No. 08-464

In the Supreme Court of the United States

AHMED OMAR ABU ALI, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a violation of the Sixth Amendment's Confrontation Clause, resulting from denying the defendant the opportunity to see the portion of a government trial exhibit containing classified information, is subject to harmless-error analysis.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-148) is reported at 528 F.3d 210.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 2008. A petition for rehearing was denied on July 7, 2008 (Pet. App. 149). The petition for a writ of certiorari was filed on October 6, 2008 (Monday). 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 Eastern District of Virginia, petitioner was convicted of conspiracy to provide and providing material support and resources to a designated foreign

terrorist organization, in violation of 18 U.S.C. 2339B (2000 & Supp. I 2001); conspiracy to provide and providing material support to terrorists, in violation of 18 U.S.C. 2339A(a) (2000 & Supp. II 2002); contribution of services to al-Qaeda and receipt of funds and services from al-Qaeda, in violation of 50 U.S.C. 1705(b) and 31 C.F.R. 595.204; conspiracy to assassinate the President of the United States, in violation of 18 U.S.C. 1751(d); conspiracy to commit aircraft piracy, in violation of 49 U.S.C. 46502(a)(2); and conspiracy to destroy aircraft, in violation of 18 U.S.C. 32(b)(4). He was sentenced to 360 months of imprisonment, to be followed by 360 months of supervised release. The court of appeals affirmed the convictions but remanded for resentencing. Pet. App. 2, 118.

1. Petitioner is an American citizen, raised in Falls Church, Virginia, who became a member of an al-Qaeda terrorist cell while studying in Saudi Arabia. The government's evidence at trial showed that in September 2002, petitioner traveled to Medina to study at the Islamic University. Once there, he contacted Moeith al-Qahtani, with whom he had become acquainted during a previous trip to Saudi Arabia. The two regularly discussed jihad. In November 2002, al-Qahtani introduced petitioner to Sultan Jubran Sultan al-Qahtani (Jubran), the second-in-command of an al-Qaeda terrorist cell in Medina. Pet. App. 4-5.

After several months of discussing jihad with petitioner, Jubran asked him to engage in jihad against the United States. As petitioner later admitted, he "immediately accepted because of [his] hatred of the [United States] for what [he] felt was its support of Israel against the Palestinian people, and because [he] was

originally from Jerusalem." Pet. App. 5 (second brackets in original).

Thereafter, Jubran introduced petitioner to Ali Abd al-Rahman al-Faq'asi al Ghamdi (al-Faq'asi), the leader of their al-Qaeda terrorist cell. Al-Faq'asi proposed that petitioner participate in a major terrorist operation in the United States, either immediately or in the future as a sleeper agent. Al-Faq'asi noted that petitioner was a United States citizen who had not previously engaged in jihad, and that he therefore could return to the United States, lead a normal life, and blend into American society while orchestrating terrorist operations executed by additional operatives sent to assist. Pet. App. 6.

Petitioner subsequently met with al-Faq'asi to plan terrorist operations within the United States. In the course of the meetings, petitioner and al-Faq'asi discussed assassinations or kidnapings of senior United States government officials, including President Bush; a plan to rescue the prisoners at Guantanamo Bay; and plans to blow up American warplanes and attack American warships, similar to the attack on the USS *Cole*. Pet. App. 7; C.A. App. 88. Al-Faq'asi suggested an operation similar to the September 11 attacks, but with the aircraft originating in Britain or Australia so that the hijackers would not need to gain entry to the United States. In a meeting with al-Faq'asi, petitioner suggested that President Bush could be assassinated either by the use of simultaneous fire from three snipers or by a martyr operation undertaken while the President was greeting the public. Pet. App. 7.

At al-Faq'asi's request, petitioner moved into an al-Qaeda safehouse in Medina for training. While at this and subsequent al-Qaeda locations, he was trained in the use of firearms and explosives, forgery techniques, and

intelligence collection. Pet. App. 7-9; Gov't Supp. C.A. App. 9-11, 15-17 (S.A.). He was also furnished with instructional manuals and equipment and given money to purchase a laptop computer, a cell phone, and books. Pet. App. 8.

