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

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

The government does not dispute that harmless error affects more criminal appeals than any other doctrine. As the *amici* confirm, the confusion and inconsistency in lower courts' understanding of the doctrine causes real-world harm. Jurists from Justice Brennan to Justice Scalia have recognized that harmless-error review must not focus singlemindedly on the prosecution's evidence, or on "whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered." *Sullivan* v. *Louisiana*, 508 U.S. 275, 279 (1993). Rather, courts must ask "whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." *Ibid.* The decision below is a textbook example of the sufficiency-of-the-evidence approach that Justices Brennan and Scalia decried.

At the eleventh hour at trial, the prosecutor was allowed to offer tainted evidence that Dr. Pon performed some 50 procedures on a patient's *blind eye*—evidence that the trial judge rightly described as "very damning." Pon was not allowed to explain, leaving the jury with the false impression that he performed self-evidently improper procedures for profit.

The majority below declared this harmless, on the ground that the prosecution's untainted evidence was "overwhelming." It certainly seems that way when you only know one side of the story. The majority never considered the error's effect on the jury's perception of Pon's defense: that he honestly believed that his unconventional laser treatment was effective. Pon testified at length that he believed in his methods, corroborated by fourteen patients' testimony and a renowned ophthalmologist's pioneering work. But how

could a reasonable jury be expected to credit his claim of good faith when he was portrayed—falsely but without explanation—as billing for needless procedures on *blind eyes*?

The court's all-too-common, one-sided approach to harmless error is both plain and consequential, and it conflicts with numerous other lower-court decisions. That is why certiorari is warranted.

Unable to dispute importance, respondent says the decision below was "correct[]." Opp. 15-19. If that is the government's view, it only confirms the need for certiorari, as prosecutors nationwide are presumably advocating the same approach, and it is anything but "correct." The majority announced a supposed *duty* to "rely on [the government's] overwhelming evidence" (App. 60a), never asking how *Pon's defense* was affected by the tainted evidence. Had the majority considered the error's effect, the result might well have been different. As several circuits have held (Pet. 22), an error that undermines the defendant's credibility can "undermine [his] entire defense and—in such cases—is not harmless." *United States* v. *Andasola*, 13 F.4th 1011, 1019 n.7 (10th Cir. 2021).

The government admits that appellate courts use "various formulations" of the harmless-error standard. Opp. 20. As the *amici* confirm (Legal Scholars Br. 4-10; CATO & FACDL Br. 5-8; Epps Br. 8-9), courts take two irreconcilable approaches. Under one, "overwhelming evidence of guilt suffices to demonstrate" harmless error (*United States* v. *Baptiste*, 935 F.3d 1304, 1314 (11th Cir. 2019)); under the other, "the strength of the Government's case does not, in itself, resolve the [issue]" (*United States* v. *Ibisevic*, 675 F.3d 342, 354 (4th Cir. 2012)).

Unable to deny the split, respondent attempts to wave it off by arguing that some circuits apply both standards—as if the existence of *both* intra- *and* inter-circuit splits makes things better. That acknowledged chaos is worse than most conflicts. The issue, taken up but not resolved in *Vasquez*, is recurring. And the stakes—life and liberty—are high.

Certiorari should be granted.

I. The government's attempts to defend the decision below are unconvincing.

The government's tactic for defeating certiorari is to raise of host of misleading claims about what the court below said and what the facts were. But where a decision rests on a plain choice of legal standard that is unquestionably important to hundreds of criminal appeals annually, the government should not be allowed to hide behind a fog of misstatements, misinterpretations, and misdirection. It is not the decision below that is "factbound." Opp. 14. It is the government's opposition.

