No. 14-1077

In the Supreme Court of the United States

GARY A. LEAKS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in conducting its harmless-error analysis by considering the weight of the properly admitted evidence in determining whether the improperly admitted evidence was prejudicial.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-76a) is reported at 96 A.3d 1, cert. denied, 135 S. Ct. 497 (2014) (No. 14-6600), and 135 S. Ct. 1474 (2015) (No. 14-8062).

JURISDICTION

The judgment of the court of appeals was entered on June 5, 2014. A petition for rehearing was denied on December 5, 2014 (Pet. App. 77a-78a). The petition for a writ of certiorari was filed on March 5, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

STATEMENT

Following a ten-week jury trial in the Superior Court for the District of Columbia, petitioner and co-defendants Warren Allen, Brion Arrington, and Harrell Hagans were each convicted on one count of con-

spiracy to commit murder, in violation of D.C. Code §§ 22-105a and 22-2401 (1981) (recodified as D.C. Code §§ 22-1805a and 22-2101 (2001)); one count of premeditated first-degree murder while armed, in violation of D.C. Code §§ 22-2401 and 22-3202 (1981) (recodified as D.C. Code §§ 22-2101 and 22-4502 (2001)); one count of assault with intent to kill while armed, in violation of D.C. Code §§ 22-501 and 22-3202 (1981) (recodified as D.C. Code §§ 22-401 and 22-4502 (2001)); one count of possession of a firearm during a crime of violence or dangerous offense, in violation of D.C. Code § 22-3204(b) (1981) (recodified as D.C. Code § 22-4504(b) (2001)); and one count of carrying a pistol without a license, in violation of D.C. Code § 22-3204(a) (1981) (recodified as D.C. Code § 22-4504(a) (2001)). Gov't C.A. Br. 1-2; Pet. App. 3a. Petitioner and Allen were also convicted on one count of unauthorized use of a motor vehicle, in violation of D.C. Code § 22-3815 (1981) (recodified as D.C. Code § 22-3215 (2001)). Gov't C.A. Br. 2. Arrington and Hagans were convicted on several additional counts. *Id.* at 1-2. Petitioner and Allen were each sentenced to a term of imprisonment of 35 years to life. *Id.* at 2-3. Arrington and Hagans were each sentenced to a term of imprisonment of 66 years and 8 months to life. *Id.* at 3. The court of appeals affirmed. Pet. App. 1a-76a.

1. a. Petitioner and his co-defendants were members of the Delafield gang, a group of 20 or more men who sold marijuana and crack cocaine in 1999 and 2000 around Delafield Place in Northwest Washington, D.C. Pet. App. 3a; Gov't C.A. Br. 4. Gang members protected the neighborhood's lucrative drug trade by forcing out competitors and warning other members of threats from the police or rival organiza-

tions. Gov't C.A. Br. 4-5. Arrington and Hagans were among the leaders of the gang, while petitioner and Allen were lower-ranking members. Pet. App. 3a-4a. From approximately 1996 (or slightly earlier) through at least 2000, the Delafield gang engaged in a violent feud with the rival drug gang known as the Mahdi gang, which was led by brothers Abdur, Nadir, Rahammad, Malik, and Musa Mahdi. Gov't C.A. Br. 7-45; Pet. App. 4a-15a. From 1999 to 2000, the violence between the gangs involved a number of shooting incidents, some of which were fatal. *Ibid.*

b. On April 25, 2001, petitioner and three co-defendants were indicted in D.C. Superior Court for conspiring to assault and kill members of the Mahdi gang and for several related crimes. Pet. App. 2a. Meanwhile, also in 2001, the Mahdi brothers were indicted in federal district court on multiple charges relating to their own drug-distribution conspiracy. *Id.* at 15a-16a; see generally *United States* v. *Mahdi*, 598 F.3d 883 (D.C. Cir.), cert. denied, 562 U.S. 971 (2010). Four of the five Mahdi brothers eventually pleaded guilty to attempting to kill Arrington and other members of the Delafield gang, as well as to narcotics charges. Pet. App. 15a-16a. In the course of tendering their guilty pleas, the Mahdi brothers agreed to factual proffers that had been drafted by the government. *Id.* at 16a.

c. During petitioner's ten-week trial, the government presented substantial evidence about the Delafield gang and its activities. See Pet. App. 3a-15a; Gov't C.A. Br. 3-45. Among the government's witnesses were five former members of the Delafield gang who had pleaded guilty and agreed to testify against petitioner and his co-defendants. Pet. App.

