No. 11-199

In the Supreme Court of the United States

ALEXANDER VASQUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
LANNY A. BREUER
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
ANTHONY A. YANG
Assistant to the Solicitor General
JOEL M. GERSHOWITZ
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the court of appeals erred in its harmless-error analysis by focusing solely on the weight of the properly admitted evidence without considering the potential effect on the jury of evidence that was erroneously admitted for its truth rather than to show the bias and inconsistent statements of a defense witness.

2. Whether the court of appeals' harmless-error analysis violated petitioner's Sixth Amendment right to a jury trial by disregarding the effect of the error on the jury in this case.

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 1
Statement 1
Summary of argument 15
Argument:
The erroneous admission of evidence in this case was harmless because it had no effect on the outcome 17
A. The court of appeals employed the correct harmless-error standard 18
1. Harmless-error analysis applies an objective inquiry based on the evidentiary record as a whole that compares the probative effect of properly considered evidence against the probable impact of the error 19
2. The court of appeals stated the correct standard 30
3. Inferences drawn from jury conduct are unreliable grounds for evaluating harmlessness 31
B. The court of appeals' decision does not violate the Sixth Amendment 35
C. The non-constitutional hearsay error in this case was harmless 37
1. The government's case was very strong 38
2. The defense case was very weak 43
3. The prejudicial impact of the error was not significant 46
Conclusion 52
Appendix 1a

TABLE OF AUTHORITIES

Cases: Page

Allen v. *United States*, 164 U.S. 492 (1896) 33, 40
Arizona v. *Fulminante*, 499 U.S. 279 (1991) 28
Brecht v. *Abrahamson*, 507 U.S. 619 (1993) 20, 26, 27
Brown v. *United States*, 411 U.S. 223 (1973) 27
Bruton v. *United States*, 391 U.S. 123 (1968) 27
Carella v. *California*, 491 U.S. 256 (1989) 26
Chapman v. *California*, 386 U.S. 18 (1967) 20, 24
Delaware v. *Van Arsdall*, 475 U.S. 673 (1986) 17, 19, 29
Harrington v. *California*, 395 U.S. 250 (1969) 21, 27
Hedgpeth v. *Pulido*, 555 U.S. 57 (2008) 20
James v. *Illinois*, 493 U.S. 307 (1990) 28
Jones v. *United States*, 527 U.S. 373 (1999) 31
Kotteakos v. *United States*, 328 U.S. 750 (1946) 20, 21, 23, 38
Milton v. *Wainwright*, 407 U.S. 371 (1972) 28
Monnette v. *United States*, 299 F.2d 847 (5th Cir. 1962) 41
Neder v. *United States*, 527 U.S. 1 (1999) ..... *passim*
Olden v. *Kentucky*, 488 U.S. 227 (1988) 30
Pope v. *Illinois*, 481 U.S. 497 (1987) 22
Premo v. *Moore*, 131 S. Ct. 733 (2011) 28
Rose v. *Clark*, 478 U.S. 570 (1986) 19, 22, 36
Satterwhite v. *Texas*, 486 U.S. 249 (1988) 19, 22
Schneble v. *Florida*, 405 U.S. 427 (1972) 21, 27, 35
Sibron v. *New York*, 392 U.S. 40 (1968) 40
Sochor v. *Florida*, 504 U.S. 527 (1992) 31

Cases—Continued: Page

Sullivan v. *Louisiana*, 508 U.S. 275 (1993) 25, 36
Tanner v. *United States*, 483 U.S. 107 (1987) 32
United States v. *Bailey*, 691 F.2d 1009 (11th Cir. 1982), cert. denied, 461 U.S. 933 (1983) 42
United States v. *Brown*, 161 F.3d 256 (5th Cir. 1998) 26
United States v. *Emerson*, 501 F.3d 804 (7th Cir. 2007) 13
United States v. *Franklin*, 323 F.3d 1298 (11th Cir.), cert. denied, 540 U.S. 860 (2003) 42
United States v. *Frazier*, 387 F.3d 1244 (11th Cir. 2004), cert. denied, 544 U.S. 1063 (2005) 40
United States v. *Hasting*, 461 U.S. 499 (1983) 19, 26, 29, 37
United States v. *Hernandez-Bermudez*, 857 F.2d 50 (1st Cir. 1988) 40
United States v. *Lane*, 474 U.S. 438 (1986) ... 18, 23, 29, 37
United States v. *Lima*, 819 F.2d 687 (7th Cir. 1987) 42
United States v. *Mechanik*, 475 U.S. 66 (1986) 17
United States v. *Olano*, 507 U.S. 725 (1993) 18
United States v. *Powell*, 469 U.S. 57 (1984) 33
United States v. *Pope*, 561 F.2d 663 (6th Cir. 1977) .. 41, 42
United States v. *Robinson*, 161 F.3d 463 (7th Cir. 1998), cert. denied, 526 U.S. 1078 (1999) 40
United States v. *Sheppard*, 901 F.2d 1230 (5th Cir. 1990) 42
United States v. *Williams*, 493 F.3d 763 (7th Cir.), cert. denied, 552 U.S. 984 (2007) 13
United States v. *Young*, 470 U.S. 1 (1985) 29, 34

Cases—Continued: Page

Washington v. *Recuenco*, 548 U.S. 212 (2006) 25, 37
Weiler v. *United States*, 323 U.S. 606 (1945) 21
Wong Sun v. *United States*, 371 U.S. 471 (1963) 41, 42
Yates v. *Evatt*, 500 U.S. 391 (1991) 2, 23, 24
Yeager v. *United States*, 129 S. Ct. 2360 (2009) 32

Constitution, statutes and rules:

U.S. Const. Amend. VI 16, 18, 25, 35, 36, 37
21 U.S.C. 846 2
28 U.S.C. 2111 18
Fed. R. Crim. P.:
Rule 8(b) 29
Rule 52(a) 18
Fed. R. Evid.:
Rule 106 ..... 10, 46
Rule 404(b) 9
Rule 606(b) 21, 32

Miscellaneous:

Administrative Office of the United States Courts, *2009 Annual Report of the Director: Judicial Business of the United States Courts* (2010) 34

In the Supreme Court of the United States

No. 11-199

ALEXANDER VASQUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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, and was granted on November 28, 2011. The jurisdiction of this Court rests on 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 with intent to distribute more than 500 grams of cocaine, in

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

1. a. Petitioner and petitioner's cousin, Joel Perez (Perez), were involved in at least two similar drug transactions: one in 2002 and the other, which gave rise to this case, in 2008. In the 2002 transaction, petitioner and Perez drove to a grocery-store parking lot in a suburb of Chicago, Illinois, where they had agreed to meet an individual to sell him cocaine. J.A. 304-307. Petitioner sold the cocaine to the buyer—a government confidential informant—for $4000 in cash, while law-enforcement officers watched. J.A. 305, 308-313. After petitioner and Perez drove away, officers stopped their car and arrested them. J.A. 312-315. A search of the vehicle revealed a hidden compartment in the passenger-side dashboard under the airbag panel, containing more cocaine and an additional $15,000 in cash. J.A. 315-316, 318-319. In 2004, petitioner pleaded guilty to unlawful delivery of a controlled substance. J.A. 320.

b. In August 2008, petitioner and Perez again participated in a drug deal in a Chicago suburb (Arlington Heights), this time with co-defendant Carlos Cruz. Pet. App. 2A-3A. The drug transaction again involved a government informant and again led to the arrest of petitioner and Perez. *Ibid.*

In early August, Perez asked his friend Cruz—who had not met petitioner—for help in locating a source for one kilogram of high-quality cocaine. J.A. 165, 167, 169-171, 240-241. Cruz called some of his contacts, including a government informant (Alex Diaz). J.A. 171. The informant told Cruz that he could secure the cocaine by Sunday or Monday. J.A. 172-173; see J.A. 104, 140.

Cruz called Perez and conveyed that information. J.A. 174-175.

On the afternoon of Monday, August 4, 2008, the informant telephoned Cruz, informing him that the cocaine was ready and that one kilogram would cost $23,000. J.A. 176, 186; see J.A. 37-38, 185-187 (call transcript), 751 (call 1). Cruz telephoned Perez to convey the news. J.A. 188. During that call, the men agreed that they would meet the informant to determine whether he really had pure, high-quality ("fish scale") cocaine and that they would not bring any money to the meeting. J.A. 188-189; see J.A. 175, 194-195. Cruz told Perez that, if the cocaine was good, they would then collect the cash and buy the cocaine. J.A. 189. Telephone call records (J.A. 751-758) show that, after Cruz made those August 4 calls to Perez (at 7:29 p.m. and 7:31 p.m.), petitioner and Perez exchanged eight telephone calls from 8:49 p.m. to 11:03 p.m., separated by several other calls to other numbers. J.A. 751, 754-755 (calls 5-6, 8-15); see J.A. 87-93.

The following day (August 5), petitioner and Perez made at least 27 documented calls to each other before they were arrested shortly after 5:30 p.m. J.A. 751-752. In the morning, the informant telephoned Cruz, prompting a series of calls in which Cruz served as an intermediary between the informant and Perez. J.A. 189-192, 751. Perez asked Cruz whether the informant could "bring the kilo of cocaine to Chicago" but Cruz told him that the informant declined and that they would instead have to travel "out to Arlington Heights." J.A. 191. The response angered Perez, who cancelled the deal. *Ibid.* Perez later reconsidered and told Cruz to pick him up near the intersection of Irving Park Road and Harlem Avenue for the drive to Arlington Heights. J.A. 192-194.

At 3:57 p.m., the informant called Cruz, who explained that he was about to depart to get Perez. J.A. 590-592 (call transcript), 751 (call 49). During a 4:36 p.m. call, Cruz told the informant that he was caught in traffic and was still on his way to Perez. J.A. 593 (call transcript), 752 (call 54). During those calls Cruz explained that he was driving to meet Perez at Irving Park and Harlem and asked the informant for directions from that location to their meeting. J.A. 592-593; see J.A. 193-194. The informant told Cruz to take Harlem to the expressway and then drive to Arlington Heights, where the informant would provide further directions once Cruz exited the freeway. *Id.* at 592-593; cf. App., *infra*, 1a (map). Perez called Cruz at 4:44, 4:50, and 5:03 p.m., before Cruz arrived to pick up Perez. J.A. 194, 714, 752 (calls 55-57). When Perez entered Cruz's truck, he confirmed to Cruz that, as they previously agreed, he did not bring any money and did not "bring [any]body else." J.A. 194-195.

