

No. _____

In the Supreme Court of the United States

DAVID PAUL LYNCH,

Petitioner,

Versus

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Did the Eleventh Circuit violate this Court’s precedent on harmless error when it focused its harmless error analysis solely on the weight of the untainted evidence without considering the potential effect of the error (the erroneous admission of hearsay statements) on this jury at all?
2. Did the Eleventh Circuit violate Mr. Lynch’s Sixth Amendment right to a jury trial by determining that Mr. Lynch should have been convicted without considering the effects of the district court’s error on the jury that heard the case?

PARTIES TO THE PROCEEDING

All the parties to this proceeding are named in the caption.

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PETITION FOR WRIT OF CERTIORARI

David Paul Lynch respectfully petitions for a writ of certiorari to review the opinion of the United States Court of Appeals for the Eleventh Circuit entered in this matter on August 14, 2019, affirming the judgment of the United States District Court for Middle District of Florida, Tampa Division.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is unpublished and appears at Lynch v. United States, 783 Fed. Appx. 904 (11th Cir. 2019). It is attached as **Appendix A**.

The judgment of the United States District Court for the Middle District of Florida, Tampa Division, is unpublished and is attached at **Appendix C**.

JURISDICTION

The court of appeals entered its order on August 14, 2019. Pursuant to Federal Rule of Appellate Procedure 35 and 11th Circuit Rule 35, a timely petition for rehearing and rehearing *en banc* was filed on September 3, 2019. Ultimately, the United States Court of Appeals for the Eleventh Circuit denied the petition on October 25, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves application of three separate constitutional and statutory provisions.

U.S. Const. amend. VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Fed. R. Crim. P. 52(a).

(a) Harmless Error.

Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) Plain Error.

A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

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.

STATEMENT OF THE CASE

A. Statement of jurisdiction in the lower courts, in accordance with this Court's Rule 14(1)(g)(ii), and suggestion of justification for consideration, as suggested under Rule 10.

The Petitioner, David Lynch, faced federal criminal charges in the district court under 18 U.S.C. § 3231, which grants exclusive original jurisdiction to district courts over offenses against the laws of the United States. The district court entered judgment on March 1, 2018. Mr. Lynch filed a timely notice of appeal on March 1, 2018. The Eleventh Circuit exercised jurisdiction over Mr. Lynch's appeal under 28 U.S.C. § 1291, which authorizes review of final judgments of the district courts, and 18 U.S.C. § 3742(a), which authorizes review of sentences.

This case concerns an important question that is the subject of an acknowledged conflict among federal courts of appeals. This is a case where the Eleventh Circuit found that the erroneous admission of hearsay statements, which were admitted without an appropriate limiting instruction, were harmless. The Eleventh Circuit was only able to reach this conclusion by failing to apply, and misapplying, this Court's precedent regarding harmless error analysis. Courts and legal scholars have long recognized this Court's conflicting jurisprudence in the area of harmless error analysis. The Eleventh Circuit ultimately hypothesized a guilty verdict based solely upon the government's evidence without any concern for the actual effect of the error and as a result, deprived Mr. Lynch (and other defendants country-wide) of his right to a jury trial under the Sixth Amendment.

B. Factual Background.

The Eleventh Circuit summarized the factual background of the instant case in a succinct manner that will best explain the facts alleged during Mr. Lynch's trial.

In June 2005, Lynch traveled to the Philippines and engaged in sexual acts with a girl he called Liza. He filmed their sex acts with video cameras from two different angles, and also took still photos of her genitals. In an electronic spreadsheet that he used to keep track of female contacts in the Philippines, Lynch described Liza as "young" and "15." And one year later, Lynch said in online chats that he was Liza's "ex bf," that he took "naked pics" of her, and that "she is only 16 he he."

Lynch returned to the Philippines in December 2006. Prior to the visit, he asked a contact named Fhey to "find 4 girls" for him to engage in sexual acts with. Fhey sent him pictures of the girls, and Lynch expressed particular interest in one girl. Fhey informed him that the girl's name was Erica, and that she was 13 years old. Lynch replied, "nice ... is she virgin?" On his trip, he made a video of himself engaging in sex acts with four people, including Erica. He also took still photographs of Erica, focusing on her genitals.