3a-4a. Former members of the Mahdi gang (but not the Mahdi brothers themselves) also testified pursuant to plea agreements. *Id.* at 4a.

Although four of the Mahdi brothers had pleaded guilty in the federal proceedings against them, none of them agreed to cooperate in the government's case against petitioner and other members of the Delafield gang. Pet. App. 4a; Gov't C.A. Br. 75-76. Consequently, the United States filed a motion in limine to admit the plea proffers of the four Mahdi brothers as statements against their penal interest. Gov't C.A. Br. 75. Over the objections of petitioner and his co-defendants that the admission of the plea proffers violated the Confrontation Clause, the Superior Court admitted redacted versions of the Mahdi brothers' proffers. Pet. App. 16a-17a; Gov't C.A. Br. 76. The court explained that the proffers were not evidence about what petitioner or his co-defendants did, but were admitted only as evidence of what the person making the proffer believed and "allowed as evidence to show the background of the relationship" between members of the Delafield and Mahdi gangs. Pet. App. 17a; Gov't Br. 77-78 (citation omitted).

Petitioner and his co-defendants were convicted on all counts. Gov't C.A. Br. 2.

2. a. The court of appeals affirmed. Pet. App. 1a-76a. Among their many claims on appeal, petitioner and his co-defendants renewed their assertion that the Superior Court had violated the Confrontation Clause by admitting redacted versions of the Mahdi brothers' plea proffers. *Id.* at 15a-27a. In light of this Court's intervening decision in *Crawford* v. *Washington*, 541 U.S. 36 (2004), the government conceded that the admission of the Mahdi brothers' plea prof-

fers violated appellants' Sixth Amendment right of confrontation. Pet. App. 17a-18a. Petitioner argued that he was entitled to a new trial because the trial court's error was so prejudicial that it likely affected the jury's guilty verdicts and thus was not harmless beyond a reasonable doubt. See Pet. C.A. Br. 27-37. The court of appeals rejected that argument, concluding "that the government has carried its burden of establishing that the erroneous admission of the Mahdi plea proffers was harmless beyond a reasonable doubt." Pet. App. 21a; see *id.* at 27a ("We are persuaded that there is no reasonable possibility the improper use at trial of the Mahdi guilty plea proffers contributed to appellants' convictions.").

In analyzing the harmless-error issue, the court of appeals focused on both the weight of the government's evidence generally and the potential prejudicial effect on the jury of the improperly admitted plea proffers. See Pet. App. 18a ("In some cases, the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the improperly admitted evidence is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the evidence was harmless error.") (internal brackets and quotation marks omitted) (quoting *Chapman* v. *California*, 386 U.S. 18, 24 (1967), and *Morten* v. *United States*, 856 A.2d 595, 600 (D.C. 2004)). The court of appeals enumerated several factors it considered in making that harmless-error determination, including the strength of the government's case, the extent to which the improperly admitted evidence was material to a critical issue in the case, whether the improperly admitted proffers were cumulative to properly admitted evidence, and the

degree of the government's reliance on the proffers. *Ibid.*

Weighing those factors, the court of appeals examined the weight of the overall evidence compared to the weight of the Mahdi proffers. The court noted that "the Mahdi plea proffers were not directly probative of any of the crimes charged in this case." Pet. App. 21a. The court found "abundant admissible and probative evidence wholly apart from the plea proffers to prove the existence of the Mahdi and Delafield gangs, the feud between them, appellants' conspiracy, and appellants' commission of each of the shootings charged in" the indictment. *Id.* at 22a. Significantly, the court added, "the Mahdi plea proffers added nothing of consequence to this evidence; they were cumulative at best." *Ibid.*