On May 6, 2003, Saudi authorities discovered a cache of explosives and weapons in Riyadh and, on the following day, published a list of the 19 most wanted individuals in connection with terrorist activity. The names included those of both al-Faq'asi and Jubran. Pet. App. 10.

Six days later, al-Qaeda carried out a number of suicide bombings in Riyadh. Thereafter, Saudi authorities intensified efforts to identify and arrest members of the terrorist cells. Pet. App. 9-10; S.A. 191. They raided several suspected terrorist safehouses in Medina and arrested members of petitioner's terrorist cell. One of petitioner's trainers disclosed petitioner's identity, resulting in petitioner's arrest. Pet. App. 9-10; S.A. 110-116, 141-144, 194-195, 230-234.

During questioning by Saudi authorities, petitioner admitted his affiliation with the Medina al-Qaeda cell and acknowledged that he had joined "to prepare and train to kill the [United States] President." Pet. App. 11 (brackets in original). In addition, Saudi authorities obtained a videotaped confession in which petitioner admitted both his involvement with the cell and its plans to conduct terrorist operations within the United States, including the assassination of President Bush, and to destroy airliners bound for the United States. *Ibid.*

Saudi authorities then notified the FBI of petitioner's suspected involvement in plans to conduct terrorist operations in the United States. Although Saudi authorities did not permit the FBI to question petitioner di-

rectly, they permitted FBI agents to supply six questions and to observe through a one-way mirror as those six questions and others were put to petitioner. Pet. App. 11-12. During that questioning, petitioner acknowledged that the idea to assassinate the President was his and that he wanted to plan the operation. C.A. App. 88.

Meanwhile, FBI agents executed a search warrant at petitioner's Virginia residence and discovered e-mail correspondence linking him to al-Qahtani, as well as an article praising the September 11 attacks and a magazine describing methods for carrying a concealed handgun. Pet. App. 12.

2. a. A grand jury sitting in the Eastern District of Virginia returned a superseding indictment charging petitioner with nine federal offenses: conspiracy to provide and providing material support and resources to a designated foreign terrorist organization, *i.e.*, al-Qaeda, in violation of 18 U.S.C. 2339B (2000 & Supp. I 2001); conspiracy to provide and providing material support to terrorists, in violation of 18 U.S.C. 2339A(a) (2000 & Supp. II 2002); contribution of services to al-Qaeda and receipt of funds and services from al-Qaeda, in violation of 50 U.S.C. 1705(b) and 31 C.F.R. 595.204; conspiracy to assassinate the President of the United States, in violation of 18 U.S.C. 1751(d); conspiracy to commit aircraft piracy, in violation of 49 U.S.C. 46502(a)(2); and conspiracy to destroy aircraft, in violation of 18 U.S.C. 32(b)(4).

Before trial, the district court was informed that the case involved national security information and therefore warranted proceedings under the Classified Information Procedures Act (CIPA), 18 U.S.C. App. at 814. CIPA establishes a procedure by which classified information may be protected from unwarranted disclosure, including disclosure to a defendant and his counsel.

CIPA permits a federal district court to authorize the government to delete specified items of classified information from discovery materials and to substitute either an unclassified summary of the contents or a statement admitting relevant facts that the classified information would tend to prove. § 4, 18 U.S.C. App. at 814. If the defendant does obtain access to classified information and seeks to disclose classified items at trial or during pretrial proceedings, he must provide advance notice and give the government an opportunity to oppose the disclosure or to propose an equally effective but unclassified substitute for the information. §§ 5(a), 6(a) and (c), 18 U.S.C. App. at 814-815. CIPA also permits the court to excise classified information from evidence admitted at trial, "unless the whole [piece of evidence] ought in fairness be considered." § 8(b), 18 U.S.C. App. 3, at 816.

b. Because both of petitioner's retained attorneys lacked security clearances and therefore could not have access to classified documents, the district court appointed attorney Nina J. Ginsberg to act as petitioner's cleared counsel. Pet. App. 68. Ms. Ginsberg had access to all of the classified information introduced at trial, and she cross-examined the witnesses who authenticated the classified documents at issue here. *Id.* at 68 n.17, 77 n.20, 88.