While en route to Arlington Heights, Cruz called the informant at 5:16 p.m., and discussed directions and the quality of the cocaine. J.A. 199-201, 752 (call 59). Cruz also observed Perez on his phone. J.A. 201. Phone records document calls between Perez and petitioner at 5:05, 5:22 and 5:24 p.m. J.A. 752 (calls 58, 60, 62). At 5:24 and 5:25 p.m., Cruz and the informant spoke again as Cruz exited the expressway. J.A. 203, 752 (calls 61 and 63). The informant told Cruz to proceed to the Shell gas station just to the right side of the expressway's exit and to meet him in the gas-station parking lot. J.A. 203; see J.A. 40.

Soon after Cruz and Perez parked in the lot, the informant arrived and parked two spaces away. J.A. 206, 218; see App., *infra*, 3a (photograph showing where the

vehicles parked); see also App., *infra*, 2a, 4a (Shell station aerial- and ground-view photographs); J.A. 40, 43-47, 204 (describing and admitting photographs). Both vehicles were located in parking spots at the north end of the gas-station convenience store in spaces at the westernmost edge of the property, immediately adjacent to the parking lot for a Denny's diner located next door. J.A. 43, 206-207, 218; see App., *infra*, 2a-3a (photographs). The Shell and Denny's parking lots were separated by a row of low bushes interspersed with a few trees. App., *infra*, 2a-3a (photographs); J.A. 44-45, 205-206 (explaining that the bushes were smaller in August 2008 than those in the photographs).

Drug Enforcement Agency (DEA) Special Agent James Chupik had been following the informant's vehicle in an unmarked car and, at approximately 5:28 p.m., he saw the informant enter the Shell property. J.A. 48-50, 123, 142. Phone records show that petitioner again called Perez at 5:29 p.m. J.A. 752 (call 64).

While sitting in his car, the informant told Cruz and Perez that the cocaine was only a few blocks away and that they should follow him to confirm its quality. J.A. 208, 213; see J.A. 41-42, 210-212 (conversation transcript). That parking-lot meeting lasted only two or three minutes. J.A. 142-143. The informant then drove away, Cruz told Perez "let's go," but Perez declined, stated that he had "somebody else to pick [him] up," and walked between the bushes into the Denny's parking lot. J.A. 214.

Meanwhile, petitioner had arrived in a black Pontiac Bonneville and had parked on the easternmost edge of the Denny's parking lot, up against and facing the row of bushes separating the Shell and Denny's lots, with Cruz's car parked just on the other side of the bushes.

J.A. 71, 96, 218; see J.A. 57; p. 5, *supra*; App., *infra*, 2a-3a (photographs). The Bonneville, like the car petitioner had used when he was arrested in 2002, contained a hidden compartment in the passenger-side dashboard under the airbag panel where the airbag should have been, which contained $23,000 in cash, *i.e*, the stated price of the cocaine. J.A. 96-98; see J.A. 37, 176, 186.

Cruz started his car to follow the informant but promptly returned to his parking spot when Perez telephoned and told him to come back. J.A. 215-216, 752 (call 65 at 5:32 p.m.). Cruz then walked through the bushes to the Bonneville, where petitioner was in the driver's seat and Perez was in the front passenger seat with his window down. J.A. 219-220. As Cruz stood at the front passenger side of the car, Perez apologized for not telling Cruz that he had arranged for someone else to pick him up. J.A. 220-221.

Agent Chupik quickly realized that Perez and Cruz did not follow the informant. J.A. 69, 143. The agent called the informant and instructed him to call Cruz to see whether the suspects intended to complete the deal and whether they had brought the money with them. J.A. 69. When the informant called, Perez told Cruz to tell the informant that they did not want to follow the informant and that they "got the money here." J.A. 222-223. Petitioner then repeated, "Tell him we got the money here." J.A. 223.

Cruz conveyed that information to the informant, who agreed to bring the kilogram of cocaine back to the gas station. J.A. 223-224. The three men then waited for about three to five minutes, with petitioner and Perez in the Bonneville and Cruz standing near the Bonneville's front passenger side. J.A. 226, 328. Meanwhile, the informant had contacted his DEA handler,

and law-enforcement officers converged on the Denny's parking lot. J.A. 70-71. Six officers on foot, wearing ballistic vests marked "Police" and "screaming 'police,'" ran into the Denny's lot from the gas station, while at least three unmarked police vehicles with lights blazing entered that lot and moved into position behind the Bonneville. J.A. 53-55, 58, 71-72, 140, 230-232, 329, 331. Cruz immediately surrendered. J.A. 57, 73, 233-234; cf. J.A. 75, 752 (call 67 from informant to Cruz's phone at 5:48 p.m. made after Cruz had been handcuffed). Petitioner did not.

When petitioner saw the advancing officers, he exclaimed "I told you" in Spanish ("te di[j]e") and threw the Bonneville into reverse. J.A. 73, 227-228. Petitioner's car struck the two police vehicles blocking the escape and briefly stopped before petitioner shifted gears and drove the Bonneville forward, striking at least one police vehicle as petitioner fled towards the Denny's exit. J.A. 59, 330-331, 348. Agent Chupik moved into the path of the oncoming Bonneville, pointed his gun at petitioner, and ordered him to stop. J.A. 59, 74, 136-137. Petitioner accelerated towards the exit and the agent was forced to leap out of the way. J.A. 74. Petitioner then raced out of the parking lot, turned west directly into oncoming rush-hour traffic in the east-bound lanes of the adjoining road, and "zigzagg[ed]" at a high rate of speed in and out of traffic until he reached an intersection and moved to the proper lane of travel. J.A. 59-60, 331-332.

Law-enforcement officers pursued petitioner and Perez and, a few minutes later, found the Bonneville abandoned in a Walmart parking lot. J.A. 332, 334-335. A bystander told the officers that he had seen two men run from the car toward a nearby McDonald's. J.A. 339.

An Arlington Heights detective pursued the pair and spotted petitioner through the restaurant's window. J.A. 340-341, 345-346. Petitioner locked eyes with the officer, then turned and ran. J.A. 341, 345, 352. The detective chased the men through the McDonald's kitchen and out the back door. J.A. 342-343, 352-353. Petitioner and Perez then split up and fled in different directions, but both were promptly apprehended. J.A. 343-344, 351, 364-367.

Officers found a cell phone on petitioner and two cell phones on the ground near Perez. J.A. 356-359, 367. Investigating agents used those phones to obtain the call records discussed above, which showed that petitioner and Perez made 27 phone calls to each other on the day of the planned drug deal. J.A. 87-93, 751-752. The call records also showed that each call or series of calls between Perez and Cruz that day was followed by phone calls between Perez and petitioner. J.A. 751-752.

Officers subsequently searched the Bonneville and discovered its hidden compartment with $23,000 in cash. J.A. 96-98. Further investigation determined that petitioner had accompanied Perez in May 2008, when the men inspected the then-for-sale Bonneville and Perez purchased it. J.A. 151-153, 158, 160, 390.

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 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 and pleaded guilty. *Id.* at 10A. Petitioner went to trial with the defense theory that he was "an innocent bystander who just happened to be in the wrong place at the wrong time." *Id.* at 11A; see J.A. 23-25.

a. The government countered that defense by presenting the evidence discussed above, including proof of petitioner's prior conviction for the similar 2002 cocaine offense as evidence of petitioner's "knowledge, intent, absence of mistake and modus operandi" under Federal Rule of Evidence 404(b). Pet. App. 7A; J.A. 305-319.

Three of petitioner's adult children and Perez's wife, Marina Perez (Marina), testified during the defense case. They stated that they had never seen petitioner drive Perez's Bonneville and that petitioner owned a Toyota and lived on Mulligan Avenue with his girlfriend, their young son, and petitioner's mother. J.A. 400-401, 408-410, 415-417, 426, 429-430; see J.A. 421 (admitting petitioner's driver's license).

Marina provided the basis for petitioner's argument that he did not know that a drug deal would occur. She testified that she was then pregnant and, after shopping for baby clothes, arrived with Perez at petitioner's home on Mulligan Avenue at around 3:00 or 3:30 p.m. on August 5, 2008. J.A. 426-427, 430, 440-441. She stated that Perez told her that he was going to Arlington Heights with friends; that she argued with Perez because she did not want him to leave; and that Perez left petitioner's home at 4:00 p.m. when an unidentified person picked him up. J.A. 432-438. Marina stated that, before he left, Perez had asked her to pick him up later and drive him back, but that she had asked petitioner to go in her stead. J.A. 432-434. She further stated that petitioner's own car was blocked by Perez's Bonneville, so she told petitioner to drive the Bonneville. J.A. 436-437. Marina testified that petitioner left in the Bonneville at around 5:00 p.m. J.A. 446. Marina also testified that she had met with petitioner's lawyer once before the trial. J.A. 424.

After Marina's testimony, the U.S. Attorney's Office discovered recorded prison-phone conversations between Marina and Perez that undermined Marina's testimony. J.A. 458-462. The district court granted the government a one-day continuance in order to prepare to call Marina (and possibly Perez) in its rebuttal case, finding that the recordings reflected that Marina had a bias and that her bias could be addressed on rebuttal. JA 468-469. The court further held that the four recordings were admissible as extrinsic evidence of Marina's bias and prior inconsistent statements. J.A. 518, 520-521, 523-524, 526-527. The court then granted petitioner's request, under Federal Rule of Evidence 106, that the recordings be played to the jury in their entirety. J.A. 524.

The government called Marina as a rebuttal witness. Marina admitted that she had met with petitioner's counsel several times before the one meeting she had mentioned in her earlier testimony. J.A. 539. She also testified that petitioner's counsel told her that the evidence indicated that her husband, Perez, would be found guilty. J.A. 533-534, 544, 548. She also acknowledged her belief that petitioner's counsel would assist in obtaining a lower sentence for her husband and that counsel wanted Perez to plead guilty in a manner that would "not admit the role of [petitioner]" because petitioner "was going to trial." J.A. 535-538.

b. The government then played to the jury four recordings of prison-phone conversations between Marina and Perez on August 1, 5, 12, and 13, 2009. J.A. 573, 585, J.A. 759-778 (transcripts).