The court of appeals also examined the effect of the plea proffers on the jury's verdict, explaining that, because "the jury was informed that the proffers were statements adopted as part of guilty pleas," the jury was "in a position to understand[] the possible motivations of the Mahdi brothers." Pet. App. 23a. The court noted that "the trial court instructed the jury" that the Mahdi proffers were not offered as evidence that petitioner or his co-defendants "did anything," and that the jury was therefore "inoculated against drawing that implication." *Id.* at 22a. The court concluded that the admission of the plea proffers was not likely to have prejudiced the jury's verdict because "Nadir Mahdi's proffer did not add to the mass of incriminating evidence directly," "the erroneously admitted plea proffers were far from central or critical to the case that the government laid out," and the

proffers "were essentially cumulative and peripheral." *Id.* at 23a, 25a-26a.

Based on that analysis, the court of appeals concluded that "the government ha[d] overcome the high bar set by the *Chapman* standard of harmlessness for constitutional error," demonstrating that "no reasonable possibility" existed that "the improper use at trial of the Mahdi guilty plea proffers contributed to" the guilty verdicts against petitioner and his co-defendants. Pet. App. 27a; see *Chapman*, 386 U.S. at 24.

b. After rejecting the other arguments for reversal raised by petitioner and his co-defendants (Pet. App. 27a-72a), the court of appeals turned to appellants' claim "that the combined prejudicial effect of the errors in this case warrants reversal of their convictions even if no single error alone was grave enough to require such relief." *Id.* at 72a. The court's "assessment of" both "the strength of the government's case" and "the innocuousness * * * of the few errors" convinced it "that, even in combination, and even applying a *Chapman* standard" for harmless error "across the board, there is no reasonable possibility the errors affected the outcome of appellants' trial." *Id.* at 75a. Accordingly, the court of appeals affirmed the convictions of petitioner and his co-defendants. *Id.* at 76a.

3. Petitioner and co-defendant Arrington filed petitions for rehearing en banc. See Pet. App. 77a. Among the questions raised by petitioner was whether the unconstitutional admission of evidence necessitates reversal under *Chapman* when "there is a reasonable possibility the jury gave weight to that evidence in its deliberations." Pet. for Reh'g at 1. The

court of appeals summarily denied the rehearing petitions. Pet. App. 77a-78a.

ARGUMENT

Petitioner urges (Pet. 15-34) this Court to review the court of appeals' application of the harmless-error standard to the acknowledged Confrontation Clause error in his case. Review of that question is not warranted because the court of appeals correctly determined, based on its review of the entire trial record, that the error did not have a prejudicial effect on the jury's verdict. The various formulations of the harmless-error test that petitioner points to do not establish a division among appellate courts; rather, they reflect application of this Court's well-established objective harmless-error standard to disparate situations. In any event, the question whether a reviewing court applying the harmless-error standard should focus on the potential effect of an error on a jury's verdict rather than exclusively on the strength of the evidence does not warrant review in this case because the court of appeals did consider the potentially prejudicial effect of the trial court's error on the verdict.

1. Review is not warranted because the court of appeals correctly applied the harmless-error standard as elucidated by this Court's decisions.

a. 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." Similarly, 28 U.S.C. 2111 provides that, "[o]n 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." 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 without justification. *United States* v. *Mechanik*, 475 U.S. 66, 72 (1986). 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)).

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 an objective judgment about whether, absent the error, the ultimate outcome likely would have been the same. When the error is constitutional, the reviewing court may conclude that it is harmless only when it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chap-*

man v. *California*, 386 U.S. 18, 24 (1967). When the error is non-constitutional, the reviewing court may conclude that it is harmless if the court finds 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).

