No.

IN THE

Supreme Court of the United States

MICHAEL BASSEM RIMLAWI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. On the important question of how courts are to decide whether constitutional error is harmless, this Court has, since 1967, given inconsistent and contradictory guidance. As one commentator has summarized:

> [S]cholars tend to agree that there are two very different approaches that judges use in determining harmless error. Under the error-based approach, the focus of the court is on the likely impact of the error on the jury in the actual trial that took place. Under the guilt-based approach, the court considers a hypothetical trial conducted without the constitutional error, and asks whether the defendant would have nonetheless been convicted. The Supreme Court has used both approaches while rarely discussing the distinctions between them.[1]

The court of appeals suggested that there may have been a violation of petitioner's Sixth Amendment right to confrontation, but ultimately declined to decide that question, holding instead that any error was harmless. In so doing, the court of appeals clearly used the guilt-based approach to harmless error, rather than the error-based approach, and found that the error was harmless based solely upon the other evidence of petitioner's guilt.

In light of the foregoing, the first question presented is:

> Did the court of appeals err in applying the guilt-based approach, rather than the error-

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1. Jason M. Solomon, *Causing Constitutional Harm: How Tort Law Can Help Determine Harmless Error in Criminal Trials*, 99 Nw. U. L. Rev. 1053, 1062 (2005) (footnotes omitted).

based approach, to assess the harmlessness of the confrontation error in petitioner's case; and should the Court grant certiorari in this case both to clarify that the error-based approach is the correct approach and to elucidate how that sort of harmlessness review should proceed?

II. Under the doctrine of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), must the facts underlying a restitution award be proved to, and found by, a jury beyond a reasonable doubt (and, in federal cases, charged in a grand jury indictment)?

PARTIES TO THE PROCEEDING

Petitioner is Michael Bassem Rimlawi, defendant and appellant below. Petitioner proceeded to trial with co-defendants Mrugeshkumar Kumar Shah, Iris Kathleen Forrest, Douglas Sung Won, Shawn Mark Henry, Wilton McPherson Burt, Jackson Jacob, William Daniel Nicholson IV, and Carli Adele Hempel. All of these co-defendants save Dr. Nicholson and Ms. Hempel were also Dr. Rimlawi's co-appellants at the Fifth Circuit.

Respondent is the United States of America, appellee below.

RELATED PROCEEDINGS

Rimlawi v. United States, No. 23A1069 (June 4, 2024)

United States v. *Shah, et al.*, No. 21-10292, reported at 95 F.4th 328 (March 8, 2024) (5th Cir.)

United States v. *Beauchamp, et al.*, Crim. No. 3:16-cr-00516-JJZ (judgment against petitioner entered April 12, 2021) (N.D. Tex.)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael Bassem Rimlawi respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 95 F.4th 328 (5th Cir. 2024), and is reproduced in the appendix to this petition at App. 1a-99a.

JURISDICTION

The United States Court of Appeals issued its revised opinion in this case and entered judgment on March 8, 2024. App. 1a. On June 4, 2024, Justice Alito extended the time for filing this petition to July 8, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULE INVOLVED

The first question presented implicates the federal harmless-error rule in criminal cases, which is codified at 28 U.S.C. § 2111 ("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.") and also at Fed. R. Crim. P. 52(a) ("Any error,

defect, irregularity, or variance that does not affect substantial rights must be disregarded.").

The first question presented also involves a violation of the Confrontation Clause of the Sixth Amendment, which provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ." U.S. Const. amend. VI.

The second question presented implicates the Grand Jury and Due Process Clauses of the Fifth Amendment to the Constitution ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of liberty, or property without due process of law. . . ."), U.S. Const. amend. V, as well as the Jury Trial Clause of the Sixth Amendment ("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. . . ."), U.S. Const. amend. VI.

STATEMENT OF THE CASE[2]

A. Forest Park Medical Center.

In the summer of 2008, Drs. Richard Toussaint and Wade Barker[3] approached Alan Beauchamp[4] to manage Forest Park Medical Center ("FPMC"), a new out-of-network surgical hospital[5] they wanted to open in Dallas,

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2. Because the statement of facts in the Fifth Circuit's opinion is incomplete or inaccurate in a number of respects relevant to this petition, this statement of the case is based on the electronic record on appeal before the Fifth Circuit. That record will be cited by page number in the following manner: ROA.[page number].

3. Dr. Barker testified pursuant to a plea agreement with the government, whereby he agreed to plead guilty to two counts of the indictment and to cooperate with the government in exchange for a recommendation that he be sentenced to not more than 77 months, nor less than 60 months, of prison. ROA.13465-13466.

4. Perhaps the government's key witness in this case, Beauchamp testified pursuant to a plea agreement with the government whereby he agreed to plead guilty to two counts of the indictment (thereby capping his exposure to imprisonment at 10 years) and to cooperate with the government in exchange for having the government inform the sentencing judge about his cooperation. ROA.57799-57800. Beauchamp was also not charged for acts in the Western District of Texas by the United States Attorney's Office there, that office having agreed to let the United States Attorney's Office for the Northern District of Texas decide how those charges should be handled. ROA.57801.

5. Most hospitals must start out as "out-of-network" hospitals (meaning that they take patients whose medical insurance allows treatment at facilities that are not "in network" with the patients' medical insurers) because it takes some time before a hospital can get "in network" with the major medical insurers. ROA.16206-16207.

Texas. ROA.57812. Beauchamp and his longtime associate Mac Burt were given the management contract for FPMC. ROA.57813,

In order to get surgeries in the door at FPMC, the management intended to do two things: (1) offer doctors ownership in FPMC as investors; and (2) induce doctors to bring surgeries to FPMC by payments of marketing money. ROA.57815. They also intended to pay nonphysicians for referrals. ROA.57818.

