

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

JOSE ANDRES VERA-GUTIERREZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

WHETHER ERRONEOUSLY ADMITTED EVIDENCE CRITICAL TO
PROVING AN ELEMENT OF THE CHARGED OFFENSE CAN BE DEEMED
HARMLESS BASED ON THE APPELLATE COURT'S DETERMINATIONS
OF WITNESS CREDIBILITY?

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW.....	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES.....	iv
OPINION BELOW.	1
JURISDICTION.	2
CONSTITUTIONAL PROVISIONS.	2
STATEMENT OF THE CASE.	3
<u>REASONS FOR ALLOWANCE OF THE WRIT.</u>	9
CONCLUSION.	14

APPENDIX

Opinion of Eighth Circuit Court of Appeals, filed July 7, 2020	1A
Order denying petition for rehearing en banc or rehearing, filed August 25, 2020	9A
Order Denying Motion for New Trail, filed 8/27/2018	10A
Government Trial Exhibit 113	15A
Government Trial Exhibit 114	24A
Government Trial Exhibit 125	29A
Government Trial Exhibit 97	36A

TABLE OF AUTHORITIES

CASES

<i>Aetna Life Ins. Co. v. Ward</i> , 140 U.S. 76, 11 S.Ct. 720, 35 L.Ed. 371 (1891).	12
<i>Maggard v. United States</i> , 156 F.3d 843 (8 th Cir. 1998).	12
<i>United States v. Barnard</i> , 490 F.2d 907 (C.A.9 1973).	12
<i>United States v. Enriquez</i> , 201 F.3d 1072 (8th Cir. 2000).	12
<i>United States v. Lane</i> , 474 U.S. 438, 106 S.Ct. 725 (1986).	13
<i>United States v. Sabeau</i> , 885 F.3d 27 (1st Cir. 2018).	12
<i>United States v. Scheffer</i> , 523 U.S. 303, 118 S. Ct. 1261 (1998).	12
<i>United States v. Wright</i> , 119 F.3d 630 (8th Cir.1997).	12

MISCELLANEOUS AUTHORITIES

Bilaisis, Harmless Error: Abettor of Courtroom Misconduct, 74 J. Crim. L.& Criminology. 457 (1983)	10
Fairfax, Harmless Constitutional Error and the Institutional Significance of the Jury, 76 Fordham L. Rev. 2027 (2008)	11
Goldberg, Harmless Error: Constitutional Sneak Thief, 71 J.Crim.L. & C. 421 (1980)..	10
Griffin, Criminal Adjudication, Error Correction and Hindsight Blindspots, 73 Wash. & Lee Law Rev. 165 (Winter 2016).	11
Mitchell, Against Overwhelming” Appellate Activism: Constraining Harmless Error Review, 82 Cal. L.Rev. 1335 (1994).	9
Traynor, The Riddle of Harmless Error 80 (1970)	10

Winkelman, et al., An Empirical Method for Harmless Error, 46 Ariz. St. L.J. 1405
(Winter 2014)..... 11

Winslow, Harmful Use of Harmless Error in Criminal Cases, 64 Cornell L.Rev. 538
(1979) 11

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**PETITION FOR A WRIT OF CERTIORARI
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

Petitioner Jose Andres Vera-Gutierrez respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, filed on July 7, 2020.

OPINION BELOW

The opinion of the Court of Appeals for the Eighth Circuit that is the subject of this petition is reported in *United States v. Vera-Gutierrez*, 964 F.3d 733 (8th Cir. 2020), and is reprinted in the appendix hereto, p. 1A-8A, infra. The Eighth Circuit denied a petition for rehearing en banc or panel rehearing in an order filed on August 25, 2020. (Appendix 9A).

The final judgment of the United States District Court for the District of Minnesota and rulings (District Judge Willhelmina M. Wright) that are the subject of this Petition have not been reported. The documents deemed relevant to this Petition are reprinted in the Appendix.

JURISDICTION

Petitioner Jose Andres Vera-Gutierrez was convicted in a jury trial of conspiracy to possess with intent to distribute methamphetamine in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A) and 846. Mr. Vera Gutierrez was sentenced to 300 months imprisonment by the Judge Wilhemina M. Wright, United States District Judge for the District of Minnesota. Sentence was imposed on December 20, 2018 and final judgment was entered on December 26, 2018. Mr. Vera-Gutierrez timely appealed his conviction and sentence.