The August 1 recording showed that, based on a conversation with petitioner's counsel (Beau Brindley), Marina told Perez that "Beau is trying to tell me that

you're f---ed" and "is trying to make you look like you're f---ed so he can use this strategy." J.A. 760-761. She stated that petitioner's counsel told her that "his idea" was that "[i]f we talk about this car. Well then you know . . . [petitioner] would be okay." J.A. 766. Marina explained her reaction to that strategy: "I'm like what? [Petitioner] came too! If [Perez] is so much f---ed then so is he." *Ibid.* Marina told Perez that, in her view, petitioner's counsel was "lying to [her]" to get her and Perez to "[d]o whatever he wants." J.A. 767. Marina explained that when she told Perez's own attorney (Frank Lipuma) about her discussion with petitioner's counsel, Lipuma "started cursing [petitioner's counsel]." J.A. 761; see J.A. 497, 558; cf. J.A. 468.

In the August 5 recording, Marina told Perez that petitioner's counsel was "saying that everybody is going to lose" but that what he was saying "does not make sense." J.A. 769. Marina stated that "[h]e's saying whatever he wants to say. I don't believe him." *Ibid.*

In the August 12 recording, Perez told Marina that petitioner had met with his counsel. J.A. 771.

> Marina Perez: So what'd Beau tell [petitioner]? What did Beau tell him?
>
> Joel Perez: A blind plea would be good, then he can guarantee this and that. You know what I mean? Just certain things, you know? I got to explain to you.
>
> Marina Perez: He's telling him about a blind plea also?
>
> Joel Perez: Yeah, he is. I gotta explain to you. You know what I mean. He says, if you want, have his wife talk to me, this or that. I have to explain to you tomorrow.

Ibid. Perez told Marina that petitioner's counsel "is saying that this is what'll be better for me"; confirmed to her that "Beau is talking about less, lesser years," "four at the most"; and added that "[h]e's saying we got to get rid of Lipuma. [Laughs]." J.A. 772, 775 (final brackets in original).

In the August 13 recording, Marina told Perez that she had spoken again with petitioner's counsel and that she understood that he could help Perez secure a sentence lower than Perez's own lawyer had indicated. J.A. 776-777. Perez then asked Marina whether petitioner's counsel was proposing that Perez accept "a blind plea or a plea?" J.A. 777. Marina told Perez that it "has to be a specific plea, but you have to be careful before you sign anything because they'll try to be like, 'it was [petitioner] too.'" *Ibid.* Marina added that petitioner's counsel said "you have to be careful with the written agreement, or whatever it is." *Ibid.*

c. After playing the tapes, the government attempted to call Perez as its final rebuttal witness but was unsuccessful and rested its case. J.A. 594, 624-625.[1]

During jury deliberations, the district court denied a jury request for the transcript of Marina's testimony (J.A. 423-449, 529-558). J.A. 739-742. The jury subsequently found petitioner guilty of conspiracy count but acquitted him of attempt. J.A. 745.

3. The court of appeals affirmed. Pet. App. 1A-17A.

a. As relevant here, the court of appeals rejected petitioner's contention that the four recorded conversations between Marina and Perez were inadmissible for

---

[1] The district court ordered Perez to testify after the government granted Perez immunity for his testimony, but Perez refused and was held in contempt. J.A. 489-495, 580-582.

any purpose. Pet. App. 14A-15A. The court held that the recordings were admissible as extrinsic evidence of (1) "Marina's bias and interest in trying to get her husband a lower sentence" and (2) her "prior inconsistent statements" insofar as they were "arguably inconsistent with her story that it was her idea that [petitioner] took the Bonneville on the day of the deal." *Ibid.* The court of appeals concluded, however, that the district court had erred in going further and "admitting the [prison] recordings for their truth." *Id.* at 15A.

The court of appeals nevertheless found the error harmless. Pet. App. 16A. It explained that the government bears the burden of proving 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)). That inquiry, the court observed, considers "whether, in the mind of the average juror, the prosecution's case would have been 'significantly less persuasive' had the improper evidence been excluded." *Ibid.* (quoting *United States* v. *Emerson*, 501 F.3d 804, 813 (7th Cir. 2007)). The court stated that "the issue is close," but it ultimately concluded based on its review of "the evidence as a whole * * * that the error was harmless." *Ibid.*

The court of appeals concluded that petitioner's flight from the police was significant evidence of guilt. Pet. App. 16a. The court recognized that flight evidence "must be viewed with caution," but that "there are degrees of flight" and this case involved "flight in the first degree." *Ibid.* The court noted that petitioner "thr[ew] the Bonneville into reverse, endangering officers"; hit two police vehicles; "gunn[ed] it the wrong way into a roadway"; "ditch[ed] the car a few moments later"; and

"tr[ied] to escape by running through the kitchen and out the back door of a McDonald's." *Ibid.* Other incriminating evidence included: cell-phone records revealing multiple calls between petitioner and Perez "leading up to the aborted deal"; petitioner's statement to Cruz that "we got the money here"; the fact that petitioner was driving the Bonneville with $23,000 in hidden cash; and the "striking similarity" between this case and petitioner's previous drug conviction, which also involved Perez, a cocaine deal, and cash hidden in a secret compartment in a car's passenger-side dashboard. *Id.* at 16A-17A. The court concluded that the evidence in this case "would have moved the jury to convict [petitioner] without a nudge from anything it heard in the government's rebuttal case." *Id.* at 17A.

b. Judge Hamilton dissented. Pet. App. 17A-28A. Judge Hamilton disagreed that the recorded conversations between Marina and Perez were admissible to show bias and prior inconsistent statements. *Id.* at 19A-21A. But even if they were, such that they could have been admitted with "a limiting instruction telling the jury that such damaging evidence should not be considered for the truth of the matters asserted," "no [such] instruction was given." *Id.* at 17A-18A. Judge Hamilton agreed with the court that "the district court erred in admitting the [prison] tapes for the truth," *id.* at 21A, but he concluded that the error was not harmless, *id.* at 21A-28A.

Judge Hamilton stated that the harmless-error inquiry requires a court to determine "'whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" Pet. App. 23A (citation omitted). Judge Hamilton then concluded that the government did not satisfy that standard, be-

cause the 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, Judge Hamilton reasoned, the government had emphasized the rebuttal evidence in its closing, *id.* at 27a, and the jury must have viewed the case as a close one, because it acquitted petitioner on the charge of attempted possession with intent to distribute, *ibid.*

SUMMARY OF ARGUMENT

The court of appeals correctly concluded that the erroneous admission at trial of recordings of prison-phone conversations between Marina and Perez for the truth of the matters asserted was harmless. The court appropriately articulated the harmless-error standard and correctly concluded based on its review of the "evidence as a whole" that the non-constitutional trial error did not alter the verdict.

The harmless-error doctrine recognizes that virtually all trials have errors, and it properly avoids unjustifiably imposing the significant social cost of unnecessary retrial by focusing on the trial's underlying fairness and determining whether the error at issue likely altered the trial's outcome. The appellate court's task of separating harmful from harmless errors embodies three basic elements. First, the conclusion of harmlessness must reflect an approriate level of confidence: a "fair assurance" that a non-constitutional error did not have a "substantial and injurious" effect on the verdict, or confidence beyond a reasonable doubt that a constitutional error ultimately did not change the outcome. Second, the court's analysis is an objective one, which does not attempt a subjective inquiry into the minds of jurors to

discern the actual (but unknowable) subjective deliberative processes underlying the verdict. And third, that objective analysis considers the record as a whole in light of the instructions given to the jury, assumes that the jury was a rational one, and weighs the probative force of the evidence that the jury *presumably* considered against the likely probative force of the error. If the government's case is sufficiently strong to give a fair assurance (for non-constitutional error) or confidence beyond a reasonable doubt (for constitutional error) that the jury's verdict would not have been different absent the error, the error is harmless.

The court of appeals followed that process here. It explained that it reviewed "the evidence as a whole," determined that "a reasonable jury would have reached the same verdict without the challenged evidence," and explained that nothing the jury "heard in the government's rebuttal case" would have "nudge[d]" the jury to convict. Pet. App. 16A-17A. The court's opinion reflects that it employed the approriate analysis.

Petitioner's contention that a court must consider the impact of the error on the verdict does not undermine that conclusion. When the government's case is sufficiently strong, a court can find that the error would not have affected the outcome. Petitioner claims that his Sixth Amendment jury-trial right was violated by the court of appeals' analysis. But the court's evaluation of the evidentiary record as a whole to determine to an appropriate degree of confidence that the trial error was harmless is nothing but a "typical appellate-court" process for deciding whether the *remedy* of retrial is warranted for the error. In finding the error harmless, the court did not adjudge petitioner guilty. The jury did so,

and its verdict of guilty beyond a reasonable doubt is the foundation upon which petitioner's conviction rests.

Finally, this Court normally does not conduct fact-bound review of harmless-error claims and it need not do so here, given that the court of appeals explained that it has already reviewed the "evidence as a whole." In any event, the evidentiary record viewed objectively shows that the government's case was quite strong, petitioner's defense was exceedingly weak, and the prejudicial effect of a brief reference to any purportedly harmful statement in the substantial trial record was itself negligible. There is at least a "fair assurance" based on that record that the error did not have a "substantial and injurious" effect on the verdict. That is, the error here was harmless.

ARGUMENT

THE ERRONEOUS ADMISSION OF EVIDENCE IN THIS CASE WAS HARMLESS BECAUSE IT HAD NO EFFECT ON THE OUTCOME

Harmless-error doctrine "focus[es] on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." *Delaware* v. *Van Arsdall*, 475 U.S. 673, 681 (1986). This ensures that the "substantial social costs" that result from reversal of criminal verdicts will not be imposed unjustifiedly. *United States* v. *Mechanik*, 475 U.S. 66, 72 (1986). Retrials demand substantial "resources to repeat a trial that has already once taken place"; impose significant burdens on crime victims; and ultimately can "cost society the right to punish" the guilty when the "[p]assage of time, erosion of memory, and dispersion of witnesses * * * render[s] retrial difficult" or "impossible." *Ibid.* (citations omitted). The harmless-error rule ensures that

those significant costs are not imposed "when an error has had no effect on the outcome of the trial." *Ibid.* In this case, the court of appeals properly held based on the entire record of the case, that the evidentiary error at issue was harmless. That holding is entirely consistent with the Sixth Amendment jury trial right.

A. The Court Of Appeals Employed The Correct Harmless-Error Standard

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." See also 28 U.S.C. 2111 ("On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."). The requirement that errors must "affect substantial rights" to warrant reversal requires, outside of the narrow category of "structural errors," see *Neder* v. *United States*, 527 U.S. 1, 7-8 (1999), that courts conduct an "analysis of the district court record * * * to determine whether the error was prejudicial," *i.e.*, whether it "affected the outcome of the district court proceedings." *United States* v. *Olano*, 507 U.S. 725, 734 (1993) (discussing Rule 52(a)).

