No. 11-199

In the Supreme Court of the United States

ALEXANDER VASQUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals applied the correct test for harmless error in concluding that the district court's erroneous admission of certain hearsay was harmless.

2. Whether the application of harmless-error analysis violated petitioner's Sixth Amendment right to a jury trial.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1A-28A) is reported at 635 F.3d 889.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 2011. A petition for rehearing was denied on May 10, 2011 (Pet. App. 29A). The petition for a writ of certiorari was filed on August 8, 2011. 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 Northern District of Illinois, petitioner was convicted on one count of conspiring to possess more than 500 grams of cocaine with intent to distribute,

in violation of 21 U.S.C. 846. He was sentenced to 240 months in prison, to be followed by eight years of supervised release. The court of appeals affirmed. Pet. App. 1A-28A.

1. Petitioner was apprehended after a dramatic flight from police in Arlington Heights, Illinois, following an aborted drug deal. Pet. App. 2A-3A. The evidence at trial showed that petitioner's co-defendants, Joel Perez and Carlos Cruz, sought to purchase a kilogram of cocaine. *Id.* at 2A. To arrange the deal, Cruz contacted a cocaine trafficker named Alejandro Diaz, who was cooperating with the government. *Ibid.* They agreed to meet at a gas station in Arlington Heights. *Ibid.*

On the appointed date, Cruz and Perez drove to the gas station. Pet. App. 2A. There, they met Diaz, who directed them to follow him to another location. *Ibid.* Instead, Perez walked to a nearby parking lot, where petitioner was waiting for him in the driver's seat of Perez's black Bonneville. *Ibid.* From the passenger seat of the car, Perez called Cruz, telling him that he was unwilling to follow Diaz. *Ibid.* Cruz then walked over to join the pair at the Bonneville, where Perez introduced him to petitioner. *Ibid.* When Diaz called to inquire why they were not following him, Cruz replied that Perez wanted to complete the deal in the parking lot. *Ibid.* Perez told Cruz to say that "we got the money here." *Ibid.* Petitioner repeated this statement: "[T]ell him we got the money here." *Id.* at 2A-3A. Cruz hung up with the understanding that Diaz would return to complete the deal. *Id.* at 3A.

Diaz contacted his handler. Pet. App. 3A. Law enforcement agents surrounded the parking lot and then approached the Bonneville by car and on foot. *Ibid.* The

officers used their lights and sirens. Gov't C.A. Br. 7. Cruz, who was standing outside of the Bonneville, surrendered. Pet. App. 3A. Petitioner did not. Instead, with Perez in the passenger seat, petitioner threw the Bonneville in reverse and accelerated, striking two Arlington Heights police cars. *Ibid.* He then shifted gears and sped toward the parking lot exit. *Ibid.* A DEA agent stood in the path of the Bonneville, pointed his gun at petitioner, and commanded him to stop. *Ibid.* Petitioner did not slow down, however, and the agent was forced to leap out of the way. *Ibid.* Petitioner sped out of the parking lot and turned west into the eastbound lanes of the adjoining road, swerving between oncoming cars. *Ibid.*; Gov't C.A. Br. 8.

A few minutes later, police found the Bonneville abandoned in a parking lot. Pet. App. 3A. A bystander told police that he had seen two men run from the car toward a nearby McDonald's. *Ibid.* An Arlington Heights detective pursued the pair and spotted petitioner through the window of the restaurant; petitioner briefly locked eyes with the detective, then turned and ran. *Ibid.*; Gov't C.A. Br. 8. The detective chased the men through the kitchen of the restaurant and out the back door. Pet. App. 3A. Perez and petitioner then split up and fled in different directions, but both were soon apprehended. *Ibid.*

The police found a cell phone on petitioner and two cell phones on the ground near Perez. Pet. App. 3A. Phone records indicated that petitioner had called Perez's phones on the day before and on the day of the planned drug transaction. *Id.* at 3A-4A. A search of the Bonneville revealed a hidden compartment containing $23,000 in cash. *Id.* at 4A.

