No. 05-793

In the Supreme Court of the United States

JUAN MIGUEL GONZALEZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals incorrectly placed the burden on petitioner to demonstrate prejudice from preserved claims of evidentiary error.

2. Whether the court of appeals, in reviewing petitioner's claims of evidentiary error, erred in applying the harmless error standard of *Kotteakos* v. *United States*, 328 U.S. 750, 776 (1946), under which error is harmless unless it had a "substantial and injurious effect" on the jury's verdict, rather than the "harmless beyond a reasonable doubt" standard articulated in *Chapman* v. *California*, 386 U.S. 18 (1967).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is not published in the *Federal Reporter*, but the decision is available at 140 Fed. Appx. 170.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 2005. A petition for rehearing was denied on September 14, 2005 (Pet. App. 16a-17a). The petition for a writ of certiorari was filed on December 13, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of possessing at least five kilograms of

cocaine with intent to distribute it, in violation of 21 U.S.C. 841, and of conspiring to import at least five kilograms of cocaine, in violation of 21 U.S.C. 963. 7/9/03 Indictment 1-3. He was sentenced to 360 months of imprisonment, to be followed by five years of supervised release. The court of appeals affirmed the conspiracy-to-import conviction, vacated the possession conviction, and remanded for further proceedings. Pet. App. 1a-15a.

1. On September 19, 2000, a grand jury in the Southern District of Florida returned a five-count superseding indictment charging petitioner and several co-defendants with federal narcotics violations. Pet. 5. After three mistrials, the case was retried on a redacted version of the superseding indictment that charged petitioner and co-defendants Juan Gonzalez (Tito)[1] and Oscar Gomez with conspiring to possess at least five kilograms of cocaine, in violation of 21 U.S.C. 846, during the period from February 1998 to April 1999 (Count I); and possessing at least five kilograms of cocaine with intent to distribute it, in violation of 21 U.S.C. 841, during October and November 1998 (Count II). Petitioner and Tito were also charged in a third count with conspiring to import at least five kilograms of cocaine, in violation of 21 U.S.C. 963, in March 1999 (Count III). Corrected Gov't C.A. Br. 2; Redacted Indictment 1-5. The jury found petitioner guilty on Counts II and III but acquitted him on Count I. Tito and Oscar Gomez were acquitted on all counts. Pet. App. 2a n.2.

According to the government's evidence, petitioner imported cocaine from Colombia via Ecuador and sold it to Miami customers, including Luis Perez. Perez then

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[1] Petitioner and Tito are not related. See Pet. App. 2a n.1.

sold the cocaine to his own customers, including Gomez and Enrique Bover. The government's case depended largely on Perez's testimony, particularly for the possession count. Petitioner's defense was that Perez implicated him to protect the true cocaine supplier, Jorge Luis Vasquez. Pet. App. 2a-3a.

Perez testified that, in September, October, and November 1998, he made three purchases of multi-kilogram quantities of cocaine from petitioner, with Tito serving as an intermediary. According to Perez, petitioner and Tito told him that petitioner obtained his cocaine from Colombian suppliers and that the cocaine purchased by Perez would arrive by ship in containers. Perez testified that he picked up the cocaine from petitioner's garage on the first two occasions, and from Tito's garage on the third. Perez then sold the cocaine to his customers, including Gomez, Bover, and Bover's brother-in-law, Orlando Garcia. In November 1998, Garcia and Bover were arrested. DEA agents searched Garcia's house and found empty cocaine wrappers with the notation "357" written on them. Garcia testified that Perez was his only supplier of cocaine in late 1998. In January 1998, Perez was arrested. Pet. App. 3a-4a.

The government also presented evidence establishing that, on March 12, 1999, a U.S. Customs officer searching a ship at Port Everglades, Florida, found pallets of floor tiles and 1500 pounds of cocaine spilling out of a broken 40-foot container. The cocaine packages had been concealed under a false bottom and bore the same handwritten "357" marking as the packages found in Garcia's garage. The container was consigned to Yalorde Tile Company, a Miami business owned by petitioner. The evidence established that in February 1999, Yalorde Tile had ordered several containers of tile from an Ecua-

dorian tile supplier. Yalorde's representative in Ecuador hired a person who picked up two of the containers on February 17, 1999, loaded them, and returned them to the port two days later. One of the two containers was swapped for the false-bottomed container that was later discovered in Florida filled with cocaine. Pet. App. 5a-6a.