That emphasis on the outcome of the criminal trial reflects the underlying function of the harmless-error inquiry. This Court has long recognized that "given the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial." *United States* v. *Lane*, 474 U.S. 438, 445 (1986) (quoting *United States* v. *Hasting*,

461 U.S. 499, 508 (1983)). The harmless-error doctrine "recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, . . . and promotes public respect for the criminal process by focusing on the underlying fairness of the trial." *Neder*, 527 U.S. at 18 (quoting *Van Arsdall*, 475 U.S. at 681); accord *Satterwhite* v. *Texas*, 486 U.S. 249, 256 (1988); *Rose* v. *Clark*, 478 U.S. 570, 577 (1986). Those principles require an objective inquiry based on the record as a whole.

1. Harmless-error analysis applies an objective inquiry based on the evidentiary record as a whole that compares the probative effect of properly considered evidence against the probable impact of the error

Because the harmless-error inquiry is designed to separate errors that mattered from errors that do not justify the high costs of a retrial, the task of an appellate court is to review the record to assess an error's likely effect on the outcome of a trial. An appellate court cannot conduct a pristine laboratory experiment to control for the presence of error. Nor can it probe the minds of jurors to discern what outcome they would hypothesize absent the error. Rather, "in typical appellate-court fashion," *Neder*, 527 U.S. at 19, appellate courts review the record to form a judgment whether, absent the error, the ultimate outcome likely would have been the same.

a. The judgment demanded by the harmless-error doctrine embodies three core elements. First, the type of error—constitutional error or not—defines the degree of confidence that a reviewing court must have in its judgment that the error was harmless. Second, the court's judgment of harmlessness must rest on an objec-

tive analysis of the likely effect on a reasonable jury, not on what may have been the (unknowable) subjective rationale of the actual jurors in a case. And third, the inquiry evaluates harmlessness by considering the entire evidentiary record properly before the jury against the probable effect of the error to determine the likelihood that the error did not alter the ultimate outcome of trial.

i. The level of confidence necessary to find that an error is harmless varies with the type of error at issue. For non-constitutional errors, this Court has held that an error is harmless if there is a "fair assurance" that the error did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Kotteakos* v. *United States*, 328 U.S. 750, 765, 776 (1946). When errors of a constitutional dimension are raised on direct review, the test calls for a greater degree of confidence. Such errors are harmless only when it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman* v. *California*, 386 U.S. 18, 24 (1967); cf. *Brecht* v. *Abrahamson*, 507 U.S. 619, 623 (1993) (applying *Kotteakos*' harmless-error standard for constitutional errors raised during habeas review). But "absolute certainty" is never required, nor could it be in any pragmatic system of justice. See *Hedgpeth* v. *Pulido*, 555 U.S. 57, 62 (2008) (per curiam).

ii. In assessing the likelihood that an error was harmless, courts employ an objective standard that considers the effect of the error on an average, reasonable jury. This Court's modern harmless-error jurisprudence recognizes that a reviewing court's evaluation of harmlessness requires consideration of the impact of the error on the jury's verdict "in relation to all else that

happened." *Kotteakos*, 328 U.S. at 764.[2] The court's function is not "to determine guilt or innocence" afresh, *id.* at 763, but to consider the probable impact of an error (if any) on a verdict delivered by jurors who are "not [to] be regarded generally as acting without reason," *id.* at 764. In making that determination, however, the court cannot inquire into the actual deliberative process that led to the verdict, see Fed. R. Evid. 606(b), and is unable to rely on knowledge of the actual "jurors who sat." *Harrington* v. *California*, 395 U.S. 250, 254 (1969). The harmless-error analysis thus is not "a subjective enquiry into the jurors' minds." *Yates* v. *Evatt*, 500 U.S. 391, 404 (1991).

Instead, a reviewing court must base its "judgment * * * on [its] own reading of the record and on what seems to [the court] to have been the *probable impact* of the [error] on the minds of an *average* jury." *Harrington*, 395 U.S. at 254 (emphases added) (finding harmless the constitutionally erroneous admission of codefendants' confessions). That objective standard seeks out a "rational explanation for the jury's verdict, completely consistent with the judge's instructions," and does not "indulge assumptions of irrational jury behavior." *Schneble* v. *Florida*, 405 U.S. 427, 432 (1972) (fol-

[2] Petitioner relies (Br. 12-15) on several decisions that predate the Court's modern harmless-error jurisprudence. For example, *Weiler* v. *United States*, 323 U.S. 606, 609-611 (1945), concluded that the failure to instruct the jury that it must find at least one witness and corroborating evidence to convict the defendant on a perjury count was not a harmless "'technical' error." That failure to instruct on a necessary finding for conviction would now be an instructional error subject to harmless-error review. See *Neder*, 527 U.S. at 11-13 (holding that a constitutional instructional error that entirely omits an element of the offense is subject to harmless-error review even though it "prevent[ed] the jury from making a finding on the element").

lowing *Harrington* and finding harmless a similar challenge to the admission of a co-defendant's confession).[3]

Accordingly, review for harmlessness is not "based on the fiction" that a court will determine that "the jury *in fact* did not have [the object of the error] in mind when it concluded that the defendant" was guilty; nor does it suggest that "the reviewing court can retrace the jury's deliberative processes." *Pope* v. *Illinois*, 481 U.S. 497, 503 n.6 (1987). The harmless-error doctrine accepts that the relevant error—*e.g.*, the "mistaken admission of evidence," a prosecutorial "comment on a defendant's silence," or the "erroneous limitation of a defendant's cross-examination"—may, in fact, have "alter[ed] the terms under which the jury considered the defendant's guilt or innocence" and therefore at least "theoretically impair[ed] the defendant's interest in having a jury decide his case." *Rose*, 478 U.S. at 582 n.11. But the question on review is whether the remedy of a new trial is warranted for "a trial error that, in theory, may have *altered the basis* on which the jury decided the case, but in practice clearly had no *effect on the outcome*?" *Ibid.* (emphases added). To answer that question, a court must determine whether "a *rational* jury would have found the defendant guilty absent the error." *Neder*, 527 U.S. at 18 (emphasis added).

---

[3] Petitioner incorrectly contends (Br. 25) that *Satterwhite* rejected a harmless-error inquiry that focused on "the minds of an average jury." *Satterwhite* held that the state court erred, not because it used the phrase "the minds of an average jury," but because it had mistakenly focused on whether "the legally admitted evidence was sufficient to support [a] death sentence" instead of deciding whether the error was harmless beyond a reasonable doubt under *Chapman*. See *id.* at 258-259.

iii. The objective nature of the inquiry defines the methodology that courts apply to evaluate harmlessness. "Since [the harmlessness] enquiry cannot be a subjective one into the jurors' minds, a court must approach it by asking whether the force of the evidence *presumably* considered by the jury in accordance with the [jury] instructions" is sufficient to show that the verdict "would have been the same in the absence of the [error]." *Yates*, 500 U.S. at 404-405 (emphasis added). If the error is of constitutional proportions, *Chapman* requires that the presumptively considered evidence be "so overwhelming as to leave it beyond a reasonable doubt that the verdict resting on that evidence would have been the same in the absence of the [error]." *Ibid.* (applying *Chapman* standard). But where, as here, nonconstitutional error is asserted, the presumptively considered evidence need only be sufficiently strong to give a reviewing court a "fair assurance" that the error did not exert a "substantial and injurious effect or influence" on the ultimate verdict of guilt. *Kotteakos*, 328 U.S. at 765, 776.

As the Court explained in *Yates* when evaluating the harmlessness of a jury instruction that allowed the jury to rely on an unconstitutional presumption, the harmlessness inquiry involves a two-step analysis. First, the court "ask[s] what evidence the jury considered as tending to prove or disprove" guilt, by examining the "entire record" with the "assumption * * * that the jury considered all the evidence bearing on the issue." *Yates*, 500 U.S. at 404-405; see *Lane*, 474 U.S. at 448 n.11 (*Kotteakos'* harmlessness inquiry "requires a review of the entire record"). Again, that objective question does not involve "a subjective enquiry into the jurors' minds" but rather depends on an "analysis of the instructions

given to the jurors" and the "application of that customary presumption that jurors follow instructions." *Yates*, 500 U.S. at 404. Second, the court "weigh[s] the probative force of that evidence" presumptively considered against "the probative force of the [error] standing alone." *Ibid.* If "the force of the evidence presumably considered by the jury in accordance with the instructions" provides a sufficient likelihood that the result "would have been the same in the absence of the [error]," *id.* at 405, the error is harmless. In other words, an error is harmless when it is sufficiently "unimportant in relation to everything else the jury considered" in the record, *id.* at 403, that the outcome of a rational jury's consideration would likely have been the same.

b. Petitioner contends (Br. 15-18, 27-32) that the proper focus of the harmless-error inquiry is "on the error's effect on the jury that heard the case," Br. 17, as reflected in decisions like *Chapman*, which discuss whether an error "possibly influenced the jury" or "contributed to the conviction," *Chapman*, 386 U.S. at 23-24 (citation omitted). But to the extent he suggests that an error is harmful if it affected the subjective decision process of the "jury that heard the case," his view cannot be squared with this Court's objective approach to harmlessness. *Yates* specifically addressed the *Chapman* standard and emphasized that "[t]o say that an error did not 'contribute' to the ensuing verdict [under *Chapman*] is not, of course, to say that the jury was totally unaware of that feature of the trial later held to have been erroneous." 500 U.S. at 403. Instead, it is "to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." *Ibid.* And that assessment of harmlessness turns not on "a subjective enquiry into the

jurors' minds" but on an evaluation of "the force of the evidence presumably considered by the jury," based on the court's "review of the entire record," the jury instructions, and the "presumption that jurors follow instructions." *Id.* at 404-405.

Petitioner similarly relies (Br. 26-33) on decisions that have found certain instructional errors to violate the right to a jury trial, arguing that they suggest that an error is harmful when it influences or affects the verdict. But the decisions on which he relies reinforce the conclusion that the objective analysis discussed above is the proper inquiry. *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993), for instance, held that a defective reasonable-doubt instruction was a structural error that was *not* subject to harmless-error analysis because it "vitiates *all* the jury's findings" such that there "has been no jury verdict within the meaning of the Sixth Amendment." *Id.* at 280-281. That rationale does not apply to cases where a jury *does* render a verdict of guilty beyond a reasonable doubt, even where an instructional error may prevent it from deciding one element of the offense. See *Neder*, 527 U.S. at 13, 17 (rejecting similar reliance on *Sullivan*); *Washington* v. *Recuenco*, 548 U.S. 212, 222 n.4 (2006) ("We recognized in *Neder* * * * that a broad interpretation of our language from *Sullivan* is inconsistent with our case law.").