The United States Court of Appeals for the Eighth Circuit affirmed Mr. Vera-Gutierrez's conviction and sentence on July 7, 2020 , and denied his petition for rehearing en banc or panel rehearing on August 25, 2020. Mr. Vera-Gutierrez now timely files this petition for writ of certiorari.

The jurisdiction of this Court to review the judgments of the Eighth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

U.S. Constitution Amendment V - No person shall . . . be deprived of life,

liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

The U.S. Drug Enforcement Administration began investigation of the underlying case in December 2016. The target was a large scale drug trafficker named Antonio Gonzalez-Perez. In the course of conducting surveillance and controlled purchases, law enforcement agents determined that Gonzalez-Perez was mainly working with two other individuals, co-defendant Felipe Castro and Lorenzo Soto-Zazueta. Agents observed Castro, Soto and Gonzalez-Perez participate in multiple drug transactions involving several pounds of methamphetamine during 2016. Castro admitted to being involved in drug trafficking with these individuals for at least two years prior to 2016, and making several hundred thousand dollars per year.

Agents believed that in about November 2016, Castro and Soto traveled from Minnesota to Phoenix, Arizona to obtain a large shipment of drugs and later determined that he had transported five pounds of methamphetamine, which led to a separate indictment. Mr. Vera-Gutierrez was not alleged to be involved in any of these transactions.

Agents obtained wiretap authorization for Castro's mobile phone, began intercepting Castro's phone calls on December 29, 2016 and began intercepting his text messages on January 13, 2017. In the course of wiretapping Castro's phone, agents identified Mr. Vera-Gutierrez as a caller whom Castro was speaking with. There was no

indication that Mr. Vera-Gutierrez was previously involved in drug trafficking.

Castro's earlier wiretapped conversations with Mr. Vera-Gutierrez were about his job. Vera-Gutierrez and Castro also joked a lot about women and drinking in their conversations. Castro had dated Vera-Gutierrez's sister for some period of time. Castro and Vera-Gutierrez worked together at a recycling company in Plymouth, Minnesota for about a year around 2013, and they sometimes socialized together. They frequently spoke on the phone. Vera-Gutierrez had found Castro the job. During the conversations recorded for this case, Vera-Gutierrez was trying to help Castro get a job with Vera-Gutierrez's employer at that time and also spoke with him about construction work. Mr. Vera-Gutierrez could receive a bonus from his employer if he made a successful job referral. Vera-Gutierrez also testified that he spoke with Castro about buying and selling cars.

Agents became interested in a wiretapped call where Vera-Gutierrez told Castro that someone had called him from Arizona, and Castro requested the phone number. Mr. Vera-Gutierrez indicated that he did not know who the caller was, but speculated it might be an "old guy" from Arizona. Agents identified the caller referred to as Everardo Cota-Preciado [Cota]. Cota's phone number was not stated in any of the recorded phone calls between Vera-Gutierrez and Castro, and they never referred to Cota by any name or nickname. Vera-Gutierrez testified that he discussed Castro bringing Vera-Gutierrez clothing from Los Angeles in that particular phone call. Vera-Gutierrez had never met

Cota but knew of him through a cousin and thought he could be recruited to work for Vera-Gutierrez's employer because he had a CDL license, and denies that he ever discussed buying drugs with Cota.

The government claimed that Castro and Vera-Gutierrez used code words to refer to drugs, but none of the many dozens of recordings introduced into evidence contained any specific mention of any illegal controlled substances. Vera-Gutierrez was not involved in any negotiation of transactions, meetings to arrange drug transactions or in the drug exchanges. Mr. Vera-Gutierrez denied ever selling drugs. He denied that any of his recorded conversations with Castro were regarding drugs.

Vera-Gutierrez was often tired from long hard work shifts, or drunk during his calls with Castro. Mr. Vera-Gutierrez stated that in one conversation where Cota mentioned selling drugs, Vera-Gutierrez stated that he wanted nothing to do with it, and he then called Castro and told Castro not to involve him. Cota subsequently told Castro in a recorded phone call that Vera-Gutierrez told Cota to "cancel everything." (Government Trial Exhibit 97, Appendix 36A).