The defense attempted to establish through cross-examination of Perez that Perez was attempting to protect Vasquez. Perez admitted that Vasquez was the godfather to his son and that he maintained a close relationship with Vasquez; that Vasquez communicated often with Perez during October and November 1998; and that Perez bought thousands of dollars of furniture for Vasquez during that time. After Perez denied that he had told anyone that Vasquez was the true supplier of the cocaine, the defense presented the testimony of two convicted felons who claimed that Perez had told them while the three were incarcerated that Vasquez was his source. On redirect, Perez again denied that he had engaged in drug trafficking with Vasquez. Pet. App. 4a.

In presenting its own case, the defense sought to have Bover testify that Vasquez had supplied cocaine to Perez in 1994 and 1995, before the charged conduct. The district court excluded that testimony on the grounds that it was too remote in time and that impeachment of Perez could not be accomplished by extrinsic evidence. The court also excluded freight invoices that would have established that Vasquez had arranged for the importation of several containers of produce from Ecuador to South Florida in late 1997, and cellular telephone records showing that Vasquez had called Perez and other persons in South America during the same time frame. Petitioner sought admission of the invoices

and the telephone records in an effort to establish that Vasquez had the ability and experience to import cocaine in containers from Ecuador. The district court concluded that the invoices and telephone records were inadmissible because the defense did not have similar evidence for 1998 or 1999. Pet. App. 5a, 12a-13a.[2]

2. On appeal, petitioner claimed that the district court abused its discretion under the Federal Rules of Evidence and denied him a fair trial by excluding Bover's testimony, the Vasquez invoices and telephone records, certain recorded statements of Perez, and an Ecuadorian police report. Pet. C.A. Br. 22-42.

In an unpublished opinion, the court of appeals affirmed the conspiracy-to-import conviction, vacated the possession conviction, and remanded for further proceedings. Pet. App. 1a-15a. The court stated that, to prevail on his claims, petitioner was required to establish that: (1) "his claim was adequately preserved or that the ruling constituted plain error"; (2) "the district court abused its discretion in interpreting or applying an evidentiary rule"; and (3) the "error affected . . . a substantial right." *Id.* at 7a-8a (quoting *United States* v. *Stephens*, 365 F.3d 967, 974 (11th Cir. 2004)). After finding that petitioner had adequately preserved his evidentiary claims for appeal, the court of appeals concluded that the district court had abused its discretion by excluding Bover's testimony. *Id.* at 9a-10a. The court of appeals explained that Bover's testimony was relevant under Federal Rule of Evidence 401 to estab-

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[2] For similar reasons, the court also excluded evidence offered by the government that, in March 2000, petitioner and Tito had been arrested in Spain for possible narcotics violations in connection with a scheme to import paint drums into Madrid. Corrected Gov't C.A. Br. 28.

lish "that Perez had a motive to protect Vasquez" and that the testimony could "tend[] to show that it was more likely that Vasquez may have supplied drugs to Perez in late 1998," and that the testimony also could have been used under Rule 608(b) to impeach Perez's claim "that he had not trafficked drugs with Vasquez." *Id.* at 10a-11a. With respect to the 1997 Vasquez invoices and telephone records, the court of appeals concluded that the district court had abused its discretion by excluding that evidence, because the evidence "makes it at least slightly more probable that Vasquez had the means to engage in a cocaine importation scheme strikingly similar to the charged offenses." *Id.* at 11a-12a.

Turning to the question of prejudice, the court of appeals concluded (Pet. App. 13a-15a) that the district court's errors affected petitioner's substantial rights with respect to the possession count but not the conspiracy-to-import count. The evidence on the possession charge, the court explained, was "not overwhelming," as "[Perez's] testimony provided the only actual link between [petitioner] and the drugs." *Id.* at 13a. Thus, "[e]vidence about Perez's motive to protect Vasquez, as well as evidence suggesting that Vasquez could have had the experience and knowledge to import the cocaine in a manner similar to the charged conduct, could have been 'quite probative to the jury.'" *Id.* at 13a-14a (quoting *Stephens*, 365 F.3d at 980). Under the circumstances, the court concluded that the exclusion of that evidence "'was more likely than not a substantial factor' in [petitioner's] conviction for possessing cocaine with intent to distribute [it]." *Id.* at 14a (quoting *Stephens*, 365 F.3d at 980).