Although an instructional error that prevents the jury from rendering a verdict on an element of the offense will "infringe upon the jury's factfinding role and affect the jury's deliberative process in ways" that are normally "not readily calculable," that error will nevertheless be harmless beyond a reasonable doubt under *Chapman* if the missing element was established with

uncontroverted evidence. *Neder*, 527 U.S. at 18.[4] That evaluation of the likelihood that a "rational jury would have found the defendant guilty absent the error," *Neder* explains, does not place the reviewing court in the role of jury but instead requires, "in typical appellate-court fashion," an examination of the record to determine beyond a reasonable doubt that the error did not affect the outcome. *Id.* at 18-19. *Neder*, of course, does not address the *Kotteakos* standard for non-constitutional errors like the one at issue here.[5]

---

[4] In some contexts, a guilty verdict itself provides sufficient evidence that an instructional error is harmless beyond a reasonable doubt. For instance, if a jury is erroneously instructed on the elements of an offense, that error does not have affected the outcome if, under the instructions actually given to the jury, the jury's verdict was necessarily based on findings that cover the elements missing from the instruction. See *Carella* v. *California*, 491 U.S. 263, 266 (1989) (per curiam). Many courts of appeals so hold. See, *e.g.*, *United States* v. *Brown*, 161 F.3d 256, 258 n.4, 259 (5th Cir.) (en banc) (erroneous jury instruction on "use" of a firearm was harmless because the jury necessarily found that the defendant "carried" the firearm in violation of 18 U.S.C. 924(c)). Petitioner (Br. 29) concedes this point.

[5] Petitioner appears to contend (Br. 27, 29-31) that *Neder* suggests that trial evidence must be "uncontroverted and incontrovertible" before an error may be found harmless based on the overall strength of that evidence. That suggestion is incorrect. *Neder* applied *Chapman*'s harmless-beyond-a-reasonable-doubt standard because the error in *Neder* (the failure to instruct the jury on an element of an offense) was a constitutional error. *Neder*, 527 U.S. at 4, 18. In that context, the Court it was sufficient (but not necessary) under *Chapman* to show the omitted element was supported by uncontroverted evidence. *Id.* at 18-19. That holding does not suggest a more general requirement that evidence be uncontroverted. Indeed, this Court has found errors to be harmless in contexts where the evidence of guilt was in fact controverted. See, *e.g.*, *Brecht*, 507 U.S. at 624, 639; *Hasting*, 461 U.S. at 511-512. That only makes sense. Cases that go to trial are nearly always controverted through cross-examination or the presentation of a de-

c. The specifics of harmlessness review may vary depending on the nature of the error at issue, but this Court has applied the same basic mode of analysis in various harmless-error contexts, including when reviewing the erroneous admission of evidence.

In *Harrington*, for example, the court reviewed under *Chapman* a first-degree-murder conviction in which confessions from two of Harrington's non-testifying codefendants were unconstitutionally admitted in violation of *Bruton* v. *United States*, 391 U.S. 123 (1968). See *Harrington*, 395 U.S. at 252-253. The Court, based on its "own reading of the record" and assessment of the "probable impact of the two confessions on the minds of an average jury," found the error harmless because "apart from [those confessions] the case against Harrington was so overwhelming that * * * th[e] violation of *Bruton* was harmless beyond a reasonable doubt." *Id.* at 254; see also *Schneble*, 405 U.S. at 430-431 (finding assumed *Bruton* error harmless under *Chapman* where "the independent evidence of guilt" was "overwhelming" and the "prejudicial effect of the codefendant's admission [sufficiently] insignificant by comparison"); *Brown* v. *United States*, 411 U.S. 223, 231 (1973) (finding assumed *Bruton* error harmless in light of "overwhelming and largely uncontroverted evidence properly before the jury").[6]

---

fense case or both. If uncontroverted evidence were always required, exceedingly few errors would be harmless.

[6] The Court in *Brecht* found the *Kotteakos* harmlessness standard to be "clear[ly]" satisfied where the State's evidence of guilt was "certainly weighty," petitioner's claim that he accidentally shot the victim was sufficiently undermined by the State's other evidence, and the State's improper references to *Brecht*'s post-Miranda silence covered less than two pages of a 900-page trial transcript. 507 U.S. at 638-639.

Similarly, in *Milton* v. *Wainwright*, 407 U.S. 371, 372 (1972), Milton argued on federal collateral review of his first-degree-murder conviction that his confession was involuntary and erroneously admitted at trial. The Court declined to reach the merits because it found "overwhelming evidence of guilt fairly established in the state court * * * by use of evidence not challenged here," rendering any error "harmless." *Id.* at 377-378. See also *James* v. *Illinois*, 493 U.S. 307, 330 (1990) (Kennedy, J., dissenting) (concluding that admission of illegally obtained statements from the defendant was harmless, given the "overwhelming evidence of [his] guilt in this case, including the testimony of five eyewitnesses").

And in *Arizona* v. *Fulminante*, 499 U.S. 279, 306 (1991), the Court concluded that an erroneously admitted confession was not harmless under *Chapman*, based on its assessment of the strength of the government's case. The Court found that the jury's consideration of the defendant's properly admitted second confession "could easily have depended" on the corroborating fact of the inadmissible confession and that, apart from the confessions, the prosecution's evidence was likely "insufficient to convict." *Id.* at 297-299; see *Premo* v. *Moore*, 131 S. Ct. 733, 744 (2011) ("*Fulminante* found that an improperly admitted confession was not harmless * * * because the remaining evidence against the defendant was weak").

The Court has also focused on the overall strength of the prosecution's evidence when assessing other types of error for harmlessness. In *Hasting*, for example, the Court held that the prosecutor's improper reference to the defendant's failure to rebut the government's evidence was harmless "[i]n the face of th[e] overwhelming

evidence of guilt and the inconsistency of the scanty evidence tendered by the defendants." 461 U.S. at 512. See also *United States* v. *Young*, 470 U.S. 1, 19 (1985) ("the overwhelming evidence of respondent's intent to defraud * * * eliminates any lingering doubt that the prosecutor's remarks unfairly prejudiced the jury's deliberations"). And in *Lane*, where the defendants claimed that certain charges were misjoined for trial in violation of Fed. R. Crim. P. 8(b), the Court found any misjoinder to be harmless "[i]n the face of [the] overwhelming evidence of guilt shown here." 474 U.S. at 450.

Although the Court's analysis often has not focused exclusively on the overall strength of the government's proof, its decisions demonstrate that a court's determination of harmlessness can properly rest on the conclusion that the admissible evidence of guilt is sufficiently strong, such that the prejudicial effect of erroneously admitted evidence can be deemed not to have altered the outcome.[7]

---

[7] In contexts where a trial error *prevents* the defendant from presenting evidence to the jury, determining whether the jury's verdict would likely have been the same absent that error requires an assessment of the likelihood that the omitted evidence would have altered the verdict. Thus, in *Van Arsdall*, the Court concluded that a Confrontation Clause error limiting the defendant's ability to cross-examine a government witness could be harmless under *Chapman* if, assuming the "damaging potential of the cross-examination were fully realized," a court can determine the error was harmless beyond a reasonable doubt. 475 U.S. at 684. A reviewing court's analysis in this context may evaluate the "importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permit-

2. The court of appeals stated the correct standard

The court of appeals stated the correct standard of harmlessness in this case. The court explained that its inquiry asked whether "a reasonable jury would have reached the same verdict without the challenged evidence" and was based on its review of "the evidence as a whole." Pet. App. 16A (citation omitted). That statement properly reflects an objective inquiry that accounts for the likely effect of the error in light of the entire evidentiary record. The court's statement that the trial evidence "would have moved the jury to convict [petitioner] without a nudge from anything it heard in the government's rebuttal case," *id.* at 17A, reflects the court's conclusion that the erroneous admission during the government's rebuttal case of taped prison-phone conversations between Marina and Perez for the truth of the matters asserted did not affect the verdict. In short, a reasonable jury would not have been "nudge[d]" by that error to convict petitioner.

Although the court of appeals did not articulate the specific rationale for its view that the erroneously admitted evidence that the jury "heard in the government's rebuttal case" did not alter the jury verdict, that economical approach to the fact-bound portion of its harmless-error analysis is not uncommon in the courts of appeals. Cf. Cert. Reply 3-4 (discussing opinions resolving harmless-error questions "in a few short sentences"). Federal courts may issue judgments without opinions, and this Court has never imposed a general requirement that federal courts electing to issue an opinion must provide lengthy explanations for such mat-

---

ted, and, of course, the overall strength of the prosecution's case." *Ibid.*; see *Olden* v. *Kentucky*, 488 U.S. 227, 232-233 (1988) (per curiam).

ters. See *Jones* v. *United States*, 527 U.S. 373, 404 (1999) (noting that a "detailed explanation" of a federal court's harmless-error analysis may not be necessary); *Sochor* v. *Florida*, 504 U.S. 527, 540 (1992) (concluding that state courts need not use "a particular formulaic indication" before their harmless-error decisions will pass scrutiny; suggesting that a "plain statement that the judgment survives" the lower court's harmless-error review would be sufficient).

Petitioner contends (Br. 12, 25-26 & n.5) that the court of appeals erred by concluding that "an average jury would still have found the defendant guilty" after it "stripped the error from the trial" and that the court "in effect" used an "'overwhelming-evidence' test" that did not consider the effect of the error on the jury. But petitioner's reading of the court's decision does not account for the court's express assurance that it "look[ed] at the evidence *as a whole*" (not just that evidence minus the material in question) to determine that "the error was harmless" or for the court's conclusion that the jury still would have convicted petitioner "without a nudge from anything it heard in the government's rebuttal case." Pet. App. 16A-17A (emphasis added).