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 must evaluate the effect of the error on the jury's verdict "in relation to all else that happened." *Kotteakos*, 328 U.S. at 764. The reviewing 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 (finding harmless the constitutionally erroneous admission of co-defendants' confessions).

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"—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* v. *Clark*, 478 U.S. 570, 582 n.11 (1986). 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.

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). Where, as here, the error is of constitutional dimension, *Chapman* requires that the presumptively considered evidence be "so overwhelm-

ing 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). 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 reviewing 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." *Ibid.* 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." *Id.* 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 the requisite 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.

That approach makes sense and reconciles what petitioner insists are conflicting views of harmless error. When properly admitted incriminating evidence is truly overwhelming—such that any rational jury that heard it would, beyond a reasonable doubt,

find the defendant guilty—then the erroneously admitted evidence, even if prejudicial standing alone, would not have had an effect on the verdict. In those cases, a court may conclude beyond a reasonable doubt that the verdict would be the same even without the improperly admitted evidence.

b. The court of appeals correctly applied the harmless-error standard to evaluate the constitutional error in this case. Consistent with this Court's guidance, the court of appeals examined "whether the force of the evidence presumably considered by the jury in accordance with the [jury] instructions" established beyond a reasonable doubt that the verdict "would have been the same in the absence of the [error]." *Yates*, 500 U.S. at 404-405. The court of appeals determined, based on its review of all the record evidence, that the erroneously admitted proffers "added nothing of consequence to the evidence; they were cumulative at best." Pet. App. 22a. The court reiterated that, "[f]ar from being the centerpiece, fulcrum, linchpin or the like, the proffers were essentially cumulative and peripheral * * * but by no means [an] essential piece of evidence that supported the government's case." *Id.* at 26a. And the court of appeals concluded that, despite "the high bar set by the *Chapman* standard of harmlessness for constitutional error," there was "no reasonable possibility [that] the improper use of the Mahdi guilty plea proffers contributed to" the convictions of petitioner or his co-defendants. *Id.* at 27a. In other words, the court of appeals based 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.

c. Petitioner contends (Pet. 19-22, 30-33) that the court of appeals erred in applying the harmless-error standard because it applied what petitioner calls a weight-of-the-evidence test by asking whether the properly admitted evidence (*i.e.*, the balance of the evidence if the improperly admitted evidence had been excluded) was sufficiently overwhelming to support the jury's verdict to the requisite degree of certainty (beyond a reasonable doubt in this case). Instead, petitioner urges (Pet. 22-25, 27-30, 31-33), the court of appeals should have applied what he calls an effect-on-the-verdict test by determining whether the admission of the proffers actually affected the jury's decision. Petitioner is incorrect on two fronts.

First, petitioner is mistaken in contending that two different substantive strains of the harmless-error standard exist in this Court's case law. This Court has already reconciled the different articulations of the harmless-error standard that petitioner identifies. In *Yates*, the Court 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, the Court explained, 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.* 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 does not even acknowledge the decision in *Yates*, let alone explain why, in light of that decision, an appellate court's objective examination of "everything else the jury considered on the issue in question," including "the entire record," *id.* at 403, is inconsistent with such a court's duty to determine whether an error affected the outcome of the trial.

Petitioner's analytical error is revealed in his suggestion (Pet. 16-18) that this Court's cases are internally inconsistent or reflect vacillation between two approaches. 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 co-defendants 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 *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 co-defendant's admission [was sufficiently] insignificant by comparison"); see also *Milton* v. *Wainwright*, 407 U.S. 371, 372, 377-378

(1972) (declining to reach merits of petitioner's argument that his confession was improperly admitted at trial because the Court found "overwhelming evidence of guilt fairly established in the state court * * * by use of evidence not challenged here," rendering any error "harmless"). In *Neder*, moreover, the Court assessed the harmlessness of an error that indisputably affected the jury's actual verdict because the error "prevent[ed] the jury from making a finding on [an] element" of the offense. 527 U.S. at 4, 10-11. This Court nevertheless found the constitutional error to be harmless based on the "overwhelming record evidence of guilt," because a "rational jury would have found the defendant guilty absent the error," *i.e.*, the "verdict would have been the same absent the error." *Id.* at 17-18.