In contrast, the court concluded that the excluded Bover testimony was not "particularly relevant" to the

March 1999 container importation that was the basis for the conspiracy-to-import count, and that several other "undisputed facts" corroborated the government's theory on that charge. Pet. App. 14a & n.8. Those facts included that "the container filled with cocaine was consigned to [petitioner's] company, Yalorde Tile," and "Yalorde's representative in Ecuador hired one company to load some containers and another person to load others, even though the containers were being filled with products from the same company." *Id.* at 14a. In light of the additional evidence, the court was not "'left in grave doubt' that 'the error itself had substantial influence' on the jury's verdict" on the conspiracy count. *Id.* at 15a (quoting *Stephens*, 365 F.3d at 977).[3]

Petitioner filed a rehearing petition in which he claimed that the panel erred by placing the burden on him to establish prejudice from evidentiary errors to which he objected at trial, and by failing to apply the "harmless beyond a reasonable doubt" standard of *Chapman* v. *California*, 386 U.S. 18 (1967). Pet. for Reh'g 5-15. The court of appeals denied the petition for rehearing. Pet. App. 16a-17a.

ARGUMENT

1. Petitioner argues (Pet. 9-13) that the court of appeals erred by placing the burden on him to demonstrate prejudice from the district court's evidentiary errors. Although the court of appeals incorrectly stated that petitioner was required to establish that errors to which

[3] The court of appeals also rejected petitioner's challenges to the exclusion of Perez's recorded statements and the Ecuadorian police report, and did not reach his claim that the district court had misapplied the Sentencing Guidelines. Pet. App. 6a n.5, 15a. Petitioner does not press those claims before this Court.

he objected in the district court affected his substantial rights, further review is not warranted because the court of appeals' unpublished decision sets no precedent and it is plain that the court's misstatement had no impact on the decision.

The harmless-error rule, Federal Rule of Criminal Procedure 52(a), provides that "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." As petitioner notes (Pet. 9), this Court has repeatedly recognized that, on direct appeal from a conviction, Rule 52(a) places the burden on the government to establish that an error to which the defendant adequately objected in the trial court did not affect the defendant's substantial rights. In *United States* v. *Olano*, 507 U.S. 725 (1993), the Court addressed the interplay between Rule 52(a) and the plain-error rule, Rule 52(b), which provides that "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention." The Court concluded that under both Rule 52(a) and Rule 52(b), an effect on "substantial rights" means that the error "must have been prejudicial," which in turn means that it "must have affected the outcome of the district court proceedings." *Id.* at 734. The Court noted, however, "one important difference" between the harmless-error and plain-error rules: under the plain-error rule, "[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *Ibid.* The Court explained that "[t]his burden shifting is dictated by a subtle but important difference in language between the two parts of Rule 52: While Rule 52(a) precludes error correction only if the error 'does *not* affect substantial rights'" (emphasis added), Rule 52(b) authorizes no remedy unless the er-

ror *does* "affec[t] substantial rights." *Id.* at 735 (brackets in original) (quoting Rule 52).

The Court has cited *Olano* several times for the proposition that, on direct appeal from a conviction, Rule 52(a) requires the government to show the absence of prejudice with respect to errors to which the defendant adequately objected. See, *e.g.*, *United States* v. *Dominguez Benitez*, 542 U.S. 74, 82 n.8 (2004); *United States* v. *Vonn*, 535 U.S. 55, 62 (2002); *O'Neal* v. *McAninch*, 513 U.S. 432, 438 (1995); see also *Kotteakos* v. *United States*, 328 U.S. 750, 765 (1946) (interpreting harmless-error statute containing language similar to Rule 52(a), and holding that the "conviction cannot stand" if an error "had substantial influence" on the verdict *or* "if one is left in grave doubt" as to whether it had such influence); *United States* v. *Lane*, 474 U.S. 438, 449 (1986) (citing *Kotteakos* as providing appropriate inquiry under Rule 52(a) for assessing harmlessness of misjoinder and quoting "grave doubt" language).

In light of the foregoing, the court of appeals was incorrect in stating that petitioner must "establish that the [district court's evidentiary] error[s] affected a substantial right." Pet. App. 8a. Rather, because the court of appeals concluded that petitioner had adequately raised the errors at trial (*id.* at 9a n.6), the government had the burden of establishing that the errors did not affect his substantial rights. Nevertheless, it is clear that the court's misstatement had no effect on the outcome of petitioner's appeal.

