No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ROGER KEELING,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MICHAEL MARKS
Assistant Federal Public Defender
FEDERAL PUBLIC DEFENDER
FOR THE DISTRICT OF ALASKA
188 W. Northern Lights Blvd., Suite 700
Anchorage, AK 99503
Telephone: (907) 646-6400
Facsimile: (907) 646-3480
Michael_Marks@fd.org

QUESTION PRESENTED FOR REVIEW

Did the Ninth Circuit err in concluding that a non-constitutional error was harmless when it found "ample," rather than "weighty," evidence of guilt contrary to *Kotteakos v. United States* and *Brecht v. Abrahamson*?

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Petitioner Roger Keeling respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit entered on December 12, 2022.

JURISDICTION

A jury found Petitioner guilty at trial for murder-for-hire and stalking, in violation of 18 U.S.C. §§ 1958 & 2261A(2). The District Court for the District of Alaska had original jurisdiction over the criminal offenses against the United States under 18 U.S.C. § 3231. Reviewing the judgment under 28 U.S.C. § 1291, the Ninth Circuit affirmed Petitioner's conviction in an unpublished disposition on December 12, 2022. *See United States v. Keeling*, __ F. App'x ___, 2022 WL 17582525 (9th Cir. 2022) (App'x A). This Court has jurisdiction to review the Ninth Circuit's decision under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

Appendix B to this Petition contains verbatim copies of the following statutes and rule:

- **18 U.S.C. § 1958**, Use of interstate commerce facilities in the commission of murder-for-hire
- **18 U.S.C. § 2261A**, Stalking
- **Federal Rule of Evidence 701**, Opinion Testimony by Lay Witnesses

DIRECTLY RELATED PROCEEDINGS

There are no directly related proceedings under Rule 14(b)(iii).

STATEMENT OF THE CASE

A. Background.

Petitioner and Eugenie Euskirchen had a romantic relationship in Fairbanks, Alaska, for nearly three years. The relationship ended after an argument that Euskirchen claimed turned violent. State police arrested Petitioner for assault, and he quickly pled guilty in an Alaska court. Euskirchen also obtained a temporary protection order, which the state court eventually extended for a year.

Euskirchen alleged that Petitioner violated the restraining order several times by contacting her through third parties, leaving her notes, sending her pseudonymous emails, and slashing her tires. State police arrested Petitioner and he ended up in the Fairbanks jail.

Petitioner's cellmate at the jail was convicted felon Everett Pratte. Pratte was in jail facing felony assault charges. He was a drug addict struggling with withdrawal symptoms. He desperately wanted to get out of jail, but he had no bond set, and, in any case, his family had neither the means nor interest to bail him out.

Along with other daily requests and complaints aimed at bettering his conditions of confinement, Pratte offered to cooperate with authorities in exchange for his release. Pratte told a jail investigator first that he had information on a few drug dealers and later that Petitioner had offered him $1,500 to kill Euskirchen. The jail investigator at first didn't take Pratte's allegation against Petitioner seriously. But when the government discovered Petitioner had wired $800 to Pratte's mother, the government charged Petitioner in federal court with stalking and murder-for-hire. The district court had jurisdiction under 18 U.S.C. § 3231.

B. District Court Proceedings.

Petitioner pled not guilty to the two charges and insisted on a jury trial. The principal disputed fact in the case would be whether Petitioner hired Pratte to kill Euskirchen. Defense counsel conceded "many violations by Petitioner" of the protection order, but he contended the evidence would show Petitioner had only given money to Pratte as a kind gesture to pay his bond. Pratte had taken advantage of Petitioner to get his money, and Pratte had lied to authorities about Petitioner in an effort to get out of jail. So even if Petitioner had harassed Euskirchen, he was not guilty of murder-for-hire.

The government presented several witnesses to establish that Petitioner had harassed and threatened Euskirchen. But the government's principal witness against Petitioner on the murder-for-hire count was a convicted felon, Everett Pratte. Pratte was held without bond on an assault charge and a probation violation when he met Petitioner at the Fairbanks jail. Pratte was frustrated about being in custody with no bond prospects. He believed he was innocent of the assault charges,

and he was suffering from back pain and drug withdrawal. He was concerned about the welfare of his dog, and fearful of losing what little money and property he had left. In his words, he was "desperate, in pain, [and] couldn't get out jail fast enough."

