No. 16-813

In the Supreme Court of the United States

DAVID ALAN RESNICK, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly found no reversible plain error in the district court's decision to admit evidence, introduced by both the prosecution and the defense, that petitioner declined to take a polygraph examination.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-28) is reported at 823 F.3d 888.

JURISDICTION

The judgment of the court of appeals was entered on May 4, 2016. A petition for rehearing was denied on July 28, 2016 (Pet. App. 29-34). On October 7, 2016, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including December 25, 2016, and the petition was filed on December 22, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Indiana, petitioner was convicted of aggravated sexual abuse of a minor, in violation of 18 U.S.C. 2241(c) (Count 1); interstate

transportation of child pornography, in violation of 18 U.S.C. 2252(a)(1) (Count 2); brandishing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(ii) (Count 3); and being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1) (Count 4). The district court sentenced petitioner to a term of life imprisonment on Count 1; concurrent terms of 20 years of imprisonment on Count 2 and ten years of imprisonment on Count 4; and a mandatory consecutive term of seven years of imprisonment on Count 3. The court of appeals affirmed. Pet. App. 1-28.

1. In July 2008, petitioner, a long-haul truck driver, persuaded friends to allow their nine-year-old son, T.M., to accompany him on a two-week road trip. Pet. App. 2. T.M. believed that he would be responsible for caring for petitioner's puppy during the trip and that petitioner would take him to Disneyland. *Ibid.* Instead, petitioner subjected T.M. to repeated sexual abuse, including forced oral sex and sodomy. *Id.* at 3. Petitioner also forced T.M. to watch pornography, *ibid.*, including a video depicting bestiality and another video depicting a nude girl who was approximately nine years old, 7/29/13 Tr. 190-192.

At one point during the trip, petitioner was pulled over by a police officer. Pet. App. 3. Before the officer reached the cab of petitioner's truck, petitioner pressed a pistol against T.M.'s head and said, "[i]f you tell anybody, I will kill you and your family." 7/29/13 Tr. 200; see Pet. App. 3. T.M. felt "[t]errified" and "trapped," 7/29/13 Tr. 200, and he did not report the abuse to the officer or his parents. Pet. App. 3.

After petitioner and T.M. returned from their trip, petitioner invited T.M. and one of T.M.'s friends,

eight-year-old K.M., to a "pool party" at a hotel. Pet. App. 3. No other children appeared at the "party," and it soon became clear that petitioner expected T.M. and K.M. to sleep with him in his hotel room. *Ibid.* Upon realizing this, T.M. fought with K.M. and was sent home. *Ibid.* K.M. remained at the hotel with petitioner, who showed K.M. a firearm and sexually abused him. *Ibid.*

K.M. eventually told his parents what had happened and his mother called the police. Pet. App. 1, 3. In April 2011, law enforcement officers obtained a warrant to search petitioner's house. *Id.* at 3. There they discovered over 66 hours of video recordings of children being sexually abused and a laptop computer that T.M. identified as the device petitioner used to watch child pornography during their road trip. *Id.* at 3-4. The officers also discovered a pistol in petitioner's bedroom and a handgun in petitioner's garage. 7/31/13 Tr. 25, 28.

During the search, two FBI agents interviewed petitioner at his home. Pet. App. 4. The agents informed petitioner of his *Miranda* rights and petitioner expressly waived them. 7/31/13 Tr. 32-33. Petitioner initially denied knowing T.M. or K.M. Pet. App. 4. He then "backpedaled" on that statement, admitting that he knew the boys but denying that he had engaged in any "inappropriate behavior" with them. *Ibid.* Petitioner also denied staying overnight at the hotel with K.M., claimed not to remember having been pulled over by police during his road trip with T.M., and denied carrying firearms. *Ibid.*

In light of those false statements, one of the agents asked petitioner if he would be willing to take a polygraph examination. Pet. App. 4. Petitioner responded

that he wanted to consult an attorney before agreeing to a polygraph and indicated that he believed that polygraph results were unreliable. *Ibid.* The agents did not inquire further about administering a polygraph examination and petitioner did not take one. See *id.* at 5.

2. A federal grand jury charged petitioner with aggravated sexual abuse of a minor, in violation of 18 U.S.C. 2241(c); interstate transportation of child pornography, in violation of 18 U.S.C. 2252(a)(1); brandishing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(ii); and being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). Superseding Indictment 1-4.

