**No. 21-**

IN THE

# SUPREME COURT OF THE UNITED STATES

JEFFREY G. BOYD,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent*

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

## PETITION FOR A WRIT OF CERTIORARI


HEIDI R. FREESE, ESQ.
Federal Public Defender

FREDERICK W. ULRICH, ESQ.*
Assistant Federal Public Defender

QUIN M. SORENSON, ESQ.
Assistant Federal Public Defender

TAMMY L. TAYLOR, ESQ.
Staff Attorney

Middle District of Pennsylvania
100 Chestnut Street, Suite 306
Harrisburg, Pennsylvania 17101
(717) 782-2237
*Counsel for Petitioner*


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## QUESTION PRESENTED

Based on this Court's harmless error jurisprudence and that of seven other circuits, the government must establish beyond a reasonable doubt that an error did not contribute to the verdict. But the Third Circuit declined to apply this rule to errors involving a failure to instruct the jury on a contested element of the offense (knowledge) – even in the face of conflicting evidence – because, in the Circuit's view, the government's proof was "overwhelming." Should this Court address this exception to the harmless error standard given its precedent and the division among the circuits?

## PARTIES TO THE PROCEEDINGS

Petitioner, the defendant-appellant below, is Jeffrey G. Boyd.

The Respondent, the appellee below, is the United States of America.

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## PETITION FOR A WRIT OF CERTIORARI

The petitioner, Jeffrey G. Boyd, petitions this Court for a writ of certiorari to review the final order of the Court of Appeals for the Third Circuit.

## OPINIONS BELOW

The precedential opinion of the Third Circuit is reproduced at Petition Appendix ("Pet. App.") 4a-37a. And it is reported at *United States v. Boyd*, 999 F.3d 171 (3d Cir. 2021).

## JURISDICTION

The court of appeals denied rehearing on July 2, 2021. Pet. App. 2a-3a. This Court has jurisdiction over this timely filed petition under 28 U.S.C. § 1254(1) and the order of March 19, 2020, extending the deadline for any petition for a writ of certiorari to 150 days.

## CONSTITUTIONAL PROVISIONS INVOLVED

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

> 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 defense.

U.S. CONST. amend. VI.

## STATUTORY PROVISIONS INVOLVED

### Firearms – Unlawful Acts

> (g) It shall be unlawful for any person—
> (8) who is subject to a court order that—
> (A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;
> (B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and
> (C) (i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

> (ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury;

18 U.S.C. § 922(g)(8).

**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.

28 U.S.C. § 2111.

> (a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

FED. R. CRIM. P. 52(a).

## INTRODUCTION

The Fifth and Sixth Amendments guarantee that a defendant may be found guilty only upon a finding by a jury—beyond a reasonable doubt—that he or she has committed each essential element of the offense. *See Sullivan v. Lousiana,* 508 U.S. 275, 277-78 (1993). That rule has been invoked and enforced in countless cases. *See id.* And it bears no exception, as this Court has said, so long as the defendant contested the element at trial. *See Neder v. United States*, 527 U.S. 1, 19 (1999).

The court of appeals in this case, however, held otherwise. Here, a jury convicted Petitioner, Jeffrey G. Boyd, of possessing a firearm when he was subject to a domestic protection order, in violation of 18 U.S.C. § 922(g)(8). But the order was a temporary, emergency, ex parte, protective order. And the circumstances attending it—whether the state court issued it following a hearing in which Mr. Boyd had a chance to participate and thus "knew" he was in the class of prohibited persons—provided the basis for his defense. Yet the district court refused the defense instruction on that element in violation of this Court's holding in *Rehaif v. United States*, 139 S. Ct. 2191 (2019). Then on appeal, the Third Court held that this error was harmless based on its view that the defense evidence paled in comparison to the government's "overwhelming evidence." Pet. App. 18a-19a, 20a & n.7.

This holding contravenes this Court's precedent that a jury, rather than a judge, reach the requisite finding of guilty. *Sullivan*, 508 U.S. at 277. And it

conflicts with how this Court and a majority of the circuits apply the harmless error standard.

