In The
Supreme Court of The United States

NOE MACHADO-ERAZO;
JOSE MARTINEZ-AMAYA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Thomas G. Corcoran, Jr.
Counsel of Record
Berliner Corcoran & Rowe LLP
1101 Seventeenth St., N.W
Washington, D.C. 20036
(202) 293-5555
tgc@bcr-dc.com
Counsel for Petitioner Noe Machado-Erazo

Additional Counsel Listed on Back of Cover

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477
A Division of Lantagne Duplicating Services

Kira Anne West
Law Office of Kira Anne West
1325 G. St., N.W., Suite 500
Washington, D.C. 20005
kiraannewest@gmail.com
(202) 236-2042
Counsel for Petitioner Noe Machado-Erazo

Christine Pembroke
Law Office of Christine Pembroke
3312 Dent Place, N.W.
Washington, D.C. 20007
(202) 553-3118
christine.pembroke@yahoo.com
Counsel for Petitioner Jose
Martinez-Amaya

QUESTIONS PRESENTED FOR REVIEW

I. Whether a state statute can be said to require the "use, attempted use, or threatened use of physical force against the person or property of another" within the meaning of 18 U.S.C. §924(c)(3)(b) if the offense, as specifically interpreted to by state appellate courts, can be accomplished by an act of omission such as withholding life-saving medication or sustenance.

II. Does this Court's harmless error standard require a reviewing court to determine if a substantial right was affected as the D.C. Circuit, Fourth Circuit, Fifth Circuit, Tenth Circuit and Eleventh Circuit require, or may the court simply apply their own harmless error standards in determining the validity of a jury's verdict as the First Circuit, Second Circuit, Sixth Circuit, Seventh Circuit and Eighth Circuits maintain?

INTERESTED PARTIES

All parties are named in the caption of the case. Yester Ayala was co-defendant and co-appellant below. He is not a party to the instant petition.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2018

No. 18A781

NOE MACHADO-ERAZO,
JOSE MARTINEZ-AMAYA,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

The Petitioners, Noe Machado-Erazo and Jose Martinez-Amaya, through counsel, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The District of Columbia Circuit's unpublished opinion, finding an act of omission sufficient to constitute "physical force" within the meaning of 18 U.S.C. §924(c)(3)(B), is attached as Appendix A. The District of Columbia Circuit's published opinion, *United States v. Machado-Erazo*, 901 F.3rd 326 (D.C.Cir. 2018), finding the erroneous admission of cell-site testimony harmless error, is attached as Appendix B. The orders denying rehearing and rehearing *en banc* are attached as Appendix C and D.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and Part III of the Rules of the Supreme Court of the United States. The decisions of the court of appeals affirming Petitioners' convictions were entered on August 17, 2018. The court of appeals denied Petitioners' petition for rehearing and petition for rehearing *en banc* on November 29, 2018. Petitioners sought and were granted a 30-day extension of time until March 29, 2019 for filing a petition for certiorari. This petition is timely filed pursuant to Supreme Court Rule 13.1.

STATUTORY PROVISIONS INVOLVED

I. Issue 1: Act of omission and physical force

18 U.S.C. §924(c)(1)(A)

> Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—
>
> (i) be sentenced to a term of imprisonment of not less than 5 years;
> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C. §924(c)(3)(A)

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another ...

18 U.S.C. §924(e)(2)(B)(i) [1]

(2) As used in this subsection— ...

B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; ...

Maryland Code, Criminal Law §2-201

Murder in the first degree,
(a) *In general* - A murder is in the first degree if it is: (1) a deliberate, premeditated, and willful killing; ...

II. Harmless Error

28 U.S.C. § 2111. Harmless error

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

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[1] The "elements" clause of the Armed Career Criminal Act (ACCA), 18 U.S.C. §924(e)(2)(B)(i), is set out here because it is referred to repeatedly in cases relied on *infra*. It defines "violent felony" identically with 18 U.S.C. §924(c)(3)(A) except that the use of physical force against the *property* of another is omitted.

STATEMENT OF THE CASE

By superseding indictment filed on May 9, 2013, a federal grand jury indicted Petitioners and five others individuals on various charges based on Petitioners' alleged involvement in *La Mara Salvatrucha* or MS-13 gang activities. The indictment charged Petitioners with engaging in a RICO Conspiracy in violation of 18 U.S.C. §1962(d) (Count 1) and Murder in Aid of Racketeering in violation of 18 U.S.C. §1959(a)(1) (Count 8). Finally, Petitioners were charged with Possession of a Firearm in Relation to a Crime of Violence, 18 U.S.C. §924(c)(1)(A) and (2)(Count 9). (Docket 330).

On August 6, 2013, the jury found both Petitioners guilty of all three offenses (*i.e.*, counts 1, 8 and 9). Count 8, the murder count, was murder in the first degree in violation of Maryland Code, Criminal Law §2-201. (Docket 402). On June 23, 2015, Petitioners were sentenced to concurrent life terms on the RICO and murder counts and 10 years to be served consecutively on the firearms offense. (Docket, Minute Entry, Jun 23, 2015). Petitioners timely appealed.

The United States Court of Appeals for the District of Columbia Circuit affirmed on August 17, 2018 in two opinions. The first, unpublished, opinion is attached as Appendix A. The published opinion is attached as Appendix B and is reported at 901 F.3d 326. The Court denied a petition for rehearing and a petition

for rehearing *en banc* on November 29, 2018. The two orders are attached as Appendices C and D.

The Court rejected two of Petitioners' arguments which are at issue on this petition for certiorari.

First, the Court rejected Petitioners' argument that first-degree murder under §2-201 of the Maryland Criminal Code cannot constitute a crime of violence in violation of 18 U.S.C. §924(c)(3)(A), given this Court's decision in *Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010), where, based on the decisions of the Maryland courts, murder can be accomplished by an act of omission, The Court did not explicitly acknowledge Petitioners' omission argument. It just concluded, "[a]t bottom, the force necessary to kill another human being is by definition *'violent* force - that is, force capable of causing physical pain or injury to another person,'" citing *Curtis Johnson* at 140, and "at a minimum, the contrary conclusion does not rise of the level of plain error." (Appendix A, App-5).

