

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOSE SOTO,

Petitioner.

-v-

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

KIMBERLY S. TRIMBLE
Federal Defenders of San Diego,
Inc.
225 Broadway, Suite 900
San Diego, CA 92101
Telephone: (619) 234-8467
Facsimile: (619) 687-2666
Kimberly_Trimble@fd.org

Attorneys for Petitioner

QUESTION PRESENTED

Should the government bear the burden of establishing the harmlessness of a properly preserved claim of prosecutorial misconduct in a federal criminal case?

prefix

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	prefix
TABLE OF AUTHORITIES	ii
PARTIES TO THE PROCEEDING	1
OPINION BELOW	2
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS.....	2
INTRODUCTION	2
STATEMENT OF THE CASE.....	4
I. The offense and trial.	4
II. The Appeal.....	6
REASONS FOR GRANTING THE PETITION.....	6
I. The rule applied by the Ninth Circuit in this case conflicts with the general rule and the precedent of the Court that call for the government to bear the burden of showing that its own errors were harmless, as long as the defendant timely objected at trial.....	7
II. The courts of appeal are split over who carries the burden for harmless error analysis of preserved prosecutorial misconduct claims, and the Ninth Circuit is on the wrong side of this circuit split.	11
III. Resolving the question presented now is critically important to the fair administration of justice.	12
IV. This case presents an ideal vehicle to resolve the circuit split.	14
CONCLUSION.....	15
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

Federal Cases	Page(s)
<i>Berger v. United States</i> , 295 U.S. 78 (1935)	12
<i>Chapman v. California</i> , 386 U.S. 18 (1967)	3, 8
<i>O'Neal v. McAninch</i> , 513 U.S. 432 (1995)	13
<i>United States v Olano</i> , 507 U.S. 725 (1993)	3, 8
<i>United States v. Parra-Perez</i> , 127 F. App'x 127 F. App'x 241 (9th Cir. 2005)	11
<i>United States v. Berry</i> , 627 F.2d 193 (9th Cir.1980)	9
<i>United States v. Brennan</i> , 326 F.3d 176 (3d Cir. 2003)	11
<i>United States v. Christophe</i> , 833 F.2d 1296 (9th Cir. 1987)	9
<i>United States v. Clark</i> , 593 F. App'x 53 (2d Cir. 2014)	11
<i>United States v. Cooper</i> , 173 F.3d 1192 (9th Cir.1999)	9
<i>United States v. Felix</i> , 50 F. App'x 882 (9th Cir. 2002)	10, 11
<i>United States v. Hinton</i> , 31 F.3d 817 (9th Cir. 1994)	9
<i>United States v. Joyner</i> , 191 F.3d 47 (1st Cir. 1999)	11
<i>United States v. King</i> , 36 F.3d 728 (8th Cir. 1994)	11
<i>United States v. Liera</i> , 585 F.3d 1237 (9th Cir. 2009)	14

<i>United States v. Loayza</i> , 107 F.3d 257 (4th Cir. 1997)	11
<i>United States v. Lorefice</i> , 192 F.3d 647 (7th Cir. 1999)	11
<i>United States v. Mitchell</i> 172 F.3d 1104 (9th Cir. 1999)	13
<i>United States v. Parra-Perez</i> , 127 F. App'x 241 (9th Cir. 2005)	10
<i>United States v. Roberts</i> , 618 F.2d 530 (9th Cir. 1980)	10
<i>United States v. Silverstein</i> , 737 F.2d 864 (10th Cir. 1984)	11
<i>United States v. Tam</i> , 240 F.3d 797 (9th Cir. 2001)	6, 9, 11, 12
<i>United States v. Thomas</i> , 12 F.3d 1350 (5th Cir. 1994)	11
<i>United States v. Tutt</i> , 704 F.2d 1567 (11th Cir. 1983)	11
<i>United States v. Wiley</i> , 534 F.2d 659 (6th Cir. 1976)	11
Federal Statutes	
18 U.S.C. § 3006A(d)(7)	1
18 U.S.C. § 3231	4
28 U.S.C. § 1254(1)	2
Rules	
Fed. R. Crim. P. 52	<i>passim</i>
Other	
<i>Prosecutors and Trial Judges</i> , 50 Tex. L. Rev. 629 (1972)	12
U.S. Const. amend. V	2

PARTIES TO THE PROCEEDING

Petitioner is Jose Soto, who was appellant in the court of appeals. Respondent is the United States of America, which was appellee in the court of appeals.

