No. _____

In The

Supreme Court of the United States

JONATHAN LYNN JENKINS, a/k/a Max,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether an appellate court improperly displaces the jury's role to determine guilt by assuming error occurred when the district court improperly admitted a two-hour videotaped confession obtained in violation of Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure Rule 11(f), then selecting which facts established at trial apply to find the assumed error harmless.

Whether the Court should limit its holding in *United States v. Mezzanatto*, 513 U.S. 196 (1995) to ensure that the government does not abuse its charging authority, by using at trial a videotaped confession obtained during plea discussions, in violation of Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure Rule 11(f).

PARTIES TO THE PROCEEDING

Petitioner, Jonathan Lynn Jenkins was the defendant-appellant below. Respondent, the United States of America was the plaintiff-appellee below.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

United States v. Jonathan Lynn Jenkins, No. 21-4447, 4th Cir. (Nov. 26, 2024) (affirming district court's judgment in unpublished opinion), and

United States v. Jonathan Lynn Jenkins, No. 21-4447, 4th Cir. (Dec. 27, 2024) (Order denying petition for en banc reconsideration).

No other proceedings in federal or state trial or appellate courts, or in this Court, directly relate to this case within the meaning of the Court's Rule 14.1(b)(iii).

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Petitioner asks the Court to issue a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit and to address whether this Court should provide guidance to the lower courts to prevent future deprivations of the right to a jury trial when the government relies on videotaped statements made by a defendant to a prosecutor during plea discussions and the court of appeals assumes error, evaluates the facts and affirms based on the harmless error doctrine.

OPINIONS BELOW

This case arises from the following proceedings:

United States v. Jonathan Lynn Jenkins, No. 21-4447, 4th Cir. (Nov. 26, 2024) (affirming district court's judgment in unpublished opinion), and

United States v. Jonathan Lynn Jenkins, No. 21-4447, 4th Cir. (Dec. 27, 2024) (Order denying petition for en banc reconsideration).

JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered its opinion on November 26, 2024. (App.1a). This petition is timely filed within 90 days of the court of appeals order denying Petitioner's request for en banc reconsideration *See* this Court's Rule 13.3.

The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

INDIGENT STATUS

The United States Court of Appeals for the Fourth Circuit appointed undersigned counsel of record for this appeal pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. VI Rights of the accused

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….

18 U.S.C. § 2 Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 1591 Sex trafficking of children or by force, fraud, or coercion

(a) Whoever knowingly—

(1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person; or

(2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1), knowing, or, except where the act constituting the violation of paragraph (1) is advertising, in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).

(b) The punishment for an offense under subsection (a) is—

(2) if …the person recruited, enticed, harbored, transported, provided, obtained, advertised, patronized, or solicited had attained the age of 14 years but had not attained the age of 18 years at the time of such offense, by a fine under this title and imprisonment for not less than 10 years or for life.

18 U.S.C.S. § 3006A Adequate Representation of Defendants

(c) **Duration and substitution of appointments.** -- A person for whom counsel is appointed shall be represented at every stage of the proceedings from his initial appearance . . . through appeal.

STATEMENT OF THE CASE

INTRODUCTION

In this case, the court of appeals assumed error when the government violated Petitioner's rights against admission of a two-hour videotaped confession obtained during plea negotiations. The court of appeals then found the error harmless. The appellate court reached this conclusion by misapplying this Court's precedents regarding harmless error analysis.

Courts and legal scholars have long recognized this Court's conflicting jurisprudence in the harmless error context. *See* Martha A. Field, *Assessing the Harmlessness of Federal Constitutional Error – A Process in need of a Rationale*, 125 U. Pa. L. Rev. 15 (1976). Three different approaches to harmless error analysis have been adopted: (1) focus on the erroneously admitted evidence to ask whether it might have contributed to a guilty verdict; (2) inquiring whether remaining overwhelming evidence supports the jury verdict once erroneously admitted evidence is excluded; or (3) deciding whether tainted evidence is merely cumulative or merely duplicative of some remaining admissible evidence. Field, 125 U. Pa. L. Rev. at 16 n. 8. Conflict between the three tests appears in appellate decisions of almost every circuit court of appeals.

Although this does not present a circuit split in the classic sense (circuit opinions do not explicitly cite other decisions and disagree with their holdings), this case demonstrates a lack of uniformity among the circuits. This court should remedy this confusion because it deprives the government and defendants of consistency and

predictability. The court of appeals essentially weighed the government's evidence to conduct its harmless error inquiry and ignored the government's own reliance on the evidence unlawfully obtained to decide that the jury was not substantially influenced by the tainted evidence. This deprived Petitioner of his right to a jury trial under the Sixth Amendment.

PROCEDURAL HISTORY

The district court sentenced Petitioner to three consecutive life sentences after a jury trial. Petitioner appealed, arguing the district court violated Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(f) by allowing the government to admit a two-hour videotape of his statement made during his plea negotiation with a prosecutor. The court of appeals affirmed the conviction and sentence in an unpublished opinion after assuming error but finding the error harmless. App.1a.