A. Respondent says the majority "correctly articulated the standard of review," such that the petition challenges at most a "misapplication" of settled law. Opp. 16, 17. Critically, however, respondent never addresses (1) the majority's rule that courts have an unbending duty to "rely on overwhelming evidence of guilt to find an error harmless * * * without displaying special wariness" (App. 59a-60a), or (2) its reaffirmation that, "'[if] the appellate court is firmly convinced that the evidence of guilt was so overwhelming that the trier of fact would have reached the same result without the tainted evidence, then there is insufficient prejudice'" to reverse. App. 35a. That sufficiency-of-the-evidence analysis drove the decision,

and it flouts this Court's condemnation of "overemphasis" on reviewing courts' "view of 'overwhelming evidence'" (*Chapman* v. *California*, 386 U.S. 18, 23-24 (1967))—a wariness rooted in the statute's focus on whether the error "affect[ed] the [defendant's] substantial rights" (28 U.S.C. 2111) and the Constitution's "jury-trial guarantee." *Sullivan*, 508 U.S. at 275; see App. 73a (Martin, J.); Epps Br. 1-2, 6-11.

B. Respondent also says courts may "consider[] the strength of the government's case." Opp. 17. True, but they "should not find [an] error harmless" where the defendant "raised evidence sufficient to support a contrary finding" on a central issue. *Neder* v. *United States*, 527 U.S. 1, 19 (1999). The majority below *repeatedly* usurped the jury's role by taking the government's side on key disputed facts. Compare, *e.g.*, App. 49a (relying on government expert's "close review" of 500 patient files) with Dkt. 223 at 115 (expert admitting he did not review "all" 150,000 diagnostic images and reviewed many for "a second or less"); compare App. 51a (stating that Pon used medication "largely" when his "diagnoses were corroborated by another doctor") with Dkt. 230 at 235 (Pon's testimony that he used "a combination" of "medication" and lasers, "[d]epend[ing] on what the patient needs and what the response is to the treatment, because the idea is to make the patient better"). For example, the majority implied that Pon *admitted* improperly coding his treatments as "photocoagulation." App. 48-49a. Yet Pon testified that he reasonably believed his coding was "proper and appropriate." Dkt. 229 at 90. Indeed, Pon was not charged with using an improper billing code, but with billing for treatments *never rendered*. Pet. 10-11. Any dispute over coding is a red herring.

Similarly, the majority said Pon "offered no evidence (other than his own testimony) that WMD could be laser-treated without scarring." Opp. 11; App. 48a. But Pon testified that Dr. Robert Murphy and Giorgio Dorin both opined that WMD could be treated without leaving a scar (Pet. 8-9, 11), and the government's expert admitted that Murphy "says you can." Dkt. 220 at 191-195. Indeed, the government has *no answer* to the ever-growing medical literature supporting Pon's once-unconventional treatment. As the latest literature confirms: "In recent years, low-level laser therapy (LLLT) has been used with great success in ophthalmology. * * * All stages of AMD are treatable. * * * The therapy is non-invasive, simple, of short duration, inexpensive, and non-damaging to tissue. As it has no adverse effects, it can be used both curatively and preventatively to preserve eyesight." T. Ivandic, *Low-Level Laser Therapy*, 118 Dtsch. Arztebl. Int. 69 (2021); see Addendum (collecting newest literature). Unless this Court intervenes, a distinguished and successful ophthalmologist will remain incarcerated on the theory that he could not possibly have believed in the efficacy of a treatment that is increasingly recognized as *superior*—all because the prosecution was allowed to introduce false but unanswered evidence that he billed Medicare for unnecessary procedures on blind eyes.

In sum, the majority could call the evidence "largely uncontroverted" (Opp. 11) only by ignoring Pon's defense.

C. Respondent also claims the majority "expressly considered the effect of the assumed error on the jury's view of the defense." Opp. 18. Nonsense. The closest

it came was this: After declaring that "[o]nly Pon testified that his WMD diagnoses were correct,[1] and that he believed [in] the treatments he administered," the majority stated that the jury observed his "demeanor" and may have "disbelieved" him, given his "strong motivation" to lie. App. 49a-50a. Maybe so. But the relevant question was whether the jury's credibility assessment may have been influenced by the unrebutted false claim that Pon needlessly billed for procedures on blind eyes. The majority never addressed that question.