## STATEMENT OF THE CASE

### A. Background surrounding issuing the emergency protection order

From 1990 to 2002, Mr. Boyd was married to Jennifer Manley. *See* CA 281.[1] They had a son together, Conner. And after their divorce, Connor resided with Mr. Boyd in Tulsa, Oklahoma. *See* CA 288. But in early March 2018, Connor moved out and began living with Ms. Manley. Mr. Boyd went to Ms. Manley's home looking for Connor, and shortly after this, on March 5, she sought and received a temporary, emergency, *ex parte*, protective order. *See* CA at 234, 281, 539, 544-548. Connor and Ms. Manley's current husband, Eric Hatheway, also sought and received emergency orders. *See* Pet. App. 8a. Although the temporary orders prohibited Mr. Boyd from injuring, abusing, harassing, or having any contact with Ms. Manley, Connor, and Mr. Hatheway, there was no evidence that he ever injured or threatened any of them. *See* Pet. App. at 8a.

The Tulsa County Court scheduled a hearing on the emergency orders for March 19, 2018 at 9:00 a.m. *See* CA at 242, 526, 539, 553. The court had ten other cases involving emergency orders scheduled on that date and time before the same judge. *See* CA 261. The docket from the March 19 proceeding reflects that Ms. Manley, Mr. Hatheway, Connor Manley, and Mr. Boyd were present and placed under oath. *See* Pet. App. 8a. There is no transcript from that proceeding. *See* CA

[1] "CA" refers to the court of appeals appendix.

260. Instead, Ms. Manley and Connor later testified that, while sitting outside the courtroom, they heard Mr. Boyd speaking to the judge. *See* Pet. App. 8a.

At the end of the proceeding, the court did not issue a final order of protection. Rather, the judge continued the temporary emergency *ex parte* order, with the March 19 order including just one change—he ordered Mr. Boyd to obtain a mental health evaluation. Pet. App. 9a; *Compare* CA 544-548 *with* CA 549-552. The court also set a date for a final hearing in September 2018.

The temporary emergency *ex parte* orders from March 5 and 19 included language "[t]hat the Defendant has been or *will be* provided the reasonable notice and an opportunity to be heard." CA at 544, 549 (emphasis added). And those orders stated that possession of a firearm "*may* subject the defendant to prosecution for a violation of federal law." Pet. App. 9a (emphasis added). By contrast, when a court issues the final order of protection, it states that a defendant had reasonable notice and an opportunity to be heard or object. *See* CA at 254, 264. As important, a final order of protection contains a specific notice of the firearms prohibition under Section 922(g). *See* CA at 255.

**B. Mr. Boyd travels to Pennsylvania**

Based on a connection with Kathryn Kelchner through Twitter, in July 2018, Mr. Boyd left Tulsa and drove to Berwick, Pennsylvania, to meet her because he thought that she may be in trouble. *See* Pet. App. 10a. Showing up unexpectedly in Ms. Kelchner's driveway, Mr. Boyd introduced himself as Jeff from Tulsa and said he had a story to tell her. *See id*. Ms. Kelchner later chose a restaurant close to her home so that they could discuss his reasons for visiting. *See id*.

While Ms. Kelchner hesitated over Mr. Boyd's unanticipated arrival, she also observed that he was "unassuming" and that she had no sense of "imminent danger." CA 209. At the restaurant, however, Mr. Boyd allegedly spoke to her about hearing voices, receiving messages on his computer, and "MK-Ultra." *See* Pet. App. 10a. When Ms. Kelchner mentioned the President because of her conservative Twitter postings, Mr. Boyd allegedly responded with an expletive. *See* CA 210.

As a result of the remarks about the President, Ms. Kelchner retrieved her cellular telephone and surreptitiously recorded a portion of Mr. Boyd's statements. *See id*. After their meeting, Ms. Kelchner went to the State Police barracks, reported her concerns about Mr. Boyd's behavior, playing what she had recorded. *See id*.