Second, although the Court found that admission of expert testimony concerning cell phone and cell site location was error, the Court found the error harmless. (Appendix B, App-22-28). The issue presented is what harmless error standard should be applied as there is a split amongst the Circuits.

REASONS FOR GRANTING THE WRIT

I. On the issue whether an act of omission can count as an act of violent force in violation of 18 U.S.C. §924(c)(3)(A), the Court should grant the petition for certiorari (a) because the District of Columbia Circuit has decided an important issue in a way that conflicts with relevant decisions of this Court, (b) because there is a significant circuit conflict, and (c) because, though the argument was not made in the district court, the argument was not waived.

(a) The panel's decision conflicts with relevant decisions of this Court.

Under Maryland law, first degree murder, is any "deliberate, premeditated, and willful killing," Maryland Code, Criminal Law §2-201. Murder, under Maryland law, can be accomplished by an act of omission. Specifically, murder can be committed by refusing to provide food, shelter, or medicine to a child. The Maryland appellate courts have upheld murder convictions based on such acts of omission. *See In re Eric F.*, 698 A.2d 1121, 1126-1127 (Md. Ct. Spec. App. 1997) (affirming second degree murder conviction when defendant left an intoxicated, unconscious girl in near freezing temperatures and failed to seek the proper assistance and the girl died of hypothermia); *Simpkins v. State*, 596 A.2d 655, 656-67, 662 (Md. Ct. Spec. App. 1991) (affirming second degree murder convictions when defendants deprived their child of food and water for days and the child died of starvation).[2]

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[2] Even though *Simpkins* and *Eric F* involved second degree murder, it necessarily follows that Maryland first degree murder can also be violated by an act of omission. The only difference between second degree murder and first degree murder is *mens rea*. First degree murder requires premeditated murder. Maryland second degree murder (as noted in *Simpkins, supra*, at 657) can be violated by four different *mens rea*: intent to kill, intent to do grievous bodily harm, intent to act under circumstances manifesting extreme indifference to the value of human life, or intent to commit a dangerous felony. There is no basis to conclude that the *actus reus* is any different for the two. In other words, both second degree

An act of omission – as ordinary people would understand it - does not have "as an element the use, attempted use, or threatened use of physical force against the person or property of another," 18 U.S.C. §924(c)(3)(A). Therefore, under the categorical approach, Maryland murder, which can be committed by omission, does not qualify as an §924(c)(3)(A) crime of violence.

In *Curtis Johnson v. United States,* 559 U.S. 133 (2010), the Supreme Court held that the phrase "physical force" in the ACCA "force" clause – which as noted above defines "violent felony" for present purposes identically with 18 U.S.C. §924(c)(3)(A) - refers to "force exerted by and through concrete bodies distinguishing physical force from, for example, intellectual or emotional force." *Id.* at 138. The Court further elaborated that "physical force" requires "violent force," which connotes a "substantial degree of force" – i.e., "*active* power," "extreme force," "strong physical force," "the exertion of great physical force or strength," or "force" that is "furious, severe, vehement," *Id.* at 139-40, citing *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004)("a category of violent, *active* crimes")(emphasis supplied).

In *Stokeling v. United States,* 139 S.Ct. 544 (2019), this Court ruled that robbery under Florida law qualifies as an ACCA-predicate offense under the elements clause. The term "physical force" in the ACCA, the Court ruled, encompasses the degree of force necessary to commit common-law robbery because that is what Congress intended as to robbery when it amended the ACCA as it reads today. The Florida Supreme Court had made clear that the robbery statute

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murder and first degree murder can be violated by the same *actus reus*, which includes an act of omission.

requires only "resistance by the victim that is overcome by the physical force of the offender." That is, the force required is just a level of "force" or violence sufficient to overcome the resistance of the victim, however slight. *Id.* at 12–13. *Stokeling* clearly refers to affirmative action by defendant. It certainly did not interpret the force clause to include acts of omission.

As the Supreme Court wrote in *Samuel Johnson v. United States*, 135 S.Ct. 2551 (2015):

> The Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." Our cases establish that the Government violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give *ordinary* people fair notice of the conduct it punishes, ..." [*Id.* at 2556, emphasis supplied.]

To "ordinary people," we submit, murder by withholding life-saving medication or sustenance would not appear to involve physical force, much less violent physical force.

United States v. Castleman, 134 S.Ct. 1405 (2014), is not to the contrary. As the Third Circuit in *United States v. Mayo,* 901 F.3d 216, 230 (3rd Cir., 2018), and the *en banc* Fifth Circuit in *United States v. Reyes-Contreras*, 910 F.3rd 169, 181 n. 25 (5th Cir. 2018) have both held, *Castleman* did not address the act of omission issue. *Castleman* only addressed direct force vs. indirect force in the context of affirmative acts (i.e., poisoning or pulling the trigger of a gun). *Id.* at 1404. *Castleman*'s holding that physical injury necessarily requires the use of force must be read consistent with *Curtis Johnson* and *Leocal*, which exclude acts of omission

from the force clause by limiting the clause to force exerted by and through concrete bodies and the active employment of force.

(b) **There is a significant circuit conflict.**

(i) **Decisions of the First, Second, Third, Fourth, Fifth and Ninth Circuits hold that an act of omission does not provide the requisite physical force.**

In *Chrzanoski v. Ashcroft*, 327 F.3rd 188 (2d Cir. 2003), petitioner pled guilty to assault in the third degree in violation of section 53a-61 of the Connecticut General Statutes, which provides, in pertinent part, that: "A person is guilty of assault in the third degree when: (1) with intent to cause physical injury to another person, he causes such injury to such person or to a third person; ..." The Court noted that the Government had not cited any authority indicating that Connecticut courts ever instruct juries that they must be satisfied beyond a reasonable doubt that force was used in order to convict a defendant of violating section 53a-61(a)(1). *Id.* at 193. "Given the elements of section 53a-61(a)(1) under Connecticut law," the Court wrote, "it seems an individual could be convicted of intentional assault in the third degree for injury caused not by physical force, but by guile, deception, or even deliberate omission." *Id.* at 195. "Thus," the Court concluded, "because use of force is not an element (whether statutorily defined or otherwise) of section 53a-61(a)(1) ... third degree intentional assault under Connecticut law is not a crime of violence under [18 U.S.C.] § 16(a). *Id.* at 197.