DEA Agent Mathison testified that agents obtained records of phone calls for Castro, Vera-Gutierrez and Cota. The government then presented as evidence a spreadsheet that Agent Mathison claimed contained all phone calls between the three individuals from December 21, 2016 to January 19, 2017, the times and dates of each phone call and the duration of each phone call, and an indication if they were texts.

(Government Exhibit 113, Appendix 15A-23A). The phone calls that were wiretapped and introduced as evidence had a cross reference to the government's identification number for the call session. (Id.) The call entries were highlighted in yellow if they were recorded, and in red if they were not subject to wiretap. (Id.) The government relied on Exhibit 113 to demonstrate (unrecorded) phone calls between Vera-Gutierrez and Cota before and after the conversation where Castro asked Vera-Gutierrez for the phone number for the person in Arizona, and subsequent calls between Castro and Cota.

The government did not provide the underlying records from the phone company or present any witness or certification to establish that the purported phone call records in the spreadsheet Exhibit 113 were valid. Mr. Vera-Gutierrez objected to the admission of the spreadsheet based on lack of foundation. The district court overruled Mr. Vera-Gutierrez's objection and admitted the spreadsheet Exhibit 113. The government emphasized in its closing argument the phone calls highlighted in red between Cota and Vera-Gutierrez in Exhibit 113.

Agent Mathison testified that agents relied on cell site information to track Castro's location at various times. The government then presented Exhibit 114 containing a series of maps that purported to show Castro's general location at various times as he traveled back and forth from Minnesota to California and Arizona. (Appendix 24A-29A). The government did not provide the actual underlying data that it relied upon in preparing Exhibit 114, and did not present any witness or certification to verify that the underlying

data was authenticate or accurate. Mr. Vera-Gutierrez objected to the admission of Exhibit 114 based on lack of foundation and hearsay. The district court overruled the objections and admitted the Exhibits. The government referenced Exhibit 114 in its closing argument as evidence that established locations where it had alleged Castro and Cota were meeting.

The government also presented Exhibit 125 which contained more maps purporting to reflect GPS data from Cota's cell phone locations when Cota and Castro were allegedly meeting with and transacting in the Los Angeles area, and then Cota allegedly going to Vera-Gutierrez's home in Brooklyn Park, Minnesota. (Addendum 30A-35A). The government did not attempt to offer the underlying GPS data from the cell phone company, and did not call any witness from the cell phone company or offer any certification to authenticate or verify the accuracy of the data. Mr. Vera-Gutierrez objected to the admission of Exhibit 125 based on lack of foundation and hearsay. The district court overruled the objections and admitted Exhibited 125. The government relied on the GPS data from Exhibit 125 in its closing and reply arguments to demonstrate Cota's locations when he was alleged to be meeting with Castro in the Los Angeles area, and allegedly went to Vera-Gutierrez's home in Brooklyn Park after Castro was caught with the drug shipment.

On the evening of January 18, 2017, agents were surveilling a red Chevy Traverse which they believed Castro was driving, and a white Toyota Corolla which they believed

Cota was driving, traveling close together as they drove from Iowa into Minnesota.

Agents arranged for a state patrol officer to pull over the red Chevy Traverse. Officers at the scene conducted a canine sniff around the vehicle, and then towed and searched the vehicle and found packages containing about 25 pounds of methamphetamine.

The government relied on the cell phone call spreadsheet in Exhibit 113 to demonstrate that after Castro was stopped, Cota made numerous attempts to call him and there was no answer. (Appendix 22A-23A). The government also reference Exhibit 113 to point out several subsequent calls or attempted calls between Vera-Gutierrez and Cota. (Appendix 23A).

Agent Mathison testified that he observed the white Toyota Corolla drive back and fourth a couple of times after the red Chevy Traverse was stopped. He then testified that based on purported cell phone GPS data from Exhibit 125, Cota drove to Vera-Gutierrez's home in Brooklyn Park, Minnesota. A DEA task force officer testified that on January 19, 2017 he went to the house that agents had identified as Mr.Vera-Gutierrez's home and observed a white Toyota Corolla with California license plates. The officer did not identify the license plate. Although the officer had a camera, he did not take any photographs of the vehicle. He did not see Mr. Vera-Gutierrez at the home at that time.