OPINION BELOW

The unpublished memorandum disposition of the United States Court of Appeals for the Ninth Circuit can be found on pages 1 through 3 of the attached Appendix A. The panel agreed that the prosecutor made an improper argument during closing that Petitioner had timely objected to, but held that Petitioner's conviction need not be reversed because Petitioner did not demonstrate that this error was not harmless. *See* Appendix A at 3.

Petitioner petitioned for panel rehearing and rehearing en banc. The panel denied rehearing, and the full court declined to hear the matter en banc. *See* Appendix B.

JURISDICTION

The court of appeals affirmed Petitioner's conviction on May 1, 2019. *See* Appendix A. On July 10, 2019, the court of appeals denied rehearing. *See* Appendix B. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. V

Federal Rule of Criminal Procedure 52

INTRODUCTION

This case presents the question of who carries the burden for the harmlessness analysis of prosecutorial misconduct claims, which is the subject of a circuit split. In this case and others, the Ninth Circuit has placed the burden on the defendant to establish that a prosecutor's misconduct was not harmless even if the defendant timely objected to the misconduct.

Placing this burden on the defendant conflicts with the general rule established by Federal Rule of Criminal Procedure 52(a), as well as this Court's precedent, that the government bears the burden to establish that a preserved error was harmless. *See United States v. Olano*, 507 U.S. 725, 734 (1993). It also conflicts with the observation of this Court in *Chapman v. California* that, "[c]ertainly error, constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless." 386 U.S. 18, 24 (1967). Finally, the Ninth Circuit's decision to place the burden on Petitioner to prove the preserved error was not harmless conflicts with the practice of the majority of the circuit courts, which analyze claims of prosecutorial misconduct under Rule 52(a) and properly place the burden on the government.

Assigning the burden to the defendant to establish that prosecutorial misconduct was not harmless, where the defendant properly objected at trial, defies the common sense notion that the party in error should bear the burden of establishing that the error was harmless. This Court should grant certiorari because the rule applied by the Ninth Circuit in this case conflicts with the general rule that the government bears the burden to establish harmlessness, because there is a circuit split on this issue, and because the issue presented in this petition is one of exceptional importance.

STATEMENT OF THE CASE

I. The offense and trial.

Petitioner was a licensed California car salesman who sold dozens and dozens of vehicles while living in the Los Angeles area with his wife. During that time, Petitioner often traveled to his hometown of Tijuana, Mexico to visit with family, go to medical appointments, go to mechanics to have cars fixed, or work as a private taxi driver.

On March 16, 2016, Petitioner tried to return from a trip to Mexico in a 2005 black Ford Mustang. He drove to the San Ysidro Port of Entry, and a dog alerted to his car. Ultimately, 13 packages of methamphetamine with a total weight of 6.1 kilograms were found hidden inside the rocker panel of the Mustang. Petitioner was arrested and charged with importation of methamphetamine. The district court had subject-matter jurisdiction under 18 U.S.C. § 3231.

The sole contested element at Petitioner's trial for importing methamphetamine was whether he knew there were drugs hidden in the Mustang he was driving. There was no direct evidence of guilt: no confession, no incriminating pictures of Petitioner with the drugs, and no incriminating recordings.

Circumstantial evidence of knowledge, then, was critical to the government's case. The government focused on Petitioner's behavior at the Port of Entry on the day of his arrest, pointing out that he did not react when the officers were searching the car. The government also introduced Petitioner's phone records and compared them to records of Petitioner's crossing history between Mexico and the United States, which showed that he had crossed fifteen times between November and March 2016.