Before trial, the government informed petitioner's counsel of its intent to introduce certain classified documents at trial, subject to appropriate limitations to protect their extremely sensitive contents. The documents memorialized communications between petitioner and Jubran after the raids by Saudi authorities on the Medina safehouses. According to the government, the communications demonstrated petitioner's use of a known

alias and contained coded information from Jubran both informing petitioner that he had escaped the Saudi authorities but did not know which cell members had been captured, and warning petitioner that he was also at risk. Pet. App. 69-70. The government furnished Ms. Ginsberg with unredacted copies of the documents, and provided petitioner's uncleared defense attorneys with "lightly redacted" copies that deleted certain identifying and forensic information. *Ibid.* The dates, opening salutations, closings, and the entire substance of the communications were unaffected by the redactions. *Id.* at 70.

The government sought an order under CIPA prohibiting testimony and questioning that would result in the disclosure of the classified portions of the communications. The district court granted that motion and also ruled that the government could present the classified information to the jury at trial by use of the "silent witness rule." Pet. App. 70-71. Under that procedure, a classified document is furnished to the witness, the court, counsel, and the jury, and questions and answers concerning classified information are addressed only by references to the locations in the document where the information appears, so that those privy to the document can understand the answers but no classified information is revealed to the public. *Id.* at 71 n.18.

During subsequent CIPA proceedings, petitioner's uncleared counsel sought an order requiring the government to provide the defense the dates on which the communications were obtained by the government and the manner in which they were obtained. Counsel argued that such information might be pertinent to whether petitioner's interrogation by Saudi authorities constituted a joint venture with the FBI, which would render the fruits of that interrogation inadmissible under *Miranda*

v. *Arizona*, 384 U.S. 436 (1966). Following an *in camera* hearing, at which Ms. Ginsberg represented petitioner but from which both petitioner and his uncleared attorneys were excluded, the district court made factual findings that the documents were not the unconstitutional fruit of a joint venture and that the redacted version of the documents provided to petitioner "me[t] the defense's need for access to the information." Pet. App. 72-73 (brackets in original) (citation omitted).

c. The case proceeded to trial. The government disclosed its intention to call two witnesses who would introduce the substance of the redacted communications: the custodian of records for a communications carrier, and the FBI Special Agent who had received the information from the custodian. Petitioner sought permission for his uncleared counsel to question these witnesses, in open court, about their "role in extracting, sharing, transferring, and handling [the] communications." Pet. App. 73 (brackets in original) (citation omitted). Because that questioning would disclose the classified portions of the communications, the government objected. The district court sustained the objection, noting that the defense's tactics "may amount to 'greymail,' which CIPA was intended to prevent." *Id.* at 74 (citation omitted). But the court nonetheless agreed to conduct an *in camera* hearing at which petitioner's cleared counsel could question the witnesses about the reliability of the communications' collection and handling. *Ibid.* The district court concluded that these steps, especially given that the redactions were minor and that petitioner and his counsel had access to the complete substance of the communications, were adequate to safeguard petitioner's rights under the Confrontation Clause of the Sixth Amendment. *Id.* at 75.

After the *in camera* hearing, petitioner's uncleared counsel objected to their exclusion from the classified proceeding and expressed concern that the jury would be told the information was classified. Counsel contended that the "secret" classification was misleading and prejudicial—"a bit of a show that we're putting on"—because "[i]t is very evident what the material is just by reading the evidence that has already been turned over to the defense." Pet. App. 76 (brackets in original) (citation omitted). The district court overruled the objection. *Id.* at 77.