Further, appellate courts must be careful about assessing witnesses' "demeanor." As Judge Edwards explains, witnesses' demeanor does not "cast[] so much as a shadow upon the printed transcript." Harry T. Edwards, *To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. Rev. 1167, 1193 (1995). The majority below gave *no* weight to the trial judge's firsthand observation that the government's tainted rebuttal was "very damning." App. 142a. Nor did it mention the prosecutor's stated reason for presenting that evidence—to overcome the persuasive force of a patient's "extremely emotional testimony." App. 128a. Those assessments, made at trial, deserve far more weight than speculations about demeanor.

D. Respondent agrees that harmless-error review "requires 'weigh[ing] the probative force of th[e] evidence' to determine whether an error was sufficiently 'unimportant in relation to everything else' that its absence would not have altered the verdict." Opp. 16

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[1] In truth, fourteen patients testified that Pon's treatments worked. Pet. 12-13.

(citation omitted). How did the majority satisfy this requirement? By "noting" that the rebuttal "consumed roughly 'one half of one percent' of the trial." Opp. 19 (quoting App. 56a). That is like saying the lovers' deaths consumed only one half of one percent of *Romeo and Juliet*.

True, the tainted evidence involved conduct outside the charged counts, and the district court generically instructed the jury to decide "the crimes charged" (Opp. 19), as if this rendered the error inconsequential. But the prosecutor defended his tainted rebuttal as proof of "conduct that the defendant is on trial for"—"billing for services not rendered." App. 128a.

* * *

None of the government's quibbles remotely add up to the conclusion that the decision below was "correct." Absent the trial court's devastating error, a reasonable jury might well have believed Pon. The experiences of fourteen patients, the studies of a renowned ophthalmologist, and Pon's own clinical experience supported his treatments—and surely his good faith. The Eleventh Circuit should have left that question to a jury, without false claims about procedures on blind eyes ringing in its ears.

II. The federal circuits and state high courts are intractably divided.

The government admits the lower courts articulate "various formulations" of the harmless-error test. Opp. 20. "Various formulations" is nothing but a euphemism for different legal standards. As Professor Epps notes (Br. 8), "confusion about the proper mode of analysis persists in the lower courts." Accord CATO & FACDL Br. 3 ("lower courts have split"), 5-8. But

rather than acknowledge the split, respondent says this variation in approaches reflects "different facts in different cases." Opp. 23. Not so. The courts are divided over a basic legal question: Must harmless-error review focus on the error and its impact on the defense, or may the error be assumed away where the prosecution's case, viewed apart from the tainted evidence, is "overwhelming"?

A. Respondent says courts following the majority rule "routinely consider the strength of the government's evidence." Opp. 20. No one doubts it. But the question is whether "overwhelming evidence of guilt *suffices* to demonstrate" harmless error. *Baptiste*, 935 F.3d at 1314 (emphasis added). Tracking the decision below, the Eleventh Circuit keeps holding that "[a] constitutional error may be harmless if there was ample evidence to convict absent the error" (*United States* v. *Nunez*, 1 F.4th 976, 992 (11th Cir. 2021))—that "the strength of the government's case alone" can "make[] [an] error harmless." *United States* v. *Powell*, 2021 WL 3878639, *4 (11th Cir. Aug. 31, 2021). The Eighth and Fifth Circuits agree. *E.g.*, *United States* v. *Holmes*, 620 F.3d 836, 844 (8th Cir. 2010) ("Evidence erroneously admitted in violation of the Confrontation Clause is harmless beyond a reasonable doubt as long as the remaining evidence is overwhelming."); *United States* v. *Harris*, 130 F.3d 829, 831 (8th Cir. 1998) ("When evidence of a defendant's guilt is overwhelming, the *Old Chief* violation is harmless."); *United States* v. *Hickman*, 151 F.3d 446, 457 (5th Cir. 1998) ("*Bruton* error may be considered harmless when, disregarding the co-defendant's confession, there is otherwise ample evidence against a defendant.").