Additionally, the government introduced records for the sale of the Mustang, which the prior owners testified were not accurate. And the government had an expert testify about the value of the methamphetamine found in the Mustang.

By closing argument, it was clear that the only question for the jury to decide was whether Petitioner knew the methamphetamine was in the Mustang when he drove to the Port of Entry. The government argued that the circumstantial evidence proved Petitioner's knowledge beyond a reasonable doubt and asked the jury to convict. Petitioner argued that he had not known that someone had hidden methamphetamine in a well-concealed compartment in the Mustang that he had just purchased and was therefore not guilty.

At the outset of the prosecutor's rebuttal closing argument, the prosecutor asserted that Petitioner "without a doubt[,] without any possible doubt, let alone a reasonable one, knew those drugs were there." He ended the rebuttal closing by twice asserting that the evidence against Petitioner was "overwhelming." Petitioner objected to both statements, but the district court only told the prosecutor to "move on" and never gave a curative instruction to the jury.

Despite these tactics that tilted the scales in the government's favor, the jury still deliberated for two full days—very nearly equal to the trial's length—to decide the sole contested issue of whether Petitioner knew about the drugs. But after this lengthy deliberation, the jury returned a guilty verdict. The district court later sentenced Petitioner to 84 months in custody.

II. The appeal.

One of the arguments Petitioner raised on appeal was that one prosecutor committed misconduct during rebuttal closing argument by twice arguing that the evidence against him was overwhelming. Petitioner noted that he had properly preserved this objection.

In an unpublished decision, the Ninth Circuit affirmed Petitioner's conviction. *See* Appendix A at 3. As is relevant to this petition, the Ninth Circuit agreed that the prosecutor made an improper argument when he twice asserted the evidence against Petitioner was "overwhelming" at the end of his rebuttal closing. Appendix A at 3. But even though Petitioner properly preserved his objections, the Ninth Circuit held his conviction need not be reversed because this error was harmless "[i]n light of the ample evidence of guilt." Appendix A at 3. As authority for its decision, the Ninth Circuit cited to a prior case where it had placed the burden of proving a preserved prosecutorial misconduct was not harmless on the defendant. *See* Appendix A at 3 (citing *United States v. Tam*, 240 F.3d 797, 802 (9th Cir. 2001)).

Petitioner's petition for rehearing or rehearing en banc was denied. *See* Appendix B. This petition follows.

REASONS FOR GRANTING THE PETITION

The Court ought to grant this petition to resolve an important question that has divided the circuits. That question is whether a defendant who timely objects to prosecutorial misconduct must nevertheless still carry the burden of proving that misconduct was not harmless to obtain a reversal. The First, Second, and Eighth Circuits, like the Ninth Circuit in this case, place the burden on the defendant. But

there is virtually no analysis in any of these cases regarding why a departure from the general rule is appropriate. In contrast, the Third, Fourth, Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits all analyze claims of misconduct under Rule 52(a) and place the burden on the government to establish harmlessness. The D.C. Circuit does not appear to have a clear rule regarding this issue.

The rule applied by the Ninth Circuit in this case, which placed the burden for the harmlessness analysis on Petitioner, conflicts with this Court's precedent. It also conflicts with the general, national rule, articulated in Federal Rule of Criminal Procedure 52(a), that where a defendant timely objects and the government is the party in error, the government bears the burden to show that its error was harmless.

This question presented is an issue of exceptional national importance and this case is an ideal vehicle to resolve the issue. Every year, criminal defendants are convicted after trials where the government prosecutor engaged in misconduct. Placing the burden on the defendant to show that the misconduct was not harmless undercuts long established and common sense norms of American justice. It also reduces the incentives prosecutors have to avoid misconduct. And had the burden been properly placed on the government in this case, Petitioner's conviction would likely have been reversed by the Ninth Circuit.