The documents were presented to the jury in their entirety, using the "silent witness" procedure, see p. 7, *supra*. Pet. App. 77.

d. The jury found petitioner guilty on all nine counts. The district court sentenced him to 360 months of imprisonment, to be followed by 360 months of supervised release. Pet. App. 2.

3. The court of appeals affirmed petitioner's conviction, in an opinion jointly written by all three panel members. Pet. App. 1-148. The portions relevant here, in which the court rejected petitioner's challenge to his conviction based on the introduction into evidence of the classified portions of the two documents, were unanimous. *Id.* at 58-89.[1]

The court held that, in the main, the district court had not abused its discretion and had "struck an appropriate balance between the government's national security interests and the defendant's right to explore the

[1] On the government's cross-appeal, the court also vacated petitioner's sentence and remanded for resentencing (which has not yet taken place). Judge Motz dissented from that disposition and from the court's resolution of a *Miranda* issue not presented here. Pet. App. 25 n.6, 119-148.

manner in which the communications were obtained and handled." Pet. App. 81. Thus, the court upheld the exclusion of petitioner's uncleared counsel from the CIPA hearings and the modest restrictions on public cross-examination of the witnesses involved in collecting the classified information. "Having fully considered the record and the classified information," the court discerned no unfairness to petitioner. *Ibid.*

The court held, however, that admitting the classified versions of the documents into evidence, without permitting petitioner access to those versions, violated his rights under the Confrontation Clause. Pet. App. 82-85. The court observed that neither CIPA nor the "silent witness" procedure endorses the use of *ex parte* information in court to secure a conviction. Rather, the court held, the government must provide the defendant with the same version of any evidence that is submitted to the jury. *Id.* at 84. The court noted that petitioner had not squarely objected to the denial of access, and indeed that his uncleared counsel "repeatedly led the district court to believe that they were aware of what had been redacted and were much more concerned with" their inability to disclose it publicly. *Id.* at 82 n.21. While the court was "more than a little troubled by this failure," it "chose[] to consider the objections stated to the district court to be broad enough to encompass this ground for appeal," and accordingly found error. *Id.* at 83 n.21.

The court held this error harmless beyond a reasonable doubt. Pet. App. 85-89.[2] Reviewing the record of the proceedings in its entirety, it concluded that the jury's decision to convict petitioner had not been af-

[2] Having "chosen" to regard the error as properly preserved, the court reviewed for harmless error rather than plain error. Pet. App. 83 n.21.

fected by access to the limited information redacted from the two documents. *Id.* at 86-87. The court observed that petitioner and his uncleared counsel had been furnished with the substance and other particulars of the communications at issue well in advance of trial, and that petitioner did not contest (or suggest that with access to the document he could contest) that he was a party to the communications. *Id.* at 87. Moreover, the court noted, petitioner's cleared counsel had access to the redacted information, yet she never asserted that disclosure of the redacted information was necessary to ensure the fairness of the trial or that the redacted forensic information required evaluation by an independent, cleared expert. *Id.* at 88. Finally, the court observed that the redacted information "was largely cumulative to [petitioner's] own confessions and the evidence discovered during the safehouse raids, which were presented to the jury." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 13-23) that the court of appeals erred in applying harmless-error analysis to the Confrontation Clause violation it identified and that the violation was a structural defect that requires reversal per se. That novel contention lacks support in the decisions of this Court or any other court. The analysis applied by the court below is fully consistent with this Court's decisions governing constitutional harmless error. No further review is warranted.

1. "[M]ost constitutional errors can be harmless." *Arizona* v. *Fulminante*, 499 U.S. 279, 306 (1991). Since the "landmark decision in *Chapman* v. *California*, 386 U.S. 18 (1967)," this Court "has applied harmless-error analysis to a wide range of errors." *Fulminante*, 499

U.S. at 306 (collecting cases); accord *Washington* v. *Recuenco*, 548 U.S. 212, 218 (2006) ("We have repeatedly recognized that the commission of a constitutional error at trial alone does not entitle a defendant to automatic reversal."). In particular, "[i]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis." *Ibid.* (second brackets in original) (citations omitted).