2. A federal grand jury indicted petitioner on one count of conspiring to possess with intent to distribute more than 500 grams of cocaine and on one count of attempting to possess with intent to distribute more than 500 grams of cocaine. Pet. App. 4A. Perez and Cruz were also indicted on drug charges and pleaded guilty. *Id.* at 10A. Petitioner elected to go to trial. The theory of petitioner's defense was that he was "an innocent bystander who just happened to be in the wrong place at the wrong time." *Id.* at 11A. The government countered this defense by introducing, under Federal Rule of Evidence 404(b), evidence of petitioner's prior conviction for a cocaine offense in which, as here, petitioner "carried out a cocaine deal with Perez using a hidden compartment in a car." *Id.* at 6A. The district court granted the government's motion to admit the evidence under Rule 404(b) "to show [petitioner's] knowledge, intent, absence of mistake and modus operandi." *Id.* at 7A.

Petitioner called as a witness Perez's wife, Marina, to establish that he lacked knowledge that a drug deal was to take place. Pet. App. 11A. Marina testified that her husband had asked her to pick him up at the location of the planned drug deal, but that she had asked petitioner to go in her place. *Ibid*. Petitioner took the Bonneville rather than his own car, Marina explained, because it was more convenient for him to do so. *Ibid*. Marina also testified that she had met petitioner's lawyer once before the trial. See *id.* at 12A.

After Marina's testimony, the district court granted the government a short continuance for the purpose of examining recordings the government had obtained of telephone conversations between Marina and Perez, who was incarcerated at the time. Pet. App. 12A. When the trial resumed, the government called Marina as a rebut-

tal witness to establish her bias. *Ibid.* Marina admitted that she had met with petitioner's lawyer several times in addition to the only meeting she mentioned in her direct testimony. *Ibid.* She also acknowledged her belief that petitioner's lawyer was going to assist in obtaining a lower sentence for her husband, Perez, and that petitioner's lawyer wanted Perez to enter a plea and thereby avoid implicating petitioner. *Ibid.* The government then introduced the recorded telephone conversations. In the recordings, Perez told Marina that petitioner's lawyer had told petitioner that he should plead guilty and that if both he and his co-defendants went to trial, "everybody is going to lose." *Id.* at 12A-13A.

After requesting the transcript of Marina's testimony during its deliberations, see Pet. 8, the jury found petitioner guilty on the conspiracy charge but acquitted him on the attempt charge. Pet. App. 5A. The district court sentenced petitioner to serve 240 months in prison. *Id.* at 1A.

3. The court of appeals affirmed. Pet. App. 1A-17A. Petitioner's principal argument on appeal was that the district court had erred in permitting the government to call Marina as a rebuttal witness and in admitting the recordings over his objection. See *id.* at 10A. Although the court of appeals rejected most of petitioner's arguments, *id.* at 13A-15A, it agreed with petitioner that the district court had improperly admitted the recordings for their truth, *id.* at 15A. The court concluded, however, that the error was harmless. *Id.* at 15A-17A.

The court of appeals explained that whether an error is harmless depends on "whether, in the mind of the average juror, the prosecution's case would have been 'significantly less persuasive' had the improper evidence been excluded.'" Pet. App. 16A (quoting *United States*

v. *Emerson*, 501 F.3d 804, 813 (7th Cir. 2007)). The court added that "the burden lies on the government" to show that "a reasonable jury would have reached the same verdict without the challenged evidence." *Ibid.* (citing *United States* v. *Williams*, 493 F.3d 763, 766 (7th Cir.), cert. denied, 552 U.S. 984 (2007)).