- I. The rule applied by the Ninth Circuit in this case conflicts with the general rule and the precedent of the Court that call for the government to bear the burden of showing that its own errors were harmless, as long as the defendant timely objected at trial.**

As articulated by this Court, Federal Rule of Criminal Procedure 52(a) establishes the general rule that where a defendant objects at trial to an error, the

government bears the burden of establishing that the error was harmless. In *Olano*, this Court discussed the differences between plain error analysis under Rule 52(b) and harmless error analysis under Rule 52(a) and noted that:

When the defendant has made a timely objection to an error and Rule 52(a) applies, a court of appeals normally engages in a specific analysis of the district court record—a so-called “harmless error” inquiry—to determine whether the error was prejudicial. Rule 52(b) normally requires the same kind of inquiry, with one important difference: It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice. In most cases, a court of appeals cannot correct the forfeited error unless the defendant shows that the error was prejudicial.

507 U.S. at 734. While the *Olano* Court’s analysis of 52(a) and 52(b) focused on the “subtle but important” differences in word choice between the two rules, *id.*, the larger principle embodied in Rule 52(a) is well ensconced in both this Court’s prior precedent and the common law.

In *Chapman*, this Court made clear that constitutional error in admitting highly prejudicial comments, “certainly casts on someone other than the person prejudiced by it a burden to show that it was harmless.” 386 U.S. at 24. In support of its decision, the Court observed that “[i]t is for that reason that the original common-law harmless-error rule put the burden on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment.” *Id.*

While the Ninth Circuit follows *Olano* and *Chapman* in placing the burden on the government in cases where it applies Rule 52(a), it has, without explanation, crafted a special rule governing claims of prosecutorial misconduct. The special rule in the Ninth Circuit conflicts with the general rule identified above by placing the

burden on the defendant to show that a prosecutor's misconduct was not harmless, even where the defendant objected at trial.

The origin of this special rule for misconduct claims is murky and no explanation as to why a different rule should be used can be found in the cases applying it. In Petitioner's case, the panel relied on *Tam*, 240 F.3d at 802, as authority for this special rule. See Appendix A at 3. The *Tam* Court cited *United States v. Cooper*, 173 F.3d 1192, 1203 (9th Cir.1999), as authority for this special rule. But that portion of the opinion in *Cooper* analyzed a *Brady* claim about a purportedly exculpatory FBI report, and the quoted language was focused on whether that report qualified as "material." *Id.*

Another commonly cited case in the Ninth Circuit for this special rule is *United States v. Hinton*, which acknowledged that the defendant had properly objected at trial, but then cited to an earlier case for the proposition that the "defendant must demonstrate that he was prejudiced by the misconduct" to obtain a reversal. 31 F.3d 817, 824 (9th Cir. 1994). In that earlier case, *United States v. Christophe*, the Ninth Circuit held that to establish reversible error on prosecutorial misconduct, "a defendant must establish: (1) the existence of prosecutorial misconduct; (2) that the issue was preserved for appeal; and (3) that defendant was prejudiced by the misconduct." 833 F.2d 1296, 1301 (9th Cir. 1987). For support it cited to *United States v. Berry*, a plain error case that contains no discussion of which party bears the burden of establishing prejudice. 627 F.2d 193, 197 (9th Cir.1980). *Berry* in turn cites to *United States v. Roberts*, which appears to be the first case to discuss claims of

prosecutorial misconduct and harmless error, but also contains no discussion of where the burden should fall regarding prejudice. 618 F.2d 530 (9th Cir. 1980).

So while it is unclear what the reasoning behind the Ninth Circuit's special harmless error rule is, it is absolutely clear that the rule conflicts with the general harmless error rule laid out in Rule 52(a), the general principles elucidated by this Court in *Chapman* and *Olano*, and the common law rule identified in *Chapman* that the beneficiary of an error bears the burden to show that it was harmless. Indeed, the rule not only conflicts with the common law, but common sense itself. If anything, there is even more justification to place the burden on the government to establish harmless error in prosecutorial misconduct claims. In such cases, the government is not only the beneficiary of the error, but also the cause of it and the party in the best position to avoid it. Assigning the burden to the government will give prosecutors additional incentive to be careful to avoid committing misconduct in jury trials.