Beauchamp and others in FPMC's management began trying to recruit doctors in late 2008, so that they would have patients immediately upon FPMC's opening. ROA.57818. FPMC opened on March 15, 2009. ROA.11396. The money that FPMC paid to marketing companies was paid first through Unique Healthcare (fronted by former FPMC employee and cooperating defendant Andrea Smith,[6] *see* ROA.11372, and later through Adelaide Health Solutions, headed by Jackson Jacob, *see* ROA.11384, 11400. ROA.57815-57816. Beauchamp testified that the use of these companies, and the drafting of marketing contracts, were designed to disguise the true nature of the transactions – *i.e.*, money for patients. ROA.57816.

Government evidence showed that physicians' marketing companies would receive marketing money in return for the physicians' performing out-of-network services at FPMC. ROA.57806, 57815, 57817, 57818,

6. In exchange for testifying for the government, Smith was allowed to plead down from a five-year conspiracy charge to a reduced charge of misprision of a felony, carrying a three-year maximum. The government also agreed to recommend that Smith should be sentenced to probation. ROA.11369-11370.

57923. As a rough rule of thumb, Beauchamp said, the marketing money would be about 10% of the collectable revenues attributable to each doctor, although he would not vary the payment from month to month; rather, he would reevaluate the numbers every three months or so. ROA.57806-57807, 57815, 57817. To monitor what the physicians were bringing to FPMC, Beauchamp consulted monthly tracking sheets prepared by Andrea Smith for each physician. ROA.11413, 57862-57863. To induce out-of-network patients to have procedures at FPMC, FPMC would routinely waive copays, co-insurance, and deductibles, and bill the patient only at the in-network rate. ROA.12055, 12758-12759.

Significantly, Beauchamp testified that he was ***not*** paying marketing money for the patients whose medical expenses were covered by federal-pay insurance programs, such as Medicare/Medicaid; rather, he said, he intended to incentivize the bringing only of the patients with more lucrative private-pay insurance benefits (*e.g.*, Blue Cross/Blue Shield), which necessarily were at the out-of-network rate, since FPMC was not yet certified as in-network by any private insurers.[7] ROA.57818. Other government witnesses testified to this understanding of the agreement with FPMC. *See*, *e.g.*, ROA.12565-12568 (cooperating defendant Dr. David Kim); ROA.12976 (cooperating defendant Andrew Hillman). Moreover, the

7. Like most new hospitals, FPMC was not "in network" with any private insurers (*e.g.*, Blue Cross/Blue Shield) when it opened or for some time afterwards. That meant that private insurers would only pay for surgeries at FPMC if the insureds had "out-of-network" benefits. FPMC wanted these out-of-network patients because, at that time, insurance companies were paying generously for out-of-network surgeries.

government itself characterized the agreement in this way during trial, ROA.15609, 16305, and repeatedly during its closing argument. ROA.16424, 16425, 16437, 16441, 16468, 16473. In fact, the government perhaps said it best in its rebuttal closing when it argued: "Alan Beauchamp wasn't paying for every patient referral. He was paying for those top end, private insurance, out-of-network cases. And that's what he got." ROA.16750. This distinction was important: 99% of Dr. Rimlawi's FPMC patients were private-pay, not federal-pay, yet his convictions rested solely upon the four federal-pay patients (out of a total of 594 patients he operated upon at FPMC), at whom the remuneration was not directed.

B. FPMC recruits Dr. Rimlawi.

Petitioner Michael Bassem Rimlawi ("Dr. Rimlawi") was a successful and highly regarded spine surgeon in Dallas, specializing in minimally invasive spine surgery. FPMC wanted Dr. Rimlawi to bring private-pay patients for surgery at FPMC, in return for which FPMC would pay money to market Dr. Rimlawi's practice.

At the time, Dr. Rimlawi, his business partner and co-defendant Dr. Douglas Won, and co-defendant and bariatric surgeon Nick Nicholson, all used a third-party Dallas marketing firm called LevelTwo to advertise their practices. ROA.11743, 11750-11751. LevelTwo was owned by cooperating defendant Kelly Loter.[8] ROA.11739.

8. In exchange for testifying for the government, Loter was allowed to plead down from a five-year conspiracy charge to a reduced charge of misprision of a felony, carrying a three-year maximum. The government also agreed that Loter should receive a term of probation. ROA.11737-11738.

On behalf of Drs. Rimlawi and Won, Loter facilitated a discussion between the doctors and Beauchamp about the doctors' practices and the amount of marketing money FPMC would pay to LevelTwo to market them. ROA.11761-11784. Starting in March of 2009, FPMC paid LevelTwo $100,000 a month for the marketing of Drs. Won and Rimlawi. ROA.11791, 11793. At some point, the payment from FPMC increased to $200,000. ROA.11802-11803.

At some point in 2009, Drs. Won and Rimlawi ended their relationship with LevelTwo, ROA.11803, and, from that point on, they used other agencies for their marketing. ROA.11514-11515, 11517-11518, 11611-11612, 14424-11425. On November 1, 2011, Drs. Won and Rimlawi announced a professional split, ROA.11506, after which their marketing was handled by different agencies. FPMC always wrote the marketing money checks to the agencies, never to Drs. Won or Rimlawi personally. ROA.11582, 11584, 11586, 11588, 11590-11591, 11612.