Although it described the issue as "close," the court concluded that the error was harmless in light of "the evidence as a whole." Pet. App. 16A. In particular, the court cited petitioner's flight from police as powerful evidence of guilt. The court acknowledged that flight evidence "must be viewed with caution," but stressed that "there are degrees of flight," and "what happened here [was] flight in the first degree." *Ibid.* (citation omitted). "How else do you describe throwing the Bonneville into reverse, endangering officers * * * , hitting two police squad cards, and gunning it the wrong way into a roadway from the parking lot, ditching the car a few moments later and trying to escape by running through the kitchen and out the back door of a McDonald's?" *Ibid.* In addition, the court pointed to petitioner's statement to Cruz that "we got the money here"; cell phone records showing multiple contacts between petitioner and Cruz leading up to the failed transaction; the $23,000 in cash hidden in the car that petitioner was driving; and the "striking similarity" between this foiled scheme and petitioner's previous conviction for a drug offense that likewise involved Perez, a cocaine deal, and cash hidden in a car. *Id.* at 16A-17A; see also *id.* at 5A-7A (rejecting petitioner's challenge to the admission of his prior conviction under Rule 404(b)).

Judge Hamilton dissented. Pet. App. 17A-28A. In his view, the admission of the telephone recordings was not harmless. He agreed with the majority that the test

for harmlessness is whether the reviewing court is "'convinced that the jury would have convicted even absent the error.'" *Id.* at 22A (quoting *United States* v. *Simmons*, 599 F.3d 777, 780 (7th Cir. 2010)). The dissent stated that this standard requires the court to determine "'whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Id.* at 23A (quoting *Neder* v. *United States*, 527 U.S. 1, 15 (1999)). In the dissent's view, that standard was not satisfied here because the government's case against petitioner was "far from a slam-dunk," *id.* at 25A, and the evidence from the recordings was "just about as prejudicial as one could expect to encounter in a trial," *id.* at 26A. Moreover, the dissent reasoned, the government emphasized the rebuttal evidence in its closing, *id.* at 27A, and the jury must have viewed the case as a close one, having acquitted petitioner on the charge of attempted possession with intent to distribute, *ibid.* In light of these factors, Judge Hamilton was "not convinced beyond a reasonable doubt that the jury would have convicted [petitioner] in the absence" of the erroneously admitted evidence. *Id.* at 28A.

ARGUMENT

Petitioner contends that the court of appeals applied the wrong standard for harmless-error review in upholding his conviction and that its decision implicates a circuit conflict on whether the impact of an error on the jury, as well as the strength of the government's evidence, is relevant to harmless-error analysis. The court of appeals concluded that an evidentiary error in petitioner's trial was harmless because, in light of the strength of the government's case, "a reasonable jury would have reached the same verdict without the chal-

lenged evidence." Pet. App. 16A. That approach does not conflict with any decision of this Court or that of any other court of appeals, and it does not warrant further review.

1. Rule 52(a) of the Federal Rules of Criminal Procedure provides that "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." This Court has repeatedly made clear that an error may be harmless under Rule 52(a) where the evidence of guilt is so strong that "the jury verdict would have been the same absent the error." *Neder* v. *United States*, 527 U.S. 1, 17 (1999); see, *e.g.*, *Schneble* v. *Florida*, 405 U.S. 427, 430 (1972); *Harrington* v. *California*, 395 U.S. 250, 254 (1969). The court of appeals applied that standard here. See Pet. App. 16A (whether the jury "would have reached the same verdict without the challenged evidence").

Petitioner emphasizes (Pet. 21-23) that this Court has alternatively articulated the harmless-error standard as whether the error in question "contributed to the conviction." *Chapman* v. *California*, 386 U.S. 18, 23 (1967) (citation omitted); see also *Fahy* v. *Connecticut*, 375 U.S. 85, 86-87 (1963) (same); *Kotteakos* v. *United States*, 328 U.S. 750, 764 (1946) (asking what "effect" or "impact" the error had on the verdict). But that formulation is just another way of asking whether a rational jury "would have reached the same verdict without the challenged evidence," the formulation the court of appeals employed here. Pet. App. 16A. For if the properly admitted evidence of guilt is so compelling that "a rational jury would have found the defendant guilty absent the error," *Neder*, 527 U.S. at 18, then the error cannot be said to have "contributed to the conviction," *Chapman*, 386 U.S. at 23 (citation omitted).

