No. 13-254

IN THE

Supreme Court of the United States

DAVID ANTHONY RUNYON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF

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INTRODUCTION

The government's opposition relies primarily on the assertion that this Court's opinion in *Neder v. United States*, 527 U.S. 1 (1999) has already answered the first question presented and that the lower courts have consistently understood and applied *Neder* in harmless error cases ever since. In fact, *Neder* did no such thing; the lower courts remain sharply divided and the government's opposition omits discussion of opinions from a number of courts that demonstrate this split.

Moreover, and contrary to the government's assertion, this case presents a prime vehicle for resolving this conflict, as the record contains ample evidence to demonstrate how application of a different harmless error test would necessarily have yielded a different result.

Finally, the government's opposition attempts to reduce the division among courts of appeals on the standard for cumulative error to a matter of semantics. In fact, however, it is the Fourth Circuit's application of that standard, and not just its description of it, that departs so dramatically from the practice of the other circuits and what the Federal Death Penalty Act ("FDPA") requires.

ARGUMENT

1. a. The government contends that there is no tension between *Neder* and *Sullivan v. Louisiana*, 508 U.S. 275 (1993) and that *Neder* held that harmless error review required a "hypothetical jury" approach. In doing so, the government misreads *Neder*. The issue in *Neder* was *whether* the harmless error rule applied to a failure

to instruct a jury on an element of the offense – not *how* the rule should be applied. 527 U.S. at 4. Thus, while the Court did describe the harmless error inquiry as a question of whether it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error," *id.* at 18, *Neder* did not present, and the Court did not decide, whether the proper test was whether a hypothetical, rational jury would have been affected or whether the actual jury that heard the case was in fact affected by the error. Indeed, in *Neder*, the answer would have been the same under either standard as the defendant did not even contest the element as to which the Court failed to instruct. *Id.* at 16-17. Moreover, *Neder* itself described the harmless error test differently when it spoke of the test's application to a case where the omitted element was contested:

> Of course, safeguarding the jury guarantee will often require that a reviewing court conduct a thorough examination of the record. If, at the end of that examination, the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error – for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding – it should not find the error harmless.

Id. at 19.

b. Nor did *Yates v. Evatt*, 500 U.S. 391 (1991), a pre-*Sullivan* decision, answer the question as to whether harmless error review turns on an objective, hypothetical jury approach or a subjective, "actual jury"

approach. In an attempt to put more weight on *Yates* than it will carry, the government refers to the Court's observation that harmless error review does not require "a subjective enquiry into the jurors' mind," 500 U.S. at 404, and suggests (by inserting the word "actual" in brackets before "jurors") that *Yates*, therefore, held that an objective analysis was required. Brief for the United States in Opposition to Petition for a Writ of Certiorari ("Resp. Br.") at 19. In fact, *Yates* held nothing of the sort – as in *Neder*, the question was not presented. Instead, the quoted language merely reflects the practical reality that a reviewing court may often lack direct evidence of jurors' thought processes. But the fact that such evidence may sometimes be unavailable does not mean that a reviewing court should ignore it when it is. Indeed, *Yates* reaffirmed that "the issue under *Chapman* is whether the jury actually rested its verdict on evidence establishing the presumed fact beyond a reasonable doubt, independently of the [improper] presumption." 500 U.S. at 404 (referencing *Chapman v. California*, 386 U.S. 18 (1967)).

In cases where there is no record evidence bearing on the actual jury's evaluation of the evidence (as was apparently the case in *Yates*), the review process under the hypothetical jury and actual jury approaches will be largely the same. However, where there is such evidence (as in the case of the split verdict here), a reviewing court can and should consider that evidence in order to determine whether the government has established beyond a reasonable doubt that the error did not contribute to the verdict actually obtained. Such evaluation of record evidence of jury deliberations in the course of harmless error analysis is hardly a novel