In the fall of 2012, the FPMC marketing program stopped. ROA.13529, 58021. According to the government, FPMC paid a total of $6,355,000 for the joint marketing of Drs. Won and Rimlawi, ROA.21450; and, after the doctors split up, FPMC paid $2,767,500 for the marketing of Dr. Won, and $1,775,000 for the marketing of Dr. Rimlawi. ROA.21450.

C. Proceedings below.

1. Indictment and trial.

Dr. Rimlawi was ultimately indicted in the Northern District of Texas for (1) two substantive violations of the

Anti-Kickback Statute ("AKS"), 42 U.S.C. § 1320a-7b(b), for soliciting or receiving kickbacks for referrals of patients whose medical costs were paid for by federal payors protected by the AKS (Counts Five and Six);[9] (2) one substantive violation of the Travel Act (18 U.S.C. § 1952), for using interstate commerce to facilitate the predicate offense of Texas commercial bribery regarding the private-pay patients (Count Fifteen); and (3) conspiracy to violate the AKS and to violate the Travel Act (Count One). ROA.1288-1312, 1315-1316. The district court exercised jurisdiction pursuant to 18 U.S.C. § 3231.

At trial, Dr. Rimlawi's chief defense was that, based on his prior experience and legal advice, he believed that it was legal to take his patients to FPMC even though FPMC was paying marketing money to third-party marketing agencies on his behalf; and that his good-faith belief about the legality of that practice negated any criminal intent on his part. Indeed, he so testified in his own defense at trial. ROA.15869-15871, 15880, 15881-15884,15894. As Dr. Rimlawi put it, "It was marketing. It goes on everywhere. I saw it my whole life. I got an attorney to make sure I'm doing everything correctly. And it was [money] to market me, MISI [my practice], and Forest Park. And it's legal."[10]

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9. These counts concerned two of the only four federal-pay patients whose surgeries Dr. Rimlawi performed at FPMC, out of a total of 594 surgeries. ROA.14137-14138, 14734. All four of these surgeries were funded by the Federal Employees' Compensation Act ("FECA"), the workers' compensation branch of the Department of Labor ("DOL"). ROA.14076-14077, 14137-14138. FECA is a federal healthcare program for purposes of the AKS. ROA.14078-14079.

10. And Dr. Rimlawi was not the only person who believed, at the time, that the FPMC marketing program was legal. Indeed,

ROA.16015. Dr. Rimlawi also attempted to introduce evidence respecting the advice of counsel on this point, but the district court significantly curtailed that evidence and ultimately refused to instruct the jury on the advice-of-counsel defense.

After a lengthy trial, including several days of deliberations, the jury returned its verdict on April 9, 2019. With respect to Count One, the jury convicted Dr. Rimlawi of conspiracy ***only*** to violate the AKS (the federal-pay patients whom Beauchamp testified he did not pay for); it did not convict him of conspiracy to violate the Travel Act (the private-pay patients that Beauchamp testified were the target of the remuneration). ROA.1879-1880. The jury convicted Dr. Rimlawi of the two substantive AKS counts (Counts Five and Six), ROA.1884-1885, but acquitted him of the substantive Travel Act count (Count Fifteen). ROA.1892.

2. The *Bruton* issue.

During trial, a significant constitutional issue arose. Before the original indictment in this case, co-defendant Mac Burt – formerly a manager at FPMC – was interviewed by the government pursuant to a proffer letter, and in that interview he stated that Forest Park paid kickbacks to doctors. ROA.2910-2911, 2915. The government contended that Burt's lawyer breached the terms of the proffer letter during cross-examination of a government witness, thus

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several ***government*** witnesses testified to that effect, including Alan Beauchamp himself. ROA.12249-12250, 12253, 12335 (Alan Beauchamp); ROA.11550, 11568, 11606-11607 (Andrea Smith); ROA.11892, 11897-11898, 11970-11971 (Kelly Loter); ROA.12639 (Dr. David Kim); ROA.13360 (Greg Long).

voiding the proffer letter and entitling the government to use Burt's interview statements against him at trial. ROA.2942-2943, 10912-10919.

The district court agreed, ROA.14384-14385, and admitted the relevant portion of Burt's interview into evidence by reading the following passage to the jury:

> "Defendant Mac Burt made statements in June 2016 to Casey England, an agent with the Office of Inspector General, during a voluntary interview where he was represented by legal counsel. The interview, consistent with DOJ policy, was not taped. The agent's notes include a statement by Burt that he realized from the very beginning that ***the $600,000 check Beauchamp requested from Forest Park to be paid to Adelaide [an intermediary to the marketing companies] was for doctor kickbacks***. You may consider this evidence as to Defendant Burt."

ROA.58083 (emphasis added); *see also* ROA.58082-58083.

The defendants objected that the evidence violated their Sixth Amendment right to confrontation – among other things, under this Court's decision in *Bruton v. United States*, 391 U.S. 123 (1968), because Burt had elected not to testify and thus could not be cross-examined, but the court overruled the objections. ROA.58082-58083. The defense requested that the last sentence of the proposed statement be changed to read "You may consider this evidence as to defendant Burt ***only***" ROA.58083 (emphasis

added), but at the government's urging the district court declined to change it, ROA.58083-58084, and read the statement to the jury as set forth above. ROA.58142.

The government then proceeded to use Burt's confession not only against Burt but also against Dr. Rimlawi. In its cross-examination of Dr. Rimlawi, the government asked: "***Mac Burt, the statement the judge read, said he knew Forest Park was paying doctors***?" ROA.15999 (emphasis added). Dr. Rimlawi denied taking kickbacks, but he had no opportunity to cross-examine Burt, and the government should not have used Burt's confession in his cross.