This Court has consistently treated the two formulations as equivalent. Thus, in *Neder*, the Court held that a district court's failure to instruct the jury on materiality in a criminal fraud case was harmless error in light of "overwhelming evidence, such that the jury verdict would have been the same absent the error." 527 U.S. at 17. The Court then added: "We think it beyond cavil that the error 'did not contribute to the verdict obtained.'" *Ibid.* (quoting *Chapman*, 386 U.S. at 24). Likewise, in *Harrington*, the Court held that a violation of the defendant's rights under the Confrontation Clause was "harmless error under the rule of *Chapman*" because the evidence against the defendant was "overwhelming." 395 U.S. at 253, 254. And in *Delaware* v. *Van Arsdall*, 475 U.S. 673 (1986), the Court cited *Harrington* and *Schneble* as examples of cases in which the *Chapman* standard had been applied. See *id.* at 680. The Seventh Circuit has likewise used both formulations. Compare, *e.g.*, Pet. App. 16A and *United States* v. *Glosser*, 623 F.3d 413, 419 (7th Cir. 2010) ("would have been the same"), with *United States* v. *Foster*, No. 10-3198, 2011 WL 2909455, at *8 (7th Cir. July 21, 2011) ("effect on the jury's verdict").

The overall strength of the government's case is not always the only factor in the harmless-error analysis. For example, where, as in *Van Arsdall*, the error in question consists of an improper restriction on cross-examination of a government witness, a reviewing court may find the error to require reversal notwithstanding the overall strength of the government's proof because the restriction may have prevented the defense from effectively undercutting that proof. In such a case, the court may appropriately consider such factors as the importance of the witness's testimony, whether the testi-

mony was cumulative, the presence or absence of corroborating or contradicting testimony, and the extent of cross-examination otherwise permitted, as well as the overall strength of the government's case. See *Van Arsdall*, 475 U.S. at 684. But in a case such as this, in which there is no claim that the defendant was prevented from challenging the government's proof and the court finds that the government's overall case was so strong that the jury verdict would have been the same without the challenged evidence, the harmless-error inquiry is complete.

Sullivan v. *Louisiana*, 508 U.S. 275 (1993), on which petitioner relies (Pet. 24), is not to the contrary. There, the district court gave a defective "reasonable doubt" instruction. This Court held that the error was not subject to harmless-error analysis because it "vitiates *all* the jury's findings," 508 U.S. at 281, and produces "consequences that are necessarily unquantifiable and indeterminate," *id*. at 282. In so doing, the Court stated that the appropriate harmless-error inquiry "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury trial guarantee." *Id*. at 279. But while in *Sullivan* a verdict of guilt beyond a reasonable doubt was never rendered because of the defective "reasonable doubt" instruction, in this case such a verdict *was* rendered, so the court of appeals did not have to "hypothesize a guilty verdict." In any event, this Court made clear in *Neder* that the above "strand of the reasoning" in *Sullivan* no longer

has force because it "cannot be squared with our harmless-error cases." 527 U.S. at 11.

In short, the court of appeals properly looked to the strength of the government's case against petitioner in determining that the district court's error was harmless. The court did not suggest that other considerations are irrelevant under Rule 52(a). Indeed, the Seventh Circuit has explicitly considered other factors in the harmless-error analysis in appropriate cases. See, *e.g.*, *United States* v. *Boling*, 648 F.3d 474, 481 (2011); *United States* v. *Lee*, 558 F.3d 638, 649 (2009); *United States* v. *Parr*, 545 F.3d 491, 502 (2008), cert. denied, 129 S. Ct. 1984 (2009). Rather, the court simply held that the overall strength of the government's proof in *this* case was enough to establish that the improper admission of the recordings was harmless. See Pet. App. 16A-17A. That fact-bound conclusion does not warrant this Court's review.