3. Inferences drawn from jury conduct are unreliable grounds for evaluating harmlessness

Petitioner contends (Br. 56-57, 63) that the Court's harmless-error analysis in this case should be based on inferences that petitioner draws from actions taken by the jury. Specially, petitioner argues that (1) the jury's mid-deliberations request for a transcript of Marina's testimony, (2) the length of the jury's deliberations, and (3) the jury's verdict of acquittal on the attempt count each indicate that *this* jury might have reached a differ-

ent result on the count of conviction absent the district court's evidentiary error. Inferences drawn from such juror conduct are highly unreliable indications of the actual effect of a trial error. Indeed, petitioner's own claims illustrate the hazards of relying on such purported indications of harmful error.

The Federal Rules of Evidence preclude the use of direct evidence of a trial error's effect (if any) on jury deliberations. Rule 606(b) excludes from evidence any testimony from a juror about "any juror's mental processes concerning the verdict" or "the *effect of anything* on that juror's or another juror's vote" (emphasis added). That rule embodies "long-recognized and very substantial concerns" warranting "the protection of jury deliberations from intrusive inquiry," even though there is "little doubt" that at least some verdicts may be "reached after irresponsible or improper juror behavior." *Tanner* v. *United States*, 483 U.S. 107, 120, 127 (1987). Because "[t]he jury's deliberations are secret and not subject to outside examination," this Court has recognized that it would be mere "conjecture" to ascribe a basis for jurors' actual votes on the basis of "speculation into what transpired in the jury room." *Yeager* v. *United States*, 129 S. Ct. 2360, 2368 (2009).

Although certain jury actions can be observed outside the jury room, those actions are normally an unreliable indication of the jury's deliberative process. A jury's request to hear certain testimony, the length of its deliberations, and the divided nature of a particular verdict say little about the strength of the government's case or the impact of particular evidence. Individual jurors may idiosyncratically give undue weight to certain aspects of the trial, only to be persuaded by fellow jurors to see the case in a different light. The very

premise of an *Allen* charge is that a dissenting juror's own assessment of a case may not be "a reasonable one" and may change with further deliberations and exchange of views. *Allen* v. *United States*, 164 U.S. 492, 501 (1896). Or a jury may arrive at a mixed verdict of acquittals and convictions through "mistake, compromise, or lenity." *United States* v. *Powell*, 469 U.S. 57, 65 (1984). Speculation about the reason is often fruitless. Such unreliable bases for inferring whether a trial error affected a jury's deliberative process thus provides at best an exceedingly tenuous basis for harmless-error analysis.

Petitioner's claims illustrate this point. First, petitioner notes (Br. 63) that the jury requested a transcript of Marina Perez's testimony (in the defense and rebuttal cases). J.A. 739. The jury's note may have reflected the request of only one juror, and it may have been prompted by any number of reasons. In this case, Marina's testimony was the sole basis of petitioner's defense that he was an innocent bystander. It is therefore unremarkable that a jury might have wanted to review her testimony before rendering its verdict. Moreover, although petitioner claims that the erroneous admission of hearsay evidence about two statements by his counsel was harmful (Br. 58), Marina's testimony did not focus on either: She admitted that *she* might have said that "everyone is in the s--- hole," J.A. 534, and she denied saying that counsel thought that petitioner "was going to lose," *ibid.* The note thus provides no reliable basis from which to infer harmful error.

Petitioner argues (Br. 56) for the first time that the court of appeals improperly overlooked the length of the jury's deliberations—eight hours—as a factor bearing on the harmless-error analysis. Petitioner suggests (Br.

56 n.9) that the average length of jury deliberation in a federal criminal trial is about four hours, but, in the year petitioner's trial was held, 61% of all criminal trials tried by federal district courts that resulted in verdicts or judgments were completed within three days. Administrative Office of the United States Courts, *2009 Annual Report of the Director: Judicial Business of the United States Courts* 386 (2010) (Table T-2). Petitioner's trial, by contrast, lasted six business days (excluding the one-day continuance), and eight hours of jury deliberation does not seem remarkable given the trial's length and the nature of the evidence. The jurors, for instance, had pages of detailed call records in evidence that they could map against the trial testimony. J.A. 751-758. In fact, the jury requested (and obtained) a dry-erase board with markers to use in the jury room, J.A. 736-737, suggesting a detailed review of the evidence. But more fundamentally, it is impossible to determine what issues took more deliberation than others. The jury may have agreed to convict on the conspiracy count within a few hours but then took longer to decide to acquit on the attempt count. Of course, any such guesswork is, like the inferences petitioner would draw, based on nothing but sheer speculation.

Finally, petitioner notes that the jury rendered a split verdict. In some contexts, a mixed verdict following an error might suggest that the error was harmless. See, *e.g.*, *Young*, 470 U.S. at 18 n.15 (finding prosecutorial comment to be nonprejudicial in part because the jury acquitted on the most serious charge, suggesting that the error "did not undermine the jury's ability to view the evidence independently and fairly"). But here, no reliable basis supports the conclusion that the verdict

of acquittal on the attempt count reflected an overall weakness of the government's case.

The most likely explanation for the split verdict is that the jury believed that the evidence established beyond a reasonable doubt that petitioner had conspired to engage in the cocaine transaction but did not believe that, under the jury instructions it was given for attempt, petitioner had completed a "substantial step" toward possessing the cocaine. J.A. 730 (instruction). The trial judge never defined "substantial," and the jury may well have concluded that the fact that petitioner simply drove to a drug deal, where he sat in the Bonneville and had no contact with the informant, did not constitute a "substantial" enough step where no drugs or money were ever displayed, Perez and Cruz declined to follow the informant to inspect the drugs, and the deal failed to proceed beyond a quick meeting in which only Cruz and Perez briefly spoke to the informant. As the Court explained in *Schneble*, "[j]udicious application of the harmless-error rule does not require that [the Court] indulge assumptions of irrational jury behavior when a perfectly rational explanation for the jury's verdict, completely consistent with the judge's instructions, stares [the Court] in the face." 405 U.S. at 431-432. Given the insubstantial nature of petitioner's assertions, the court of appeals could reasonably have deemed it unnecessary to address them in its opinion.

B. The Court Of Appeals' Decision Does Not Violate The Sixth Amendment

Petitioner contends (Br. 33-43, 63-64) that the court of appeals' harmless-error analysis violated his Sixth Amendment right to a jury trial by focusing exclusively on the strength of the untainted evidence without con-

sidering whether the error had any effect on the jury's verdict. That claim fails on two grounds. First, as explained, the court of appeals' opinion reflects its conclusion that the evidence of guilt was sufficiently weighty that the effect of the district court's evidentiary error would not have altered the verdict. See pp. 30-31, *supra*. Second, and more fundamentally, petitioner is incorrect that harmless-error analysis violates the Sixth Amendment by depriving him of his right to a jury trial.

Petitioner unquestionably had a Sixth Amendment right to a jury trial, and "the determination of guilt or innocence * * * is for the jury rather than the court." *Rose*, 478 U.S. at 582 n.11. But petitioner *was* convicted by a jury that found him guilty beyond a reasonable doubt in an adversarial trial where petitioner was represented by counsel. Petitioner's conviction thus rests on a jury verdict. "Harmless-error analysis addresses a different question: what is to be done about a trial error that, in theory, may have altered the basis on which the jury decided the case, but in practice clearly had no effect on the outcome?" *Ibid.* In other words, should a reviewing court *set aside* the jury's verdict and order a retrial as a remedy? That inquiry does not violate the Sixth Amendment.

Petitioner relies heavily on the Court's decision in *Sullivan*. Br. 40-42. But, as discussed above, *Sullivan* involved a structural error—a defective jury instruction that diluted the meaning of proof beyond a reasonable doubt—that "vitiate[d] *all* the jury's findings" and led the Court to conclude that there had been "no jury verdict within the meaning of the Sixth Amendment." *Sullivan*, 508 U.S. at 280-281. As a result, the Court concluded that "the entire premise of *Chapman* review [was] simply absent": Without any "jury verdict of

guilty-beyond-a-reasonable-doubt, the question whether the *same* verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless." *Id.* at 280.

This Court in *Neder* made clear that the same reasoning does *not* apply where a "constitutional error * * * prevents the jury from rendering a 'complete verdict.'" 527 U.S. at 11. *Neder* explained that the "strand of reasoning in *Sullivan*" cannot "be squared with [the Court's] harmless-error cases." *Ibid.* Although the failure to instruct the jury on an element of the offense was unconstitutional and necessarily "prevent[ed] the jury from making a finding on the element," *ibid.*, the Court could rely on "evidence of guilt the jury did not *actually* consider" to determine that the error was harmless under *Chapman*. *Id.* at 17; accord *Recuenco*, 548 U.S. at 220-221 (following *Neder* and holding that a court's application of a statutory sentencing enhancement without the requisite jury finding is subject to *Chapman* harmless-error review).

Neder forecloses petitioner's Sixth Amendment contentions. *Neder* makes clear that "[a] reviewing court making this harmless-error inquiry does not * * * 'become in effect a second jury to determine whether the defendant is guilty.'" 527 U.S. at 19 (citation omitted). It instead performs a "typical appellate-court" function when deciding whether an error is harmless based on the record of the case. *Ibid.*

C. The Non-Constitutional Hearsay Error In This Case Was Harmless

This Court conducts harmless-error inquiries only "sparingly." *Lane*, 474 U.S. at 450 (quoting *Hasting*, 461 U.S. at 510). And this case presents no compelling

reason to depart from that practice, given that the court of appeals applied the correct test and stated that it has already reviewed "the evidence as a whole." Pet. App. 16A.

In any event, the court of appeals correctly concluded that the district court's non-constitutional hearsay error was harmless. The admissible evidence of petitioner's guilt was sufficiently strong in relation to the impact of the error to provide a "fair assurance" that the error did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Kotteakos*, 328 U.S. at 765, 776.[8]

1. The government's case was very strong

It was undisputed at trial that petitioner was present at the scene of the aborted drug transaction; that he transported the money to pay for the drugs to the scene in a secret compartment in the Bonneville; that he parked the car in a location from which he could see Perez, Cruz, and the informant; and that he waited with Perez and Cruz at the parking lot for the informant's return.[9] Petitioner's defense at trial was that he lacked

---

[8] The court of appeals did not state the applicable standard of review and may have imposed a burden higher than that demanded by *Kotteakos*. Pet. App. 16A (requiring proof that "a reasonable jury would have reached the same result"). Any such application would have benefitted petitioner. The dissenting judge mistakenly stated, without explanation, that the harmless-beyond-a-reasonable-doubt standard set by *Chapman* for constitutional errors applied to this case. See Pet. App. 23A, 28A.