concept. To the contrary, reviewing courts readily and routinely consider such evidence. *See, e.g., Bollenbach v. United States*, 326 U.S. 607, 611-14 (1946) (considering jury notes and length of deliberations in assessing effect of error); *United States v. Leal-Del Carmen*, 697 F.3d 964, 975-76 (9th Cir. 2012) (holding errors not harmless where length of deliberations and split verdict indicate close case); *United States v. Ofray-Campos*, 534 F.3d 1, 24-25 (1st Cir. 2008) (considering content of jury note and timing of deliberations in assessing harmlessness of error); *United States v. Varoudakis*, 233 F.3d 113, 126-27 (1st Cir. 2000) (finding that the length of deliberations and mid-deliberation jury note indicating an impasse support conclusion that improperly admitted evidence was not harmless); *United States v. Price*, 298 F. App'x 931, 940 (11th Cir. 2008) (holding that the jury's request to review improperly admitted evidence indicates that admission of such evidence was not harmless); *Ferensic v. Birkett*, 501 F.3d 469, 483-84 (6th Cir. 2007) (finding erroneous exclusion of expert testimony not harmless in part because of jury note reflecting difficulty in reaching a verdict).

c. The government is also incorrect in its assertion that, post-*Neder*, the lower courts are in agreement over the applicable harmless error standard. Thus, while the government contends that the courts of appeals uniformly "utilize an objective inquiry based on the reviewing court's assessment of the error's effect on a rational jury," Resp. Br. at 25, a number of the courts of appeals continue to apply *Sullivan's* actual jury approach to harmless error analysis. *See, e.g., Wilson v. Mitchell*, 498 F.3d 491, 503-04 (6th Cir. 2007) (quoting *Sullivan* as support for proposition that "Harmless-Error Review Looks to Actual, Not Hypothetical, Impact"); *Ofray-Campos*, 534 F.3d at 22

("the harmless error inquiry is 'not whether, in a trial that occurred without the error, a guilty verdict surely would have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error'") (quoting *Sullivan*, 508 U.S. at 279) (emphasis in original); *United States v. Arias*, 404 F. App'x 554, 557 (2d Cir. 2011) (same); *United States v. Korey*, 472 F.3d 89, 97 (3d Cir. 2007) (advocating *Sullivan*'s "actually rendered" harmlessness inquiry). Indeed, in making its sweeping statement, the government fails to address several of the post-*Neder* cases cited in the Petition that followed the actual jury approach. *See* Pet. at 23-24 (citing *Varoudakis*, 233 F.3d at 125-26; *Gov't of the V.I. v. Martinez*, 620 F.3d 321, 337 (3d Cir. 2010); and *Wray v. Johnson*, 202 F.3d 515, 526 (2d Cir. 2000)).[1]

d. The government also misses the mark in its assertion that this case presents a poor vehicle for resolution of the harmless-error question presented.

First, the difference in standards is outcome determinative. Here, the record contains evidence of the actual jury's findings, including the split verdict and mitigating factors, as well as deliberations that lasted more than a full day, Pet. at 12, evidence which the Court of Appeals ignored in conducting its hypothetical jury analysis but which would require reversal under an actual jury approach. The government attempts to neutralize

1. In addition, and as noted in the Petition and not contested by the government, at least two state courts of last resort apply the actual jury approach. *See* Pet. at 24 (citing *Rigterink v. State*, 2 So. 3d 221, 255-56 (Fla. 2009), *vacated on other grounds*, 559 U.S. 965 (2010) and *State v. Alvarez-Lopez*, 98 P.3d 699, 709-10 (N.M. 2004)).

the significance of the split verdict by offering a "rational explanation" for the jury's different recommendations. Resp. Br. at 18-19 n.2. In particular, the government suggests that the jury may have believed that a different penalty was appropriate for the carjacking count because, at the guilt phase, "the district court instructed the jury that the carjacking count did not require proof that petitioner 'actually intended' to harm Voss as part of the offense." *Id.* But although the jury may not have been required to conclude that Petitioner actually intended to harm Voss in order to find Petitioner guilty on this count, the jury did so conclude. At the eligibility phase, the jury was required to make a threshold determination of Petitioner's intent with respect to each count. And, on the carjacking count, the jury specifically found that Petitioner "intentionally killed" Voss, C.A. App. at 330, precisely the same finding as it made on each of the other counts. *Id.* at 329, 331. In any event, the conduct underlying all three counts was identical, and the arguments for and against the death penalty did not distinguish among them. *Id.* at 2324-3180. It therefore strains credulity to suggest that the nature of the carjacking offense itself explains the difference. But, even if it did, that distinction would only highlight the deficiency of the Court of Appeals' harmless error analysis, for if the scales were so lightly balanced in favor of death that a mere change in the underlying offense could tilt them in favor of life, the court's conclusion that exclusion of wrongfully admitted evidence could not likewise have made a difference is indefensible. *See Leal-Del Carmen*, 697 F.3d at 975-76 (error not harmless in light of deliberations of comparable length to those here and of split verdict).[2]