The government went even further in closing argument. First, it referred to the Burt statement in its initial closing argument:

> And then you heard the stipulation read by the judge that in an interview Mac Burt said he realized from the very beginning that ***the $600,000 check*** from Beauchamp – or Beauchamp requested from Forest Park to be paid to Adelaide ***was for doctor kickbacks***. Those were his words.

ROA.16429 (emphasis added).

Then, in rebuttal closing argument, the government specifically argued Burt's statement against Dr. Rimlawi:

> First, with all due respect to Mr. Burt's counsel, his client confessed. You heard that from the judge. In a voluntary interview with

> two of his own lawyers – present – that means he could come and go as he choose [sic] – as he pleased. ***He told the government agents that he knew from the very beginning that the money going from Forest Park to Adelaide was for doctor kickbacks.***
>
> ***And who are those doctors, folks?***
>
> [You] [s]aw the projection sheets that him and Alan Beauchamp were making in January 2009.
>
> 70,000 for Nick Nicholson. These are the cases we expect in return.
>
> ***You've seen in that sliding scale email with Mac Burt on it, with Doctors Won and Rimlawi. How many more dollars could we get for more surgeries?***
>
> ***We know that a hundred – that 20 to 25 cases gets husband [sic] a hundred – a hundred thousand dollars. We want to know the levels we can achieve when we bring in even more cases. What is 20 to 25 – 25 to 30, 30 to 35.***

ROA.16732-16733 (emphasis added).

3. Sentencing.

Before sentencing, the Probation Office recommended that under the Mandatory Victim Restitution Act of

1996 ("MVRA"), 18 U.S.C. § 3663A, Dr. Rimlawi was responsible for $28,839,201.68 in restitution to four private insurance companies for the private-pay patients (Blue Cross/Blue Shield, Aetna, Cigna, and United Health Care) and the Federal Employees Health Benefits Program or "FEHBP." ROA.4967, 4980, 5037-5038. This loss was calculated on the following basis: (1) the total paid to FPMC by the various insurers on account of out-of-network surgeries performed by Drs. Rimlawi and Dr. Won during the alleged conspiratorial period, (2) less the amount that the insurers would have paid for those same surgeries ***in***-network (the difference between the two, or "loss difference," being expressed as a percentage), (3) resulting in a restitution amount allegedly owed to the various insurers. ROA.4989.

Dr. Rimlawi objected to the PSR's recommendation on restitution on several grounds. First, he contended that it was illegal to award ***any*** restitution to the private insurers, because he was not convicted of any offense involving private-pay patients; rather, he said, he was convicted only of AKS offenses implicating only four of the 594 patients he operated on at FPMC. ROA.5012-5014. He also raised a foreclosed objection that the failure to submit the question of restitution to the jury violated his Fifth Amendment right to due process and Sixth Amendment right to jury trial. ROA.5014. Finally, he made a number of specific objections to the Probation Office's calculations. *See* Pet. C.A. Br. 75-78.

The district court overruled Dr. Rimlawi's objections to restitution and sentenced him to pay $28,839,201.68 ROA.6491-6492, 56417 (sentencing transcript), 56339

(judgment). The district court also sentenced Dr. Rimlawi to 90 months' imprisonment, three years of supervised release, and forfeiture in the amount of $4,952,500. ROA.56416.

4. The appeal.

Dr. Rimlawi filed a timely notice of appeal to the United States Court of Appeals for the Fifth Circuit. ROA.4937-4938. That court affirmed Dr. Rimlawi's judgment of conviction and sentence. *See United States v. Shah*, 95 F.4th 328 (5th Cir. 2024) (reproduced in the appendix to this petition).

As relevant here, the Fifth Circuit suggested that Dr. Rimlawi's confrontation rights under *Bruton* may well have been violated by the government's use of non-testifying co-defendant Mac Burt's out-of-court statement against Dr. Rimlawi. App. 53a-60a. But the Fifth Circuit ultimately declined to decide whether constitutional error had in fact occurred, holding instead that any such error was harmless because of the weight of the other evidence against Dr. Rimlawi. App. 60a-61a. The Fifth Circuit also summarily rejected the *Apprendi* challenge to restitution on the basis of that court's prior decision in *United States v. Rosbottom*, 763 F.3d 408, 420 (5th Cir. 2014). App. 97a & n.292.

REASONS FOR GRANTING THE PETITION

I. The Court should grant certiorari in this case to clarify that harmless-error review of constitutional errors should examine the effect of the error on the verdict in the particular case under consideration, and not simply whether, in the judgment of the reviewing court, there is sufficient, or even "overwhelming," evidence to support a finding of guilt.

A. Introduction.

In the Court's seminal decision in *Chapman v. California*, 386 U.S. 18 (1967), the Court held that constitutional errors did not always mandate reversal, but could sometimes be disregarded as harmless error. *See id.* at 22. The Court, however, 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. This showing "requir[es] the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* The Court criticized, as inconsistent with this approach, the California state courts' "emphasis, and perhaps overemphasis, on the court's view of 'overwhelming evidence,'" *id.* at 23 – *i.e.*, the California courts reliance on allegedly "overwhelming" evidence of guilt to find a constitutional error harmless.