In *Whyte v. Lynch*, 807 F.3rd 463 (2015), that First Circuit interpreted the same Connecticut statute. The Court cited *Chrzanoski, supra*, at 196, for the

proposition that the statute's "language is broad enough to cover myriad other schemes, not involving force, whereby physical injury can be caused intentionally" and gave as an example, a person could intentionally cause physical injury by "telling the victim he can safely back his car out while knowing an approaching car driven by an independently acting third party will hit the victim." *Whyte, supra,* at 469. Although acts of omission were not specifically mentioned, it is clear from the First Circuit's reasoning that, following *Chrzanoski,* it also held that an act of omission could be prosecuted under the Connecticut statute and therefore that it not constitute a crime of violence.

In *United States v. Mayo,* 901 F.3d 216 (3rd Cir., 2018), the Third Circuit held that Pennsylvania aggravated assault under 18 Pa. Cons. Stat. § 2702(a)(1)(1993) fails to qualify as an ACCA "violent felony." Under Pennsylvania law, a person is guilty of aggravated assault if he "attempts to cause serious bodily injury to another." 18 Pa. Cons. § 2702(a)(1) (1993). "Serious bodily injury" is defined as "[b]odily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." *Id.* § 2301.

The Third Circuit noted that Pennsylvania aggravated assault convictions "have been upheld not because a defendant used physical force against the victim, but because serious bodily injury occurred, as *with the deliberate failure to provide food or medical care.*" *Mayo,* 901 F.3d at 227 (emphasis added). "Because Pennsylvania aggravated assault under §2702(a)(1) criminalizes certain *acts of*

omission, it sweeps more broadly than the ACCA's definition of 'physical force'" – which requires not only an affirmative act but the "exertion of great physical force or strength." *Id.* at 230. Therefore, the Court concluded, the Pennsylvania offense "does not qualify as a predicate offense under the [force] clause of the ACCA." *Id.*

The Third Circuit's decision in *United States v. Oliver*, 728 Fed. Appx. 107 (3rd Cir., 2018) is also on point. In *Oliver*, the Third Circuit likewise held that the Pennsylvania aggravated assault statute is not an ACCA "violent felony" because it can be committed by an act of omission. The Court reasoned that "[w]hile there is no doubt that physical pain sufficient to constitute serious bodily injury under [the Pennsylvania aggravated assault statute] can occur as a result of an omission, [*Curtis*] *Johnson*'s ACCA violent felony definition requires the use or attempted use of physical force exerted by or through 'concrete bodies.'" *Oliver*, *supra*, at 111.

The Third Circuit further explained that "[u]nder this binding definition, physical force is not used 'when no act [is done]." *Id.* at 111. In other words, " 'when the act has been one of omission, . . . there has been no force exerted by and through concrete bodies,' and thus, physical force as defined in [C*urtis*] *Johnson* has not been used." *Id.*

The Fifth Circuit in *United States v. Resendiz-Moreno* 705 F.3d 203 (5th Cir. 2013), has held likewise that first-degree child cruelty under Georgia law is not a "crime of violence," defined under U.S.S.G. § 2L1.2(b)(1)(A)(ii) identically to the ACCA force clause, because the offense can be committed by "depriving [a] child of medicine or by some other act of omission that does not involve the use of physical

force". *Id.* at 205. In doing so, the Fifth Circuit, relied, on its *en banc* decision in *United States v. Calderon*, 383 F. 3d 254 (5th Cir. 2004), ruling that child endangerment under Texas law was not a crime of violence under the 2001 version of U.S.S.G. § 2L1.2. because "one can knowingly endanger ... without intending to make any physical contact with the victim." *Id.* at 261.

The Fourth Circuit's decision in *United States v. Gomez*, 690 F.3d 194, 201 (4th Cir. 2012), is to the same effect. In that case, the Court found that a Maryland child abuse statute, which requires the "sustaining of a physical injury," failed to qualify as a "crime of violence" under the former U.S.S.G. § 2L1.2(b)(1)(A)(ii) force clause because it can be violated by neglecting a child – an act of omission. *Id.*

Likewise, in finding that a North Carolina involuntary manslaughter conviction could not qualify as a crime of violence under the former U.S.S.G. § 2L1.2(b)(1)(A)(ii) force clause, the Ninth Circuit ruled that, "[l]ogically, one cannot use, attempt to use, or threaten to use force against another in failing to do something." *United States v. Trevino-Trevino*, 178 F. App'x. 701, 703 (9th Cir., 2006).

(ii) Decisions of the Seventh, Eighth, and Tenth Circuits, and here the D.C. Circuit, hold that an act of omission does provide the requisite physical force.

There are five federal courts of appeals decisions (that we have found) which have concluded that acts of omission resulting in physical injury constitute violent physical force. Three of these rely heavily on *United States v. Castleman*, 134 S. Ct. 1405 (2014) , mistakenly as we have argued *supra*. *Castleman* did not address the

act of omission issue. It only addressed direct force vs. indirect force in the context of affirmative acts (i.e., poisoning or pulling the trigger of a gun). *Id.* at 1404..