At trial, one of the FBI agents who interviewed petitioner testified concerning the various statements petitioner made during their conversation, including that petitioner declined to take a polygraph. Pet. App. 5; see 7/31/13 Tr. 38. Petitioner did not object to that testimony; to the contrary, petitioner's counsel repeatedly elicited further testimony on the subject during cross-examination, including that petitioner asked to consult with an attorney before taking a polygraph and that the agents did not inquire further about a polygraph once he did so. Pet. App. 5; see 7/31/13 Tr. 55, 57. On redirect examination, the agent testified that, in addition to requesting to speak with an attorney, petitioner expressed his view that polygraph results could be "manipulate[d]" by "whoever is operating the polygraph machine" and that petitioner did not (to the agent's knowledge) take a polygraph examination. Pet. App. 5; see 7/31/13 Tr. 75.

The only other references to petitioner's statements concerning a polygraph examination were in

closing arguments. See Pet. App. 5. The prosecutor briefly recounted petitioner's various statements to the agents, including the fact that he "refused to take a polygraph." 8/1/13 Tr. 38. Petitioner did not object to that statement and argued twice in his own closing argument that his demurral on the polygraph issue demonstrated his willingness to cooperate with the investigation and his desire to not provide information that could be unreliable. See *id.* at 41, 57.

The jury convicted petitioner on all counts. Judgment 1. The district court sentenced petitioner to life imprisonment and a mandatory consecutive term of seven years in prison. *Id.* at 2.

3. The court of appeals affirmed. Pet. App. 1-19. As relevant here, petitioner argued that the district court plainly erred in admitting evidence that he had declined to take a polygraph examination. See *id.* at 6. The court held that petitioner could not demonstrate reversible plain error. *Id.* at 13-19.

The court of appeals noted that it and other courts of appeals have generally upheld the exclusion of polygraph evidence at trial due to the lack of a "scientific consensus that polygraph testing is reliable" and the potential for "unfair prejudice" from such evidence. Pet. App. 15-16. The court also observed that, in some circumstances, evidence that a defendant refused to take a polygraph examination could be construed as adverse commentary on the exercise of his "constitutionally protected [right to] silence," which is generally prohibited by the Fifth Amendment. *Id.* at 17 (citing *Doyle* v. *Ohio*, 426 U.S. 610, 618 (1976)).

The court of appeals concluded, however, that even if the district court erred in admitting the evidence,

the error "was not plain and did not affect [petitioner's] substantial rights in light of the record as a whole," as required by the plain-error standard. Pet. App. 19. The court noted, for example, that it had not "adopted a blanket rule" excluding polygraph evidence and instead afforded district courts "considerable deference" in deciding whether such evidence should be admitted in a particular case. *Id.* at 16 (quoting *United States* v. *Ross*, 412 F.3d 771, 773 (7th Cir. 2005)). Thus, even if the general reluctance to admit the results of polygraph examinations applied to "evidence of a *refusal* to take a polygraph," the court concluded that the admission of such evidence would not be a clear or obvious error. *Ibid.*

The court of appeals further noted that petitioner's case was arguably distinguishable from those involving adverse commentary of the right to remain silent because petitioner "was not silent" and affirmatively declined to take a polygraph after "g[iving] exculpatory answers to a number of questions." Pet. App. 17; see *ibid.* (noting general principle that testimony concerning a defendant's "refus[al] to expand" on exculpatory answers to questions posed in a non-custodial setting "does not violate the Fifth Amendment"). The court found it unnecessary to resolve that question, however, because any error would not have been "plain" given that the court "ha[d] never before held that the refusal to take a polygraph implicates the Fifth Amendment." *Id.* at 18.