When he returned home in late December 2006, Lynch chatted online with "Thomas" - another one of Fhey's clients-to compare notes on their most recent trips to the Philippines. Thomas showed Lynch a picture of a girl named Rica and said, "she is 13." Lynch commented that Rica had "a gorgeous body." Thomas asked Lynch if he liked to "roleplay" or "ageplay" with the girls. Lynch replied, "no need to role play when the ages are real." Half a year later, on yet another trip to the Philippines, Lynch met Rica and took a close-up picture of her genitals.

By 2015, Lynch had developed an online relationship with a Filipino woman named Rose who sent Lynch erotic and pornographic photos of herself and her 11- year-old daughter, Denise, in exchange for a laptop and money. In 2016, he asked Rose, "how old is she now?" And Rose replied, "this December she is 13 yrs old." That December, Lynch made plans to meet up with Rose and Denise "in real" in the Philippines. He and Rose discussed at length what sex acts Denise was "ready" to perform.

Meanwhile, based on a tip sent to the National Center for Missing and Exploited Children, the FBI obtained a search warrant for various email and online messaging accounts that turned out to belong to Lynch. On December 29, 2016, the FBI arrested Lynch as he was boarding a plane to the Philippines. The FBI found sex toys, male performance drugs, cameras, data storage devices, and a large amount of candy in his luggage. When FBI agents searched his home, they found thousands of

pornographic videos and photos featuring what appeared to be underage girls.

Pet. App. A2-A4.

C. Procedural History in the District Court.

On September 6, 2017, a federal grand jury returned a twelve-count, Third Superseding Indictment against Mr. Lynch. Counts One through Five, and Seven through Nine, charged Lynch with production of child pornography – specifically, for taking sexually graphic photos and videos of Liza, Erica, and Rica. Each count alleged that Mr. Lynch “did use and persuade and attempt to use and persuade a minor” to engage in sexually explicit conduct for the purpose of producing child pornography. However, these counts did not include any reference to the additional mens rea, or knowingly, requirement for “attempted” production. (Doc. 58). Count Six charged Mr. Lynch with traveling in foreign commerce with intent to engage in illicit sexual conduct with a minor—specifically, for the December 2006 trip where he was caught on video engaging in sex acts with Erica—in violation of 18 U.S.C. § 2423(b). Count Ten charged Mr. Lynch with knowing receipt of child pornography—specifically, for receiving photos of Denise over email—in violation of 18 U.S.C. § 2252(a)(2) and (b)(1). Count Eleven charged Mr. Lynch with “knowingly attempt[ing]” to travel in foreign commerce with intent to engage in illicit sexual conduct with a minor—specifically, for the December 2016 trip where the FBI caught him on his way to meet Denise—in violation of 18 U.S.C. § 2423(b) and (e). (Doc. 58 at 7) (emphasis added). Count Twelve charged Mr. Lynch with knowing possession of child pornography—a catch-all charge covering thousands of child

pornography videos and photographs found in the FBI raid of his home—in violation of 18 U.S.C. § 2252(a)(4)(B) and (b)(2). (Doc. 58).

Prior to trial, the government submitted a trial brief to the district court, wherein it laid out what it believed they would show at trial. Pursuant to that brief, it was clear, that the government knew attempted production was legally different than actual production of child pornography. In its brief, the government expressed:

“ordinarily in a production case ‘evidence relating to [the defendant’s] perception of the victim’s age [is] irrelevant.’ United States v. Riquene, 522 Fed. Appx. 940, 944 (11th Cir. 2014).

Attempted production is different, however, because the crime involves the defendant’s *intent* to use and persuade a child to produce child pornography and his taking of a substantial step to do that. A defendant can be guilty of attempted production even if the persons in the visual depictions are not actually real children. See United States v. Lee, 603 F.3d at 904, 913 (11th Cir. 2010) (holding that the defendant could be convicted under Section 2251 for “attempting to use a fictitious minor to produce child pornography”); see also United States v. Pierson, 544 F.3d 933, 938 (8th Cir. 2008) (affirming a conviction for attempted production of child pornography based on evidence that the defendant “believed that the undercover profile was a minor”). Accordingly, given the charges in this case, evidence related to the defendant’s perception of the victim’s ages is relevant.”