In *United States v. Waters*, 823 F.3d 1062, 1066 (7th Cir. 2016), the Seventh Circuit ruled that the Illinois enhanced battery statute constitutes a violent crime pursuant to a crime of violence definition identical with the ACCA's. The court reasoned as follows. Waters argued that there were many ways in which a person could cause injury to another in violation of the enhanced battery statute without using or threatening physical force, including by poisoning or withholding medicine. However, this Court had recently confirmed that 'the act of employing poison knowingly as a device to cause physical harm' is a use of force, citing *United States v. Castleman, supra*, at 1415). "Likewise," the Seventh Circuit concluded, "withholding medicine causes physical harm, albeit indirectly, and thus qualifies as the use of force under *Castleman." Waters, supra,* at 1066.

In *United States v. Peeples*, 879 F.3d 282, 287 (8th Cir.2018), another case involving a definition of "violent crime" substantially identical to the ACCA's, the crime in question, a felony under the Iowa Code, provides, "[a] person commits a class 'B' felony when, with the intent to cause the death of another person and not under circumstances which would justify the person's actions, the person does any act by which the person expects to set in motion a force or chain of events which will cause or result in the death of the other person." *Id.* at 286.

Based on past decisions, the Eighth Circuit reasoned as follows on the act of omission issue. The Court agreed with Peeples that the phrase: "any act by which

the person expects to set in motion a force or chain of events" would include omissions. However, the statute still required the use of force. In Peeple's example of a caregiver refusing to feed a dependent, it was the act of withholding food with the intent to cause the dependent to starve to death that constituted the use of force, citing, *see Castleman*, 134 S. Ct. at 1415. It did not matter that the harm occurred indirectly as a result of malnutrition. Because it was impossible to cause bodily harm without force, the Court concluded, it would be impossible to cause death without force and an attempt to cause death would also require the use of force.. *Peeples, supra*, at 287.

In *United States v. Ontiveros*, 875 F.3d 533 (10th Cir., 2017), the Tenth Circuit, in a case involving a force clause relevantly identical to the ACCA's, concluded that Colorado second degree assault was a crime of violence even though the crime could be committed by simple omission to act where there was a duty to act. The Court, relying on *Castleman*, reasoned, *in toto*, that if it is "impossible to commit a battery without applying force, and a battery can be committed by an omission to act, then [Colorado] second-degree assault must also require physical force." *Id.* at 538.

United States v. Jennings, 860 F.3d 450 (7th Cir. 2017), did not rely on *Castleman* on the omission issue. The court there addressed the issue whether Minnesota felony domestic assault was a crime of violence under the ACCA where it could be committed by denying food to a child. The Seventh Circuit reasoned that "if a defendant has the ability to withhold life sustaining food or medication, then the

victim is likely disabled from sustaining himself by a circumstance like age, infirmity, or captivity – a vulnerability that renders him subject to the defendant's control." *Id.*at 459. With that said, the Seventh Circuit concluded that the exertion of such control, when coupled with the aim of physically harming another, necessarily involves violent physical force. *Id.*

Quite clearly, we submit, there is a very significant circuit conflict. The issue is also very likely to recur. It already has.

(c) Under the circumstances of the case, the crime of violence argument, though not made in the district court, was not waived.

We refer here first to the grounds for addressing arguments not made below set out in *National Association of Social Workers v. Harwood*, 69 F.3d 622, 628-629 (1st Cir. 1995). The argument made here raises a pure issue of law that can be decided without further fact-finding and is an issue of constitutional magnitude, *see Samuel Johnson, supra.* (*Harwood,* factors 1 and 2). Considering the argument would not work any special prejudice or inequity to the other party (factor 4). Because the issue is constitutional, the argument implicates a matter of 'great public moment' (factor 6). No plausible argument can be made that the party's failure to raise the argument below was done deliberately to yield a tactical advantage (factor 5). The apparent reason the argument was not made below was that it was very unlikely to succeed. Machado and Amaya were sentenced on June 23, 2015. Dkt. 623. *Samuel Johnson, supra,* the decision that struck down the ACCA's residual clause, 18 USC §924(e)(2)(B), a very similar residual clause to the residual clause in §924(c), was not decided until June 26, 2015, three days later.

Second, the argument is jurisdictional. A jurisdictional defect exists "when the indictment affirmatively alleges conduct that does not constitute a crime at all because that conduct falls outside the sweep of the charging statute." *United States v. Brown,* 752 F.3rd 1344, 1352 (11th Cir. 2014)(quoting *United States v. Peter*, 310 F.3rd 708, 714 (11th Cir. 2002). When such a defect exists, "proof of the alleged conduct, no matter how overwhelming, would [bring] it no closer to showing the crime charged than would ... no proof at all." *Peter*, 310 F.3rd at 715. "The problem [with such defect] is not that the government failed to allege a fact or an element that would have made the indictment's criminal charge complete." Instead, "it is that the Government affirmatively alleged a specific course of conduct that is outside the reach of the [statute charged]." *Brown*, 752 F.3rd at 1352 (quoting *Peter*, 301 F.3rd at 715).

Third, put another way, actual innocence excuses any procedural default here. Because Maryland First Degree murder is not an 18 U.S.C. §924(c) crime of violence, it is impossible for the government to prove one of the required elements of §924(c) - the crime of violence element. *See United States v. Adams,* 814 F.3rd 178, 183 (4th Cir. 2016)(petitioner was actually innocent of his felon-in-possession conviction because intervening Fourth Circuit precedent established that he was no longer a felon).

Finally, we respectfully submit, as a matter of English, the error is plain. A non-use of force cannot provide the "use of physical force" in 18 U.S.C. §924(c)(3)(A). A conviction in violation of the Fifth Amendment and a consequent ten year

sentence establish an effect on Petitioners' substantial rights and on the fairness, integrity, and public reputation of judicial proceedings.

II. Supreme Court precedent regarding the application of the harmless error doctrine has usurped the role of the jury and is not specific enough. This has caused a split amongst the Circuits in how and when it is applied. The harmless error standard has been changed by this Court which adds to the confusion of what harmless standard to apply amongst the Circuits.

(a) The harmless error doctrine's evolution has allowed appellate courts to fact find thus stripping away the jury's fact finding mission and depriving criminal defendants their due process rights under the Sixth Amendment.