Pratte began requesting interviews with jail officers. He wrote a note the day after his arrest saying he had information about drug dealers he would trade for his release. When an officer at the jail agreed to speak with him, Pratte added a claim that Petitioner had offered him money to kill Euskirchen.

Pratte claimed Petitioner couldn't stop talking about Euskirchen. He testified that Petitioner said he wanted to pay someone to torture and kill Euskirchen. Pratte said he wanted Petitioner to stop discussing Euskirchen, so he decided, "I'm just going to con this guy." He said he told Petitioner that he knew someone who would commit the murder if Petitioner paid his bond and left extra money for the killing. As a self-described "hustler," Pratte said he wasn't planning on following through and didn't know anyone who would carry out the murder. Pratte testified that while the plan started off as a "money thing," he realized that if he could set up Petitioner, it might be his ticket out of jail. Pratte collected a number of notes from Petitioner. They included information about Euskirchen: her address, name, and morning schedule. Pratte placed these documents in an envelope. When the jail official finally met with him, he handed over the envelope and told of the alleged plot against Euskirchen. Pratte used his cooperation to negotiate a $250 bond with the district attorney.

Once Petitioner got out of jail, he sent Pratte's mother $500. Pratte was able to get an additional $300 from Petitioner, which Petitioner arranged to be sent from his neighbor to Pratte's mother. Pratte had no further contact with Petitioner. Pratte called Petitioner a nice guy in recorded phone calls to his mother when she asked why Petitioner gave him money.

At trial, Pratte admitted that his story had changed over time in his various interviews and testimony. He originally told agents that Petitioner wanted Euskirchen's kneecaps broken. But he later told an investigator that he wanted her shot in the knees. In an interview a month after his alleged deal with Petitioner, Pratte for the first time said Petitioner wanted the attack videotaped. And while he had originally stated that Petitioner wanted Euskirchen shot in the head, he later told an investigator that Petitioner wanted her injected with meth to die of an overdose. When Pratte testified in front of the grand jury, he said the deal was for $1,600 to $2,000, rather than the $1,500 he had reported when he was still in jail.

The government offered the testimony of Alaska State Trooper Sailer to bolster Pratte's questionable testimony. Sailer was the principal investigator in Petitioner's case. He had originally become involved when he fielded a call from Euskirchen about a possible violation of the protection order. But Pratte later coordinated with the jail officer who had spoken to Pratte about Petitioner's supposed murder-for-hire plot.

On direct examination, the prosecutor asked Sailer, "And based on your previous investigation and being the lead trooper on this investigation, how did you react when you got this evidence and information from Sergeant Inderrieden?"

Sailer began to answer, "It was very shocking and I . . ." Defense counsel interrupted and objected, contending the question might improperly be asking "for some personal reaction." The prosecutor attempted to "clarify" but Sailer's answer *did* provide his opinion, as well as that of the entire investigative team:

> The police action was that the content of these letters were very concerning to us from a law enforcement perspective. The conduct that we had seen from Petitioner up until this point appeared to have escalated extremely quickly, and it was very clear and apparent to myself as well as other . . .

Defense counsel interrupted again to object, asking that Sailer's answer be stricken. The court did not rule, instead addressing Sailer and saying, "Well, the question is, what did you do next. Isn't that the question?" The following exchange resulted:

> Sailer: Yes, Your Honor. After receiving these notes, I immediately contacted the individuals who had conducted an interview with Petitioner—or sorry, with Mr. Pratte. I contacted additional resources, such as our Fairbanks internal investigations unit, as well as the FBI, including Special Agent Derik Stone, and we came together for a meeting to figure out what to do next from a law enforcement perspective regarding the threats to Eugenie.
>
> Prosecutor: And, now, why—what was that quick response based on?
>
> Sailer: The quick response was based on the immediate threat and the severity that we—the severity and the possibility of the threats being realistic.

Sailer eventually added that "we needed to place Petitioner under arrest to eliminate any additional threats[.]"

The final topic of Sailer's testimony was a search warrant he executed at Petitioner's house. Before asking specifically about the results of the search, the prosecutor asked, "And just summarizing, did the evidence that you obtained, in

your training and experience, corroborate the previous information that you had obtained regarding this murder-for-hire plot?" Sailer responded, "Absolutely."