Despite the clarity of Justice Black's opinion for the Court in *Chapman*, "[t]his constitutional harmless error doctrine has been plagued by [a] central ambiguity[y] since its inception: . . . [namely,] uncertainty about how

harmless error should be judged,"[11] – *i.e.*, "how is this harmlessness to be determined?"[12] Consequently, "[i]n the years following *Chapman*, two tests for constitutional harmless error evolved, one focusing on the effect that the error . . . had on the deliberations of the jury, and one focusing on whether the evidence properly before the jury was overwhelming, such that any reasonable jury would surely have convicted in the absence of the error."[13] As another commentator has summarized:

> Indeed, scholars tend to agree that there are two very different approaches that judges use in determining harmless error. Under the error-based approach, the focus of the court is on the likely impact of the error on the jury in the actual trial that took place. Under the guilt-based approach, the court considers a hypothetical trial conducted without the constitutional error, and asks whether the defendant would have nonetheless been convicted. The Supreme Court has used both approaches while rarely discussing the distinctions between them.[14]

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11. Gregory Mitchell, Comment, *Against "Overwhelming" Appellate Activism: Constraining Harmless Error Review* [hereinafter "*Against 'Overwhelming' Appellate Activism*"], 82 Calif. L. Rev. 1335, 1336 (1994) (footnotes omitted).

12. *Id.* at 1337.

13. Jeffrey O. Cooper, *Searching for Harmlessness: Method and Madness in the Supreme Court's Harmless Constitutional Error Doctrine* [hereinafter "*Searching for Harmlessness*"], 50 U. Kan. L. Rev. 309, 311 (2002) (footnotes omitted).

14. Jason M. Solomon, *Causing Constitutional Harm: How Tort Law Can Help Determine Harmless Error in Criminal*

See also, *e.g.*, Judge Harry T. Edwards, *To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated*? [hereinafter "*To Err Is Human*"], 70 N.Y.U. L. Rev. 1167, 1171 (1995) (acknowledging these two approaches to harmless error, and calling one the "effect-on-the-verdict approach" and the other the "guilt-based approach"). In this petition, we will refer to these two approaches as the "error-based approach" and the "guilt-based approach."

The Fifth Circuit's treatment of Dr. Rimlawi's confrontation claim fell squarely into the guilt-based approach to harmless error. The Fifth Circuit strongly suggested that, under the doctrine of *Bruton v. United States*, 391 U.S. 123 (1968), Dr. Rimlawi's confrontation rights had been violated by (1) the government's introduction of the out-of-court statement of non-testifying co-defendant Mac Burt and (2) the government's use of that statement to impeach petitioner during his trial testimony. App. 53a-60a. But the Fifth Circuit ultimately declined to decide whether constitutional error had in fact occurred, holding instead that any such error was harmless because of the weight of the other evidence against Dr. Rimlawi. App. 60a-61a.

Especially because this Court has sent conflicting signals, lower courts are in serious need of this Court's guidance on the question of harmless-error review of constitutional errors. Because this case is a good vehicle to decide that question, the Court should grant certiorari in this case to do just that.

Trials [hereinafter "*Causing Constitutional Harm*"], 99 Nw. U. L. Rev. 1053, 1062 (2005) (footnotes omitted).

B. The proper application of harmless-error analysis to constitutional errors is an important question as to which the lower courts need this Court's guidance.

1. Getting harmless-error review right is critical.

The proper application of harmless-error review is not merely an academic question. "Harmless error is almost certainly the most frequently invoked doctrine in all criminal appeals,"[15] and "[t]he harmless-error rule has been called 'probably the most cited rule in modern criminal appeals.'"[16] "Getting harmless-error determinations right, then, is central to accurate determinations of guilt – an area about which there is evident cause for concern."[17]

The disparity between the error-based approach to harmless error and the guilt-based approach

> is significant because the different tests, when applied to the same set of facts, may yield

15. Daniel Epps, *Harmless Errors and Substantial Rights*, 131 Harv. L. Rev. 2117, 2119 (2018) (footnote omitted).

16. *Causing Constitutional Harm*, 99 Nw. U. L. Rev. at 1054 (footnote omitted). This same commentator also observed that "[t]he Chief Judge of the Second Circuit has referred to harmless error as 'one of the most important doctrines in appellate decisionmaking,' and posited that harmless-error principles may determine the outcome of more criminal appeals than any other doctrine." *Id.* (footnote omitted).

17. *Id.* at 1055.

> different results. A court's choice of harmless error test alone, and not the merits of a case, may determine the outcome of appellate review. Accordingly, the situation is ripe for the Court to address directly the proper definition of harmless error.[18]

2. The Court has sent mixed messages on this question.

The need for the Court to resolve this question stems largely from "mixed messages"[19] the Court has sent respecting the correct approach to harmless error. As noted above, in *Chapman*, this Court clearly endorsed the error-based approach to harmless error. Yet only two years after *Chapman*, the Court, in a 5-3 opinion authored by Justice Douglas appeared to change tack, by holding a *Bruton* error harmless because the evidence of the petitioner's guilt was "overwhelming." *See Harrington v. California*, 395 U.S. 250, 254 (1969). Justice Brennan, joined by Chief Justice Warren and Justice Marshall, dissented, vehemently disagreeing both with the majority's "overwhelming evidence" test for harmlessness and with the conclusion that the *Bruton* error was harmless beyond a reasonable doubt. *See id.* at 255-57 (Brennan, J., dissenting). And, within just a few years after *Harrington*, the Court, relying on *Harrington*,

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18. *Against "Overwhelming" Appellate Activism*, 82 Calif. L. Rev. at 1338 (footnotes omitted). Although this article was written in 1994, the quoted remarks remain equally true today.

19. Anne Bowen Poulin, *Tests for Harm in Criminal Cases: A Fix for Blurred Lines* [hereinafter "*Blurred Lines*"], 17 U. Pa. J. Const. L. 991, 1024 (2015).

and *Chapman* notwithstanding, handed down another decision applying the guilt-based approach to affirm a conviction despite *Bruton* error, over a vigorous dissent by Justice Marshall. *See Schneble v. Florida*, 405 U.S. 427, 430-32 (1972)*; but see id.* at 432-37 (Marshall, J., joined by Douglas and Brennan, JJ., dissenting).