After Castro was stopped and about 25 pounds of methamphetamine were found in his vehicle, he agreed to cooperate with law enforcement in order to reduce his sentence. As part of Castro's deal, the federal charges against him arising out of the transport of

five pounds of methamphetamine in November 2016 were dismissed.

Mr. Vera Gutierrez challenged the district court's admission of Exhibits 113, 114 and 125 on appeal. The Eighth Circuit Court of Appeals did not decide whether these exhibits were improperly admitted but held that any error was harmless. (App. 3A-5A). The appeals court found that the charts were mostly duplicative of other evidence, primarily the testimony of the cooperating co-defendant Castro and testimony about one specific issue by a law enforcement agent. (*Id.*) The appellate panel stated that it was the jury's province to determine witness credibility but did not provide any explanation for its speculation that the jury found the witnesses to be credible and had not relied on the improperly admitted documentary evidence. (*Id.*)

REASONS FOR ALLOWANCE OF THE WRIT

This case presents an opportunity for the Court to address important but unsettled issues of the limitations of harmless error analysis. The use of harmless error over the past several decades has evolved into a convenient mechanism for appellate courts to avoid correcting important substantive and procedural errors at trial, and thereby eviscerating constitutional due process guarantees and the right to have a jury determine guilt or innocence.

Numerous commentators have cautioned about the dangers of an appellate court invoking harmless error to undermine the constitutional rights associated with a trial. *See e.g. Mitchell, Against Overwhelming" Appellate Activism: Constraining Harmless Error*

Review, 82 Cal. L.Rev. 1335, 1353 (1994)(“Two primary reasons exist for the great respect given to trial courts' findings of fact. First, the trial court is in the best position to assess the probative value of evidence.... Second is a rationale specific to criminal trials: if criminal juries are truly to sit as the ‘final arbiter[s] of truth and justice,’ their factual determinations must be given finality”) and at 1353-55 (“rightly or wrongly, ‘jury trials comprise the heart of our criminal justice system.’ A defendant expects to receive judgment from a panel of peers and not from a panel of experienced jurists who may approach questions of guilt in a significantly different manner. Indeed, the defendant may seek to exploit the sympathies of jurors who have not become immune to the pleas of defendants or jaded by repeated encounters with hardened criminals. This right to invoke public sympathy and opinion is guaranteed by the Sixth Amendment.”); R. Traynor, *The Riddle of Harmless Error* 80 (1970) (“[T]he evaluation of an error as harmless or prejudicial is one of the most significant tasks of an appellate court, as well as one of the most complex. Each evaluation bears upon our traditional understanding that fair trial encompasses not only fair notice and an adequate opportunity to be heard before the appropriate tribunal, but also an orderly presentation of evidence and a rational application of the law thereto”); Bilaisis, *Harmless Error: Abettor of Courtroom Misconduct*, 74 J. Crim. L.& Criminology. 457, 475 (1983) (“The harmless error standards as currently applied in review of criminal trials are eroding the integrity of the criminal justice system by encouraging violations of longstanding trial rules”); Goldberg,

Harmless Error: Constitutional Sneak Thief, 71 J.Crim.L. & C. 421, 422 (1980) (“the doctrine of harmless constitutional error destroys important constitutional and institutional values”); Winslow, Harmful Use of Harmless Error in Criminal Cases, 64 Cornell L.Rev. 538, 540 (1979) (“increased use of harmless error analysis is inherently dangerous regardless of whether the errors violate the Constitution, statutes, or the common law”); Fairfax, Harmless Constitutional Error and the Institutional Significance of the Jury, 76 Fordham L. Rev. 2027, 2072 (2008) (“By usurping the jury's core fact-finding function through harmless error review of elemental omissions, appellate courts undermine the jury's structural and institutional role of injecting popular input into the judicial function. Notwithstanding the pragmatic benefits that might flow from allowing appellate judges to substitute their judgment of the facts for that of the jury, ‘first-guessing’ works a fundamental intrusion into the province of the jury.”); Griffin, Criminal Adjudication, Error Correction, and Hindsight Blind Spots, 73 Washington and Lee L. Rev. 165 (Winter 2016)(discusses problems of applying harmless error analysis in light of psychological evidence of confirmation bias which obstructs decision makers due to the tendency to construe errors in favor of the known results); Winkelman, et al., An Empirical Method for Harmless Error, 46 Ariz. St. L.J. 1405 (Winter 2014)(Also analyzes problems of harmless error analysis in light of empirical evidences of biases inherent when the outcome is already known).