In *O'Neal* v. *McAninch*, *supra*, this Court discussed the common law harmless-error rule, under which the party benefitting from an error was required to demonstrate the absence of injury from the error. The Court held that in the "unusual" circumstance in which record

review leaves a court in grave doubt as to whether an error affects substantial rights, the court should grant relief. 513 U.S. at 435, 445. The Court emphasized that the question of which party bears the burden with respect to prejudice is normally not outcome-determinative in harmless-error analysis because the reviewing court will generally be able to ascertain, based on its own review of the record, whether the error substantially influenced the jury's verdict. *Id.* at 435-437. The Court explained that the burden is dispositive only in the "special circumstance" in which the court, after reviewing the record, is left with "grave doubt about the likely effect of an error on the jury's verdict"—that is, "in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error." *Id.* at 435; see *id.* at 436-437.

The court of appeals' opinion makes clear that this case does not present such a "special circumstance." The court concluded, based on its review of the record, that the erroneous exclusion of evidence "'was more likely than not a substantial factor' in [petitioner's] conviction for possessing cocaine with the intent to distribute [it]," but that the errors did not contribute to the jury's verdict on the conspiracy-to-import count, which was supported by substantial, undisputed evidence independent of Perez's testimony. Pet. App. 14a-15a (quoting *Stephens*, 365 F.3d at 980). The court expressly noted that it was "not 'left in grave doubt' that 'the error[s] [themselves] had substantial influence' on the jury's verdict" on the conspiracy-to-import count. *Id.* at 15a (quoting *Stephens*, 365 F.3d at 977). Accordingly, the court of appeals' misstatement on the burden of persuasion had no impact on its conclusion that the error was harmless.

Petitioner is mistaken in asserting that this Court's intervention is needed because of "conflicting decisions" on the burden issue within and among the courts of appeals. Pet. 11. As petitioner appears to acknowledge, the Eleventh Circuit and "all other circuits" generally have "correctly saddled the government with the burden of persuading that a preserved trial error was harmless." Pet. 10-11 (citing cases); see *United States* v. *Magluta*, 418 F.3d 1166, 1180 (11th Cir. 2005); *United States* v. *Monroe*, 353 F.3d 1346, 1352 (11th Cir. 2003); *United States* v. *Fern*, 155 F.3d 1318 (11th Cir. 1998). Although petitioner has identified certain decisions that incorrectly state that the burden of demonstrating prejudice rests with the party asserting the error, petitioner has not demonstrated that those courts in fact intended to shift the burden rather than merely made a misstatement. The misstatements in those cases, in any event, did not affect the outcome.[4]

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[4] In a number of decisions cited by petitioner, the court of appeals misstated the burden but found no evidentiary error. See *United States* v. *Breitweiser*, 357 F.3d 1249, 1254 (11th Cir.), cert. denied, 541 U.S. 1091 (2004); *United States* v. *Izydore*, 167 F.3d 213, 218 (5th Cir. 1999) (finding no evidentiary error but stating that court had nevertheless "reviewed the record as a whole and [could not] conclude that [any error] * * * affected the substantial rights of the appellants"); *United States* v. *Saget*, 991 F.2d 702, 709-711 (11th Cir.), cert. denied, 510 U.S. 950 (1993); *United States* v. *Cameron*, 907 F.2d 1051, 1068 (11th Cir. 1990); see also *United States* v. *Dack*, 987 F.2d 1282, 1284-1285 (7th Cir. 1993) (finding no instructional error but concluding that any error was in any event harmless in light of overwhelming evidence of guilt).

In two of the cases cited by petitioner, the court of appeals incorrectly stated that the complaining party had the burden of establishing prejudice from preserved claims of evidentiary error, but correctly recognized in conducting harmless-error review that a preserved error is not harmless if the court is left in "grave doubt" about whether it affected the defendant's substantial rights. *Stephens*, 365 F.3d at 977

2. Petitioner also contends (Pet. 13-20) that the court of appeals applied the wrong harmless-error standard when it concluded that the exclusion of Bover's testimony and the 1997 Vasquez invoices and telephone records did not affect his substantial rights with respect to the conspiracy-to-import conviction. That claim does not warrant review.

In *Chapman* v. *California*, 386 U.S. 18 (1967), this Court held that, "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id.* at 24. In contrast, under *Kotteakos* v. *United States*, 328 U.S. 750, 776 (1946), a *non*-constitutional error is harmless unless it had a "substantial and

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(holding that exclusion of exculpatory evidence was prejudicial); *United States* v. *Mitchell*, 113 F.3d 1528, 1532 (10th Cir. 1997) (in light of "overwhelming" evidence of guilt, court could not "say that the error had a substantial influence in determining the jury's verdict"), cert. denied, 522 U.S. 1063 (1998).