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2. Significantly, the government did not present its current rationalization of the split verdict in its argument to the Court of

Second, the government is mistaken in claiming that the erroneous admission of the videotape should be subject to plain error review. As the government concedes and as the Court of Appeals noted, Petitioner did object at trial to the admission of the entire videotape, Pet. App. at 22a, 30a, and the Court of Appeals, although noting a dispute over the standard of review,[3] applied harmless error review. *Id.* at 31a. Thus, the Court of Appeals' application of the harmless error standard is presented on a fully developed record for this Court to review.

Third, the Petition seeks review of a direct appeal of a federal capital sentencing. Thus, in addition to the institutional benefits to the criminal justice system that would result from resolution of the question presented, further review is also necessary to ensure that the erroneous inclusion of evidence appealing to ethnic and religious biases has not in fact contributed to the jury's decision to impose a sentence of death. *See Parker v. Dugger*, 498 U.S. 308, 321 (1991) (noting "the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally" and reversing denial of habeas relief due to state supreme court's failure to consider effect of mitigating evidence

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Appeals and there is no indication from the Court's opinion that it considered this explanation in conducting its harmless error analysis.

3. In fact, the government argued below only that plain error applied to Petitioner's claims of errors in summation. Brief of the United States at 20, *United States v. Runyon*, No. 09-11 (4th Cir. Sept. 11, 2012), ECF No. 80. The government did not dispute Petitioner's contention that harmless error review applied to the evidentiary issue concerning the videotape. *Id.* at 20, 28-29.

and split verdict in assessing significance of improperly applied aggravating factors in trial court's decision to impose death sentence).

2. a. The government's response to the second question presented (the proper standard of review for cumulative error) begins by mistakenly suggesting that the Court of Appeals' "fundamental fairness" test was appropriate because Petitioner's brief on appeal itself invoked fundamental fairness. Resp. Br. at 27-28. Petitioner did argue that the cumulative effect of the errors violated the due process clause's guarantee of fundamental fairness, but the government neglects to note that Petitioner also expressly cited *Chapman*, 386 U.S. at 24, and stated, "The standard of review is whether the cumulative effect of the District Court's errors is harmless beyond a reasonable doubt." Opening Brief on Behalf of David Anthony Runyon at 92, *United States v. Runyon*, No. 09-11 (4th Cir. Feb. 29, 2012), ECF No. 68; *see also id.* at 93 (citing FDPA's harmless error provision).

b. The government also argues that a test of whether errors violate "fundamental fairness" is not "materially different" from a test of whether the cumulative effect of the errors is harmless. Resp. Br. at 28-29. However, even a cursory review of the opinion below demonstrates that the "fundamental fairness" test applied by the Court of Appeals in this case bears no resemblance to any harmless error standard ever endorsed by this Court or any other court of appeals. The Fourth Circuit's analysis in this case focused on the procedural rights that Petitioner enjoyed, including the ability to confront witnesses, rebut evidence and introduce mitigating evidence, Pet. App. at 86a, all of which led the Court to note, "Tellingly, none of

his claims concern his basic ability to present his case to the jury in an effective manner." *Id.* at 85a-86a. Having satisfied itself that Petitioner's trial was procedurally fair, the Court of Appeals finished its analysis with what resembles a sufficiency of the evidence test more than a harmless error analysis. Specifically, the Court concluded by noting "that the jury had a strong evidentiary basis for unanimously finding numerous aggravating factors beyond a reasonable doubt," *id.* at 87a, and that "[t]he jury was justified in concluding that these aggravators sufficiently outweighed the mitigators established by the defense." *Id.*

c. Whatever label one attaches to such a cumulative error analysis, there is no question that this standard is in fact materially different from the method employed in other circuits. *See, e.g.*, *United States v. Meises*, 645 F.3d 5, 23 (1st Cir. 2011) ("The inquiry to determine whether cumulative errors are harmless is the same as for individual error . . . ."); *Jackson v. Martin*, No. 13-6240, 2014 WL 3466720, at *4 (10th Cir. July 16, 2014) ("cumulative-error analysis aggregates all constitutional errors found to be harmless and analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless").

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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