(Doc. 88 at 2).

On October 10, 2017, Mr. Lynch proceeded to trial. Over the course of several days, the government presented testimony and evidence in the form of texts and chat messages. One of the government’s witnesses, Sarasota Police Department Detective Megan Buck, testified about her involvement in Lynch’s case as the lead investigator. Throughout her testimony, Agent Buck specifically identified and testified about email exchanges, Yahoo! chat conversations, Skype chat messages, and text message

conversations. However, none of individuals who Lynch was purportedly messaging in any of the various vehicles was presented at trial. Agent Buck admitted that she had no other direct knowledge as to the age of the individuals reflected in the photographs **except** for what was said in the various conversations. The government did not have birth certificates, driver's licenses, social security cards, or any other identifying information that could help determine an exact age of the individuals. (Doc. 149 at 242).

During the testimony of government witness Agent Buck, trial counsel for Lynch requested a limiting instruction that the statements made, either written form or audio, by individuals other than Lynch, could not be used as substantive evidence of age given the fact that they were hearsay statements. (Doc. 149 at 196). The government argued that the statements were not hearsay because the issue was not about whether what they said was true, but rather if the Lynch believed the statements to be true. (Doc. 149 at 197). The government specifically argued that

"[t]he effect on the here (sic) in this instance is what the defendant believed; and the reason why that is important is because the production count – production of child pornography counts here are charged as attempts. As Miss Peresie rightly pointed out in the trial brief, what the defendant believed is essential; and if the defendant believed that these were underage minors and, thus, tried to produce pornographic images of them, he had attempted to produce child pornography."

(Doc. 149 at 198). The district court acknowledged that it believed the government was correct, but would address the issue at a later point in the trial and give the parties time to discuss a proposed solution. (Doc. 149 at 199).

During the charge conference, trial counsel again brought up the issue of giving the jury a limiting instruction regarding the hearsay statements that were offered to prove the truth of the matter asserted, made out-of-court by declarants that did not testify at Lynch's trial. Counsel argued that a limiting instruction was appropriate in order to explain to the jury that the hearsay statements were not substantive evidence of age and instead, solely evidence admitted to place Lynch's own statements into context. (Doc. 150 at 214). The district court allowed Lynch and the government to try and come to an agreed upon limiting instruction, but that was to no avail. (Doc. 150 at 215).

GOVERNMENT: Your Honor, the government's position remains, I think, in accordance with the Court's ruling, that the objection which was overruled was based on the fact that this was not hearsay at all. It was a hearsay objection. The Court, in the government's view, properly ruled that it was for the effect on the hearer, the listener, citing the *Rivera* case to which Your Honor just alluded and, therefore, no instruction is needed.

DISTRICT COURT: I agree. I'm not going to give a limiting instruction. (Doc. 150 at 216).

During deliberations, the jury requested clarification on the *mens rea* required for the various charges. The jury submitted a written question: "If the defendant believed Liza, Erica, Rica and Denise were under the age of 18 (whether or not they were) is that sufficient to satisfy the condition that they be a minor?" Lynch and the government agreed on a written response: "Yes as to counts 1, 2, 3, 4, 5, 7, 8, 9 & 11" and "No as to counts 6, 10 & 12."

D. Eleventh Circuit’s Consideration of the Matter.

On appeal, a three-judge panel of the Eleventh Circuit held that any error complained of by Mr. Lynch was harmless. First, the panel discussed the issue of whether the government produced sufficient evidence to establish that the alleged victims were actual minors under the age of 18. The panel found that the government presented sufficient evidence of such, relying on Lynch’s statements, an expert pediatrician, and dozens of photographs and videos.

In deciding the remaining issue, the panel ultimately found that the district court likely erred when it denied Lynch’s request for a limiting instruction.