Trial by jury is guaranteed by the Sixth Amendment to the Constitution of the United States and is a bedrock of our constitutional jurisprudence. A jury in a criminal trial must find every element of the charged offense beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000). Sometimes District Judges make errors. Some constitutional, some non-constitutional and some structural. What the harmless error doctrine allows is for an appellate court to second guess the jury -whose job it is to fact find- so that it can then determine if the government has proved the charges beyond a reasonable doubt. In this case, by allowing the admission of critical and dramatic expert testimony of the cell tower expert, the jury then considered and found that an element of the offense of murder that it may not have otherwise found if it had not heard this last-minute unreliable testimony. The harmless error doctrine as is currently applied by the Circuit Courts sacrifices individual criminal defendants rights, subverts the constitutional function of the jury itself, and has undermined the jury's function for efficiency and finality and has undermined the jury's institutional role. Recent applications of

Circuit harmless error review to certain constitutional rights of defendants has shown the standard is not evenly applied. See part II, *infra.*

This case presents an opportunity to resolve long-recognized inconsistencies in its jurisprudence on harmless error. After this Court's holding in *Kotteakos v. United States,* 328 U.S. 750, 764-65 (1946), that the harmless error analysis "cannot be merely whether there was enough [other evidence] to support the result, apart from the phase affected by the error," this Court held *in Chapman v. California* that there are some constitutional rights so basic to a fair trial that they could never be subject to the harmless error standard. 386 U.S. 18, 23 (1967)(citing *Payne v. Arkansas,* 356 U.S. 560 (1958) (coerced confession); *Gideon v. Wainwright,* 372 U.S. 385 (1963) (right to counsel); *Tumey v. Ohio,* 273 U.S. 510 (1927) (impartial judge)). In *Chapman,* the constitutional violation at issue was of statements by the prosecutor of the failure of the defendant to take the stand in his own defense. *Chapman,* 386 U.S. at 19. This Court reversed the California Supreme Court's holding of harmless error and held this type of error to be one of the due process constitutional rights in which the harmless error standard could not apply. *See id.* at 24-26. The California Supreme Court in holding the error harmless cited the "overwhelming evidence" in support of the result. *Id.* at 20-21. This Court had previously criticized this "overwhelming evidence" doctrine in *Fahy v. Connecticut,* 375 U.S. 85 (1963), wherein this Court held the sufficiency of the evidence was not the issue, but whether there was a reasonable possibility the error contributed to the conviction. *Id.* at 86-87. In *Chapman* this Court further held that before an

error can be called harmless, the error must be of such a nature that it was "harmless beyond a reasonable doubt." *Chapman,* 386 U.S. at 24. After *Chapman,* even where the defendant raises a timely objection to a constitutional error below,[3]the appellate court may affirm the conviction in cases where it is clear beyond a reasonable doubt that such error did not affect the outcome of the proceedings or "did not contribute to the verdict obtained." *Id.* Unlike *Kotteakos,* which closely examined the federal harmless error statute, 28 U.S.C. § 2111, the *Chapman* Court seemed to ignore the existing statutory basis for the imposition of the harmless error rule. *See Chapman, 386 U.S.* at 20-21, 26-27.

Two years later, this Court confused the issue by allowing a conviction to stand despite constitutional error because of the "overwhelming" evidence of the defendant's guilt. *Harrington v. California*, 395 U.S. 250, 254 (1969). *Harrington* turned the *Chapman* standard on its head and shifted the standard of review under

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[3] In cases where the defendant failed to make a timely objection below, the defendant (usually, *see infra* pages 15-16) has the burden of showing that the error was "plain," and that it "affect[s] substantial rights," and "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings," in order to trigger the reviewing court's remedial discretion to correct the error under Rule 52(b) of the Federal Rules of Criminal Procedure. *See United States v. Olano*, 507 U.S. 725, 735-36 (1993); *see also*, e.g., *United States v. Cotton*, 535 U.S. 625, 631-34 (2002); *Johnson v. United States*, 520 U.S. 461, 466-67 (1997). In addition, appellate courts apply a different harmless error standard on habeas review. *See Brecht v. Abrahamson*, 507 U.S. 619, 623, 637-38 (1993) (holding that the standard applied to errors on habeas review is whether error had a "'substantial and injurious effect or influence in determining the jury's verdict,'" rather than whether the error was harmless beyond a reasonable doubt (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)); *See also* John H. Blume & Stephen P. Garvey, Harmless Error in Federal Habeas Corpus After *Brecht v. Abrahamson*, 35 Wm. & Mary L.Rev. 163 (1993).

the harmless error test to allow affirmance of convictions that are supported by "overwhelming untainted evidence." *Harrington*, 395 U.S. at. 255-66 (Marshall, C.J. and Brennan, J., dissenting). In the instant case, the D.C. Circuit held that even if there is error, it's simply harmless unless it "affects the appellant's substantial rights" and that the error itself "influenced or tainted the outcome of the district court proceedings." *United States v. Machado Erazo*, 901 F.3d 326, 338 (2018) citing *United States v. Olano*, 507 U.S. 725, 734 (1993); *United States v. Smith*, 232 F.3d 236, 243 (D.C. Cir. 2000)). *Kotteakos* has guided this result by its holding that reversal depended on whether "the errors had substantial influence" and if "the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand." *Kotteakos 328 U.S. at 764-65.*

In the years since *Chapman,* this Court has basically applied three distinct techniques for determining whether an error is harmless beyond a reasonable doubt. The first, suggested by *Chapman* itself, examines only the extent to which the regard to the untainted evidence. *Chapman*, 386 U.S. at 23–24. The second looks to whether the error was "cumulative"—i.e., duplicative of untainted evidence tending to establish the same fact or facts supported by the erroneously admitted material. *See Harrington v. California*, 395 U.S. 250, 254 (1969). The third analyzes whether the jury likely gave the erroneously admitted material significant weight in light of the entire record. *Yates v. United States*, 500 U.S. 391, 403–04 (1991); *See also* John M. Greabe, The Riddle of Harmless Error Revisited, 54 Hous. L. Rev. 59, 73-74 (2016). This Court seems to have settled on the third

technique as the one reviewing courts should employ. Greabe, 54 Hous. L. at 74. (citing *Yates,* 500 U.S. at 403–04 (clarifying that *Chapman* requires reviewing courts to weigh the probative force of the untainted evidence against the probative force of the erroneously admitted material standing alone and to determine the likely significance of the error upon reasonable jurors)). *See also Sullivan v. Louisiana*, 508 U.S. 275, 279–80 (1993) (endorsing and applying the *Yates* analysis).