The tension between the error-based approach exemplified by *Chapman* and the guilt-based approach exemplified by *Harrington* had remained unresolved for four decades when, in 2011, the Court granted certiorari in *Vasquez v. United States*, No. 11-199, to address the following questions:

> 1. Did the Seventh Circuit violate this Court's harmless-error precedent when it focused its harmless-error analysis solely on the weight of the untainted evidence without considering the potential effect of the error (the erroneous admission, for the truth of the matter asserted, of trial counsel's statements that his client would lose the case and should plead guilty) at all?
>
> 2. Did the Seventh Circuit violate Mr. Vasquez's Sixth Amendment right to a jury trial when it determined that Mr. Vasquez should have been convicted instead of considering the effect of the district court's error on the jury's verdict?

Petition for Cert., *Vasquez v. United States*, No. 11-199, 2011 WL 3628548, at *i (Aug. 8, 2011); *see also Vasquez v. United States*, 565 U.S. 1057 (2011) (mem.) (order granting

certiorari). However, after briefing and argument, the Court dismissed the writ of certiorari as improvidently granted. *See Vasquez v. United States*, 566 U.S. 376 (2012) (mem.).

Because "[e]xisting Supreme Court precedent d[id] not clearly endorse one approach over the other[,] the *Vasquez* case offered the Court the opportunity to provide guidance. Unfortunately, the Court bypassed that opportunity." *Blurred Lines*, 17 U. Pa. J. Const. L. at 993. And since the Court has never returned to the question since its dismissal of the writ in *Vasquez*, the need for resolution of the question presented here is as great as – if not greater than – it was at the time of *Vasquez*.

C. The guilt-based approach to harmless error is deeply problematic.

The problems with the guilt-based approach to harmless error have been well documented. First off,

> [u]nder the [guilt-based approach], appellate review substantially intrudes on the province of the trial court because it allows the appellate court reviewing the trial record to come to its own, independent conclusion of guilt. Thus, the court does not ask what effect an error had "upon the guilty verdict in the case at hand." If a defendant is guilty by the appellate court's judgment, as shown by overwhelming-evidence, what a jury might have done at an error-free trial is irrelevant.

> This degree of appellate-level factfinding is undesirable for two reasons. First, it places the appellate court in the position of trier of fact, a role traditionally reserved for the jury. This undermines the jury's function as the conscience of the community and intrudes on the Sixth Amendment right to trial by jury. Second, it allows appellate judges, who are poorly situated to make any factual determination, to decide the ultimate fact: whether the defendant is guilty or not guilty.

Against "Overwhelming" Appellate Activism, 82 Calif. L. Rev. at 1340 (footnotes omitted). Judge Edwards has echoed the sentiment that one of "the flaws that inhere in this guilt-based approach" is "its inconsistency with the constitutional role and institutional competency of appellate courts. . . ." *To Err Is Human*, 70 N.Y.U. L. Rev. at 1172; *see also id.* at 1192-94 (explaining this view).

These flaws in the guilt-based approach are exacerbated by the manner in which many courts apply that approach. First, the guilt-based approach's focus on the strength of the evidence is sometimes watered down to something even less protective of constitutional rights than a pure "overwhelming evidence" test. "Some courts assert that overwhelming evidence supports the conviction without carefully considering the possibility of harm. Equally troubling, some courts accept less than overwhelming evidence as adequate to support a finding of no harm." *Blurred Lines*, 17 U. Pa. J. Const. L. at 1046 (footnotes omitted). Most troubling of all, sometimes courts find error harmless when the untainted evidence is merely ***sufficient*** to sustain a conviction – despite this

Court's long-ago admonition that "[t]he inquiry cannot be merely whether there is enough to support the result, apart from the phase affected by the error." *Kotteakos v. United States*, 328 U.S. 750, 765 (1946).

Another problem, of a piece with the error of treating harmlessness as a sufficiency-of-the-evidence question, is that "[c]ourts also tend to view the evidence in the light most favorable to the government," *Blurred Lines*, 17 U. Pa. J. Const. L. at 1031, and "often draw all inferences in favor of the government." *Id.* at 1033 (footnote omitted); *cf. Schneble*, 405 U.S. at 1062 (Marshall, J., dissenting) ("The mistake the Court makes [in its harmless-error analysis] is in assuming that the jury accepted as true all of the other evidence."). "Instead, when assessing harm, the court should recognize that a different fact finder could draw the inferences in favor of the defendant and should therefore draw all inferences in favor of the defendant, giving weight to arguments that reframe the evidence in light of the identified error." *Blurred Lines*, 17 U. Pa. J. Const. L. at 1048 (footnote omitted).

Relatedly, in assessing harmlessness, courts often "reject or disregard defense theories that might sway a jury." *Id.* at 1023; *see also id.* at 1034 ("Just as they often view the evidence in a light most favorable to the government, courts also tend to dismiss out of hand the defense theory advanced to support the argument that the defendant suffered harm."). But "[v]iewing the record in the light most favorable to the defendant should also prompt courts to consider the defense theory more seriously, recognizing that jurors could accept the posited defense." *Id.* at 1051-52.