Finally, petitioner cites several cases, like the instant case, in which a court reviewing a preserved claim of evidentiary error incorrectly stated that the complaining party had the burden of establishing prejudice and found error, but nevertheless made clear that there was no "grave doubt" concerning whether the defendant's substantial rights were affected. See *United States* v. *Burston*, 159 F.3d 1328, 1336 (11th Cir. 1998) (finding no prejudice in exclusion of impeachment evidence because the evidence supporting the conviction was "overwhelming" and because the excluded evidence would have had only a "marginal impact" in light of the other "substantial evidence calling into question" witness's credibility); *United States* v. *Messner*, 107 F.3d 1448, 1455 (10th Cir. 1997) (finding no prejudice from claimed evidentiary error where record made clear that the defendant's "substantial rights * * * could not have been affected"); *United States* v. *Montoya*, 827 F.2d 143, 154 (7th Cir. 1987) (finding no prejudice in improper admission of hearsay because district court immediately gave a curative instruction and the other evidence of guilt was "overwhelming").

injurious effect or influence in determining the jury's verdict."

Although the court of appeals did not specifically refer to *Kotteakos* or *Chapman* in its unpublished opinion, the court's harmless-error analysis and its citation of *Stephens* indicate that the court applied the *Kotteakos* standard. See Pet. App. 13a-15a (assessing whether errors had a "substantial influence on the jury"); see also *Stephens*, 365 F.3d at 977 (citing *Kotteakos*). Petitioner argues (Pet. 18) that the court of appeals should have instead applied the *Chapman* test because an erroneous ruling excluding relevant and favorable defense evidence necessarily amounts to constitutional error. In its broadest form, that contention is incorrect.

As petitioner notes (Pet. 14), the Compulsory Process Clause of the Sixth Amendment and the Due Process Clause of the Fifth Amendment give a defendant a right to present witnesses or evidence in his defense. See, *e.g.*, *Chambers* v. *Mississippi*, 410 U.S. 284, 302 (1973); *Washington* v. *Texas*, 388 U.S. 14, 18-19 (1967). "A defendant's right to present relevant evidence is not unlimited," however, "but rather is subject to reasonable restrictions," including restrictions embodied in the rules of evidence and procedure. *United States* v. *Scheffer*, 523 U.S. 303, 308 (1998); *Taylor* v. *Illinois*, 484 U.S. 400, 411-416 (1988); *Rock* v. *Arkansas,* 483 U.S. 44, 55 (1987). Moreover, as the decisions cited by petitioner establish, "'[e]rroneous evidentiary rulings rarely rise to the level of harm to th[e] fundamental constitutional right' to present a meaningful defense." *Washington* v. *Schriver*, 255 F.3d 45, 56 (2d Cir. 2001) (citation omitted).

This Court may shed light on when the erroneous exclusion of defense evidence rises to the level of a con-

stitutional violation in its decision in *Holmes* v. *South Carolina*, No. 04-1327 (argued Feb. 22, 2006). In *Holmes*, the Court is considering the circumstances under which a defendant has a constitutional right to admit defense evidence that a third party has committed the crime with which the defendant is charged. The Court's decision may illuminate when the strength of the government's case is relevant to whether the exclusion of defense evidence of third party guilt is constitutional error, and it may also bear on whether a showing of prejudice is a component of a defendant's claim that the exclusion of evidence violated his constitutional right to present a defense, or, alternatively, whether it is the government's burden to establish the harmlessness of any erroneous exclusion. Compare, *e.g.*, *United States* v. *Valenzuela-Bernal*, 458 U.S. 858, 872-873 (1982), with *Crane* v. *Kentucky*, 476 U.S. 683, 691 (1986). This case, however, is not an appropriate vehicle for consideration of those issues, and it need not be held for the Court's decision in *Holmes*.[5]

First, the court of appeals' decision is unpublished, and, in other published cases, the Eleventh Circuit has applied the test that petitioner supports—the *Chapman* standard—to the review of claims involving the erroneous exclusion of defense evidence. See Pet. 18-19 (citing *United States* v. *Todd*, 108 F.3d 1329, 1334 (11th Cir. 1997); *United States* v. *Watson*, 669 F.2d 1374, 1383 (11th Cir. 1982)). This Court's intervention is not re-

[5] In contrast to *Holmes*, the district court's decision to exclude certain defense evidence did not rely on any legal rule specifically addressing third party guilt evidence. Nor did the court exclude the evidence based on any view about the strength of the government's case against petitioner. Instead, it relied on considerations of remoteness and relevance. See pp. 4-5, *supra*.

quired to resolve any intra-circuit disagreement that may exist in the court of appeals.