[9] Petitioner's ability to see the meeting at the western edge of the Shell parking lot from his location at an adjacent parking space on the eastern edge of the Denny's lot was established by photographic exhibits and the testimony of law-enforcement officers. See App., *infra*, 2a-

knowledge, when all this occurred, that a drug deal was to take place. The following factors, in combination, strongly established petitioner's knowledge:

The Phone Records. The call records showed that from 4:26 p.m. on August 4 (when Cruz told Perez that the cocaine was ready) to approximately 5:30 p.m. the following day (when the attempted drug deal was aborted), petitioner and Perez made 38 calls to each other. J.A. 751-752. The records further showed that almost all of the phone conversations or series of conversations between Perez and Cruz arranging the transaction were followed within minutes by a phone conversation between Perez and petitioner. *Ibid.* Perez was shown to be in contact with petitioner on August 5 both when Perez would have been waiting for Cruz to go to Arlington Heights and when Perez was en route with Cruz to the meeting. Compare J.A. 751-752 (calls 51-52, 58, 60, 62) with p. 4, *supra*. Perez also contacted petitioner contemporaneously with Perez's face-to-face meeting with the informant. J.A. 752 (call 64); p. 5, *supra*. This evidence strongly suggested that Perez kept petitioner informed of the progress of the transaction. The fact that during the relevant period Perez was also in phone contact with other individuals is beside the point, for nothing suggests that any of those other individuals drove the Bonneville containing the cash to the scene of the aborted transaction.[10]

3a (exhibits); J.A. 49, 68, 71, 329; see also pp. 4-6, *supra* (discussing locations of the vehicles in the lots); J.A. 631-632.

[10] Petitioner argues (Br. 47) that petitioner and Perez were close and regularly exchanged phone calls. But that does not explain the frequency and timing of their phone conversations leading up to the aborted drug transaction.

Petitioner, the Bonneville, and $23,000. Petitioner drove Perez's Bonneville, which contained the $23,000 purchase price of the cocaine, to the planned scene of the transaction. Petitioner's own family members testified that petitioner owned his own car and that he never drove the Bonneville. J.A. 401, 409-410, 417. The defense's position was that petitioner used the Bonneville instead of his own car because, at the time, his car was inside his garage and the Bonneville was blocking it. It defies belief that petitioner's use of the car containing the cash for the drugs—a car he otherwise never used—was merely fortuitous.

Petitioner makes much (Br. 48) of Cruz's testimony that he asked Perez not to bring money or anyone else with him to meet the informant, and that the purpose of the meeting was only to inspect the drugs. J.A. 189, 194-195. But that was not *Perez's* plan because, even under the defense's theory of the case, Marina would have driven the Bonneville with the money to the scene. Moreover, Cruz testified that, just before Perez introduced him to petitioner, Perez apologized to Cruz for disregarding his instruction not to bring anyone else to the meeting. J.A. 220.

Petitioner's Flight. "Flight at the approach of * * * law officers" is a "strong indic[ation] of *mens rea*." *Sibron* v. *New York*, 392 U.S. 40, 66 (1968); see *Allen*, 164 U.S. at 499 ("the law is entirely well settled that the flight of the accused is competent evidence against him having a tendency to establish his guilt"). The courts of appeals likewise recognize that flight evidence may be highly probative of consciousness of

guilt.[11] That is particularly so where, as here, the flight entails extreme conduct: backing into two police squad cars; accelerating towards a law-enforcement officer who stepped in front of the car petitioner was driving, pointed his gun at petitioner, and then had to jump out of the way; gunning the car against and directly into oncoming rush-hour traffic; and attempting to escape on foot by running through the kitchen of a McDonald's. Such conduct poses a serious threat of injury both to the suspect and others. As the court of appeals observed, "[i]f there were degrees of flight, what happened here would be flight in the first degree." Pet. App. 16A.

The Court in *Wong Sun* v. *United States*, 371 U.S. 471, 483 n.10 (1963), expressed some skepticism about the probative value of flight evidence, and the court of appeals here recognized that flight evidence must be viewed "with caution." Pet. App. 16A. But, on its facts, this case could hardly be more different from *Wong Sun*. In *Wong Sun*, the "flight" consisted merely of a suspect's running down the hall of his own laundry establishment when the supposed customer at the door revealed that he was a narcotics agent. 371 U.S. at 482. The Court in *Wong Sun* stressed that the agent from whom the defendant ran had affirmatively misrepresented his reason for being on the premises; that the misimpression had not been adequately dispelled before the suspect fled; that the agent was not certain that he had the correct man; and that the agent's uninvited en-

---

[11] See, *e.g.*, *United States* v. *Frazier*, 387 F.3d 1244, 1267 n.20 (11th Cir. 2004), cert. denied, 544 U.S. 1063 (2005); *United States* v. *Robinson*, 161 F.3d 463, 469 (7th Cir. 1998), cert. denied, 526 U.S. 1078 (1999); *United States* v. *Hernandez-Bermudez*, 857 F.2d 50, 54 (1st Cir. 1988); *United States* v. *Pope*, 561 F.2d 663, 669 n.6 (6th Cir. 1977); *Monnette* v. *United States*, 299 F.2d 847, 851 (5th Cir. 1962).

try into the suspect's own living quarters was unlawful. *Id.* at 482-484. Under those circumstances, the suspect's flight reflected "ambiguous" conduct that "signified a guilty knowledge no more clearly than did a natural desire to repel an apparently unauthorized intrusion." *Id.* at 482-483. But in this case, petitioner's conduct was not ambiguous, because he could not have been confused about the identity of the officers or the official nature of their actions. The courts of appeals have repeatedly and correctly distinguished the flight in *Wong Sun* from the sort of flight, like that here, that more reliably reflects consciousness of guilt.[12]

Petitioner argues (Br. 51) that the flight evidence was inconclusive because, as a parolee, he had reason to flee unrelated to the charged offense. An innocent parolee, however, would have surrendered to sort matters out with the authorities instead of fleeing. He would have known that fleeing, especially the sort of "first-degree flight" involved here, would only make things worse. Petitioner offers no support for his dubious assertion (*ibid.*) that his parole officer would have sought to have his parole revoked even if he had no knowledge of the drug-trafficking scheme and was merely an innocent bystander.

The Other-Crime Evidence. The government's other-crime evidence showed at trial that petitioner and Perez had engaged in a similar cocaine transaction in 2002. Like the transaction here, it took place in a park-

---

[12] See, *e.g.*, *United States* v. *Franklin*, 323 F.3d 1298, 1302 & n.4 (11th Cir.), cert. denied, 540 U.S. 860 (2003); *United States* v. *Sheppard*, 901 F.2d 1230, 1237 n.11 (5th Cir. 1990); *United States* v. *Lima*, 819 F.2d 687, 689 (7th Cir. 1987); *United States* v. *Bailey*, 691 F.2d 1009, 1019 n.12 (11th Cir. 1982), cert. denied, 461 U.S. 933 (1983); *Pope*, 561 F.2d at 669 n.6.

ing lot and involved the use of a secret compartment in a car to carry the cocaine and cash ($15,000). The evidence that petitioner and Perez had previously worked together trafficking cocaine, and that they had used a similar *modus operandi*, forcefully undercuts petitioner's claim that he was merely an innocent bystander.[13]

Petitioner's Statements to Cruz. Cruz's testimony, while by no means essential to the government's case, also confirmed petitioner's guilty knowledge. Cruz testified that (1) petitioner stated, "tell him we got the money here," while Cruz was on the phone with the informant, J.A. 223; (2) petitioner then told Cruz that Perez had asked petitioner to be there, J.A. 220, and (3) petitioner said "I told you" ("te di[j]e") to Perez as he threw the Bonneville in reverse to escape the approaching officers, J.A. 227-228. Standing alone, this evidence might not be weighty in the harmless-error analysis, because a rational jury could have refused to believe Cruz in light of the consideration Cruz received from the government in exchange for his cooperation and other factors. But, viewed together, Cruz's testimony and the other evidence of petitioner's guilty knowledge were mutually corroborating.

---

[13] Petitioner's observation (Br. 52-53) that petitioner and Perez both communicated and met with the buyer directly in 2002 does not undercut the probativeness of the other-crime evidence in establishing petitioner's guilty knowledge. Petitioner and Perez had previously engaged in drug trafficking together; the earlier transaction, like the one in this case, took place in a commercial parking lot; and both transactions involved petitioner and Perez using a car with a secret compartment in the same location to carry cash and drugs. Indeed, the evidence showed that petitioner had helped Perez purchase the Bonneville a few months before the aborted drug deal.

2. The defense case was very weak

Petitioner's defense at trial was very weak compared to the case presented by the government. It rested almost entirely on Marina's testimony that her husband asked her to pick him up in Arlington Heights; that she asked petitioner to perform that chore after Perez had already left; and that she told petitioner to take the Bonneville because it was more convenient than taking his own car. That testimony was powerfully impeached by the government and it asked the jury to accept an exceedingly implausible story in light of other established facts.

In the government's rebuttal case, Marina admitted that she had met several times with petitioner's lawyer, J.A. 530-531, 537, 539, and that she believed that petitioner's lawyer would help her husband obtain a favorable sentence if he would plead guilty and refuse to incriminate petitioner, J.A. 537-538. The prison-phone recordings, the admission of which the court of appeals upheld for the purpose of establishing Marina's biased state of mind (Pet. App. 14A-15A), revealed that Marina and Perez discussed petitioner's counsel's offer to help Perez obtain a favorable sentence, J.A. 772, 776, and that Marina believed that petitioner faced the same likelihood of being convicted as did Perez. J.A. 766, 777. Not surprisingly in light of that powerful impeachment evidence, the district court at sentencing noted that Marina was not a "very credible witness." 12/4/2009 Tr. 38.

Marina's testimony also asked the jury to accept the proposition that Perez wanted *her* to drive his car to a drug transaction and that petitioner unwittingly stumbled into a cocaine deal roughly similar to the one he previously committed with Perez. First, if Marina's story were true, Perez, who knew that he had concealed

$23,000 in cash in his car—*i.e.*, the exact purchase price for the cocaine that Perez had learned only one day before—would have intended his wife to drive that car with the money to a major drug deal in the suburbs. There is no basis for concluding that Perez had exactly $23,000 in his car for any reason other than to purchase the kilogram of cocaine on August 5. It makes little sense that Perez would depend on his own wife to drive the cash—unknowingly—to a major drug deal at the right time so that he could complete the transaction. See J.A. 636.