In any event, the court of appeals concluded that petitioner had failed to show that any error caused him prejudice. Pet. App. 18. The court observed that "the case against [petitioner] was airtight," including testimony from T.M. and K.M., petitioner's other

statements to law enforcement, and extensive physical and forensic evidence. *Id.* at 16; see *id.* at 18 (noting that evidence against petitioner "was very strong"). The court also noted that petitioner's "defense did not depend on his credibility" because he did not testify at trial. *Id.* at 18. The court found no indication that, under those circumstances, the limited evidence about petitioner's refusal to take a polygraph examination, mentioned briefly "by each side during closing," would likely have affected the jury's verdict. *Ibid.*

Judge Bauer dissented. Pet. App. 19-28. In his view, petitioner's refusal to take a polygraph was an exercise of his right not to incriminate himself. *Id.* at 22. Judge Bauer would have held that cases precluding the government from using a defendant's invocation of that right against him at trial, and the absence of precedent expressly conferring discretion on district courts to admit such evidence, were sufficient to show that the error was "plain." *Id.* at 23-25. Judge Bauer did not dispute the court's conclusion that any error was unlikely to have affected the jury's verdict but concluded that petitioner should still be able to obtain redress on plain-error review for the violation of his "clearly established rights." *Id.* at 27.[1]

4. Petitioner filed a petition for rehearing, which the court of appeals denied. Pet. App. 29-30. Four judges dissented from the denial of rehearing. *Id.* at 30-34. In the dissenting judges' view, the court should

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[1] Petitioner also contended on appeal that the government presented insufficient evidence that he had brandished a firearm and that the district court erred in admitting evidence that he had abused K.M. Pet. App. 6. The court of appeals unanimously rejected those arguments, *id.* at 6-13, and petitioner does not renew them in his petition for a writ of certiorari.

have "[a]dopt[ed]" a "narrow[] rule" in this case precluding the use of evidence of a defendant's refusal to take a polygraph while leaving open the possibility that polygraph evidence could be admissible in other circumstances. *Id.* at 32. The dissenting judges argued that the "concerns presented" by the use of such evidence "outweigh[]" the need to strictly adhere to the plain-error rule, *ibid.*, and thus the court should have reversed to "send the right signal" that petitioner's trial was "unfair, no matter how 'overwhelming' the evidence against" him, *id.* at 34.

ARGUMENT

Petitioner contends (Pet. 12-22) that this Court should grant his petition for a writ of certiorari and adopt a new "bright-line rule" that precludes references during a criminal trial to a defendant's refusal to take a polygraph examination. That request does not warrant review. Petitioner did not preserve an objection to the introduction of the challenged evidence at trial; indeed, petitioner himself elicited testimony concerning his refusal to submit to a polygraph examination and sought to use that evidence to his advantage during closing arguments. Petitioner states no basis on which this Court could adopt the new evidentiary rule he proposes under a plain-error standard of review. Nor does the court of appeals' decision implicate a circuit conflict concerning the admission of such evidence or the application of the plain-error rule more generally (Pet. 22-32). The petition for a writ of certiorari should be denied.

1. When a defendant fails to object to an alleged error at trial, he may not obtain relief from that error on appeal unless he establishes reversible "plain error" under Federal Rule of Criminal Procedure 52(b).

To satisfy that standard, the defendant must demonstrate that (1) the district court committed an "error"; (2) the error was "plain," meaning "clear" or "obvious" under governing law; (3) the error "affect[ed] [his] substantial rights"; and (4) the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Olano*, 507 U.S. 725, 732-736 (1993) (citation omitted). "Meeting all four prongs is difficult, 'as it should be.'" *Puckett* v. *United States*, 556 U.S. 129, 135 (2009) (quoting *United States* v. *Dominguez Benitez*, 542 U.S. 74, 83 n.9 (2004)); see *Johnson* v. *United States*, 520 U.S. 461, 466 (1997) (noting the "limited and circumscribed strictures" of the plain-error rule) (internal quotation marks omitted).

An error is not "plain" under the second prong of the plain-error standard unless it was so clear and obvious under governing law that the court and prosecutor "were derelict in countenancing it, even absent the defendant's timely assistance in detecting it." *United States* v. *Frady*, 456 U.S. 152, 163 (1982); see *Henderson* v. *United States*, 133 S. Ct. 1121, 1127 (2013) (explaining that error must be "plain" at the time of trial or at the time of appellate review). To establish an effect on "substantial rights" under the standard's third prong, a defendant ordinarily "must make a specific showing of prejudice." *Olano*, 507 U.S. at 735. And the standard's fourth prong usually requires a showing that the error "affect[ed] the jury's verdict." *United States* v. *Marcus*, 560 U.S. 258, 265-266 (2010); see *United States* v. *Cotton*, 535 U.S. 625, 632-633 (2002) (concluding that the fourth prong was not satisfied where evidence of a fact erroneously

not submitted the jury was "overwhelming" and "essentially uncontroverted") (citation omitted).