Second, to the extent that the court of appeals applied what petitioner believes to be the wrong standard, he bears substantial responsibility for that himself. The court of appeals, in its unpublished opinion, cited neither *Delaware* v. *Van Arsdall*, 475 U.S. 673 (1986), on which petitioner principally relies (Pet. 17-18) in arguing for the *Chapman* standard, nor *Valenzuela-Bernal*, which petitioner seeks to distinguish (Pet. 16). Nevertheless, insofar as the court implicitly relied on *Valenzuela-Bernal*, see Pet. App. 14a (noting that errors were "material" with respect to the possession count), any arguable error in that regard is directly traceable to petitioner. In his opening brief in the court of appeals, petitioner cited *Valenzuela-Bernal* and *Washington* v. *Texas*, *supra*, and asserted that the Due Process Clause and the Compulsory Process Clause guarantee a defendant "the right to present witnesses and evidence that are *material* and favorable to the defense." Pet. C.A. Br. 22 (emphasis added); see *id.* at 42-44 (arguing that evidentiary errors denied petitioner a fair trial); Pet. C.A. Reply Br. 17-18 (same). In contrast, petitioner did not cite or discuss *Van Arsdall* and *Chapman*, on which he now chiefly relies.

Only after the court had ruled did petitioner cite *Chapman* and argue for application of the "harmless beyond a reasonable doubt" standard, raising that claim in his petition for rehearing. It is well established that the courts of appeals are not obligated to address matters raised for the first time on rehearing, where, as here, those matters could have been raised earlier. See, *e.g.*, *United States* v. *Dockery*, 401 F.3d 1261, 1262-1263 (11th Cir.) (applying the court's "well established rule"

that issues raised for the first time in a rehearing petition are deemed abandoned), cert. denied, 126 S. Ct. 142 (2005). Accordingly, review of petitioner's claim that the court of appeals should have relied on *Chapman* is unwarranted. See, *e.g.*, *Yee* v. *City of Escondido*, 503 U.S. 519, 533 (1992) (declining to consider a claim raised for the first time in a petition for discretionary review that was denied without comment by the highest state court).[6]

Third, the exclusion of the evidence in this case is harmless beyond a reasonable doubt under *Chapman*, as the reasoning of the court of appeals itself indicates. As the court of appeals concluded, the conspiracy-to-import count was "not mostly dependent on Perez," as other "undisputed facts" supported that charge. Pet. App. 14a-15a. The container loaded with 1500 pounds of cocaine, for example, was consigned to petitioner's company, and his company's representative in Ecuador hired an individual to load that container and a separate entity to load most of the others, despite the fact that all of the containers were supposed to be filled with tile from the same supplier. *Ibid.*; see *id.* at 6a. At the same time, Bover's testimony about Perez's prior relationship with Vasquez "is not particularly relevant to the facts about the March 1999 container importation," *id.* at 14a n.8, for which petitioner was convicted. Petitioner had no evidence whatsoever that Vasquez had anything to do with that importation. Under the circumstances, any error in excluding the defense evidence was harmless

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[6] For the same reason, this case would not be a suitable vehicle for addressing petitioner's claim of "confusion" among the courts of appeals concerning when the exclusion of defense evidence in violation of the Federal Rules of Evidence triggers the *Chapman* standard. Pet. 18-20.

beyond a reasonable doubt with respect to the conspiracy-to-import conviction.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2006

[7] Contrary to petitioner's assertion (Pet. 12-13, 20), the fact that two prior juries were unable to reach a verdict does not compel the conclusion that the district court's evidentiary errors were prejudicial. See, *e.g.*, *United States* v. *Newton*, 369 F.3d 659, 680 (2d Cir.) ("A jury may hang for any number of reasons, including the idiosyncratic views of a single juror. Thus, while a prior hung jury may support a finding that an error committed with respect to a very close issue during a retrial is not harmless, it does not compel such a conclusion.") (citations omitted), cert. denied, 543 U.S. 947 (2004).