### C. The State Police search for Mr. Boyd, find him, and then take him into custody.

Upon interviewing Ms. Kelchner and listening to her recording of Mr. Boyd, two state troopers went to find Mr. Boyd. *See* Pet. App. 10a. The troopers located Mr. Boyd's truck at a grocery store and approached as if conducting a traffic stop. They found Mr. Boyd inside and asleep. *See id*.

After one of the troopers knocked on the truck's window, Mr. Boyd awakened and his two dogs started jumping around. *See* CA 216-217. The trooper advised that they were concerned for his welfare and wanted to make sure he was okay. *See* CA at 217. They then asked Mr. Boyd to step out of his truck, come to the back of it, and talk to them. *See id*. In doing so, they asked if Mr. Boyd had any weapons, and he

said that he had a gun. Pet. App. 10a. As Mr. Boyd got out, the trooper noticed two loaded magazines in the door's side pocket.

Mr. Boyd was very cooperative, but during the interview, he discussed hearing voices and referenced "MK-Ultra." *See* CA 217. These remarks concerned the troopers, who decided to take Mr. Boyd into custody and bring him back to their barracks to talk with someone. *See id.* During an inventory search of Mr. Boyd's truck, the troopers recovered a .45 caliber Springfield handgun, ammunition, a knife, a concealed firearm carry permit, his hunting and fishing licenses. *See* Pet. App. 10a.

Back at the barracks, the State Police discovered that Mr. Boyd was under three emergency protective orders. *See* CA 231. The State Police contacted a local assistant district attorney, who advised that they should charge Mr. Boyd with making a terroristic threat. *See* Pet. App. 10a. Besides the district attorney, the state police contacted the Secret Service. *See id.* Later, a Secret Service agent interviewed Mr. Boyd. During the interview, Mr. Boyd did not talk about the alleged threats, but acknowledged hearing voices in his head. *See* CA 233.

### D. The government prosecutes Mr. Boyd for unlawfully possessing a firearm.

In August 2018, a grand jury returned a one-count indictment, charging Mr. Boyd with having violated Section 922(g)(8). *See* Pet. App. 10a-11a. In particular, the government alleged that Mr. Boyd was in the class of individuals disqualified from possessing a firearm because he was subject to a domestic protection order issued for Ms. Manley. *See id.*

Mr. Boyd raised several pretrial challenges. He requested, for example, that the district court exclude testimony about his alleged threats to the President and his

family, as that evidence had no relevance to the firearm possession offense. *See* Pet. App. 22a. The district court denied that motion.

At trial, two other issues arose. First, the district court refused to charge the jury that Mr. Boyd had to "know" of his status in the class of individuals who are prohibited from possessing firearms under Section 922(g)(8). *See* Pet. App. 12a-13a. The court's decision depended on the then existing law that the "knowing" element in Section 922(g) only extended to the possession of the firearm. *See* Pet. App. 13a. Second, in her closing, the prosecutor repeatedly argued that the defense was "misleading" the jury by challenging an element of the offense based on whether Mr. Boyd had an "opportunity to be heard" on the *ex parte* protection order. *See* Pet. App. 23a. The jury found Mr. Boyd guilty and he appealed.

### E. The Third Circuit finds that all of the errors, constitutional and evidentiary, were harmless.

The Third Circuit found that the failure to instruct on the knowledge element under Section 922(g)(8) constituted error. Pet. App. 13a. And the court acknowledged that Mr. Boyd's defense hinged on this element. *Id*. at 12a, 15a, 18a. But it found that the defense evidence was unpersuasive. *Id*. at 20a n.7. In contrast, the court viewed the government's evidence on Mr. Boyd's knowledge of his prohibited status as overwhelming. *Id*. at 18a. Based on this evidence, the court held that the constitutional error was harmless. *Id*. at 21a. The court then discounted the evidentiary errors based on the government's evidence. *See* Pet. App. 23a, 26a.