Second, petitioner errs in suggesting that the court of appeals failed to examine whether the improper admission of the proffers affected the jury's verdict (*i.e.*, was prejudicial). The court of appeals recognized at the outset of its analysis that "reversal [was] required unless it [was] shown 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" Pet. App. 18a (quoting *Morten* v. *United States*, 856 A.2d 595, 600 (D.C. 2004)). And the court ultimately concluded that "the proffers did not prejudice" petitioner and his co-appellants because "there is no reasonable possibility the improper use at trial of the Mahdi guilty plea proffers contributed to appellants' convictions." *Id.* at 21a, 27a; see *id.* at 75a (holding that cumulative effect of errors was harmless because "there is no reasonable possibility the errors affected the outcome of appellants' trial").

Although petitioner seeks to portray this case as involving a disagreement over a legal standard, it actually involves only a disagreement with the court of appeals' conclusion that the admission of the proffers was not prejudicial. In finding the admission of the proffers harmless, the court emphasized that the proffers "were not directly probative of any of the crimes charged in this case"; that the proffers were at best "cumulative" of other proof of the existence of the rival gangs and their feud; and that ample evidence corroborated the direct testimony from the government's cooperating witnesses of petitioner's role in the crimes. Pet. App. 21a-23a. The court also rejected petitioner's claim, repeated here (Pet. 7-12, 31-32), that the government's reference to the plea proffers in argument demonstrates that it must have had an effect on the verdict. Pet. App. 25a-27a. The court's factbound analysis is correct and takes into account all of the factors that petitioner says should be considered.

Petitioner takes issue with the court of appeals' view of the emphasis that the government placed on the Mahdi plea proffers. Compare Pet. 32 ("prosecutors kept returning to this evidence, citing it at least seven times in closing arguments and rebuttal") with Pet. App. 26a ("In several hours of argument, spanning some 240 pages of transcript, we count only seven instances in which the prosecutors mentioned the proffers."). But that fact-specific challenge to the application of the harmless-error standard does not equate to use of a different legal test. And a disagreement over the significance of closing argument references does not warrant review. See *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant

* * * certiorari to review evidence and discuss specific facts."). That principle has particular force in this context, because it is primarily the role of the court of appeals to review the trial record for harmlessness. This Court has addressed *application* of the harmless-error doctrine only "sparingly," even when it has granted review to resolve a legal question implicating harmless-error principles. See *Pope*, 481 U.S. at 504; *United States* v. *Hasting*, 461 U.S. 499, 510 (1983). Petitioner offers no reason to depart from that normal practice in this instance.

2. Petitioner argues (Pet. 15-25) that federal and state appellate courts are deeply divided about how to apply the *Chapman* harmless-error standard. He contends that some courts employ a "weight-of-the-evidence" approach, assessing "the overall strength of the prosecution's case," while others apply an "effect-on-the-verdict" test, asking "whether it is likely that the error influenced the jury's decision." Pet. 15. As discussed at pp. 14-16, *supra*, the two purportedly different approaches petitioner identifies are simply two ways of articulating the same ultimate inquiry: whether an error at trial was prejudicial to the defendant. The supposed division among appellate courts that petitioner relies on is thus no division at all.

a. Like this Court, see pp. 15-16, *supra*, appellate courts called upon to determine whether the improper admission of evidence was harmless often assess the strength of the overall evidence and compare that to the strength of improperly admitted evidence—but they do so in order to assess the ultimate prejudicial effect of the improperly admitted evidence, which is just another way of asking whether a reasonable jury

would have acquitted the defendant absent the error. As the Court explained in *Neder*, if "a reviewing court concludes beyond a reasonable doubt" that the evidence of guilt is so strong "that the jury verdict would have been the same absent the error," then the "error 'did not contribute to the verdict obtained.'" 527 U.S. at 17 (quoting *Chapman*, 386 U.S. at 24).

