No. 20-1709

In the
Supreme Court of the United States

DAVID MING PON,

Petitioner,

v.

UNITED STATES,

Respondent.

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

BRIEF FOR PROFESSOR DANIEL EPPS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Daniel S. Epps
Counsel of Record
Washington University
School of Law
1 Brookings Drive, CB 1120
Saint Louis, MO 63110
(314) 935-3532
epps@wustl.edu

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

BRIEF FOR PROFESSOR DANIEL EPPS AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE *AMICUS CURIAE*

Daniel Epps is Treiman Professor of Law at Washington University in St. Louis. He teaches and writes about constitutional law and criminal procedure, and he has written about the harmless constitutional error doctrine in particular. See Epps, Harmless Errors and Substantial Rights, 131 Harv. L. Rev. 2117 (2018); Epps, The Right Approach to Harmless Error, 120 Colum. L. Rev. F. 1 (2020). He has an interest in the sound development of the law in this area.[1]

SUMMARY OF ARGUMENT

The Court should grant the petition for certiorari as this case presents an excellent opportunity for the Court to clarify the doctrine of harmless constitutional error and provide needed guidance for lower courts. Although this Court established a rule for harmless constitutional errors in *Chapman v. California*, 386 U.S. 18 (1967), it has never answered a set of fundamental questions raised by that decision. For example, the Court has never explained what source of law generates the *Chapman* rule or what its relationship is to the governing federal statute, 28 U.S.C. § 2111. The leading view is that harmless error is part of the law

[1] *Amicus curiae* requested consent from both parties to this case more than 10 days prior to the due date of this brief. Both petitioner and the Government have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no monetary contribution intended to fund the preparation or submission of this brief was made by any party or any party's counsel.

of remedies. Others believe that it is mandated by constitutional due-process guarantees. *Amicus*'s own theory is that harmless error flows directly from the underlying constitutional rights at issue in an appeal.

This larger debate about harmless constitutional error is of more than merely academic interest. Trying to understand harmless error's foundations is necessary if the Court is to explain how harmless-error analysis should work in practice. If harmless constitutional error is a wholly remedial doctrine, then an approach like the Eleventh Circuit's—which looks to "overwhelming evidence of guilt"—may well be permissible. But as opinions from jurists ranging from Justice Brennan to Justice Scalia show, powerful intuitions about harmless error contradict the Eleventh Circuit's approach. Rather than asking about whether a jury in an alternate universe would have convicted the defendant had the error never occurred, courts instead must ask "whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (Scalia, J.).

Even if this Court disagrees with petitioner and *Amicus* on the merits, however, this case is still worth hearing. Because the Court has never explained fundamental questions about harmless error, confusion about how harmless error should operate in practice will persist. The Court should grant certiorari to clear up the confusion and explain exactly how courts should conduct the analysis. This case presents an excellent opportunity for the Court to clarify the doctrine, as the court below took an approach that is impossible to square with the inquiry that petitioner, *Amicus,* and this Court's own precedent support. The question presented is also manifestly important, as

harmless error almost certainly affects more criminal appeals than any other criminal-procedure issue this Court could consider.

REASONS FOR GRANTING THE PETITION

I. The harmless constitutional error doctrine is in dire need of clarification.

This Court first recognized the harmless constitutional error doctrine in *Chapman v. California*, 386 U.S. 18 (1967). In that case, the Court overturned a California Supreme Court ruling that had refused to give effect to a federal constitutional violation. In so doing, the Court held that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id.* at 24.

Chapman seemingly set out a clear rule, but it left many mysteries in its wake. First, the relevant source of law for the *Chapman* doctrine is entirely unclear. What authority does the Supreme Court have to impose harmless-error rules on *state* courts? *Chapman* cannot rest on the Court's "supervisory power" as that power extends only to *federal* courts. See, *e.g.*, *Dickerson v. United States*, 530 U.S. 428, 438 (2000) ("It is beyond dispute that we do not hold a supervisory power over the courts of the several States.").