Second, according to Marina, Perez was picked up at petitioner's home around 4:00 p.m. by an unknown individual. But the evidence (including call transcripts, J.A. 592-593) showed that Perez was later picked up by Cruz at Irving Park Road and Harlem Avenue, a location just beyond the halfway point on the ten- to 20-minute drive from petitioner's to Perez's home. Cf. App., *infra*, 1a (map); J.A. 420, 562-563. Thus, if Marina were correct, Perez obtained a ride from an unidentified, third party simply to travel a short distance in order to wait for another ride from Cruz. That odd itinerary makes little sense.

Third, Marina testified that petitioner left about 5:00 p.m. to get Perez. But the government's informant did not tell Cruz and Perez about the Shell-station meeting point until they had already arrived next to the station at the freeway exit. See, *e.g.*, J.A. 593 ("Call me when you exit, so I can tell you exactly where.") (call transcript). If Marina's story were correct, petitioner would have been on the road in Perez's car during his 5:05, 5:22, and 5:24 p.m. calls to Perez (J.A. 752) traveling in the general direction of Arlington Heights while Perez himself was en route, unable to advise petitioner where

exactly to go. The idea that petitioner believed that Perez was out with friends driving to some location in the suburbs, which Perez himself did not know, only to be picked up immediately upon arrival by petitioner for the return home is inherently implausible.

Ultimately, Marina's story requires not just one or two implausible conclusions but a long string of circumstances—each exceedingly unlikely in its own right—to proceed one after the other, with all of the independent factors that point to petitioner's guilt being chalked up to bad timing and bad luck. In light of petitioner's cocaine-deal history with Perez and the balance of the evidence, Marina's impeached testimony provided only an exceedingly weak defense. An average, rational jury considering the evidence as a whole would have concluded that Maria's story did not add up and that petitioner was guilty beyond a reasonable doubt. Even after the likely impact of the error in this case is considered, the evidentiary record provides a "fair assurance" that the error did not have a substantial and injurious effect or influence on the jury's verdict.

3. The prejudicial impact of the error was not significant

Petitioner vastly overstates the prejudicial impact of the admission of the prison-phone recordings for their truth. His argument rests on two points—that the recordings, admitted for their truth, would have led the jury to believe (1) that defense counsel wanted petitioner to plead guilty, and (2) that counsel personally thought petitioner was guilty. Br. 58-60. Neither point has merit.

The error that petitioner claims was harmful did not affect *anything* that the jury heard in this case. The

court of appeals held that the prison-phone recordings were properly admitted into evidence as proof of Marina's bias and prior inconsistent statements. Pet. App. 14A-15A; cf. J.A. 524 (petitioner's request that entire recordings be admitted under Fed. R. Evid. 106). Petitioner has never challenged those holdings in this Court. The jury thus properly could consider the recordings as non-hearsay proof that Marina and Perez actually made the statements therein. The district court's error was simply in failing to provide a limiting instruction directing the jury not to consider the recordings as proof that the recorded statements made by Marina and Perez were themselves true. The prejudicial impact of that error was not significant.

1. The recordings do not indicate that defense counsel wanted petitioner to plead guilty. In the relevant passage, Perez told Marina about a conversation he had had with petitioner:

> Marina Perez: So what'd Beau [petitioner's counsel] tell [petitioner]? What did Beau tell him?
>
> Joel Perez: A blind plea would be good, then he can guarantee this and that. You know what I mean? Just certain things, you know? I got to explain to you.
>
> Marina Perez: He's telling him about a blind plea also?
>
> Joel Perez: Yeah, he is. I gotta explain to you. You know what I mean. He says, if you want, have his wife talk to me, this or that. I have to explain to you tomorrow.

J.A. 771. Perez again emphasized that point:

> Joel Perez: You have to see what Beau has to say, just listen to him and he'll explain to you. He said, ask his wife to come to my office and I'll explain it to her.
>
> Marina Perez: Tell me?
>
> Joel Perez: Yes.

J.A. 774. Properly understood, Perez is saying here that petitioner told Perez that petitioner's counsel had "also" told petitioner that it "would be good" if *Perez*, not petitioner, entered a blind guilty plea,[14] and that petitioner's counsel wanted to discuss the matter with Marina, who in fact reported to Perez the next day that she had spoken to counsel. J.A. 776; see pp. 11-12, *supra*. Petitioner's contrary reading of the conversation makes no sense. If petitioner's counsel had suggested that petitioner plead guilty, there would have been no reason for petitioner's counsel to discuss the matter with Marina.

Petitioner's reading is also irreconcilable with the recorded conversations as a whole. The overarching subject of the conversations is petitioner's counsel's attempt to persuade Perez and Marina to assist in a strategy whereby Perez would plead guilty and avoid implicating petitioner; counsel would help Perez obtain a favorable sentence in return; and petitioner, with the Perezes' cooperation, would proceed to trial. See pp. 10-12, *supra*; J.A. 759-778. Given that context, a rational jury would not have understood the passage as indicating that petitioner's counsel wanted *petitioner* to plead guilty. Even when read in isolation, the passage is at

---

[14] A blind plea is a guilty plea entered without a plea agreement. Pet. App. 22A n.3.

best ambiguous and, as such, should not have had a significant impact on the jury's verdict.

2. Petitioner claims that the prison-phone recordings, admitted for their truth, would have led the jury to believe that petitioner's counsel thought that his client was guilty. Petitioner focuses on the following:

> Joel Perez: I don't understand babe what's going on, but it's not the way, Beau's, he's putting it two different ways. If he didn't explain to you the way, the either or, then it's a different story. If you didn't ask him, then. . . .
>
> Marina Perez: Yes, *he's saying that everybody is going to lose*. He's saying whatever he wants to say. I don't believe him.
>
> Joel Perez: I don't know what's going to happen. I just can't wait to see you tomorrow.
>
> Marina Perez: Well, what he's saying is stupid, that does not make sense.

J.A. 769 (emphasis added). Petitioner's reliance on this dialogue overlooks its timing. The statement that "everybody is going to lose" does not convey the belief that "everybody is guilty." When counsel allegedly made that statement, Marina testified that she had yet to discuss with him the events of August 5, 2008. J.A. 551-552. If that is credited, counsel would not have known that Marina would corroborate petitioner's defense that he was an innocent bystander, and without Marina's testimony petitioner would have had little to offer to explain his presence at the drug deal.[15] Indeed, as Ma

---

[15] Marina testified that she did not discuss the events of August 5, 2008, with petitioner's counsel until August 20, 2009, a week after the

rina herself understood at the time, counsel's purpose in making the statement was to persuade the Perezes to cooperate with petitioner's defense and provide exculpatory testimony. In short, the recorded conversations provided no sound reason for the jury to think that, at the time of trial, counsel believed that his client was guilty.

3. Petitioner argues (Br. 60-61) that the government's actions at trial, such as obtaining a continuance after the defense rested its case in order to study the prison-phone recordings and seek their admission, reveal that it regarded those recordings as important rebuttal evidence.[16] The government did regard the recordings as helpful to its case, but not because of the passages to which petitioner objects. Rather, the government sought the admission of the recordings because they demonstrated in Marina's own words her biased state of mind. The government explained in district court that it was offering the recordings as prior inconsistent statements and for the purpose of "showing [Marina's] bias, her motivation to lie." J.A. 517. And the

---

last recorded conversation between her and her husband and five days before the commencement of trial. J.A. 551.

[16] The request for a continuance did not have the effect of emphasizing the disputed evidence. After the defense rested on a Thursday, the court sent the jury home for the weekend, explaining that it had other matters to address on Friday. J.A. 454. The government's motion was filed over the weekend and argued on Monday. J.A. 458-469. The court informed the jury that unforseen matters required a one-day continuance, J.A. 473, and, when the trial resumed, the government presented testimony from Marina and three other witnesses in addition to playing the prison-call recordings (JA 572-573, 585). See J.A. 529-594. The continuance thus may have reflected the government's attempt to impeach Marina, but it did not emphasize counsel's disputed statements, which are addressed only briefly on the recordings.

government made clear that the recordings "will *not* be introduced for the truth of the matters asserted." *Ibid.* (emphasis added). Indeed, at the hearing on the motion, neither of the parties even adverted to the offending passages. Petitioner's counsel argued only that the recordings should be excluded because of hearsay, reliability, and relevancy concerns, not because of the prejudicial content of any statements on the recordings attributed to counsel. J.A. 515-527.

The government in its rebuttal case did ask Marina whether defense counsel stated that "everybody was going to lose" when examining Marina to reveal her bias. J.A. 533. But the important point is that, in answering the question, Marina denied that counsel said any such thing. J.A. 534. Instead, she testified that counsel had stated only that "my husband [wa]s f---ed." *Ibid.* In any event, the jury would have understood that any such statement by counsel did not reflect a belief on his part at the time of trial that petitioner was guilty. See pp. 49-50, *supra*.

Contrary to petitioner's suggestion (Br. 62), the government made no reference whatever in its closing arguments to anything in the recordings suggesting that defense counsel wanted petitioner to plead guilty, or that he thought that "everybody [would] lose" if Perez decided to go to trial. See J.A. 644-646, 710-717. The government used Marina's rebuttal testimony and the prison-phone recordings in its initial closing argument for the purpose of showing that Marina was a biased witness because of her belief, "right or wrong, that the defendant's attorney could help her husband with his own case." J.A. 645. And, in its rebuttal argument, the government used the recordings in support of the same point: "[Marina] believes, rightly or wrongly, that the

defense is going to make certain motions on behalf of her husband at sentencing and that the defense was guaranteeing her husband a lower sentence." J.A. 711. It also referred to the recordings as establishing that *Marina*, not petitioner's counsel, believed that petitioner was in as much trouble as Perez. J.A. 717. If anything, the government's *total* neglect of the allegedly prejudicial parts of the recordings in its closing argument supports the finding of harmlessness.

Taking into account the strength of the untainted evidence of guilt, the weakness of the defense case, and the negligible prejudicial impact of the error, there is a "fair assurance" that the error did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Kotteakos*, 328 U.S. at 765, 776.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
LANNY A. BREUER
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
ANTHONY A. YANG
Assistant to the Solicitor General
JOEL M. GERSHOWITZ
Attorney

FEBRUARY 2012

APPENDIX

[FOLDOUT]

[Gov. Exh. Northwest Chicago Overview]

[FOLDOUT]

[Gov. Exh. Arlington Heights Photo]

[FOLDOUT]

[Gov. Exh. Shell Photo 1]

[FOLDOUT]

[Gov. Exh. Shell Photo 2]