## REASONS FOR GRANTING THE PETITION

The issue here implicates the harmless error standards for both constitutional claims, *see Chapman v. California*, 386 U.S. 18, 24 (1967), and evidentiary ones, *see Kotteakos v. United States*, 328 U.S. 750, 776 (1946). These standards share a similar focus, that is, the effect of the error on the judgment. But the Third Circuit departed from this Court's precedent and its own jurisprudence, applying a different standard with a different focus—whether the government's evidence was overwhelming. *See* Pet. App. at 14a-18a, 23a, 26a. In so doing, the court deepened a long-standing circuit split.[2]

### A. A minority of circuits—including now the Third—have altered the harmless error standard from its focus on whether the error affected a disputed issue material to the verdict to whether the government's evidence was overwhelming.

More than fifty years ago in *Chapman*, this Court framed the harmless error standard. That standard's focus is whether there is certainty "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman*, 386 U.S. at 24. The "doubt" is not whether the appellate court views the defendant as guilty; it is whether the jury might have harbored reasonable doubt without the error. *See Kotteakos*, 328 U.S. at 764. Under this standard, an appellate court does not—as a jury would—weigh the government's evidence. *See* Roger J. Traynor*, The Riddle of Harmless Error* 21 (1970). Instead, the court

[2] Legal scholars and commentators have also recognized the confusion stemming from the competing harmless error tests. *See generally* Daniel Epps, *Harmless Errors and Substantial Rights*, 131 Harv. L. Rev. 2117, 2119 (June 2018) (observing that nearly every aspect of the harmless error doctrine is subject to fundamental disagreement and confusion); Jeffrey O. Cooper, *Searching for Harmlessness: Method and Madness in the Supreme Court's Harmless Error Doctrine*, 50 U. KAN. L. REV. 309, 311 (2002) (tracing the history of the competing standards).

simply makes a threshold assessment of whether the error affected a disputed issue that was material to the verdict. *E.g.*, *United States v. Yarbrough*, 527 F.3d 1092, 1103 (10th Cir. 2008).

This Court has held similarly. For example, when the error concerns a missing element of the offense in a jury charge, it may be harmless if the defendant did not contest the element and the evidence of it was uncontroverted. *See Neder,* 527 U.S. at 16-18. But when, as here, a defendant contests the element and offers evidence sufficient for a contrary finding, the omission cannot be harmless. *See id*. at 19.[3]

A majority of the circuits have followed suit, applying a standard that, for the most part, looks to whether the error had a substantial and injurious effect. *E.g.*, *United States v. Cudlitz,* 72 F.3d 992, 999 (1st Cir. 1996); *Wray v. Johnson*, 202 F.3d 515, 526 (2d Cir. 2000); *United States v. Ibisevic*, 675 F.3d 342, 350 (4th Cir. 2012); *Reiner v. Woods*, 955 F.3d 549, 557 (6th Cir. 2020); *United States v. Caruto*, 532 F.3d 822, 831 (9th Cir. 2008); *United States v. Makkar*, 810 F.3d 1139, 1148 (10th Cir. 2015); *United States v. Cunningham*, 145 F.3d 1385, 1394 (D.C. Cir. 1998). The Third Circuit had been in this camp. *See Government of Virgin Islands v. Martinez*,

[3] For instance, Mr. Boyd contested the knowledge element under Section 922(g)(8). Pet. App. 12a, 15a, 18a. And he controverted the government's proof, emphasizing that each order included language that it was an "Emergency Ex Parte Order of Protection." CA at 476-477, 479. The orders also contained unclear language, *e.g.*, that "THE COURT FINDS: That the Defendant has been *or will be* provided with reasonable notice and opportunity to be heard." CA at 476 (emphasis added). Similarly, the warning was equivocal, advising that "[p]ossession of a firearm or ammunition by a defendant while an order is in effect *may subject* the defendant to prosecution for a violation of federal law . . ." CA at 479 (emphasis added). And the summary nature of the proceeding supported Mr. Boyd's defense—the judge had 11 cases scheduled between 9:00 and 10:30 a.m. *See* CA at 498-499. The Third Circuit never explained why Mr. Boyd could not rely on the language in the orders, dismissing the defense based on its assessment of the government's proof. *See* Pet. App. 20a & n.7.