The instant case presents a compelling example of an appellate court making a

determination of harmless error without substantive support for its reasoning. The appellate panel held that the erroneous admissions of critical documentary evidence was harmless based on the assumption that jury found witness testimony as to similar facts, including a cooperating accomplice receiving substantial benefit for his testimony, to be credible. The appellate opinion did not provide any explanation for its assumption that the jury would have found such testimony to be credible absent the support and corroboration of detained documentary evidence that should not have been presented.

The appellate court's own determination that witness testimony was credible not only lacks any substantive basis in this case, but also ignores a basic limitations on an appellate court. This Court has explained,

A fundamental premise of our criminal trial system is that “the *jury* is the lie detector.” *United States v. Barnard*, 490 F.2d 907, 912 (C.A.9 1973) (emphasis added), *cert. denied*, 416 U.S. 959, 94 S.Ct. 1976, 40 L.Ed.2d 310 (1974). Determining the weight and credibility of witness testimony, therefore, has long been held to be the “part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men.” *Aetna Life Ins. Co. v. Ward*, 140 U.S. 76, 88, 11 S.Ct. 720, 724–725, 35 L.Ed. 371 (1891).

United States v. Scheffer, 523 U.S. 303, 313, 118 S. Ct. 1261, 1266–67, 140 L. Ed. 2d 413 (1998); *see also United States v. Sabeen*, 885 F.3d 27, 36 (1st Cir. 2018)(“With only narrow exceptions not pertinent here, credibility determinations are left to the wisdom of the jury”); *United States v. Enriquez*, 201 F.3d 1072, 1074 (8th Cir. 2000)(*quoting Maggard v. United States*, 156 F.3d 843, 847 (8th Cir. 1998) (*quoting United States v. Wright*, 119 F.3d 630, 634 (8th Cir.1997)))(“We have stated numerous times that ‘it is the

sole province of the jury to weigh the credibility of a witness.’)

This court of appeals in the instant case had no way of determining whether the jury found the testimony of cooperating accomplice Castro to be credible, or only credited his testimony to the extent that it was supported by professional looking charts, maps and photos purporting to contain objective substantive data. The Eighth Circuit exceeded its proper constitutional role by making its own credibility judgment and intruding on the fundamental role of the jury to apply witness testimony to the law as that it must be properly instructed to follow.

The appeal court’s decision in this case constitutes and thereby approves for future cases a process whereby an appellate court invokes “harmless error” in order to rubber stamp a conviction that it approves. As a prior opinion by this Court warned,

Harmless-error analysis is not an excuse for overlooking error because the reviewing court is itself convinced of the defendant's guilt. The determination of guilt is for the jury to make, and the reviewing court is concerned solely with whether the error may have had a “substantial effect” upon that body.

United States v. Lane, 474 U.S. 438, 465, 106 S.Ct. 725, 740 (1986)(Brennan concurring/dissenting in part).¹ This is a case where a panel of appellate judges overlooked serious instructional error addressing an essential and disputed element of the charged offense because the panel had convinced itself of the convicted defendants’ guilt

¹ The “substantial effect” standard applied to habeas review and is lower than the standard in the instant case, but the underlying concern about an appellate court substituting its opinion for an independent jury determination is a principle applicable to the instant case

(or wanted to convince itself of their guilt). In reaching their desired conclusion, the appellate court it invited itself to weigh the credibility and importance of particular testimony and evidence, a function that the constitution designates exclusively to the jury. This overstepping of the appellate court's proper function must be reviewed and corrected in order to prevent this continuing unconstitutional trend.

CONCLUSION

Petitioner Jose Andres Vera-Gutierrez respectfully prays that a writ of certiorari issue.

Respectfully submitted,

Dated: November 23, 2020

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