If a court admits evidence that is admissible for one purpose but inadmissible for another, and the defendant makes a “timely request” for a limiting instruction, the court “must restrict the evidence to its proper scope and instruct the jury accordingly.” Fed. R. Evid. 105. Here, the court allowed in statements about the alleged victims’ ages that were admissible to prove Lynch’s state of mind, but inadmissible to prove that his victims were minors. The government argues that some of the statements at issue may have been admissible under well-established hearsay exceptions; in some cases, for instance, Lynch “manifested that [he] adopted or believed [them] to be true.” Fed. R. Evid. 801(d)(2)(B). But hearsay exceptions at best account for some, not all, of the statements about age submitted to the jury.

Pet. App. A11. However, the panel found that any error was harmless.

As we explained at length in addressing Lynch’s first claim, there was sufficient admissible evidence that Lynch’s victims were minors—including expert testimony, the admissible chat messages, and the many photos and videos of the victims. We cannot say that hearsay within the chat transcripts had a substantial influence on the outcome of the trial, so the error does not warrant reversal.

Pet. App. A11-12.

Mr. Lynch moved for a Petition for Rehearing and Rehearing *En Banc* after the Eleventh Circuit rendered its decision. Mr. Lynch argued that the panel's decision was contrary to Eleventh Circuit precedent in United States v. Fortenberry, 971 F.2d 717 (11th Cir. 1992). However, Mr. Lynch's petitions were ultimately denied. No judge in regular active service on the Eleventh Circuit panel requested that the Court be polled on rehearing en banc. Pet. App. A15.

REASONS FOR GRANTING THE PETITION

A. There is Acknowledged Conflict Amongst the Circuit Courts of Appeal As a Result of Two Competing Modes of Conducting Harmless Error Analysis.

The Eleventh Circuit's decision in this case further complicates the already established, and consistently acknowledged, conflict amongst the appellate circuits regarding harmless error analysis. Less error analysis is probably the most cited doctrine in the criminal law, and its consequences are significant. The outcome of the harmless error analysis means the difference between offering a remedy for an injury to an individual's rights and making the decision that such an injury is an acceptable cost of an expedient criminal justice system. With such significant consequences hanging in the balance, it is imperative that the doctrine be applied consistently.

Legal scholars and commentators have long recognized that two competing tests have emerged for determining whether an error is harmless. The first test inquires whether the error had any effect on the verdict. The second test inquires whether there was overwhelming evidence of guilt that was untainted by the error.

See *Gregory Mitchell*, 82 Cal. L. Rev. 1335, 1339 (1994) (noting that "courts

evaluate harmless error under one of two tests or a hybrid of the two"); Harry T. Edwards, To Err is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?, 70 N.Y.U. L. Rev. 1167, 1170-1171 (1995) (distinguishing between a "guilt-based approach" and an "effect-on-the-verdict-approach" in determining whether an error is harmless); Charles S. Chapel, The Irony of Harmless Error, 51 Okla. L. Rev. 501, 504 (1998) (identifying two tests, one considering "the effect of the error on the verdict," the other requiring "a consideration of the evidence of guilt); Erika A. Khalek, Searching for A Harmless Alternative: Applying the Harmless Error Standard to Alternative Theory Jury Instructions, 83 Fordham L. Rev. 295 (2014) (acknowledging a divide amongst the circuits in their interpretation of the harmless error standard and the reality that some circuits impose a less demanding standard, while others demand a more stringent standard).

The standard applied by the Eleventh Circuit below was referenced in United States v. Fortenberry, 971 F.2d 717 (11th Cir. 1992). Specifically, the standard emphasized in the Eleventh Circuit requires the court to look at two separate aspects: first, whether the erroneous admission of evidence had a substantial influence on the outcome; and second, whether there was sufficient evidence uninfected by error that supports the verdict. Id. The Eleventh Circuit's application encompasses both of the identified tests that the Court has identified in its precedents. However, that cannot be said for all circuits, hence the conflict.

In the First Circuit, the courts have applied a standard that compares the weight of properly admitted evidence versus the weight of improperly admitted

evidence. See, United States v. Santana, 175 F.3d 57 (1st Cir. 1999) (finding that “[i]n order to determine whether the jury’s consideration of extrinsic evidence was harmless error, a reviewing court must ‘assess the record as a whole to determine the impact of the improper evidence upon the jury … the prejudicial effect of the improper evidence must be weighed against the weight of the properly admitted evidence.’”) (Internal quotations omitted).