Finally, nearly twenty-five years after *Chapman*, the Court offered a framework for determining which constitutional errors were subject to automatic reversal and which were subject to harmless error review. The Court, in *Arizona v. Fulminante,* 499 U.S. 279 (1991), delineated a distinction between the numerous constitutional errors it had made subject to harmless error review and those constitutional errors the Court had deemed to be reversible per se. This is why we have the trial error/structural error dichotomy to which the Court adheres today. *Id* at 307-311. The Court, in *Fulminante,* distinguished those errors susceptible to harmless error review by making a distinction between "trial errors", which may be quantitatively assessed in the context of the other evidence, and "structural" errors, which "affect[] the framework within itself." *Id.* at 310. To be sure, the term "structural error" does not refer to constitutional structure; instead, it corresponds to the "infrastructure" within which a criminal case is tried. Only those constitutional errors that "transcend[] the criminal process," *Id.* at 311, and implicate that trial infrastructure or framework, according to *Fulminante*, were

reversible per se. *Id.* *See Also* Roger A. Fairfax, Jr., Harmless Constitutional Error and the Institutional Significance of the Jury, 76 Fordham L. Rev. 2027 (2008).

This Court in *Fulminante* held that appellate courts reviewing convictions should always provide remedies for "structural defects," *Fulminante,* 499 U.S. at 309, but should conduct harmless-error review of all "trial errors." *Id.* at 307-308. The existence of all these different harmless error standards floating around is intolerable and unworkable. We have seen the federal harmless-error doctrine evolve in such a way that it now encompasses a multi-tiered system that distinguishes among four different categories of error: (1) constitutional "structural" errors, which defy analysis by harmless-error review; (2) constitutional "trial" errors challenged on direct review, which are reviewed for harmlessness under the *Chapman* principle; (3) nonconstitutional trial errors challenged on direct review, which are reviewed for harmlessness under the *Kotteakos* test; and (4) constitutional trial errors challenged on collateral review, which also are reviewed for harmlessness under the Brecht/Kotteakos test." *See* John M. Greabe, The Riddle of Harmless Error Revisited, 54 Hous. L. Rev. 59, 73-74 (2016).

In *Kotteakos,* the issue for this Court was whether the variance between the single conspiracy charged in the indictment and the multiple conspiracies proved at trial constituted a technical error or defect that did not affect the substantial rights of the parties within the meaning of the federal harmless error statute. *Id.* at 757-59. Holding that the error did not fall within the reach of the statute and therefore required a new trial, this Court stated that the issue was whether the error had

"substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 776.

In explaining what the analysis under this standard should entail, Justice Rutledge stated in part:

> If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. . . . But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

Id. at 764-65. (Internal citations and footnotes omitted).

In *Fahy v. Connecticut,* 375 U.S. 85 (1963), this Court defined the term "prejudicial" as "there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Id.* at 86-87.

Justice Scalia's dissent in *Neder v. United States* stated that the harmless error analysis "puts appellate courts in the business of reviewing the defendant's *guilt.*". This, as Justice Scalia argued, basically waters down the right to a jury trial simply for the expediency of the judges and their dockets.[4] In the instant case, admitting the expert testimony greatly altered the evidence the jury considered in determining whether the government proved its case beyond a reasonable doubt.

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[4] Justice Scalia ten years earlier explains at length why supplanting the jury's role is so troubling in *Carella v. California,* 491 U.S. 264 (1989).

Thus, application of the traditional "overwhelming evidence" test on harmless error review-a test that queries whether the untainted evidence is sufficient to support the conviction—places the appellate court into the jury's fact-finding role, a role it is neither intended nor competent to perform." *See* Gregory Mitchell, Against "Overwhelming" Appellate Activism: Constraining Harmless Error Review, 82 Cal. L. Rev. 1335, 1340-47 (1994) (tracing the development of disparate standards and criticizing the "overwhelming evidence" test").

In *Pope v. Illinois*, Justice Stevens in his dissent crystalized the issue:

> "the harmless-error doctrine may enable a court to remove a taint from proceedings in order to preserve a jury's findings, but it cannot constitutionally supplement those findings. It is fundamental that an appellate court (and for that matter, a trial court) is not free to decide in a criminal case that, if asked, a jury *would* have found something that it did not find."

Pope v. Illinois, 481 U.S. 497, 509-10 (Stevens, J., dissenting)(internal citations omitted).

The way the harmless error rule is currently applied allows the appellate court to step into the shoes of the jury as fact finder which has serious Sixth Amendment usurpation implications.

Public confidence in fairness and in the administration of criminal justice could never be more important than it is today. Although this must be balanced against the finality of jury verdicts, more direction is needed from the Court so that appellate courts can tackle these issues in a more uniform answer. *See Blakely v. Washington*, 542 U.S. 296, 313 (2004) ("the Framers' paradigm for criminal justice ...[was based on] strict division of authority between judge and jury.") Indeed, this

will require very fact specific inquiries on a case by case basis, which , arguably, is what is happening now. But having an expert testify to unreliable facts that put the defendant close to the murder scene, is not the same as overruling a hearsay objection. The proper test for harmless error analysis must be more clearly articulated and plainly stricter than mere sufficiency review. See Anne Bowen Poullin, Tests for Harm in Criminal Cases: A Fix for Blurred Lines, 17 J. of Constit. L. 991, 1009 (2015).