2. Petitioner's survey of the law in other courts of appeals (Pet. 17-20) does not aid his cause. Although the courts of appeals, like this Court, have used a variety of verbal formulations to describe the harmless-error inquiry, none has concluded that the strength of the government's case can never by itself establish the harmlessness of an evidentiary error. To the contrary, *every* regional court of appeals, like the court below, has repeatedly found errors to be harmless based on that factor alone. There is consequently no reason to believe that the outcome of petitioner's appeal would have been different in another circuit.

For example, petitioner highlights (Pet. 15) the Second Circuit's statement in *Wray* v. *Johnson*, 202 F.3d 515 (1998), that in harmless-error analysis a reviewing court must consider the importance of the wrongly ad-

mitted testimony as well as the overall strength of the prosecution's case. But here the court *did* consider the impact of the improperly admitted evidence in relation to the strength of the government's overall case. See Pet. App. 17A (concluding that the evidence of petitioner's guilt "would have moved the jury to convict [petitioner] without a nudge from anything it heard in the government's rebuttal case"). And in any event, a determination that the jury would have reached the same verdict absent the error constitutes an implicit determination that the error was not important enough in relation to the government's proof to affect the outcome. See p. 8, *supra*. The Second Circuit has made clear that the strength of the government's case is "the most critical factor" in the harmless-error analysis, see *United States* v. *Curley*, 639 F.3d 50, 58 (2d Cir. 2011) (citation omitted), and it has repeatedly found errors to be harmless based on that factor alone, see, *e.g.*, *United States* v. *Gabayzadeh*, No. 06-5466-cr, 2011 WL 2519539, at *2 (2d Cir. June 27, 2011); *United States* v. *Nicolo*, 421 Fed. Appx. 57, 67-68 (2d Cir.), cert. denied, No. 11-5662 (Oct. 3, 2011); *United States* v. *Jass*, 569 F.3d 47, 64-65 (2d Cir. 2009), cert. denied, 130 S. Ct. 2128 (2010); *United States* v. *Paulino*, 445 F.3d 211, 219 (2d Cir.), cert. denied, 549 U.S. 980 (2006).

Similarly, petitioner cites (Pet. 17, 19) cases from the Third and Eighth Circuits examining factors in addition to the strength of the government's proof in determining whether an improper reference to the defendant's exercise of his right to remain silent was harmless. See *Virgin Islands* v. *Martinez*, 620 F.3d 321, 338 (3d Cir. 2010), cert. denied, 131 S.Ct. 1489 (2011); *United States* v. *Martin*, 391 F.3d 949, 955 (8th Cir. 2004). In other contexts, however, both of those courts have routinely

found errors to be harmless based solely on the strength of the government's case. See, *e.g.*, *United States* v. *Christie*, 624 F.3d 558, 571, 572 (3d Cir. 2010), cert. denied, 131 S. Ct. 1513 (2011); *United States* v. *Shabazz*, 564 F.3d 280, 286 (3d Cir. 2009); *United States* v. *Price*, 13 F.3d 711, 720 (3d Cir.), cert. denied, 512 U.S. 1241 (1994); *United States* v. *Watson*, No. 11-1169, 2011 WL 3568918, at *3 (8th Cir. Aug. 16, 2011); *United States* v. *Gregoire*, 638 F.3d 962, 969 (8th Cir. 2011); *United States* v. *Samuels*, 611 F.3d 914, 919 (8th Cir. 2010), cert. denied, 131 S. Ct. 1583 (2011). For the same reason, petitioner's discussion of cases selected from the Fourth, Sixth, Ninth, Tenth, and D.C. Circuits is likewise unpersuasive. See Pet. 17-20. Each of those courts, like the court of appeals below, has repeatedly held errors harmless based solely on the overwhelming nature of the government's proof.[1]