b. Petitioner contends (Pet. 22-25) that various federal and state appellate courts "reject the weight-of-the-evidence test" and instead inquire whether an error likely affected the outcome of the trial. As explained, reviewing courts do not face a binary choice between those standards. A reviewing court must ultimately determine that an error did not affect the outcome of a trial in order to find the error harmless—but in doing so the court may assess the strength of the overall evidence of guilt. The decisions petitioners cites are not to the contrary.

i. Petitioner argues (Pet. 25) that federal courts of appeals are divided in their approach to applying harmless error, with some "reject[ing] a weight-of-the-evidence approach." But petitioner has not identified any federal circuit that refuses to find harmless error when the weight of the properly admitted incriminating evidence is so overwhelming that, even without the improperly admitted evidence, any reasonable jury would convict. Petitioner relies (Pet. 25), for example, on the D.C. Circuit's decision in *United States* v. *Cunningham*, 145 F.3d 1385, cert. denied, 525 U.S. 1059 (1998), and 525 U.S. 1128 (1999), in which the court explained that its focus on the weight of evidence when applying a harmless-error standard "is not a mere sufficiency-of-the-evidence inquiry." *Id.* at 1396 (quoting *United States* v. *Smart*, 98 F.3d

1379, 1391 (D.C. Cir. 1996), cert. denied, 520 U.S. 1128 (1997)). In so holding, the D.C. Circuit did not rule out the possibility that a reviewing court could properly deem the erroneous admission of evidence to be harmless when the improper evidence plainly did not sway the jury's verdict because the remaining evidence of guilt was so overwhelming. Indeed, the D.C. Circuit has routinely followed that approach since its decision in *Cunningham*. See, *e.g.*, *United States* v. *Garcia*, 757 F.3d 315, 318 (2014); *United States* v. *Hinton*, 12 Fed. Appx. 11, 11-12 (2001). Petitioner's reliance (Pet. 25 & n.15) on decisions from the First and Fourth Circuits is similarly unpersuasive. Like the D.C. Circuit in *Cunningham*, the First Circuit in *United States* v. *Melvin*, 730 F.3d 39 (2013), explained that harmlessness cannot be demonstrated beyond a reasonable doubt based on a showing that properly admitted evidence was merely sufficient to justify a guilty verdict. *Id.* at 40. The government must instead demonstrate that proper evidence was sufficiently overwhelming that every reasonable jury would have convicted the defendant in the absence of the improperly admitted evidence. *E.g.*, *United States* v. *Dunbar*, 553 F.3d 48, 59-60 (1st Cir. 2009); *United States* v. *Garcia-Ortiz*, 528 F.3d 74, 80 (1st Cir.), cert. denied, 555 U.S. 910 (2008). The Fourth Circuit decision petitioner cites also does not prohibit reliance on overwhelming evidence to conclude that improperly admitted evidence was harmless, see *United States* v. *Holness*, 706 F.3d 579, 598 (2013) (noting that harmlessness of error "cannot be assessed in isolation, without an examination of the totality of the evidence before the jury"), and other decisions of the Fourth Circuit have explicitly relied on overwhelming evi-

dence of guilt in finding an error to be harmless, see, *e.g.*, *Bereano* v. *United States*, 706 F.3d 568, 579 (2013); *United States* v. *Byers*, 649 F.3d 197, 211, cert. denied, 132 S. Ct. 468 (2011).