Adding to the gestalt of problems with the guilt-based approach is the fact that it often leads reviewing courts to ignore contextual evidence that the error in question did indeed contribute to the verdict. "The court should consider the theory of the defense, the timing of the error in the course of the trial, the parties' opening and closing arguments, prosecution conduct in relation to the error, and the jury instructions presented at trial to determine whether any of these aspects of the trial heightens the significance of the flaw." *Id.* at 1051 (footnote omitted); *see also Causing Constitutional Harm*, 99 Nw. U. L. Rev. at 1095-97 (listing contextual clues that a court reviewing for harmlessness should consider).

Last, but certainly not least, as Judge Edwards has written, "[t]he most serious flaw in the guilt-based approach, however, is its tendency to undermine our most important legal principles." *To Err Is Human*, 70 N.Y.U. L. Rev. at 1194. "As the *Harrington* dissenters warned, any analysis measuring the harmlessness of error according to the weight of the evidence that the prosecution stacks against a defendant erodes the individual rights and liberties that are presumed to elevate our system of justice." *Id.* (footnote omitted). Judge Edwards further wrote:

> As Justice Frankfurter put it, "it is an abuse to deal too casually and too lightly with rights guaranteed by the Federal Constitution, even though they . . . may be invoked by those morally unworthy." We commit just such an abuse when we hold errors harmless in a criminal case based solely on our own perceptions of a defendant's guilt. Such guilt-based application

> of the harmless-error doctrine dilutes the force of our laws and shrinks the boundaries of the sphere of individual autonomy.

Id. at 1195 (footnote omitted).[20]

D. This case is a good vehicle to decide the question presented because the Fifth Circuit not only clearly applied the guilt-based approach to reject Dr. Rimlawi's *Bruton* claim as harmless, but also applied that approach in a way that raises all of the concerns identified in the previous subsection.

This case is a good vehicle to decide the question presented because the Fifth Circuit's application of harmless error here strongly implicates all of the concerns that have been raised about the guilt-based approach. First off, in its terse discussion of harmless error, the Fifth Circuit looked ***only*** at the government's evidence – and that in the light most favorable to the government – without considering or mentioning the defense theory or defense evidence. Claiming that "a mountain of other evidence inculpates Rimlawi," the Fifth Circuit incorporated by reference its discussion of the sufficiency of the evidence against Dr. Rimlawi in Part II(B) of its

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20. Only 12 years after *Chapman*, Judge Irving Goldberg of the United States Court of Appeals for the Fifth Circuit recognized the truth of these principles when he wrote the following in an opinion for that court: "The constitution speaks in cosmic concepts or cosmic principles, and they are not to be grudgingly applied nor mini[a]turized. We must be careful lest the purgatory of the harmless error doctrine erode our sacred constitutional rights." *United States v. Hammond*, 598 F.2d 1008, 1014 (5th Cir. 1979).

opinion, *see* App. 61a – a discussion that explicitly "[v]iewed [the evidence] in the light most favorable to the verdict." App. 16a. In fact, the Fifth Circuit pointed to evidence that FPMC paid for federally insured patients and that Dr. Rimlawi knew, in the abstract, that it was illegal to accept remuneration for referral of federally insured patients, but the Fifth Circuit did not so much as mention the countervailing evidence that (1) Dr. Rimlawi did not believe that payment of marketing money to a third-party agency was an illegal remuneration under the AKS and that he would not have agreed to the marketing-money payments had he known they were illegal; and (2) FPMC was not, in fact, paying for federally insured patients, but rather only for privately-insured patients for whom they could bill the out-of-network rate. *See supra* text, at 5-6, 8-9.

The Fifth Circuit also failed to examine contextual factors indicating that the *Bruton* error had an effect on the verdict. Dr. Rimlawi testified in his own defense, and his testimony, if accepted by the jury, would have provided a basis for acquittal. Yet the government was allowed to undercut that testimony by bringing up the Burt statement during cross-examination of Rimlawi. ROA.15999; *see also supra* text, at 11.

Even worse, the government again brought up the Burt statement in the first part of its closing argument. ROA.16429; *see also supra* text, at 11. And worst of all, in rebuttal closing argument – when Dr. Rimlawi would have no further opportunity to speak to the jury – the government specifically argued Burt's statement against Dr. Rimlawi. ROA.16732-16733; *see also supra* text, at 11-12. Yet the Fifth Circuit did not so much as mention the closing argument when evaluating harmlessness.

Furthermore, although a *Bruton* error cannot be cured by a limiting instruction, it is also worth noting that the instruction given by the district court in this case did not – or at least did not clearly – tell the jury that it could not use Burt's statement against Dr. Rimlawi. *See supra* text, at 10-11.

Finally, the Fifth Circuit did not even acknowledge the nature of the error, namely, "the effect that such a 'powerfully incriminating extrajudicial statement[ ]' is likely to have on a jury." *Samia v. United States*, 599 U.S. 635, 660 (2023) (Kagan, J., dissenting) (quoting *Bruton*, 391 U.S. at 135-36). Indeed, "the introduction of [Burt's] confession posed a substantial threat to [Dr. Rimlawi's] right to confront the witnesses against him. . . ." *Bruton*, 391 U.S. at 137. This was especially true since Burt was the only co-defendant/co-conspirator not testifying for the government pursuant to an advantageous plea deal.

For all these reasons, this case is a good vehicle for the Court to clarify how harmless-error analysis of constitutional errors should proceed.