Because the rule in the Ninth Circuit conflicts with the ordinary application of the harmless error rule articulated by this Court, Rule 52(a), and the common law origins of the harmless error rule, this Court should take up the issue to resolve the conflict.¹

¹ The government may argue that the Ninth Circuit has not applied this special rule consistently. While it is true that the Ninth Circuit has properly assigned the burden of proving harmlessness to the government in some other cases, those other cases are unpublished. *See United States v. Felix*, 50 F. App'x 882 (9th Cir. 2002); *United States v. Parra-Perez*, 127 F. App'x 241, 243 (9th Cir. 2005). In its published decisions, the Ninth Circuit has consistently applied the special rule. And notably, the government has previously agreed that the Ninth Circuit's special rule is wrong. *See Gov't's Br. in Opp'n to Cert. Pet. at 9, Brenes v. United States*, No. 16-5980 (Dec. 14, 2016) (not disputing that the government carries the burden of proving that a preserved error involving prosecutorial misconduct was harmless).

II. The courts of appeal are split over who carries the burden for harmless error analysis of preserved prosecutorial misconduct claims, and the Ninth Circuit is on the wrong side of this circuit split.

The Court should grant certiorari in this case to resolve the circuit split regarding which party carries the burden for harmless error analysis of prosecutorial misconduct claims. *Compare United States v. Brennan*, 326 F.3d 176 (3d Cir. 2003) (government carries burden); *United States v. Loayza*, 107 F.3d 257 (4th Cir. 1997) (same); *United States v. Thomas*, 12 F.3d 1350 (5th Cir. 1994) (same); *United States v. Wiley*, 534 F.2d 659 (6th Cir. 1976) (same); *United States v. Lorefice*, 192 F.3d 647 (7th Cir. 1999) (same); *United States v. Silverstein*, 737 F.2d 864 (10th Cir. 1984) (same); *United States v. Tutt*, 704 F.2d 1567, 1570 (11th Cir. 1983) (same), *with United States v. Joyner*, 191 F.3d 47, 54 (1st Cir. 1999) (defendant carries burden); *United States v. Clark*, 593 F. App'x 53, 55 (2d Cir. 2014) (same); *United States v. King*, 36 F.3d 728, 733 (8th Cir. 1994) (same). Notably, the Ninth Circuit has decisions on both sides of this circuit split. *Compare*, 240 F.3d at 802 (defendant carries burden), *with Felix*, 50 F. App'x at 882 (government carries burden); *Parra-Perez*, 127 F. App'x at 243 (same); *see also* Gov't's Br. in Opp'n to Cert. Pet. at 9, *Brenes v. United States*, No. 16-5980 (Dec. 14, 2016) (not disputing that the government carries the burden of proving that a preserved error involving prosecutorial misconduct was harmless).

In this case, the panel cited *Tam*, 240 F.3d at 802, as authority for its holding that it was not required to reverse Petitioner's conviction despite its conclusion that the prosecutor made an improper argument during closing if Petitioner "suffered no prejudice." Appendix A at 3. In *Tam*, the Ninth Circuit explained, "[t]he defendant

must show that it is ‘more probable than not that the misconduct materially affected the verdict.’” 240 F.3d at 802 (quotations and citation omitted). Thus, the panel’s decision in this case rested on its conclusion that Petitioner had not proven he suffered prejudice. That puts the Ninth Circuit on the wrong side of the circuit split because placing the burden on the defendant to prove that an error was not harmless is inconsistent with the ordinary application of the harmless error rule articulated by this Court, Rule 52(a), and the common law origins of the harmless error rule.

This Court should therefore grant certiorari in this case to bring the First, Second, Eighth, and Ninth Circuits into conformity with the majority of the circuits. Whether a person receives a fair trial, free of any misconduct that would materially affect the outcome of the trial, should not depend on what circuit they are tried in. Moreover, given the size of the circuit split and the number of criminal cases tried in the respective jurisdictions, the resolution of the issue presented in this petition will affect a substantial number of cases and ensure greater consistency in the administration of justice across the United States.