Harmless error is typically understood as a rule about constitutional *remedies*. Yet the Court has no obvious authority to require state appellate courts to recognize particular remedies for constitutional violations in criminal appeals—especially given that the Court has repeatedly observed that states need not provide appeals in criminal cases at all. See, *e.g.*, *Ross v. Moffitt*, 417 U.S. 600, 611 (1974) ("[I]t is clear that

the State need not provide any appeal at all."); *McKane v. Durston*, 153 U.S. 684, 687 (1894) ("A review by an appellate court of the final judgment in a criminal case . . . was not at common law, and is not now, a necessary element of due process of law.").

Nor has the Court ever explained what relationship the *Chapman* doctrine has with the governing federal statute, 28 U.S.C. § 2111. That section provides that "[o]n the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." The Court has distinguished between "structural defects" that require automatic reversal and "trial errors" that are subject to harmless-error rule. See *Arizona v. Fulminante*, 499 U.S. 279, 306–11 (1991). But it has never explained whether structural errors automatically affect "substantial rights" under § 2111, or whether instead that provision does not apply to structural errors.

The leading theory is that *Chapman* can only be understood as a form of "constitutional common law." That is, *Chapman* is not directly mandated by the Constitution but is a judicially created remedy that may be subject to revision by Congress. See Goldblatt, Comment, Harmless Error as Constitutional Common Law: Congress's Power to Reverse *Arizona v. Fulminante*, 60 U. Chi. L. Rev. 985, 993 (1993); Meltzer, Harmless Error and Constitutional Remedies, 61 U. Chi. L. Rev. 1 (1994). In this way, the *Chapman* rule resembles the private cause of action created in *Bivens v. Six Unknown Federal Narcotics Agents,* 403 U.S. 388 (1971), and the Fourth Amendment exclusionary rule, see *Mapp v. Ohio*, 367 U.S. 643 (1961); see

generally Monaghan, Foreword: Constitutional Common Law, 89 Harv. L. Rev. 1 (1975).

This explanation unfortunately raises as many questions as it answers. For one: If the *Chapman* rule is a rule of common law, it is debatable whether the Court has power to enforce it on the states. Cf. *Collins v. Virginia*, 138 S. Ct. 1663, 1678 (2018) (Thomas, J., concurring) ("If the exclusionary rule is federal law, but is not grounded in the Constitution or a federal statute, then it must be federal common law. . . . As federal common law, however, the exclusionary rule cannot bind the States.").

More fundamentally, whether courts have the power to create "constitutional common law" at all is deeply contested. See, *e.g.*, Grano, Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy, 80 Nw. U. L. Rev. 100, 129–36 (1985). Those who agree with such critiques would need to find a different conceptual foundation for *Chapman*.

Another theory is that harmless error derives from constitutional due-process guarantees. In his separate opinion in *United States v. Lane*, Justice Brennan offered such a theory, though without going into great detail on the specifics. See 474 U.S. 438, 460 (1986) (Brennan, J., concurring in part and dissenting in part) (suggesting that "constitutional errors are governed by the Due Process Clauses of the Fifth and Fourteenth Amendments"). Along somewhat similar lines, Professor Richard Re has argued that harmless-error doctrine "can be viewed as a product of the Due Process Clauses." Re, The Due Process Exclusionary Rule, 127 Harv. L. Rev. 1885, 1917 (2014).

Amicus agrees with Justice Brennan and Professor Re that *Chapman* must rest on constitutional

rights, not constitutional remedies. But rather than relying on due process, *Amicus*'s theory is that harmless error can only be understood as part of the substance of the *underlying* constitutional rights at issue in an appeal. See generally Epps, Harmless Errors and Substantial Rights, 131 Harv. L. Rev. 2117 (2018). Under this theory, harmless-error rules form part of the doctrinal test to determine when criminal convictions actually rest on true *violations* of constitutional rights. That is, when asking (say) whether a trial error involving the Confrontation Clause was harmless, the appellate court is really asking whether the conviction truly rests on a meaningful violation of the defendant's confrontation rights. Understood this way, many of the mysteries of harmless error quickly evaporate. See *id.* at 2164–70.