Meanwhile, other courts hold that "overwhelming evidence * * * will not alone suffice" (*State* v. *Mercier*,

479 P.3d 967, 977 (Mont. 2021)), that "the strength of the Government's case does not, in itself, resolve the [issue]" (*Ibisevic*, 675 F.3d at 354), or that "even if we find the untainted evidence against [the defendant] to be overwhelming, we could not find the error harmless for this reason." *United States* v. *Cunningham*, 145 F.3d 1385, 1394 (D.C. Cir. 1998); Pet. 20-23. Indeed, respondent admits that some courts "d[o] not address the strength of the government's evidence" at all (Opp. 21 n.3 (citing *United States* v. *Makkar*, 810 F.3d 1139 (10th Cir. 2015) (Gorsuch, J.))), focusing instead on defendants' "substantial rights." 28 U.S.C. 2111.

This is not just an argument about "formulations." As the academic *amici* explain, there is a "deep split"; "[t]he data reveals significant discrepancies in outcomes" based on the court's "approach" that cannot be explained by the "fact-specific nature of harmless error review." Legal Scholars Br. 5, 9. "[C]ourts focusing on the error's effect on the verdict affirmed 47% of the time versus 93% of the time when focusing on the strength of the evidence of guilt." *Id.* at 9 (citing Jason M. Solomon, *Causing Constitutional Harm: How Tort Law Can Help Determine Harmless Error in Criminal Trials*, 99 Nw. U. L. Rev. 1053, 1071 (2005)). Naturally, harmless-error review requires close factual analysis. But when courts focus solely on the government's evidence when they deem it "overwhelming," while considering other factors when they deem the case close, that is precisely the judge-as-second-jury approach that the Sixth Amendment forbids. CATO & FACDL Br. 2.

B. This conflict continues to grow. Recent First, Second, Fourth, and Tenth Circuit decisions stress the error's impact on the defense. See *United States* v.

Galindez, 999 F.3d 60, 71 (1st Cir. 2021) (error harmless absent proof that it "affected [defendant's] ability to present his theory"); *United States* v. *Cabrera*, 13 F.4th 140, 153 (2d Cir. 2021) (errors that "prejudiced [defendant's] only defense" harmful where court could not be "certain[] that a rational jury would have rejected [it]"); *United States* v. *Caldwell*, 7 F.4th 191, 205 (4th Cir. 2021) (in finding error harmless, stating that the "[m]ore significant[]" factor was whether erroneously impeached evidence had "value to [the] defense"). As the Tenth Circuit recently observed, an error "that impacts the credibility of the defendant" can "operate to undermine the defendant's entire defense and—in such cases—is not harmless." *Andasola*, 13 F.4th at 1019 n.7.

Likewise, the Colorado Supreme Court recently held—without discussing the strength of the prosecution's case—that the same Sixth Amendment violation at issue here was harmful "because it prevented [the defendant] from presenting a complete defense." *People* v. *Johnson*, 486 P.3d 1154, 1162 (Colo. 2021). The D.C. Court of Appeals recently rejected the "overwhelming evidence" test, explaining that "the inquiry * * * is not whether the evidence was ultimately overwhelming against a defendant, but instead whether the government has established 'beyond a reasonable doubt that the error complained of did not contribute to the verdict.'" *Morales* v. *United States*, 248 A.3d 161, 184 (D.C. 2021) (citation omitted).

If the split warranted certiorari in *Vasquez*, review is certainly warranted now.

III. This case is an exceptional vehicle to decide the question presented.

The government cannot dispute the reasons why this case is an excellent vehicle to revisit harmless-error law. Pet. 34-35, 26-29. Nevertheless, it says "two threshold assumptions" made by the majority below "would complicate" review. Opp. 26. Not so.