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[1] See, *e.g.*, *United States* v. *Blauvelt*, 638 F.3d 281, 290-291 (4th Cir.), cert. denied, No. 10-1473 (Oct. 3, 2011); *United States* v. *Cole*, 631 F.3d 146, 154-155 (4th Cir. 2011); *United States* v. *Hardy*, 643 F.3d 143, 153-154 (6th Cir.), petition for cert. pending, No. 11-6002 (filed Aug. 16, 2011); *United States* v. *Martinez*, 588 F.3d 301, 313 (6th Cir. 2009), cert. denied, 131 S. Ct. 538 (2010); *United States* v. *Cardenas-Mendoza*, 579 F.3d 1024, 1032-1033 (9th Cir. 2009); *United States* v. *Thongsy*, 577 F.3d 1036, 1043 (9th Cir. 2009); *United States* v. *Edwards*, 540 F.3d 1156, 1164 (10th Cir. 2008), cert. denied, 129 S. Ct. 964 (2009); *United States* v. *Sarracino*, 340 F.3d 1148, 1164 (10th Cir. 2003), cert. denied, 540 U.S. 1131 (2004); *United States* v. *Ginyard*, 444 F.3d 648, 655-656 (D.C. Cir. 2006); *United States* v. *Kayode*, 254 F.3d 204, 212 (D.C. Cir. 2001), cert. denied, 534 U.S. 1147 (2002).

Although petitioner does not mention the First, Fifth, and Eleventh Circuits, the same practice prevails in those courts as well. See, *e.g.*, *United States* v. *Rivera-Rodriguez*, 617 F.3d 581, 595 (1st Cir. 2010), cert. denied, 131 S. Ct. 960 (2011); *United States* v. *Hicks*, 575 F.3d 130, 143 (1st Cir.), cert. denied, 130 S. Ct. 647 (2009); *United States* v. *Diaz*, 637 F.3d 592, 600 (5th Cir.), cert. denied, No. 11-5111 (Oct. 3, 2011);

There is consequently no substance to petitioner's claim that the "weight of the circuit authority embraces the view" that overwhelming evidence of guilt "cannot be the sole focus of the harmless error inquiry." Pet. 20. In fact, every circuit has recognized the commonsense proposition that, even in cases of constitutional error (which the error here was not), the amount and persuasive force of the evidence properly admitted against a defendant may lead a reviewing court to conclude "beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Neder*, 527 U.S. at 18. Consistent with that settled approach, the court of appeals here properly concluded that the evidence of guilt "would have moved the jury to convict" petitioner regardless of the district court's error. Pet. App. 17A. Further review is not warranted.

3. Petitioner additionally contends (Pet. 32-33) that the court of appeals' harmless-error determination amounted to a denial of his constitutional right to a trial by jury. Petitioner principally relies for this argument on this Court's suggestion in *Sullivan* that for a reviewing court "to hypothesize a guilty verdict that was never in fact rendered" would violate "the jury trial guarantee." 508 U.S. at 279. As this Court subsequently explained in *Neder*, however, that "strand of the reasoning" from *Sullivan* has no independent force because it "cannot be squared with our harmless-error cases." 527 U.S. at 11; see pp. 10-11, *supra*. And in any event, the court of appeals here did not "hypothesize a guilty ver-

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United States v. *Rice*, 607 F.3d 133, 140-141 (5th Cir.), cert. denied, 131 S. Ct. 356 (2010); *United States* v. *Phaknikone*, 605 F.3d 1099, 1109-1110 (11th Cir.), cert. denied, 131 S. Ct. 643 (2010); *United States* v. *Street*, 472 F.3d 1298, 1315-1316 (11th Cir. 2006), cert. denied, 551 U.S. 1138 (2007).

dict that was never in fact rendered," but instead concluded that the jury's *actual* verdict would not have been different without the erroneously admitted evidence—the very inquiry that the Court in *Sullivan* concluded was required. Compare *Sullivan*, 508 U.S. at 280 (describing the correct inquiry as whether "the jury's actual finding of guilty beyond a reasonable doubt *would surely not have been different* absent" the error), with Pet. App. 17A (concluding that the properly admitted evidence in the record "would have moved the jury to convict [petitioner] without a nudge from anything it heard in the government's rebuttal case").