(b) The Circuits are applying different standards of harmless error which creates confusion and impedes the fair administration of justice.

(i) The D.C. Circuit applies multiple standards of review for harmless error and in this case applied the "substantial rights" harmless error standard

There are several different harmless error standards used by various Circuits. Which standard applied depends upon what error was made in the district court-whether a non-constitutional error such as an evidentiary error, such as an uncorroborated remark[5] or a constitutional error, such as those mentioned *supra* . Take for instance the instant case in the DC Circuit. Here, the harmless error standard applied because the defendants objected at the district court. *United States v. Machado-Erazo*, 901 F. 3d 326 (2018). The objected to error was the admission of unreliable expert testimony. The Circuit Court stated "[e]ven when the [D]istrict [C]ourt has abused its discretion, reversal is appropriate only upon a concomitant finding that the error affected appellants' "substantial rights."" *Id.* at 338. *citing English v. District of Columbia*, 651 F.3d 1, 7 (D.C. Cir. 2011); *Kotteakos*

[5] *United States v. Wilson*, 605 F.3d 985, 1024 (D.C. Cir. 2010).

v. United States, 328 U.S. 750, 764-65 (1946). The court reasoned that "given the breadth of evidence linking Machado-Erazo and Martinez -Amaya to the murder, much of which was undisputed, we find that the admission of the challenged testimony was not prejudicial, and therefore reversal is not appropriate." [6] *Machado-Erazo,* 901 F.3d at 338.

The D.C. Circuit applies many different harmless error standards, but delineates between non-constitutional errors constitutional errors. *See United States v. Whitmore,* 359 F.3d 609, 622 (D.C. Cir. 2004). The test for a non-constitutional error is whether the error "had a substantial and injurious effect or influence in determining the jury's verdict." *Id.* In *Whitmore,* although applying the non-constitutional harmless error standard in the context of denial of cross examination of a witness, the Circuit Court found this so severe as to hold it not harmless error. Applying the Circuit's *Whitemore* harmless error standard, it's clear that this would have an injurious effect on the jury's verdict. We contend is a constitutional error. Not being able to effectively cross examine the witness is clearly a confrontation error. *See Alford v. United States,* 282 U.S. 687 (1931). Confrontation is a "substantial right" as it is rooted in our Constitution. The D.C. Circuit in a constitutional error case, albeit a sentencing error case, defined the error as harmless if it was "beyond a reasonable doubt that the error complained of did not contribute to the [sentence] obtained." *United States v. Simpson,* 430 F.3d 1177, 1184(D.C. Cir 2005). Here, the D.C. Circuit did not afford appellants' this

[6] As stated in petitioner's petition for rehearing, the Circuit Court misstated the facts.

heightened level of error analysis.[7] Moreover, the facts upon which the Circuit Court relies in finding "the breadth of [other] evidence linking [appellants] to the murder", were misstated. *Machado-Erazo*, 901 F.3d at 338. So even when appellant proves his error, he can't overcome the factual error of the Circuit Court.

In *United States v. Wilson,* 605 F. 3d 985 (D.C. Cir 2010), the Circuit applied yet another standard for non-constitutional harmless error by stating that "an error is harmless if the guilty verdict was "surely unattributable to the error." *Id.* at 1024 (citing *United States v. Baugham*, 449 F.3d 167, 176 (D.C. Cir. 2006)(quoting *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993))). The Court in *Wilson* looked at the objected to statement "in the context of the whole trial" and found the error harmless. *Wilson,* 605 F. 3d at 1025. As Judge Ginsberg aptly noted:

> In some cases, including this one, we have seemingly asked whether it is "highly probable" an error had a "substantial and injurious effect or influence in determining the jury's verdict. *See, e.g., United States v. Harris*, 491 F.3d 440, 452 (2007). In other cases we have articulated a less demanding standard for deeming an error harmless. *See, e.g., United States v. Batley*, 319 F.3d 514, 519 (2003)("fair assurance...that the judgment was not substantially swayed by the error"); *United States v. Lampkin*, 159 F.3d 607, 613 (1998)(no "real possibility that the [error]had a substantial effect on the jury's verdict"). In still other cases we have seemingly dispensed with the concept of probability asking only whether an error had "a substantial and injurious effect or influence in determining the jury's verdict." *See, e.g., United States v. Bentley,* 480 F.3d 360, 363 (2007).

United States v. Pineda, 592 F.3d 199, 200 (D.C.Cir. 2010)(on pet. for reh'g).

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[7] Here, the harmless error standard rather than plain error applied because the defendants objected at the district court during trial.

(ii) The Fourth, Tenth and Eleventh Circuits use a harmless error standard similar to the one used by the D.C. Circuit

In the Fourth Circuit, the Court has stated that on harmless error review, in a non-constitutional error context, a defendant is entitled to reversal of his conviction unless the Government can establish that ""the error 'does not affect substantial rights.'" *United States v. Hastings*, 134 F3d 235, 240 (4th Cir. 1998), *quoting Olano*, at 735. Stated another way, non-constitutional error is "the Government must demonstrate that the error did not have a 'substantial and injurious effect or influence in determining the jury's verdict.'" *United States v. Garcia*, 752 F.3d 382, 396-97 (4th Cir 2014), *citing United States v. Curbelo*, 343 F.3d 273, 278 (4th Cir 2003), *quoting Kotteakos*, (citation omitted)(error to allow agent to testify as decoding expert and as a fact witness). The standard for a constitutional error is quite different. First, FRCP 52(a) harmless error analysis must first be applied and then ask "is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?" *United States v. Garcia Lagunas*, 835 F.3d 479, 488 (4th Cir. 2016), *citing Neder v. United States,* 527 U.S. 1,7(1999). Or, "on harmless-error review, a defendant is entitled to reversal of his conviction unless the Government can establish that "the error 'does not affect substantial rights.'" *United States v. Hastings*, 134 F3d 235, 240 (4th Cir 1998), *quoting Olano*, 507 U.S. at 735. *See also, United States v. Irving*, 665 F.3d 1184, 1209 (10th Cir 2011)("a non-constitutional error...is considered harmless 'unless a substantial right of[a] party is affected." " An error affecting a substantial right of a party is an error that had a "substantial influence" on the outcome or