This Court has "repeatedly cautioned" that it lacks authority to expand the definition of a "plain error" or to create exceptions to Rule 52(b). *Puckett*, 556 U.S. at 135; see *Johnson*, 520 U.S. at 466 (noting that "the seriousness of the error claimed does not remove consideration of it from the ambit of" Rule 52(b)). "Rule 52 is, in every pertinent respect, as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions." *Peguero* v. *United States*, 526 U.S. 23, 29 (1999) (quoting *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254-255 (1988)).

2. The court of appeals correctly held that petitioner failed to carry his burden of demonstrating that the district court committed a clear and obvious error by permitting both parties, without objection, to introduce evidence that petitioner declined to take a polygraph examination.

a. Federal courts have generally adopted a flexible approach to the admission of polygraph evidence. Many courts of appeals afford district courts "wide discretion" to determine whether the results of a polygraph examination should be admitted under the Federal Rules of Evidence in light of the facts and circumstances of each case. *United States* v. *Piccinonna*, 885 F.2d 1529, 1537 (11th Cir. 1989) (en banc); see, *e.g.*, *United States* v. *Montgomery*, 635 F.3d 1074, 1094 (8th Cir. 2011), cert. denied, 565 U.S. 1263 (2012); *United States* v. *Ross*, 412 F.3d 771, 773 (7th Cir. 2005); *United States* v. *Zaccaria*, 240 F.3d 75, 81 (1st Cir. 2001); *United States* v. *Call*, 129 F.3d 1402, 1404

(10th Cir. 1997), cert. denied, 524 U.S. 906 (1998); *United States* v. *Cordoba*, 104 F.3d 225, 228 (9th Cir. 1997); *United States* v. *Posado*, 57 F.3d 428, 433-436 (5th Cir. 1995); cf. *United States* v. *Scheffer*, 523 U.S. 303, 311 (1998) (noting that several courts of appeals leave the "admission or exclusion" of polygraph evidence "to the discretion of district courts"); *United States* v. *Lee*, 315 F.3d 206, 214 & n.6 (3d Cir.) (noting the lack of "a per se exclusionary rule regarding polygraph evidence" at trial and the varying approaches to that question taken by district courts), cert. denied, 540 U.S. 858 (2003).

Other courts have adopted more limited approaches. The Fourth Circuit, for example, has held that polygraph evidence is usually inadmissible at trial. See *United States* v. *Sanchez*, 118 F.3d 192, 197 (1997). The court has, however, recognized an exception to that rule for polygraph evidence "offered for a limited purpose such as rebutting a defendant's assertion that his confession was coerced," *United States* v. *Blake*, 571 F.3d 331, 346 (4th Cir. 2009) (citation omitted), cert. denied, 558 U.S. 1132 (2010), and has expressed a willingness to adopt "a more nuanced evaluation of polygraph evidence" if called upon to reconsider the issue en banc, *United States* v. *Prince-Oyibo*, 320 F.3d 494, 501 (4th Cir.), cert. denied, 540 U.S. 1090 (2003). The Sixth Circuit, too, generally excludes polygraph evidence but has held that, "in limited circumstances, the district court has discretion to admit evidence of a party's willingness to take a polygraph examination." *United States* v. *Scarborough*, 43 F.3d 1021, 1026 (1994) (emphasis omitted).

b. Contrary to petitioner's argument (Pet. 13, 16-19), neither this Court nor the courts of appeals have categorically barred the admission of evidence concerning a defendant's willingness to submit to a polygraph examination. Petitioner contends (Pet. 13), for example, that "police-administered polygraph examinations constitute custodial interrogations" and thus a refusal to participate implicates the Fifth Amendment prohibition on the prosecution's use of evidence that a defendant exercised his right to remain silent during a custodial interrogation. See *Doyle* v. *Ohio*, 426 U.S. 610, 617-619 (1976). As the court of appeals explained, however, that rule does not clearly apply where, as here, a defendant declines a request to take a polygraph examination after giving a series of exculpatory answers to questions posed in the course of a non-custodial interview. Pet. App. 17-18.