After Sailer left the stand, defense counsel raised an objection to the testimony as an "improper opinion." Counsel requested that the court remind the jury of the question and answer, sustain the objection, and strike the testimony. Ultimately, the court did not sustain the objection or strike the testimony. The court instead settled on a "general instruction":

> Ladies and gentlemen, periodically throughout the trial, witnesses may comment regarding the evidence and what they believe it means. Ultimately, however, what the evidence means and the weight it should be given is up to you. For it is for you alone to determine the guilt or innocence of the defendant.

The court did not specifically reference Sailer's testimony in the instruction.

At the close of evidence, the government argued that the jury should credit Pratte's testimony and convict Petitioner of hiring Pratte to murder Euskirchen. The defense argued that Pratte was not credible; he was motivated to fabricate the murder-for-hire plot to get out of jail and con Petitioner. His story had changed drastically over time, proving the story untrue. But Pratte had motive to stick to his story: he wouldn't admit to lying to law enforcement while testifying at trial and risk more charges. The jury deliberated and, despite Petitioner's defense, convicted him on both counts.

C. Appeal to the Ninth Circuit.

On appeal, Petitioner argued *inter alia* that the district court had erred in admitting Sailer's lay opinion testimony. He argued that the plain language of Fed. R. Evid. 701 limited admissible testimony to opinion that was "helpful to the jury"

in assessing the evidence. Here, Sailer's opinion that Pratte was credible and that evidence he discovered during his investigation "corroborated" Pratte's story was merely "choosing sides." *See* Fed. R. Evid. 701, Advisory Committee Notes (1972). That opinion did not assist the jury in determining material facts but instead goaded the jury into accepting Sailer's conclusion that Petitioner was guilty.

Petitioner explained that the improper admission of Sailer's lay opinion was prejudicial. Although abundant evidence proved that Petitioner had harassed Euskirchen, the existence of the murder-for-hire plot depended almost exclusively on Pratte's testimony. The jury had plenty of reason to distrust Pratte: he was a convicted felon with strong motives to fabricate the plot and clear reason to stick with his story at trial. Sailer's inadmissible opinion—and the inadmissible opinion of a team of investigators—that Pratte's story was credible and corroborated plainly caused the jury to convict.

The Ninth Circuit had jurisdiction under 28 U.S.C. §§ 1291 & 1294(1). The court ruled that "[e]ven if Trooper Sailer's testimony transgressed Federal Rule of Evidence 701's limitations, we conclude that any errors were harmless." *See* App'x A. The panel found "ample evidence of guilt, including incriminating documents seized from Keeling's apartment (which were presented in detail to the jury), as well as evidence that [Petitioner] transferred money in excess of the cellmate's bail amount to the cellmate's mother." *Id.* The court ruled that this evidence, together with the curative instruction, gave assurance that "Trooper Sailer's testimony did not substantially sway the jury to convict Keeling." *Id.* The panel thus affirmed Petitioner's conviction.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to correct the Ninth Circuit's error in adopting and applying an incorrect harmless error standard. As this Court ruled in *Kotteakos v. United States*, 328 U.S. 750, 765 (1946), a court reviewing a non-constitutional error for harmlessness must reverse unless the record as a whole provides a "fair assurance . . . that the judgment was not substantially swayed by the error." In *Brecht*, this Court explained that that the evidence required to provide such a "fair assurance" must be, "if not overwhelming, certainly weighty[.]" 507 U.S. 619, 639 (1993).

Here, however, the Ninth Circuit panel affirmed Petitioner's conviction upon application of a less burdensome harmless error analysis. Rather than searching for overwhelming or weighty evidence, the panel found only that the record provided "ample" evidence of guilt. This distinction is not merely semantic. The panel's memorandum indicates a diminished standard by focusing on a few stray facts that are far from weighty and wholly ignoring any discussion of the weakness of the government's case. Most glaringly, the panel ignored the government's reliance on the biased and impeached testimony of a cooperator. This Court should grant certiorari to correct the Ninth Circuit's error.

A. Reviewing courts conducting a harmless error analysis must consider the evidence as a whole and may only affirm when evidence of guilt is weighty or overwhelming.

Federal Rule of Criminal Procedure 52 states that "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." This Court has clarified that, in the context of non-constitutional

error, the question is "what effect the error had or reasonably may be taken to have had upon the jury's decision." *Kotteakos*, 328 U.S. at 764. If the reviewing court "is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand[.]" *Id*. If, however, the reviewing court "cannot 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, it is impossible to conclude that substantial rights were not affected." *Id.* at 765.