In United States v. Garcia, 413 F.3d 201 (2d Cir. 2005), the Second Circuit discussed the factors relevant to harmless error review of inadmissible evidence, which the Court admitted were “distilled” or refined from relevant Supreme Court precedent. The Court identified four factors: (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 testimony; and (4) whether such evidence was cumulative of other properly admitted evidence. Id. at 217. See also, Zappulla v. New York, 391 F.3d 462, 468 (2d Cir. 2004); Wray v. Johnson, 202 F.3d 515, 526 (2d Cir. 2000).

The Third Circuit does not apply the standard that focuses on whether the evidence was sufficient to convict despite the admitted error (also known as the “could have” returned a verdict absent the error standard). Instead, the Third Circuit determines whether there was a reasonable possibility that the error contributed to the jury verdict. In United States v. Waller, 654 F.3d 430 (3d Cir. 2011), the Court emphasized that when determining whether a constitutional error is harmless, the inquiry is not whether, in a trial that occurred without the error, a guilty verdict

would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error.

The Fourth Circuit applies a similar inquiry when considering an error under Rule 52.

Under Rule 52, any error that doesn't affect substantial rights is harmless and must be disregarded. See United States v. Heater, 63 F.3d 311, 325 (4th Cir. 1995). An error is harmless if we can 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." Id. (internal quotation marks omitted). Put another way, an error is harmless if it's "highly probable that [it] did not affect the judgment." United States v. Nyman, 649 F.2d 208, 212 (4th Cir. 1980) (internal quotation marks omitted). The decisive factors to consider are "the closeness of the case, the centrality of the issue affected by the error, and the steps taken to mitigate the effects of the error." Id. (internal quotation marks omitted).

United States v. Burfoot, 899 F.3d 326, 340–41 (4th Cir. 2018). Other cases within the Fourth Circuit have further analyzed the factors and determined that the final factor – the closeness of the case – is the single most important factor of the harmless error inquiry. However, courts are quick to clarify that the closeness inquiry involves assessing whether the evidence is not only sufficient to convict, but whether it is sufficiently powerful in relation to the excluded testimony to ensure the error did not affect the outcome. See, United States v. Ibisevic, 675 F.3d 342 (4th Cir. 2012).

The Fifth Circuit focuses the analysis on whether the error contributed to the verdict obtained. See, United States v. Cornett, 195 F.3d 776 (5th Cir. 1999). Under a harmless error analysis, the issue is "whether the guilty verdict actually rendered in this trial was surely unattributable to the error." See, United States v. Walker, 148 F.3d 518 (5th Cir. 1998) (citing Sullivan v. Louisiana, 508 U.S. 275, 279, 113 S.Ct.

2078, 124 L.Ed.2d 182 (1993)). The focus, therefore, is on the effect that an error may have had upon the verdict actually rendered. Id. Thus, the error will not require reversal if “beyond a reasonable doubt the error complained of did not contribute to the verdict obtained.” Sullivan, 508 U.S. at 279, 113 S.Ct. 2078.

Similar to the Fifth is the analysis applied in the Sixth, Seventh and Eighth Circuit. See, United States v. Snyder, 2019 WL 4512659 (18-4144) (6th Cir. Sept. 19, 2019); United States v. LaVictor, 848 F.3d 428, 448 (6th Cir. 2017) (the court found that a new trial is not warranted “if the record evidence of guilt is overwhelming, eliminating any fair assurance that the conviction was substantially swayed by the error.”); United States v. Quiroz, 874 F.3d 562 (7th Cir. 2017) (finding that harmless errors are those that do not have an effect on the outcome because the case against the defendant is so overwhelming absent the erroneously admitted evidence); Lyons v. Luebbers, 403 F.3d 585 (8th Cir. 2005) (concluding that where there is overwhelming evidence of a defendant’s guilt, the improper admission of evidence constitutes harmless error). However, the Eighth Circuit goes a step beyond merely looking back at the evidence. The Court in United States v. Stoney End of Horn, 829 F.3d 681 (8th Cir. 2016) identified that harmless-error analysis necessarily requires a prediction about what would have occurred if the record were different.