Rather, as petitioner's own cited cases demonstrate, appellate courts generally treat evidence of a party's willingness to take a polygraph much the same way they do evidence of polygraph results, reviewing the district court's decision for abuse of discretion on the facts of each case. Cf. *General Elec. Co.* v. *Joiner*, 522 U.S. 136, 141 (1997) (holding that "abuse of discretion is the proper standard of review of a district court's evidentiary rulings"). In *United States* v. *Murray*, 784 F.2d 188 (1988), for example, the Sixth Circuit reversed the defendant's conviction for mail fraud where an FBI agent "deliberately" interjected a reference to a polygraph examination in his testimony, the defendant "immediately" objected, the other evidence of the defendant's guilt was equivocal, and the jury was erroneously instructed that it need not find proof beyond a reasonable doubt in order to convict.

Id. at 188-189. The court noted, however, that it did "*not* hold that under any and all circumstances in every case where the words 'polygraph examination' are mentioned, a grant of a new trial would be required," *id.* at 189, and the Sixth Circuit has elsewhere stated that district courts have "discretion to admit evidence of a party's willingness to take a polygraph examination," *Scarborough*, 43 F.3d at 1026 (emphasis omitted).

The other cases on which petitioner relies are similarly fact specific. See, *e.g.*, *United States* v. *Street*, 548 F.3d 618, 628-629 (8th Cir. 2008) (concluding that testimony that defendant failed a polygraph examination warranted a mistrial based on "the particular circumstances of th[e] case," including that defendant's credibility was "vital" to his defense, the "case was close," and defendant objected);[2] *United States* v. *Lopez*, 885 F.2d 1428, 1438 (9th Cir. 1989) (holding that district court did not abuse its discretion in excluding testimony that defendant passed a polygraph examination), cert. denied, 493 U.S. 1032 (1990); cf. *Garmon* v. *Lumpkin Cnty.*, 878 F.2d 1406, 1410 (11th Cir. 1989) (holding that refusal to take a polygraph did not establish probable cause for a search warrant

[2] The other Eighth Circuit cases on which petitioner relies predate that court's reconsideration of its earlier per se rule excluding polygraph evidence, see *Montgomery*, 635 F.3d at 1094, and are fact-specific in any event. See *United States* v. *St. Clair*, 855 F.2d 518, 523 (1988) (holding that an agent's reference to the defendant's refusal to take a polygraph warranted a mistrial because the defendant's "credibility * * * was critical to the outcome" of the trial); *United States* v. *Cardarella*, 570 F.2d 264, 267 (affirming the district court's refusal to allow the defendant to introduce evidence of his own willingness to take a polygraph examination), cert. denied, 435 U.S. 997 (1978).

where refusal was based on health concerns unrelated to suspect's veracity); *deVries* v. *St. Paul Fire & Marine Ins. Co.*, 716 F.2d 939, 945 (1st Cir. 1983) (affirming district court's "discretion[ary]" decision not to allow evidence of plaintiffs' refusal to take a polygraph). Nothing in those cases suggests that the district court clearly and obviously erred in permitting the parties to introduce such evidence, without objection, in the unique context of this case.

Petitioner is therefore mistaken to suggest (Pet. 24) that a "well-settled and undisputed" rule exists that categorically prohibits the admission of evidence concerning a defendant's willingness to take a polygraph examination. Even assuming that, in the absence of relevant circuit precedent, an error may be "plain" based on the "uniform[]" decisions of other circuits, see *United States* v. *Gore*, 154 F.3d 34, 43 (2d Cir. 1998), petitioner cannot show that the district court's failure to exercise its discretion *sua sponte* to exclude evidence elicited by both parties without objection was a clear and obvious error.

c. Petitioner's assertion (Pet. 21) that this case presents the Court with an opportunity to "impos[e] [a] bright-line rule" excluding the admission of evidence concerning a defendant's willingness to take a polygraph examination is misplaced. The plain-error standard requires, "[a]t a minimum," that an error be "clear under current law." *Olano*, 507 U.S. at 734. The "obvious" consequence of that requirement is that a court "cannot adopt * * * new rules of law" in a case arising on plain-error review "and then declare that [the challenged decision] was plain error for being inconsistent with such new rules." *United States* v. *Lujan*, 268 F.3d 965, 968 (10th Cir. 2001).