But the Court need not embrace *Amicus*'s theory of harmless constitutional error in order to find this case worthy of consideration on the merits. As described below, answering the open questions about harmless error, one way or another, is necessary for the Court to provide guidance for lower courts.

II. The issue in this case turns on unresolved questions underlying the harmless constitutional error doctrine.

The debates about harmless constitutional error's conceptual foundations are not merely academic. Instead, they have profound implications for how harmless error should work in practice, even in seemingly ordinary cases like this one involving direct appeals from federal district courts. The question this case raises is, at bottom, about how exactly courts should conduct the harmless-error inquiry. Should they ask whether a constitutional error at trial may have

affected the actual jury verdict in the defendant's case? Or should they instead ask whether some *hypothetical* jury would have still convicted had the error never occurred? By declaring errors harmless whenever there is "overwhelming evidence" of the defendant's guilt, Pet. App. 60a, the Eleventh Circuit's approach embraces the second mode of analysis.

There are good reasons to reject this approach. As Justice Scalia observed, courts conducting harmless-error review should ask

> 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. . . . 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.

Sullivan v. Louisiana, 508 U.S. 275, 279 (1993). For this reason, Justice Scalia's opinion for a unanimous court concluded that an improper jury instruction on reasonable doubt was a structural error requiring automatic reversal. As the Court explained, "[t]he Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal." *Id.* at 280.

This premise—that certain errors, such as the complete denial of a jury, demand by their very nature reversal—seems deeply intuitive. The problem, though, is that the remedial approach provides no good reason to support this intuition. If harmless error

is just a doctrine about when the remedy of reversal is appropriate, why can't a court decline to issue that remedy in cases where a new trial is highly unlikely to lead to a different result? Courts regularly consider, among other factors, whether a party is likely to succeed on the merits before granting equitable relief. See, *e.g.*, *Winter v. Nat. Resources Def. Council*, 555 U.S. 7, 20 (2008). By analogy, why couldn't the likelihood of success on retrial be a relevant consideration in an appellate court's remedial calculus for reversal?

If, by contrast, harmless error is at bottom about figuring out which convictions actually violate a defendant's constitutional *rights*—as both the due-process and rights-based approaches contend—it must have a more limited domain. The relevant inquiry is not what some hypothetical jury might do in a counterfactual world. It's what *this* jury actually did in the real world.

That insight helps show why the debates about harmless error matter for the legal question here: how courts should conduct harmless-error analysis in cases where it is applicable. If harmless error is about determining whether the defendant's rights were in fact violated, then the analysis must center on the degree to which a claimed error actually influenced the jury in this case. If, by contrast, harmless error is a purely remedial calculus, it may make more sense to ask whether a hypothetical jury would have convicted anyway even if the error had never occurred.

But because the Court has never resolved fundamental questions about harmless error, confusion about the proper mode of analysis persists in the lower courts. See, *e.g.*, Pet. for Cert. 20–26. The Court itself has contributed to the confusion through its

inconsistency in how it has conducted harmless-error analysis. For example, in *Harrington v. United States*, the Court held a constitutional error harmless by emphasizing that the "the case against [the defendant] was so overwhelming." 395 U.S. 250, 254 (1969).

This language prompted Justice Brennan to lament in dissent that the majority was silently backing away from *Chapman*. He argued that, instead, "[t]he focus of appellate inquiry should be on the character and quality of the tainted evidence as it relates to the untainted evidence and not just on the amount of untainted evidence." *Id.* at 256 (Brennan, J., dissenting).