4. Finally, petitioner argues (Pet. 26-32) that the outcome would have been different in this case if the court of appeals had considered in its harmless-error analysis such factors as the prejudicial nature of the telephone recordings; the district court's failure to give a limiting instruction; the jury's request for a transcript of Marina Perez's testimony; and the jury's rendering of a split verdict. But once the court of appeals decided that the jury would have reached the same verdict regardless of the error in light of the strength of the properly admitted evidence, it made no difference how prejudicial the recordings may have been (Pet. 16) or that the district court failed to give a proper limiting instruction (Pet. 28). Indeed, this Court has held that even the erroneous admission of a defendant's confession—the "most probative and damaging evidence" that a defendant can face, *Cruz* v. *New York*, 481 U.S. 186, 195 (1987) (White, J., dissenting) (citation omitted)—can be harmless error in light of "the remainder of the evidence

against the defendant," *Arizona* v. *Fulminante*, 499 U.S. 279, 310 (1991).[2]

Neither the jury's request for the transcript of Marina Perez's testimony nor its return of a split verdict suggests that the jury would not have reached the same verdict without the recordings. Marina Perez's testimony was the basis of petitioner's affirmative defense that he was simply an innocent bystander. See Pet. App. 11A ("She was his only hope, and a slim one at that."). That the jury wanted to review her testimony before rendering its verdict is therefore unremarkable. And the most likely explanation for the split verdict is that, while the jury believed that the evidence established beyond a reasonable doubt that petitioner had conspired with Perez and Cruz to engage in the cocaine transaction, it did not believe that he proceeded far enough in consummating that transaction to be guilty of attempt. That explanation is particularly plausible given that petitioner and Perez refused to follow Diaz as instructed to complete the cocaine deal. In any event, petitioner's fact-specific arguments concerning the court of appeals' harmless-error analysis in this case do not warrant this Court's review.[3]

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[2] Petitioner observes (Pet. 29) that, on the facts in *Fulminante*, the Court held that the erroneous admission of the defendant's confession was not harmless even though the defendant's second confession to another person had been properly admitted. But the Court in *Fulminante* found that the jury's assessment of the admissible confession "could easily have depended" on the corroborating fact of the prior, inadmissible confession, 499 U.S. at 297-299, and it stressed that, apart from the confessions, the prosecution's evidence was likely "insufficient to convict," *id.* at 297.

[3] Petitioner argues (Pet. 26) that the court of appeals accorded excessive weight to his attempted flight. That fact-bound question does not merit this Court's review. In any event, it was entirely appropriate for

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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the court of appeals to give weight to that evidence in its harmless-error analysis. It is true that this Court has expressed doubt about the probative value of flight evidence, see *Wong Sun* v. *United States*, 371 U.S. 471, 483 n.10 (1963), and the court of appeals here recognized as much, acknowledging that flight evidence must be viewed "with caution." Pet. App. 16A. As the court explained, however, "there are degrees of flight," and "what happened here [was] flight in the first degree." *Ibid.* "How else do you describe throwing the Bonneville into reverse, endangering officers * * * , hitting two police squad cards, and gunning it the wrong way into a roadway from the parking lot, ditching the car a few moments later and trying to escape by running through the kitchen and out the back door of a McDonald's?" *Ibid.* In *Wong Sun*, by contrast, the "flight" consisted merely of a defendant's running down the hall of his laundry establishment when the supposed customer at the door revealed that he was a narcotics agent. 371 U.S. at 482. The court of appeals did not err in concluding that, together with the other proof of guilt (as well as the Rule 404(b) evidence that impeached petitioner's only affirmative defense), petitioner's dramatic and violent flight from police supported the court's harmless-error determination.