An error in the "presentation of the case to the jury" is simple trial error, not structural error, and is subject to harmless-error review because it can "be quantitatively assessed in the context of other evidence presented in order to determine whether [the error] was harmless beyond reasonable doubt." *Fulminante*, 499 U.S. at 307-308. To justify automatic reversal without regard to prejudice, an error must be so fundamental an alteration of the "framework within which the trial proceeds" that it "def[ies] analysis by 'harmless-error' standards." *Id.* at 309, 310; accord *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 149 n.4 (2006) ("[W]e rest our conclusion of structural error upon the difficulty of assessing the effect of the error.").[3]

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[3] This Court has confined structural errors to "a very limited class of cases." *Johnson* v. *United States*, 520 U.S. 461, 468 (1997); accord *Recuenco*, 548 U.S. at 218 & n.2 ("rare cases"). These include: complete deprivation of the right to counsel at trial, *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); trial before a judge who was not impartial, *Tumey* v. *Ohio*, 273 U.S. 510 (1927); denial of self-representation at trial, *McKaskle* v. *Wiggins*, 465 U.S. 168 (1984); denial of a public trial, *Waller* v. *Georgia*, 467 U.S. 39 (1984); racial discrimination in the selection of a grand jury, *Vasquez* v. *Hillery*, 474 U.S. 254 (1986); giving a defective reasonable-doubt instruction, *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993); and denial of the right to representation by counsel of

2. This Court has squarely held that Confrontation Clause errors are subject to harmless-error analysis. The Court's most extensive discussion came in *Delaware* v. *Van Arsdall*, 475 U.S. 673 (1986), in which this Court reversed the Delaware Supreme Court's application of an automatic-reversal rule to a Confrontation Clause violation. Van Arsdall was denied the opportunity to cross-examine a prosecution witness about the witness's possible biases. While those limits on cross-examination violated the Confrontation Clause, this Court held that "the constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, *like other Confrontation Clause errors*, is subject to *Chapman* harmless-error analysis." *Id.* at 684 (emphasis added). The Court accordingly rejected the state court's "*per se* reversal rule." *Id.* at 683.

The Court has reached the same conclusion in applying harmless-error review to numerous other strands of Confrontation Clause doctrine. See, *e.g.*, *Coy* v. *Iowa*, 487 U.S. 1012, 1021 (1988) ("We have recognized that other types of violations of the Confrontation Clause are subject to * * * harmless-error analysis, and see no reason why denial of face-to-face confrontation should not be treated the same.") (citation omitted); *Rushen* v. *Spain*, 464 U.S. 114, 117-118 & n.2 (1983) (per curiam) (concluding that a conceded denial of the Sixth Amendment right to be present at all critical stages of trial must be reviewed for harmless error);[4] *Harrington* v. *California*, 395 U.S. 250, 254 (1969) (concluding that the

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choice, *Gonzalez-Lopez*, 548 U.S. at 150.

[4] *Rushen* also forecloses petitioner's attempt (Pet. 30) to draw support from right-to-be-present cases such as *Illinois* v. *Allen*, 397 U.S. 337 (1970).

admission of a co-defendant's confession, in violation of the Confrontation Clause as interpreted in *Bruton* v. *United States*, 391 U.S. 123 (1968), must be reviewed for harmless error); see also *Lilly* v. *Virginia*, 527 U.S. 116, 139-140 (1999) (holding that admission of an unconfronted statement violated the Sixth Amendment and remanding for harmless-error analysis); *Lee* v. *Illinois*, 476 U.S. 530, 547 (1986) (same). See generally *Fulminante*, 499 U.S. at 307 (listing Confrontation Clause errors among the sort of "trial error[s]" that are susceptible to harmless-error analysis). Thus, this Court has already rejected petitioner's suggestion (Pet. 29-31) that the mere ease of administering a bright-line rule of automatic reversal justifies adopting such a rule.