Yet elsewhere, the Court has suggested an approach that looks more like Justice Brennan's. For example, in *Yates v. Evatt*, 500 U.S. 391 (1991), the Court applied the *Chapman* rule to jury instructions that erroneously instructed the jury to presume an element of the offense satisfied. As the Court explained, "[t]o satisfy *Chapman*'s reasonable-doubt standard, it will not be enough that the jury considered evidence from which it could have come to the verdict without reliance on the presumption. Rather, the issue under *Chapman* is whether the jury actually rested its verdict on evidence establishing the presumed fact beyond a reasonable doubt, independently of the presumption." *Id.* at 404. Unless and until the Court is willing to get to the bottom of the harmless error doctrine, this confusion will remain.

III. This case is an excellent vehicle for the Court to clarify the doctrine and thus resolve a profoundly important legal question.

By finding the error below harmless given what it saw as "overwhelming evidence of guilt" in the record, Pet. App. 61a, the Eleventh Circuit embraced an

approach that looks not to the effect that an error had on the jury, but rather requires asking whether the jury would have convicted absent the error. As the Eleventh Circuit put it, the question is whether "the appellate court is firmly convinced that the evidence of guilt is so overwhelming that the trier of fact would have reached the same result without the tainted evidence." Pet. App. 35a (quoting *Cape v. Francis*, 741 F.2d 1287. 1294–95 (11th Cir. 1985)).

This is precisely the mode of analysis that Justice Scalia's opinion for the unanimous Court in *Sullivan* rejected: an inquiry into "whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered." 508 U.S. at 279. Instead, the Eleventh Circuit should have analyzed "whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." *Ibid.*

This is not to say that the presence of "overwhelming evidence" can never be relevant in the harmless-error inquiry. But it is relevant only in a particular way. An analysis of the other evidence presented to the jury could be relevant to the likelihood that the *actual* jury was swayed by the error rather than other evidence it properly considered. But that is a different question than asking whether a jury in an alternate universe might have convicted regardless. In some cases, an error's likely effects will be weighty enough that it is impossible to conclude beyond a reasonable doubt that it was in fact harmless. Under the Eleventh Circuit's approach, however, all that matters is what the court thinks would have happened had the error never occurred.

Had the Eleventh Circuit framed the question in the correct way, it is quite likely, for the reasons

explained by petitioner, that it would have concluded that the error was not harmless. See Pet. for Cert. 26–29. This is because the error here was of sufficient magnitude, forming what in the jury's eyes would have been a central part of the prosecution's case against petitioner, that it is extremely difficult to conclude that it was harmless in its effect on the *actual* jury—regardless of what might have happened in an alternate universe where the error never occurred. At the very least, were this Court to conclude that harmless-error analysis requires more than simply pointing to the volume and strength of other evidence, the Eleventh Circuit's harmlessness analysis cannot stand and must be reconsidered. For this reason, this case presents an excellent vehicle for the Court to resolve the legal question here and, in so doing, provide greater clarity on harmless-error doctrine as a whole.

It also bears note that this question—how courts should operationalize harmless error—is profoundly important. Legal scholars have noted that harmless error is perhaps the most commonly applied doctrine in all criminal cases. See, *e.g.*, Landes & Posner, Harmless Error, 30 J. Legal Stud. 161, 161 (2001); Edwards, To Err is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?, 70 N.Y.U. L. Rev. 1167, 1181 n.52 (1995). Thus, the Court's resolution of the question here might affect far more cases than almost any other criminal-procedure question the Court could consider.

* * *

Harmless-error doctrine is profoundly important to the resolution of the innumerable criminal appeals that federal and state courts decide year after year. But the doctrine has rested on an unstable foundation

for more than a half century. It is high time for the Court to clarify harmless error and to provide clearer guidance for how harmless-error analysis should work in practice. This case provides an excellent opportunity for the Court to do so.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

Daniel S. Epps
Counsel of Record
Washington University
School of Law
1 Brookings Drive
CB 1120
Saint Louis, MO 63110
epps@wustl.edu
(314) 935-3532

Counsel for Amicus Curiae

July 2021