leaves one in "grave doubt" as to whether it had such effect." *Quoting Kotteakos v. United States*, 328 U.S. 750, 765 (1946)). In *United States v. Irving*, 665 F.3d 1184 (10th Cir. 2011), the Tenth Circuit excluded certain testimony. *Id.* at 1214. The Court Stated that "a non-constitutional error...is considered harmless 'unless a substantial right of[a] party is affected." An error affecting a substantial right of a party is an error that had a "substantial influence" on the outcome or leaves one in "grave doubt" as to whether it had such effect." *Id.* at 1209, *citing Kotteakos v. United States*, 328 U.S. 750, 765 (1946).

(iii) The Fifth Circuit adds an additional layer to the "substantial rights" analysis

The Fifth Circuit harmless error standard in a non-constitutional context is that "an error affects substantial rights if there is a reasonable probability that the improperly admitted evidence contributed to the conviction." *United States v. Sumlin,* 489 F.3d, 683, 688 (5th Cir 2007)(citing *Schneble v. Florida*, 405 U.S. 427 (1972). We could call this the "reasonable probability" harmless error rule. Or, take for instance *United States v. Clark,* 577 F.3d 273 (5th Cir 2009). Here the Fifth Circuit states that the harmless error standard in a non-constitutional context is "when the admission of evidence substantially affects the rights of a party." *Clark,* 577 F.3d at 287.[8]

(iv) Other Circuits apply completely different harmless error standards

[8] At least the Fifth Circuit reviews evidentiary rulings on a "heightened abuse of discretion standard." *See United States v. Franklin,* 561 F.3d 398, 404 (5th Cir. 2009).

Other circuits have a different non-constitutional harmless error standard of review. *See United States v. Meserve,* 271 F.3d 314, 329-330(1st Cir. 2001)("[T]he greater weight of the other evidence against the defendant, the less likely it is that a given error swayed the jury," but the greater the probable impact of the error, the less likely it is that the court can conclude that the error was harmless."*(citation omitted); United States v. Sepulveda-Contreras,* 466 F.3d 166, 171 (1st Cir. 2006)(as to non-constitutional errors, "the government has the burden of demonstrating the absence of any grave doubt"); *United States v. Al-Moayad,* 545 F.3d 139, 164 (2d Cir 2008)(in conducting a harmless error review, a four factor test is used: "(1) the overall strength of the prosecution's case; (2) the prosecutor's conduct with respect to the improperly admitted evidence; (3) the importance of the wrongly admitted [evidence]; and (4) whether such evidence was cumulative of other properly admitted evidence."); *United States v. Mack,* 729 F.3d 594, 603 (6th Cir 2013)(Error is "harmless unless it is more probable than not that the error materially affected the verdict."...stated another way, admission of other-act evidence constitutes harmless error "if the record evidence of guilt is overwhelming, eliminating any fair assurance that the conviction was substantially swayed by the error."(citations omitted); *United States v. Robinson,* 724 F.3d 878, 888 (7th Cir. 2013)(the Court examines the effect of the error on the decision making process as a whole, asking "whether the error itself had substantial influence", *citing Kotteakos* at 765); *United States v. Lowen,* 647 F.3d 863, 870 (8th Cir 2011)(an error is harmless if the error did not influence or had only a very slight influence on the verdict.); *United*

States v. Seschillie, 310 F.3d 1208, 1214 (9th Cir 2002)(harmless error standard for non-constitutional error is reversal "if there is a 'fair assurance' of harmlessness, or stated otherwise, unless it is more probable than not that the error did not materially affect the verdict.").

The D.C. Circuit didn't use the proper harmless error standard so a new trial is constitutionally required. If the D.C. Circuit had applied the standard in *Chapman* , or Justice Rutledge's test, the outcome would have been different. Because "it is not the appellate court's function to determine guilt or innocence," the inquiry cannot stop with the question "whether there was enough to support the result, apart from the phase affected by the error." *United States v. Robinson,* 724 F3d 878, 888 (7th Cir. 2013) (conviction reversed)(citing *Kotteakos v. United States,* 328 U.S. 750, 761 (1946) "Rather, we examine the effect of the error on the decision making process as a whole, asking "whether the error itself had substantial influence.").

The *Chapman* principle's implicit promise of relief unless the government establishes harmlessness beyond a reasonable doubt delivers a constitutionally compelled remedy responsive to an ongoing deprivation of the defendant's due process right not to be convicted at a trial where evidence that might have played a role in the decision to convict was unconstitutionally admitted.

This Court has instructed appellate courts to assess "not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand." *Sullivan v.*

Louisiana, 508 U.S. 275, 279 (1993). As the harmless error standard now stands, it has serious, long lasting Sixth Amendment and Due Process implications.

CONCLUSION

For the foregoing reasons, Petitioners Noe Machado-Erazo and Jose Martinez-Amaya respectfully request that the Petition for Writ of Certiorari be granted.

Respectfully Submitted,

Thomas G. Corcoran, Jr.
Counsel of Record
Berliner Corcoran & Rowe LLP
1101 Seventeenth St., N.W
Washington, D.C. 20036
(202) 293-5555
tgc@bcr-dc.com
Counsel for Petitioner Noe Machado-Erazo

Kira Anne West
Law Office of Kira Anne West
1325 G. St., N.W., Suite 500
Washington, D.C. 20005
kiraannewest@gmail.com
(202) 236-2042
Counsel for Petitioner Noe Machado-Erazo

Christine Pembroke
Law Office of Christine Pembroke
3312 Dent Place, N.W.
Washington, D.C. 20007
(202) 553-3118
christine.pembroke@yahoo.com
Counsel for Petitioner Jose Martinez-Amaya