Of this line of cases, petitioner acknowledges only *Van Arsdall*, and asserts (Pet. 22-23) that that case is distinguishable on the theory that it involved only "the scope and extent of cross-examination," which "the federal rules (and common law) place firmly within the District Court's discretion." That attempted distinction is without merit. The discretion of the trial judge is a factor in the analysis of whether a limitation on confrontation violates the Constitution at all. *Van Arsdall*, 475 U.S. at 679; cf. *Gonzalez-Lopez*, 548 U.S. at 151-152 (making a similar point with respect to the trial court's discretion to limit the defendant's right to counsel of choice). The Court in *Van Arsdall* squarely held that such a constitutional violation *had* occurred. 475 U.S. at 679. It then proceeded to reject the notion that Confrontation Clause violations are "so fundamental and pervasive that they require reversal without regard to the facts or circumstances." *Id.* at 681. See also *Coy*, 487 U.S. at 1021 (holding that denials of face-to-face confrontation, like "other types of violations of the Con-

frontation Clause," are subject to harmless-error analysis). There is no basis for applying a different rule here.

3. Petitioner points to no case that has treated a Confrontation Clause error as structural despite the holdings of *Van Arsdall*, *Rushen*, *Coy*, and *Harrington*. We are aware of none. See, *e.g.*, *United States* v. *Mills*, 138 F.3d 928, 939 (11th Cir. 1998) ("[A]s far as we know, no kind of Confrontation Clause error since *Chapman* * * * has escaped harmless-error analysis under the 'harmless beyond a reasonable doubt' standard."); *United States* v. *Cunningham*, 145 F.3d 1385, 1393-1394 (D.C. Cir.) (rejecting structural-error analysis), cert. denied, 525 U.S. 1059 (1998), and 525 U.S. 1128 (1999); *Eslaminia* v. *White*, 136 F.3d 1234 (9th Cir. 1998) (same); see also *State* v. *Matt*, No. DA 06-0134, 2008 WL 5403690, at *10 (Mont. Dec. 30, 2008) (rejecting the application of structural-error analysis to right to be present at critical stages); *State* v. *Watt*, 160 P.3d 640, 644 (Wash. 2007) (citing cases); *People* v. *Patterson*, 841 N.E.2d 889, 900-901 (Ill. 2005) (citing cases).

Instead, petitioner suggests (Pet. 16-22) that this Court's recent decisions in *Giles* v. *California*, 128 S. Ct. 2678 (2008); *Crawford* v. *Washington*, 541 U.S. 36 (2004); and *Gonzalez-Lopez*, *supra*, should change the analysis. That contention lacks merit.

Both *Giles* and *Crawford* dealt with the question whether the admission of particular types of unconfronted statements violates the Confrontation Clause; neither case considered whether such a violation could be considered harmless. Accordingly, the lower courts have unanimously rejected the suggestion that *Crawford* mandated the application of a different harmless-error rule. See *Watt*, 160 P.3d at 644.

Gonzalez-Lopez considered another constitutional right entirely—the right to counsel of choice. The Court rested its holding on the conclusion that "[i]t is impossible to know" what effect the substitution of one lawyer for another had on a particular trial. 548 U.S. at 150. Petitioner provides no indication that *any* lower court has read *Gonzalez-Lopez* to change the required structural-error analysis in any meaningful way, let alone that a mature conflict has developed on the question whether *Gonzalez-Lopez* requires reconsidering the structural nature of other constitutional errors.

4. In any event, the reasoning of *Gonzalez-Lopez* has no application, and harmless-error review is entirely appropriate, where the claimed error is the admission of particular evidence without confrontation. That is the case here (as it was in *Coy* and *Harrington*). The court below amply demonstrated that the Sixth Amendment violation it found could "be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." *Fulminante*, 499 U.S. at 308. Because the redacted portions of the classified document did not include any substantive evidence, Pet. App. 87, and because the redacted information was "largely cumulative," *id.* at 88, the court of appeals had no difficulty weighing the impact that the redacted portions might have had on the jury's verdict.

