affec[t] the framework

within which the trial proceeds,' and are not 'simply an error in the trial process itself.' " *United States v Gonzalez-Lopez*, *id*, at 148 (citing *Arizona v. Fulminante,* 499 U.S. 279 (1991)). *Gonzalez-Lopez* does not stand for the principle that a new trial must be granted where trial errors are impossible to ascertain. Rather, it says that a structural error affects the trial process as a whole, requiring reversal. *Arizona v. Fulminante,* 499 U.S. 279 (1991). The court reversed the jury verdict in those cases not because harmless error was impossible to ascertain; but rather, it was beside the point. The analysis in *Vasquez* and *Gonzalez-Lopez* is inapplicable to civil cases, because no constitutional structural defect issue is present in the civil cases under discussion.

The circuit courts' divergent expressions of the principle do not reflect a difference in application. The courts consistently adhere to the standard established under the precedents of the Supreme Court. Furthermore, cases in which this principle is addressed are fact-bound by their nature. Irrespective of language, each court seeks to determine the integrity of the jury verdict. The reviewing court evaluates the case on its facts determines if it is sufficiently convinced that error in the trial did not improperly influence the jury in its deliberations. In practice, all of the courts seek to determine whether or not an error in the evidence presented or the charge delivered was tainted by an error that casts doubt upon the reliability of the verdict.

In *Loesel v. City of Frankenmuth,* 692 F.2d 452 (6th Cir. 2012), the retrial was ordered where one of two theories for violation of the plaintiff's equal rights was found to be factually insufficient. A new trial was

required. The court could not conclude that the jury based its decision on the remaining theory as opposed to the factually insufficient one. The same conclusion is reached by applying the Second Circuit's expression of the rule. The Second Circuit would have considered whether it was sufficiently convinced that the jury verdict was not improperly influenced.

In *Friedman & Friedman, Ltd. v. Tim McCandless, Inc.*, 606 F.3d 494 (8th Cir. 2010), a jury verdict was set aside where the verdict form did not differentiate damages for a breach of contract claim from a fraud claim after the jury had been instructed as to the measure of damages being different. The fraud claim was thrown out, and the damages finding fell as well because the verdict sheet was not clear as to whether the damages award was based upon the sustained breach of contract claim or the rejected fraud claim. The ordering of the new trial was not automatic. The court first analyzed whether the error in composition of the verdict sheet made it impossible for the court to conclude that the jury applied the correct measure of damages.

The Eighth Circuit upheld a jury verdict where one claim was invalid but the jury form provided for separate liability verdicts. *Ondrisek v. Hoffman,* 698 F.3d1020, 1026 (8th Cir. 2012). In that case, the court was confident to conclude that the submission of the invalid claim to the jury did not influence its verdict, as manifested by the verdict. The court did not automatically reverse where there was an invalid claim, as long as it was not concerned that the invalid claim influenced the verdict.

Three distinct theories of liability were raised in the case of *Maccabees Mut. Life Ins. Co. v Morton*, 941 F2d 1181 (11th Cir. 1991), three theories were introduced to the jury; the court found that the submission of one of these was improper. The Eleventh Circuit held that, because one of the three theories was improperly presented to the jury, the case had to be retried with only the two remaining theories submitted for deliberation. The elimination of the invalid cause of action by necessity required the court to conclude that it did not have sufficient certainty that the jury's verdict was not influenced by the submission of the invalid theory. Because each theory required different proof, the court could not conclude that the striking of one theory did not affect the jury's deliberation on the other theories. The result would be the same under the Second Circuit's expression of the issue.

In the D.C. Circuit case, *N. Am. Graphite Corp. v. Allan*, 184 F.2d 387, 389 (D.C. Cir. 1950), the court set aside a jury verdict on a case brought in contract and in quasi contract. The court held that, with the general verdict, the prevailing party had to demonstrate that it prevailed under both theories. The court then analyzed the contract claim, found it to be supportable in favor of the plaintiff and thereafter sustained the verdict.

Each circuit court has addressed the harmless error rule using its own linguistic approach, but the analysis is the same. Whether the court must be "absolutely certain" or "reasonably certain"; whether the court places the burden upon the losing party to prove the absence of error; or whether the court applies a four-pronged test enumerating the factors considered by the other courts to reach their conclusion, there is no meaningful conflict in the operation of the law.

II. THE ISSUE PRESENTED IS NOT COMPELLING OR ONE OF WIDESPREAD SIGNIFICANCE

The difference among the circuit courts is one of semantics, not of substance. The cases decided by the circuit courts have reached appropriate results, irrespective of differing terminology. This difference in semantics has not caused a misunderstanding on the part of litigants or unjust results; all of the circuit courts consider the impact of the error upon the jury verdict. There is no compelling reason for the Court to review this issue at this time. There is no necessity for this Court to address the issue at all. A circuit court must examine the specific elements of each case, so that a restatement of the rule to unify the disparate language will have no meaningful impact.

The small number of cases in which the court must address the harmless error is prevents this issue from being one of widespread significance. There are few instances in which the reversal of a general verdict on multiple claims is controversial. Most such motions are resolved in the district court. The resources of this court need not be devoted to addressing this issue, one having little substantive or practical significance. Even if this Court were to review the body of law and formulate a unitary statement of practice, such a rule by necessity must be broad and flexible enough to enable the reviewing court to address the various kinds of cases and errors in reaching a just result.

The majority of the circuit courts, including the Second Circuit, employ the harmless error language in addressing the issue. The Second Circuit's determination here falls

squarely within the consensus of analysis employed by the circuit courts. The minority of the circuit courts has failed to adopt the harmless error language. Nevertheless, those courts utilize the same analytic approach in deciding the cases. In such circuit courts, a reversal will not be automatic where, for example, the trial court's use of a verdict sheet with written findings elucidates the jury's thinking so that the court may conclude that the jury was not unduly influenced. See *Ondrisek v. Hoffman,* supra.

The *Maryland v. Baldwin* decision continues to guide the circuit courts. If extraneous matter – evidence, theory, or jury charge - was improperly introduced to the jury, the court must determine whether, on the facts of the case, the material improperly presented might have influenced the jury's general verdict.

CONCLUSION

The Court should not grant certiorari in this case. The case was correctly decided by the reviewing court, and the outcome would not be changed upon review. The issue petitioner seeks to review is not presented by this case, making it an inappropriate subject for review of the jurisprudence. The jurisprudence of granting a new trial is not in need of review at the Supreme Court level, as the divergence among the circuit courts is rhetorical, not substantive.

Respectfully submitted,

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