First, it is no obstacle to review that the majority "assum[ed]" the constitutional error. *Ibid.* Error is always a "threshold" issue in harmless-error cases, and the Eleventh Circuit's square holding is already being cited in its constitutional harmless-error cases. *Supra* at 8. Moreover, Judge Martin, the only judge who analyzed whether the district court erred, carefully explained why it did. App. 66a-71a.

Second, it does not matter for purposes of the question presented (Pet. i) whether the error was constitutional (though it was), or whether Pon argued that it was constitutional (which he did).[2] As respondent acknowledges (Opp. 16), the only difference between constitutional and non-constitutional error is the degree of certainty required. Both types of error require analyzing the error's effect on the jury.

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[2] The majority did not find forfeiture (App. 33a), and the dissent found the issue "preserved." App. 72a n.4. Indeed, the district court *itself* "specifically raised Mr. Pon's Sixth Amendment right to offer an explanation" (*ibid.*), calling the rebuttal "very damning" and asking "whether," given "Pon's Sixth Amendment right," he should be allowed to respond. App. 142a. Thus, the issue "fairly appear[s] in the record as having been raised or decided." App. 72a n.4 (quoting 19 James Wm. Moore et al., Moore's Federal Practice § 205.05(1) (3d ed. 2019)).

This vehicle is far superior to the cases respondent says "rais[ed] similar questions." Opp. 15. *Vasquez* was a poor vehicle. Pet. 34-35. None of the other decisions had dissents, and all contained minimal analysis, were unpublished, or considered the error's effect on the jury. *United States* v. *Acosta-Ruiz*, 481 F. App'x 213, 218 (5th Cir. 2012) (unpublished; one-paragraph analysis); *Hagans* v. *United States*, 96 A.3d 1, 18 (D.C. 2014) (multiple factors); *United States* v. *Gomez*, 716 F.3d 1, 10 (1st Cir. 2013) (alternative holding; one-sentence analysis); *United States* v. *Runyon*, 707 F.3d 475, 498 (4th Cir. 2013) (capital sentencing); *United States* v. *Ford*, 683 F.3d 761, 767 (7th Cir. 2012); *United States* v. *McGill*, 815 F.3d 846, 895 (D.C. Cir. 2016) (considering "whether 'effective steps were taken to mitigate the [error's] effects'").

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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ADDENDUM

Cohn, A.C., et al., *Subthreshold Nano-Second Laser Treatment and Age-Related Macular Degeneation*, 10(3) J. Clin. Med. 484 (2021) ("Overall, these findings suggest that nanosecond laser application selectively ablates RPE cells without inducing overt visible damage in adjacent structures. Moreover, absorption of nanosecond laser energy by the RPE induces gene expressional changes that are associated with thinning of the BM, particularly involving the MMPs. These findings support the evaluation of this laser in macular conditions, including AMD.")

Ivandic, T., *Low-Level Laser Therapy*, 118 Dtsch. Arztebl. Int. 69 (2021) ("In recent years, low-level laser therapy (LLLT) has been used with great success in ophthalmology. This is a transconjunctival irradiation of the affected area of the retina with a weak continuous wave (CW) laser. The laser strength is so low that it cannot damage healthy or diseased cells. All stages of AMD are treatable. The laser causes hyperpolarization of the cell membrane and activation of the resynthesis of adenosine triphosphate (ATP), which provides free energy for the regenerative bioprocesses through hydrolysis. This facilitates the transport of cell debris towards choriocapillaris and regeneration, and edema and exudates are absorbed. Visual acuity, color vision, and central scotoma improve. The therapy is non-invasive, simple, of short duration, inexpensive, and non-damaging to tissue. As it has no adverse effects, it can be used both curatively and preventively to preserve eyesight. It can be repeated as often as necessary." (citations omitted)).