E. Conclusion.

In sum, "[g]etting harmless-error determinations right [] is central to accurate determination of guilt. . . ." *Causing Constitutional Harm*, 99 Nw. U. L. Rev. at 1055. And, "[t]he way in which courts apply the tests will either enhance the protection of the defendant or increase the likelihood that an error that actually harmed the defendant will not be redressed. Yet, different judges take markedly different approaches to harm assessment." *Blurred Lines*, 17 U. Pa. J. Const. L. at 1046. Because

the error-based approach to harmless error – first articulated by this Court in *Kotteakos* and then applied to constitutional errors in *Chapman* – is superior to the guilt-based approach applied by the Fifth Circuit in this case, this Court should grant certiorari to reaffirm the error-based approach and, as Judge Edwards put it, "to break the stranglehold of the guilt-based approach to harmless error." *To Err Is Human*, 70 N.Y.U. L. Rev. at 1171.

II. The Court should grant certiorari to decide whether the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), applies to facts that increase the maximum restitution amount for which a criminal defendant may be liable.

"In *Apprendi v. New Jersey*, 530 U.S. 466 . . . (2000), [this Court] held that '[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. In federal prosecutions, such facts must also be charged in the indictment." *United States v. Cotton*, 535 U.S. 625, 627 (2002) (citations omitted). And the rule of *Apprendi* applies to financial penalties as well as custodial penalties. *See Southern Union Co. v. United States*, 567 U.S. 343, 346, 360 (2012) (facts raising statutory maximum fine must be proved to, and found by, a jury beyond a reasonable doubt).

The question has thus arisen whether the rule of *Apprendi* requires that the facts underlying a restitution order must be proved to, and found by, a jury beyond a reasonable doubt (as well as being charged in the

indictment in federal cases). Here, they were not; that is why Dr. Rimlawi and his codefendants objected under *Apprendi* to their restitution orders. ROA.5014. The Fifth Circuit, however, summarily rejected the *Apprendi* challenge to restitution on the basis of that court's prior decision in *United States v. Rosbottom*, 763 F.3d 408, 420 (5th Cir. 2014). App. 97a & n.292.

The Court has yet to decide whether *Apprendi* applies to restitution orders. But although the Fifth Circuit and other courts have answered that question in the negative, the Iowa Supreme Court has answered that question in the affirmative, *see State v. Davison*, 973 N.W.2d 276, 279, 283-88 (Iowa 2022), as have a number of individual jurists.[21] So have a number of scholars.[22]

Perhaps most to the point, two Members of the Court have called for the Court to decide this question. *See Hester v. United States*, 139 S. Ct. 509, 509-11 (2019)

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21. *See, e.g., United States v. Leahy*, 438 F.3d 328, 339-48 (3d Cir. 2006) (*en banc*) (McKee, J., concurring in part and dissenting in part (joined by JJ. Rendell, Ambro, Smith, Becker); *United States v. Carruth*, 418 F.3d 900, 905-06 (8th Cir. 2005) (Bye, J., dissenting); *Groom v. State*, ___ P.3d ___, 2024 WL 2790722, at *8-*15 (Alaska Ct. App. May 31, 2024) (Wollenberg, J., dissenting); *State v. Arnett*, 496 P.3d 928, 938-43 (Kan. 2021) (Standridge, J., dissenting, joined by Rosen, J.), *cert. denied*, 142 S. Ct. 2868 (2022).

22. *See, e.g.*, James Barta, Note, *Guarding the Rights of the Accused and Accuser*, 51 Am. Crim. L. Rev. 463 (2014); Judge William M. Acker, Jr., *The Mandatory Victims Restitution Act Is Unconstitutional. Will the Courts Say So After* Southern Union v. United States? 64 Ala L. Rev. 803 (2013); Melanie D. Wilson, *In* Booker's *Shadow: Restitution Forces a Second Debate on Honesty in Sentencing*, 39 Ind. L. Rev. 379 (2006).

(Gorsuch, J., dissenting from denial of certiorari, joined by Sotomayor, J.). As Justice Gorsuch there wrote, the question presented here "is not only important, [but] it seems doubtful" that the Fifth Circuit and other courts like it have resolved it correctly. *Id.* at 510 (Gorsuch, J., dissenting from denial of certiorari). This is so because, "just as a jury must find any facts necessary to authorize a steeper prison sentence or fine, it would seem to follow that a jury must find any facts to support a (nonzero) restitution argument." *Id.* (Gorsuch, J., dissenting from denial of certiorari).

Dr. Rimlawi's co-defendant, Mrugeshkumar Kumar Shah ("Dr. Shah"), has filed, or will soon be filing, a petition for writ of certiorari raising this same issue. Dr. Rimlawi incorporates by reference the arguments made by Dr. Shah. And, because Dr. Shah's case presents a good vehicle to decide the issue, Dr. Rimlawi supports a grant of certiorari in that case, and asks that, if the Court does so, the Court hold Dr. Rimlawi's case for a decision in *Shah*.

Alternatively, however, if for some reason the Court does not think that *Shah* is an acceptable vehicle to decide this important question, Dr. Rimlawi asks that the Court grant certiorari to decide the question in his case. Dr. Rimlawi's case presents a good vehicle to decide that question for the following reasons. As noted above, Dr. Rimlawi was ordered to pay over $28 million in restitution based on private-pay insurance claims – on which he was not convicted. Rather, as set out above, the jury convicted him only on AKS charges relating to federal-pay claims. But the four federal-pay claims formed no part of the restitution award because federal payments are uniform, without an "out of network/in network"

distinction. Moreover, as to those private-pay claims, Dr. Rimlawi raised numerous objections to the calculation of the restitution amount, including presenting unrebutted expert testimony to the sentencing judge contradicting the $28 million figure. *See supra* text, at 13. The government cannot show that the error of failing to submit restitution to a jury was harmless, let alone harmless beyond a reasonable doubt.

For these reasons, the Court should grant certiorari to decide this question, either in Dr. Shah's case or in Dr. Rimlawi's case.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

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