The Ninth Circuit conducts a similar analysis, but requires the Court to review not only the remaining incriminating evidence but also the probabilities of the effect of the error on a reasonable trier of fact. See, United States v. Jobs, 871 F.3d 852 (9th

Cir. 2017) (holding that review for harmless error requires not only an evaluation of the remaining incriminating evidence in the record, but also the most perceptive reflections as to the probabilities of the effect of the error on a reasonable trier of fact; Court of Appeals must be convinced that the improperly admitted evidence did not contribute to the verdict, and the government bears the burden of showing the harmlessness of the error). The Ninth Circuit also directs courts to look to facts about jury deliberations that tend to demonstrate that an error was not harmless. Longer jury deliberations weigh against a finding of harmless error because lengthy deliberations suggest a difficult case. United States v. Lopez, 500 F.3d 840 (9th Cir. 2007) (quoting United States v. Velarde Gomez, 269 F.3d 1023 (9th Cir. 2001)).

The Tenth Circuit has phrased the test in different terms, on some occasions asking “whether the jury would have returned the same verdict absent the error,” United States v. Nash, 482 F.3d 1209 (10th Cir. 2007), and on other occasions asking whether “the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the codefendant’s admission is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error.” United States v. Glass, 128 F.3d 1398 (10th Cir. 1997).

The weight of the circuit authority embraces the view that, while overwhelming evidence is an important consideration, it cannot be the sole focus of the harmless error inquiry. Therefore, the greater weight of the circuit authority indicates that the analysis of the majority panel below was incomplete and insufficient. This error creates further conflict and constitutional issues.

B. This Court's Own Precedents are in Conflict Regarding the Appropriate Mode of Harmless Error Analysis.

The Circuit Courts are not the only entity that have conflicting and inconsistent methods for conducting a harmless error analysis. It could be argued that the underlying basis for the varying versions across the Circuits is because of this Court's inconsistent holdings regarding harmless error.

The Court first articulated the standard for harmless error in Kotteakos v. United States, 328 U.S. 750 (1946). In that case, the Court held that the proper inquiry was not to assess the weight of the untainted evidence. The Court stated:

it is not the appellate court's function to determine guilt or innocence . . . Nor is it to speculate upon probable reconviction and decide according to how the speculation comes out . . . the question is, not were [the jurors] right in their judgment, regardless of the error or its effect upon the jury. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own.

328 U.S. at 763-764. This formulation of the test was repeated in Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963) ("We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction").

Probably the most cited case dealing with harmless error is United States v. Chapman, where the Court found that harmless error analysis applies to constitutional violations. 386 U.S. 16 (1967). In Chapman, the Court formulated the test similar to Kotteakos and Fahy: "[t]he question is whether there is a reasonable

possibility that the evidence complained of might have contributed to the conviction.” 386 U.S. at 22. Despite Chapman, the majority below did not answer that question.

After Chapman, the Court decided numerous cases that presented “alternative” standards for the harmless error analysis. In Harrington v. California, 395 U.S. 250 (1969) the Court departed from Chapman and found that an error is harmless if the properly admitted evidence was overwhelming. Thereafter, in Schneble v. Florida, 405 U.S. 427 (1972), the Court attempted to combine the standards, stating that “[i]n some cases the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the codefendant’s admission is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error.” In Delaware v. VanArsdall, 475 U.S. 673 (1986), the Court addressed the harmless error analysis in the context of a Confrontation Clause violation and ultimately set forth a list of factors to be considered in a harmless analysis. The factors included (1) the importance of the witness’s testimony in the prosecution’s case; (2) whether the testimony was cumulative; (3) the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points; and (4) the overall strength of the prosecution’s case. Id. at 279.