Thus, none of the federal decisions petitioner cites reflects a conflict. Like this Court, each circuit has articulated the harmless-error standard to include consideration of both the effect of the error and the weight of the remaining evidence. That some decisions focus more on the error's effect, and others more on the weight of the evidence, reflects the different facts in different cases.

ii. The state cases similarly do not give rise to a conflict warranting this Court's review. In *Ventura* v. *State*, 29 So. 3d 1086 (Fla. 2010) (per curiam), for example, the Supreme Court of Florida faulted the lower court for finding harmless error based *only* on that court's assessment that the evidence in the record supported a finding of guilt *without inquiring* "whether there [was] a reasonable possibility that the constitutional error affected the verdict." *Id.* at 1091. Nothing in that decision suggests that a court applying a harmless-error standard may not consider the overall strength of the evidence that supports the jury's verdict in determining the ultimate question of prejudice. Petitioner's reliance on *State* v. *Van Kirk*, 32 P.3d 735 (Mont. 2001), is similarly unavailing. In that case, the Montana Supreme Court held that, "in order to prove that trial error was harmless, the State must demonstrate that there is no reasonable possibility that the inadmissible evidence might have contributed to the conviction" by proving that the inadmissible evidence was cumulative because "the fact-finder was presented with admissible evidence that proved

the same facts as the tainted evidence." *Id.* at 746. That is fully consistent with the approach adopted by the court of appeals in petitioner's case. See Pet. App. 22a ("The government is also correct in stating that it relied on abundant admissible and probative evidence wholly apart from the plea proffers to prove the existence of the Mahdi and Delafield gangs, the feud between them, appellants' conspiracy, and appellants' commission of each of the shootings charged in their indictments.").

The same is true of the other state-court decisions petitioner relies on (Pet. 23-25), all of which appear to permit consideration of the strength of the overall evidence in a case so long as such consideration is in service of answering the ultimate question of prejudice. See, *e.g.*, *State* v. *Tollardo*, 275 P.3d 110, 123 (N.M. 2012) ("Of course, evidence of a defendant's guilt separate from the error may often be relevant, even necessary, for a court to consider, since it will provide context for understanding how the error arose and what role it may have played in the trial proceedings; but such evidence, as discussed above, can never be the singular focus of the harmless error analysis."); *People* v. *Hardy*, 824 N.E.2d 953, 957-958 (N.Y. 2005) (confirming that an assessment of whether an error might have contributed to the conviction includes a review of the evidence in the entire record); *State* v. *Bible*, 858 P.2d 1152, 1191 (Ariz. 1993) (noting that "[t]here is no bright line statement of what is and what is not harmless error" and directing that courts "consider the error in light of all of the evidence"); *State* v. *Caulfield*, 722 N.W.2d 304, 317 (Minn. 2006) (affirming that the strength of properly admitted evidence is an important component of harmless-error

analysis and should be one factor in the ultimate determination of whether an error likely affected the jury's verdict).

The claimed division among state and federal appellate courts—or between this Court's decisions and those of lower appellate courts—is thus illusory. Although this Court's analysis has not always 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—overwhelmingly so—to justify a determination by the court that the prejudicial effect of erroneously admitted evidence did not alter the outcome. That approach is followed throughout the country. Petitioner's disagreement with the result of the court of appeals' application of harmless error in this case does not warrant review. This Court has repeatedly denied certiorari on similar questions addressing the harmless-error standard. See, *e.g.*, *Runyon* v. *United States*, 135 S. Ct. 46 (2014) (No. 13-254); *Gomez* v. *United States*, 134 S. Ct. 784 (2013) (No. 13-5625); *Demmitt* v. *United States*, 134 S. Ct. 420 (2013) (No. 12-10116); *Ford* v. *United States*, 133 S. Ct. 2795 (2013) (No. 12-7958); *Acosta-Ruiz* v. *United States*, 133 S. Ct. 2795 (2013) (No. 12-6908). No different result is warranted here.[*]

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[*] Petitioner observes (Pet. 33) that this Court granted certiorari on a similar question in *Vasquez* v. *United States*, 132 S. Ct. 759 (2011) (No. 11-199), but dismissed the writ of certiorari as improvidently granted after oral argument, 132 S. Ct. 1532 (2012) (per curiam). Consistent with that disposition, analysis of the cases indicates no conflict warranting review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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