III. Resolving the question presented now is critically important to the fair administration of justice.

As this Court has taught us, a prosecutor’s duty “is not that [he] shall win a case, but that justice shall be done.” *Berger v. United States*, 295 U.S. 78, 88 (1935). Unfortunately, “[t]he academic commentators who have examined the problem of prosecutorial misconduct have almost universally bemoaned its frequency.” Albert W. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 Tex. L. Rev. 629, 631 (1972). The frequency of meritorious prosecutorial misconduct claims calls

into question not just the fairness of individual trials, but the fairness of our entire system of criminal justice. While many prosecutors practice with integrity and respect for the rules, the non-trivial number of prosecutors who do not can cause tremendous damage to the public's perception of how our criminal justice system operates.

The issue presented in this petition strikes directly at the heart of this important issue. By addressing the conflict between the Ninth Circuit and this Court, as well as the majority of the circuit courts, this Court can set clear rules for the review of prosecutorial misconduct claims. These rules will provide important incentives for prosecutors to avoid misconduct and will better comport with common sense notions of fair play—if you commit misconduct in obtaining a conviction, it is on you to prove that your actions did not materially affect the end result.

While in some cases the issue of the burden of persuasion may not matter, there is no shortage of examples of cases where the outcome of a harmless error review is simply not clear. For example, in *United States v. Mitchell*, the Ninth Circuit came to the conclusion that it was simply “just not sure whether an error was harmless” after reviewing all the facts of the case. 172 F.3d 1104, 1111 (9th Cir. 1999). However, because the factors were in “equipoise” and the government had the burden of persuasion, the court reversed. *Id.*

Burdens matter in difficult cases. *See O'Neal v. McAninch*, 513 U.S. 432, 437 (1995) (“The case may sometimes arise, however, where the record is so evenly balanced that a conscientious judge is in grave doubt as to the harmlessness of an error.”). And while not every case is difficult, who bears the burden will always matter

in a non-trivial number of cases and in an extremely significant way to the defendants whose liberty is on the line.

IV. This case presents an ideal vehicle to resolve the circuit split.

Petitioner's case presents an ideal vehicle for resolving this issue precisely because the issue of who bears the burden of persuasion is outcome determinative in his case. Additionally, Petitioner properly preserved this issue both in district court and in the Court of Appeals.

Whether the prosecutor's misconduct in this case was harmless is, at best for the government, a close call. The case against Petitioner was entirely circumstantial. Petitioner did not confess. There were no incriminating pictures of Petitioner with the drugs, nor any incriminating recordings. Moreover, Petitioner presented a plausible explanation to the jury for how the methamphetamine could have been placed in the vehicle without his knowledge—before he purchased the vehicle. Cases have been reversed in similar circumstances when the burden of establishing harmlessness was properly placed on the government. *See, e.g., United States v. Liera*, 585 F.3d 1237, 1244 (9th Cir. 2009) (finding an error not harmless in an alien smuggling case, even though the aliens were hidden in a dangerous engine compartment, where there was no direct evidence of the defendant's knowledge).

Moreover, on appeal, Petitioner argued that the burden of proving harmlessness should be placed on the government. Petitioner made this argument in his opening brief. When the panel affirmed his convictions, Petitioner filed a petition for rehearing or rehearing en banc where he again argued that the court had erred by placing the burden for the harmlessness analysis on him. Thus, this case presents

the ideal vehicle to resolve this circuit split because the issue was properly preserved both at trial and on appeal.


Because the issue of the burden of persuasion is outcome determinative in this case, is an issue of exceptional national importance, and is an issue that will affect a substantial number of cases across the United States, this Court should grant certiorari.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Dated: October 8, 2019


KIMBERLY S. TRIMBLE
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, California 92101-5097
Telephone: (619) 234-8467
Kimberly_Trimble@fd.org
Attorneys for Defendant-Appellant