The Court more recently discussed the issue again in Sullivan v. Louisiana, 508 U.S. 275 (1993). In Sullivan, the Court stated

Consistent with the jury trial guarantee, the question it instructs the reviewing court to consider is 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. Harmless

error review looks, we have said, to the basis on which the jury actually rested its verdict. The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered no matter how inescapable the findings to support that verdict might be would violate the jury trial guarantee.

Id. at 279. Several years later, when faced with a different factual scenario, the Court identified yet another possible analysis. In Neder v. United States, 527 U.S. 1 (1999), the Court rejected the defendant's application of Sullivan and held that "[i]n a case such as this one, where a defendant did not, and apparently could not, bring forth facts contesting the omitted element, answering the question whether the jury verdict would have been the same absent the error does not fundamentally undermine the purposes of the jury trial guarantee." Id. at 19.

The Court's various analyses for harmless error demonstrate a common focus on looking at the weight of the untainted evidence. However, the Court's precedent also directs following courts to determine whether **this specific** jury could have been influenced by the error. Without a specific and consistent analysis being applied by the Court, the uncertainty trickles downstream into the Circuit Courts and creates the current state of conflict. Regardless, in light of the Court's two constant factors that are addressed in its precedent, the panel in the instant case failed to render an opinion consistent with such. The panel failed to engage in a detailed analysis of the effect of the error, which if they had, would have resulted in a finding that Mr. Lynch was entitled to a new trial.

C. The Eleventh Circuit's Application of the Harmless Error Test Resulted in a Conflict with the Court's Precedent.

The Eleventh Circuit's ultimate decision in the instant case centered around whether the error complained of by Mr. Lynch was harmless or not. In his appeal, Mr. Lynch argued that the district court abused its discretion when it refused to give the jury a limiting instruction on the use of hearsay evidence that was admitted through the government's case. Mr. Lynch specifically argued that the error was reversible because the requested instruction was correct, was not substantially covered by the charge actually given to the jury, and the instruction dealt with some point in the trial so important that failure to give the requested instruction seriously impaired Mr. Lynch's ability to conduct his defense. Mr. Lynch argued that the error was compounded by the insufficient charging Indictment, that did not specifically identify the mens rea element (knowingly), and the lack of an adequate jury instruction on the required intent for attempted production. The Eleventh Circuit found that the district court **did** err by failing to provide the jury with a limiting instruction, but found that the error was harmless. However, in making that determination, the court only considered whether there was sufficient, uninfected evidence, to support the verdict. The court did not consider whether the erroneous admission of evidence had a substantial influence on the outcome of **Mr. Lynch's jury panel.**

The court below was able to characterize the error of an omitted jury instruction as harmless by considering only the government's untainted evidence (that otherwise, with the instruction, would not have been appropriately for

consideration) and gave no consideration whatsoever to the actual impact that the erroneously introduced evidence could have had on the jury. Specifically, the court failed to consider whether the actual jury that decided Mr. Lynch's fate could have been substantially influenced by the improper hearsay statements included in the government's evidence, because those statements were understood as being the truth of the matter asserted since the district court failed to give a limiting instruction on their actual weight and purpose of admissibility. Had the panel employed a test that considered the magnitude of the error and its potential prejudicial impact, as well as the concrete indications from the government and the jury that the evidence was critical to Mr. Lynch's conviction on several counts, it could not have found the error harmless. A proper harmless error analysis looks to three things: (1) the strength of the government's case, absent the erroneously admitted evidence; (2) the effect that the error had in the context of the trial; and (3) any indications as to the importance of the evidence to the jury.

The panel below clearly considered the weight of the government's evidence in making the finding that any error was harmless. However, the panel's focus on that factor led to its neglect of the other factors. Specifically, the panel failed to consider and discuss the effect that the error had in the context of the trial. Mr. Lynch was charged with twelve different counts surrounding his alleged involvement with minors in the Philippines. Counts One, Two, Three, Four, Seven, Eight and Nine all alleged that Mr. Lynch produced child pornography depicting a minor. As instructed by the district court, Mr. Lynch could only be found guilty of those counts if the