Indeed, the court of appeals' conclusion that petitioner failed to show a reversible plain error does not indicate that the court would reach the same result in a case where an objection was preserved. The court repeatedly stated its concern that polygraph testing is not reliable and could lead a jury to conclude, improperly, "that a person who refuses to take a polygraph has something to hide." Pet. App. 14; see *id.* at 15-16. The court did not foreclose the possibility that, in an appropriate case, such concerns might warrant the adoption of "a blanket rule excluding the use of polygraph evidence in federal prosecutions," including evidence that a defendant declined to take a polygraph examination. *Id.* at 16. The court merely concluded that, "[g]iven the standard of review, this case is not the right one in which to take that step." *Ibid.* No reason exists to presume, as petitioner does (Pet. 21), that the court of appeals' decision in this case invites the admission of such evidence in future cases.

3. The court of appeals also did not err in concluding that petitioner failed to prove that the brief references to a polygraph examination at trial prejudiced him. As an initial matter, petitioner misstates the standard for establishing prejudice under the third and fourth plain-error prongs. Although he contends that "reversal is required unless [the error] is harmless beyond a reasonable doubt," Pet. 27, that standard applies to de novo review of preserved claims of constitutional error, see *Chapman* v. *California*, 386 U.S. 18, 24 (1967). On review for plain error, petitioner bears the burden of proving an effect on his substantial rights, which requires him to establish "a reasonable probability that, but for the error," the

outcome of the proceeding would have been different. *Dominguez Benitez*, 542 U.S. at 83.

Petitioner also misstates (Pet. 28-29) the standard other courts follow in determining whether a defendant has been prejudiced. He relies principally on the Fourth Circuit's unpublished decision in *United States* v. *Davis*, 953 F.2d 640, 1992 WL 1129 (1992) (Tbl.) (per curiam), which held that a directed verdict for the government is necessarily prejudicial even if the evidence of the defendant's guilt is overwhelming. See *id.* at *4. *Davis* is not a precedential decision and thus does not give rise to a circuit conflict. And whatever the merit of *Davis*'s holding on the specific facts of that case, its analytical approach no longer reflects the position of the Fourth Circuit. See, *e.g.*, *United States* v. *Williamson*, 706 F.3d 405, 412 (4th Cir.) (affirming conviction on plain-error review where defendant was unable to show that erroneously admitted evidence "affect[e]d the outcome of his trial"; "[w]here the evidence is overwhelming and a perfect trial would reach the same result, a substantial right is not affected") (citation omitted), cert. denied, 134 S. Ct. 421 (2013).[3]

Here, as in *Williamson*, isolated evidence admitted without objection does not warrant reversal on plain-error review given the overwhelming other evidence

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[3] The other cases petitioner cites (Pet. 29) are inapposite. See *Government of the Virgin Islands* v. *Mujahid*, 990 F.2d 111, 118 (3d Cir. 1993) (declining to reverse based on erroneous admission of co-defendant's guilty plea where "the other evidence of guilt was so strong that [the defendant] would have been convicted regardless of the district court's error"); *United States* v. *Pabisz*, 936 F.2d 80, 83 (2d Cir. 1991) (finding reversible plain error where district court did not properly instruct the jury on the "pivotal issue in th[e] case").

of petitioner's guilt. Petitioner did not testify at trial or otherwise put his credibility at issue, and the court of appeals concluded that the evidence as a whole—including testimony from multiple eyewitnesses, physical evidence, and petitioner's other admissions to law enforcement—was "airtight" and amply proved petitioner's guilt. Pet. App. 16; see *id.* at 18-19. Petitioner contends (Pet. 29) that T.M.'s testimony was not credible, but that assertion does not account for all the other evidence against him, nor is it a reason to grant review. See *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts.").

In any event, petitioner's assertions of prejudice are particularly misplaced in this case, given that he himself elicited testimony concerning his refusal to take a polygraph examination and tried to use that evidence to his advantage by arguing that it demonstrated his desire to assist law enforcement by providing them with reliable information and thus helped prove his good faith. See Pet. App. 5; see also, *e.g.*, 7/31/13 Tr. 55, 57; 8/1/13 Tr. 41, 57. It is well established that a defendant may not "elect to pursue one course at the trial and then, when that has proved to be unprofitable, to insist on appeal that the course which he rejected at the trial be reopened to him." *Johnson* v. *United States*, 318 U.S. 189, 201 (1943).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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