The rule of *Kotteakos* thus creates two tasks for the courts of appeal in considering harmlessness. First, courts must assess the evidence as a whole in deciding what affect, if any, the error had on the verdict. This means considering the evidence of guilt alongside exculpatory evidence, without excising the error. Next, the court must decide whether the evidence of guilt so overwhelms both the exculpatory evidence and the prejudicial effect of the error that the error may be deemed harmless.

On this second inquiry, this Court gave further explanation in *Brecht v. Abrahamson*, 507 U.S. 619 (1993). There, this Court explained that the *Kotteakos* harmless-error standard is the correct standard for assessing prejudice in habeas cases. *Id.* at 623. Reviewing for harmlessness, this Court ruled that the evidence against the petitioner was "if not overwhelming, certainly weighty." *Id*. at 639. This Court explained that the errors were "infrequent" and "cumulative." *Id.* Only under those circumstances did the Court conclude that it was "clear" the error did not affect the verdict.

B. The Ninth Circuit erred in its assessment of the evidence necessary to establish harmlessness.

The Ninth Circuit panel wrongly decided that the evidentiary errors in Petitioner's trial were harmless. First, the panel wrongly singled out a few inculpatory facts instead of viewing the record as a whole. Second, the panel improperly concluded the errors were harmless by finding there was sufficient or "ample" evidence of guilt rather than the weighty or overwhelming evidence required under *Kotteakos* and *Brecht*.

Had the panel examined the record as a whole, the government's case would have appeared far more tenuous. The murder-for-hire plot depended entirely on the testimony of Pratte. Pratte was a convicted felon who only brought the plot to the attention of law enforcement when he was in jail, in pain, down on his luck, and looking for a way to get home. Pratte even admitted on the stand that he was a con artist. Yet the panel completely ignored the problems with his credibility.

Instead, the panel focused entirely on some (weak) corroboration of Pratte's story. The panel pointed to "incriminating documents" found at Petitioner's apartment, *see* App'x A, but failed to note that *none* of those documents described a plot to kill Euskirchen. True, one document described a "job" for Pratte, but it said nothing about murder. The panel, though, found convincing that Petitioner transferred to Pratte "money in excess of [Pratte]'s bail amount." App'x A. What the panel leaves out is that the excess money was $300. In other words, the government expected the jury to believe that Petitioner contracted a murder for $300—a head-scratching claim.

Moreover, the panel never addressed "all that happened *without stripping the erroneous action from the whole*[.]" *See Kotteakos*, 328 U.S. at 765 (emphasis added). The error here was not isolated from the inculpatory evidence. Rather, Trooper Sailer's improperly admitted opinion that Pratte's story was credible and "corroborated" by other evidence colored the jury's assessment of the evidence. But the panel never assessed "what the error meant to [the jurors]." *Id*. at 764. The panel ignored that the juror's assessment of both the inculpatory *and* exculpatory facts would be hopelessly tied to the faith they would naturally put in the lead investigator's opinion.

Ultimately, this led the panel to its most grievous error. Instead of searching for weighty or overwhelming evidence, the panel affirmed upon finding that "ample" evidence supported the verdict. *See* App'x A. That is, contrary to *Kotteakos* and *Brecht*, the panel assessed the evidence of guilt on its own—free of the evidentiary error and uncomplicated by the weaknesses of the government's case—and decided that there was enough evidence to support the verdict. The court's review was really a review for sufficiency, then, not a review for harmlessness.

Unlike *Brecht*, where the errors were isolated and infrequent, the errors here were a critical component of the government's case. The principal issue in the case was whether the government's cooperator was telling the truth. The wrongful admission of the chief investigator's opinion that the cooperator's story was credible was not harmless. Put differently, the underwhelming corroboration of Pratte's story does not give a fair assurance that Sailer's opinion did not sway the jury.

CONCLUSION

The Ninth Circuit erred in its harmless-error analysis. As a result, the court wrongly affirmed Petitioner's conviction despite prejudicial error. This Court should grant this Petition for a Writ of Certiorari and correct the Ninth Circuit's error.

Respectfully submitted,

Dated: March 13, 2023

s/ Michael Marks

MICHAEL MARKS
Assistant Federal Public Defender
FEDERAL PUBLIC DEFENDER
FOR THE DISTRICT OF ALASKA
188 W. Northern Lights Blvd. Suite 700
Anchorage, AK 99503
Telephone: (907) 646-6400
Facsimile: (907) 646-3480
Michael_Marks@fd.org

Attorney for Petitioner