government proved, beyond a reasonable doubt, that “an actual minor, that is, a real person who was less than 18 years old, was depicted.” In offering proof of those counts, the government introduced the inadmissible hearsay statements through text messages, chat messages and e-mails. However, because the district court would not provide a limiting instruction, advising the jury that the statements contained in the messages were not to be taken as the truth, but instead, as to the effect on the listener, the jury was allowed to accept the substance of the messages as substantive evidence or proof that the victims were under the age of 18 years old. The messages and e-mails were the only direct evidence of how old the minor victims allegedly were, and therefore, were **critical** to the government’s offer of proof on eight separate counts. The panel failed to consider and discuss how the lack of a limiting instruction and the admittance of the inadmissible hearsay statements affected the trial. Had the panel followed the lead of the majority of Circuits and considered the potential impact of the error, the outcome would have been different.

The panel further failed to consider the actual record evidence that revealed how the error affected the jury deliberations. Specifically, during jury deliberations, the jury asked the district court “if the defendant believed Liza, Erica, Rica, and Denise were under the age of 18, parentheses, whether or not they were, is that sufficient to satisfy the condition that they be a minor?” (Doc. 151 at 102). The jury’s question highlights the fact that they were unsure about what type of proof the government had offered and/or what the government was required to prove as to the element of an actual minor being involved. The jury was sent an answer to the

question at 1:27 p.m., and they reached their verdict by 2:07 p.m. The jury's quick return following this important question clearly revealed that it believed the evidence showed that Mr. Lynch believed the alleged victims were under the age of 18, which they could have only found based on the messages introduced by the government (which the panel found were improperly admitted without a limiting instruction). This question and the quick verdict reveals exactly how the erroneously admitted evidence affected the jury that convicted Mr. Lynch. In light of this question, had the panel adequately considered the appropriate factors in its harmless error analysis, they would have found that the error was anything but harmless and ordered for Mr. Lynch to receive a new trial.

The absence of a consistent harmless error test allowed the panel below to wholly fail to consider the devastating impact that the inadmissible hearsay statements and the lack of a limiting instruction had on the jury. No jurist who considered that impact could possibly say it did not affect the jury's verdict. Yet, the majority failed to even consider this impact despite the fact that considering the impact of error is an essential element of most of its sister Circuits' harmless error analysis and part of the analysis that was promulgated by this Court through its precedent. The only way to ensure that this type of error does not continue to infect our justice system is to pronounce a consistent harmless error analysis that all courts shall follow.

D. The Eleventh Circuit's Application of the Harmless Error Test Resulted in a Violation of Mr. Lynch's Sixth Amendment Right to a Trial By Jury

This case presents an ideal opportunity to resolve this important and recurring issue. The Eleventh Circuit's application of the harmless error test resulted in a violation of Mr. Lynch's Sixth Amendment right to a trial by jury. The Sixth Amendment guarantees to criminal defendants the right to a trial by jury. U.S. Const. amend. VI. The invocation of harmless error analysis implicates the jury trial right because one of the purposes of that right is to protect "against arbitrary law enforcement." Duncan v. State of La., 391 U.S. 145, 156 (1968). The harmless error inquiry asks courts to choose which laws and rules are worthy of enforcement in a particular case. When the analysis is not conducted carefully according to the precedents of this Court, it wrests from the hands of the jury the power the Constitution has assigned to juries alone: the power to determine guilt or innocence.

When the Eleventh Circuit chose to substitute its judgment for that of the jury, and determine that there was sufficient evidence to convict Mr. Lynch, the Court violated Mr. Lynch's jury trial guarantee. The Eleventh Circuit hypothesized a trial that did not involve the erroneous admissions, rather than correctly consider whether the error effected the ultimate verdict of the jury.

The Eleventh Circuit's actions denied Mr. Lynch his right to be tried by a jury. Who is to say that the Eleventh Circuit, as well as its sister Circuits', have not been issuing similar opinions that violate other defendants' rights? The mere possibility that such a violation could be happening, because of a lack in consistent holdings, is

something this Court has the ability to resolve. This Court should grant certiorari to remedy this Constitutional violation and set appropriate boundaries for harmless error analysis in order to avoid future violations of similar magnitude.

CONCLUSION

For the reasons stated above, the Petitioner respectfully submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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