Moreover, the record demonstrated that the reason petitioner wanted to explore the classified portions, which dealt with the collection of the communications between petitioner and Jubran, had nothing to do with the reliability of the substantive evidence (which petitioner had ample opportunity to explore through his cleared counsel) or its effect on the jury. Petitioner did

not dispute that he was a party to the communications. Pet. App. 88. Rather, petitioner's "singular hope" was to bolster his *legal* claim, made to the district court, that he was interrogated as part of a joint venture between the United States and Saudi Arabia and that he therefore had been entitled to *Miranda* warnings. *Id.* at 87-88. The district court, which had access to the classified portions of the government's evidence, rejected petitioner's joint-venture theory by making a finding of fact that the United States did not actively or substantially participate in petitioner's questioning. *Id.* at 23 n.5. The court of appeals affirmed that finding, *ibid.*, and petitioner does not challenge that determination here. In any event, that issue has little bearing upon "the factual question of the defendant's guilt or innocence." *Fulminante*, 499 U.S. at 308.[5]

Nor is there substance to petitioner's claim (Pet. 26-28) that harmless-error analysis is improper because, absent access to the classified information, neither he nor his uncleared counsel could demonstrate prejudice. Petitioner's contention that he could not know whether he (or anyone else) was really a party to the communications in question was rejected by the court of appeals as an "eleventh-hour" argument that could not be squared with the fact that "[a]t no point prior to or during trial did [petitioner] contest that he was a party to the declas-

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[5] Petitioner faults the court of appeals (Pet. 27 n.15) for finding the Confrontation Clause violation harmless but also noting that the "coded communications" were "[p]erhaps the strongest independent evidence corroborating [petitioner's] confessions." Pet. App. 39. But the court of appeals was relying on the *substance* of the coded communications to corroborate petitioner's confession. The Sixth Amendment violation was limited to the redactions, and none of the communications' substantive content was redacted. *Id.* at 87.

sified communications provided to him or attempt to formulate any such alibi." Pet. App. 88. Indeed, both the substance of the communications and their dates were fully available to petitioner and his uncleared counsel well in advance of trial. *Id.* at 70, 87. And petitioner's uncleared counsel repeatedly suggested that the classification was unnecessary because the contents of the classified portions were readily knowable from the information already in their possession. *Id.* at 76, 82 n.21.

Moreover, petitioner's cleared counsel was afforded unfettered access to the classified portions of the two documents at issue and therefore had the opportunity to challenge the "coded communications" (Pet. 27) at trial. Despite that access, she made no claim whatsoever that the classified portions of the documents were misrepresented; that petitioner needed access to the redacted information in order to obtain a fair trial; or that the classified identifying information warranted evaluation by properly cleared forensic experts. Pet. App. 88.

Finally, the court of appeals itself had access to the classified evidence, see Appellant's Classified C.A. App. 9-15, and the benefit of sealed adversary briefing.[6] It discerned no prejudice from the presentation of the redacted portions to the jury. Pet. App. 86-89. Petitioner's contention that he was unable to make arguments at trial pertaining to those portions of the two communications is therefore beside the point; the court of appeals was satisfied beyond a reasonable doubt that he would

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[6] A cleared appellate defense counsel had access to the classified, unredacted exhibits, which afforded him the opportunity to advance claims of trial prejudice allegedly resulting from the denial of access to the redacted material. See, *e.g.*, Pet. Classified C.A. Br. 9, 19-20.

have been convicted even if the jury had not seen those portions at all.

5. The intersection of the Confrontation Clause with CIPA in this case does not warrant review. The court of appeals held that nothing in CIPA or in the "silent witness" procedure authorizes the presentation of classified evidence to a jury without disclosing it to the defendant. Pet. App. 83-85. The government has not taken issue with that holding, and there is no reason to speculate that these unusual facts will recur. As petitioner correctly states (Pet. 23), CIPA does not change the harmless-error analysis, and the court of appeals correctly held that Confrontation Clause violations are reviewed for harmless error in all cases.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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