620 F.3d 321, 338 (3d Cir. 2010) (rejecting an analysis that focuses on the amount of incriminating evidence).

But a minority of the circuits—now including the Third—focus on the strength of the government's evidence—not the effect on the verdict. *See, e.g.*, *United States v. Staggers*, 961 F.3d 745, 760 (5th Cir. 2020); *United States v. Erickson*, 610 F.3d 1049, 1054 (8th Cir. 2010); *United States v. Pon*, 963 F.3d 1207, 1228 (11th Cir. 2020). This focus departs from the jury-protective standard, allowing appellate courts to uphold tainted verdicts based on judicial assessments of the evidence.[4]

More than that, such focus ignores substantive distinctions between types of error. For example, as Justice Scalia emphasized, there is a difference between an evidentiary error and, as here, a constitutionally deficient jury instruction. *See Neder*, 527 U.S. at 37-38. (Scalia, J. dissenting). In the former, an appellate court speculates toward confirming the jury's verdict. Whereas the latter involves speculation on a finding the jury never made. *See id*. at 38. And, as then Judge Gorsuch acknowledged, when an error deprives a defendant of evidence on a contested issue, "substantial rights are affected." *United States v. Makkar*, 810 F.3d 1139, 1148 (10th Cir. 2015) (quoting *Yarbrough*, 527 F.3d at 1103). Likewise, errors that undermine the plausibility of the defense affect substantial rights. *E.g.*, *Government of Virgin Islands v. Davis*, 561 F.3d 159, 167 (3d Cir. 2009). The same

[4] State courts are also divided. Some reject the overwhelming evidence standard. *E.g.*, *People v. Hardy*, 824 N.E.2d 953, 957-58 (N.Y. 2005); *Ventura v. State*, 29 So. 3d 1086, 1089 (Fla. 2010) (per curiam); *Higginbotham v. State*, 807 S.W.2d 732, 734-35 (Tex. Crim. App. 1991). Others employ it. *E.g.*, *State v. Lui*, 315 P.3d 493, 511 (Wash. 2014); *State v. Wall*, 910 A.2d 1253, 1262 (N.H. 2006); *State v. Peterson*, 652 S.E.2d 216, 222 (N.C. 2007).

holds true for errors bearing on a defendant's credibility, *e.g.*, *United States v. Caruto*, 532 F.3d 822, 832 (9th Cir. 2008), or state of mind. *E.g.*, *United States v. Miller*, 767 F.3d 585, 600 (6th Cir. 2014).

This divide has created an unfair and confusing set of standards for harmless error across federal and state courts. And because harmless error affects more appeals than any other doctrine, *see* William M. Landis & Richard A. Posner, *Harmless Error*, 30 J. LEGAL STUD. 161, 161 (2001), resolution of the issue is important.

## CONCLUSION

For all of these reasons, this Honorable Court should grant Mr. Boyd's petition for a writ of certiorari.[5]

Respectfully submitted,

HEIDI R. FREESE, ESQ.
Federal Public Defender
Middle District of Pennsylvania

QUIN M. SORENSON, ESQ.
Assistant Federal Public Defender

October 12, 2021

*/s/ Frederick W. Ulrich*
FREDERICK W. ULRICH, ESQ.
Assistant Federal Public Defender

TAMMY L. TAYLOR, ESQ.
Staff Attorney

Middle District of Pennsylvania
100 Chestnut Street, Suite 306
Harrisburg, Pennsylvania 17101
(717) 782-2237
fritz_ulrich@fd.org

*Counsel for Petitioner*

[5] The same issue is pending a request for certiorari. *See David Ming Pon v. United States*, No. 20-1709.