FACTUAL BACKGROUND

The government prosecuted Petitioner for conspiracy to commit sex trafficking and two counts of sex trafficking in violation of 18 U.S.C. §§ 1591(a), (b)(2) and 1954(c) (Count One); 18 U.S.C. §§ 1591(a), (b) and 2 (Counts 2 and 3). Prior to trial, Petitioner moved to suppress statements he made while engaged in protected plea negotiations with a prosecutor. Petitioner waived his rights against self-incrimination and counsel during the plea discussions. However, he was not informed of and did not waive his rights under Fed. R. Evid. 410 and Fed. R. Crim. P. 11(f). The district court orally denied the motion the day the jury trial began.

The recorded confession became a two-hour video, played at the end of the government's case in chief. The government relied heavily upon the confession during opening statement and both closing arguments.

The court of appeals found harmless error occurred, because the government's evidence was "extensive and compelling." App. 3a. The appellate court noted that the Petitioner waived his 5th and 6th Amendment rights at the beginning of plea discussions, but failed to mention that he neither knew of, nor waived his rights under Fed. R. Evid. 410 and Fed. R. Crim. P. 11(f). App. 9a.

The court of appeals minimized the devastating effect of the unlawful evidence presented to the jury: "[Petitioner] contends … the videotape was prejudicial because the Government mentioned it at trial and played audio clips from it in closing arguments." App.9a. However, the appellate court neglected to note that the first and last time the government spoke directly to the jury, it emphasized Petitioner's confession. The court of appeals also failed to mention that the government closed its opening statement by telling the jury that they would see a "videotaped confession where the defendant describes doing the very things with which he is charged here today." The court of appeals also ignored the fact that during its first closing argument, the government mentioned Petitioner's protected statements and played audio clips from his confession eighteen times, and that the government mentioned portions of the confession three times during its final argument. Moreover, the last evidence the jury heard before the government rested its case was the improper two-hour videotaped confession.

The appellate court also failed to observe why confessions present the most powerful evidence at trial and can hardly be ignored by a jury. The court of appeals cited *United States v. Ince*, 21 F.3d 576, 583 (4th Cir. 1994) as it discussed harmless error, but ignored its lesson about the powerful effect a confession has on the jury. *Ince* stated:

> [A] trial court would have to go to extraordinary lengths to cure the harm caused by an erroneously admitted confession. Evidence of a confession can have such a devastating and pervasive effect that mitigating steps, no matter how quickly and ably taken, cannot salvage a fair trial for the defendant. As Justice White has explained, [a] confession is like no other evidence. Indeed, "the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him …. The admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have a profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so. *Ince*, 21 F.3d at 582.

The opinion also ignored other circuit courts observations that "Confessions are by nature highly probative and likely to be at the center of the jury's attention." *United States v. Leon-Delfis*, 203 F.3d 103, 112 (1st Cir. 2000). This is true, "especially where the government emphasizes the confession in its closing argument because these are the last words spoken by the trial attorneys." *United States v. Manning*, 23 F.3d 570, 575 (1st Cir. 1994).

The court of appeals stated that the government bears the burden of showing harmless error by demonstrating that the error did not have a substantial and injurious effect or influence in determining the jury's verdict. App. 10a. But the appellate court opinion never mentioned that the government failed to raise harmless

error in its brief. During oral argument, one judge observed that the government never raised harmless error.

The appellate court does not inquire into whether absent the error sufficient evidence existed to convict, but whether "we believe it 'highly probable that the error did not affect the judgment.'" The court added that it must be able to 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. App 10a.

The 4th Circuit has identified three factors in making that determination: (1) the centrality of the issue affected by the error; (2) the steps taken to mitigate the effects of the error; and (3) the closeness of the case. *United States v. Ince*, 21 F.3d 576, 583 (4th Cir. 1994). The appellate court conceded that the first two factors clearly favored Petitioner, but decided that the third factor, "the single most important factor," "sinks his case, " citing *United States v. Ibisevic*, 675 F.3d 342, 353 (4th Cir. 2012). App. 10a.

The appellate court referred to the evidence as "one-sided" and chose not to list evidence produced during cross-examination. One example of this from the opinion was when the court proclaimed that Petitioner shot at one of the prostitution customers, without mentioning that the witness testified, after viewing Petitioner in the courtroom, that Petitioner was not the person with whom the witness had engaged in a shootout. App. 8a. The court of appeals decided that the evidence was

"cumulative" and that admitting the video confession in violation of Petitioner's rights under Rules 410 and 11(f) did not substantially sway the jury. App. 11a.

REASONS FOR GRANTING THE WRIT

I. The Court should grant the writ to ensure that appellate courts do not improperly displace the jury's role to determine guilt by assuming error occurred, then selecting which facts established at trial apply to find the assumed error harmless.

Numerous federal circuit courts of appeals vary the approach to analyzing whether an error is harmless. The Second Circuit utilizes the effect of the error test, using a series of factors requiring the reviewing court to engage in a detailed analysis. *Wray v. Johnson*, 202 F.3d 515, 526 (2d Cir. 1998). In *Wray*, the Second Circuit noted "the principal factors to be considered are the importance of the wrongly admitted (evidence), and the overall strength of the prosecution's case. *Id.* To assess the importance of wrongly admitted evidence, the Second Circuit looks to (1) whether the testimony bore on an issue plainly critical to the jury's decision, (2) whether the wrongly admitted evidence was material to establish a critical fact or whether it was instead corroborated and cumulative, and (3) whether the wrongly admitted evidence was emphasized to the jury. *Id.* If the appellate court here had applied that standard, its analysis would have been different. Instead of focusing narrowly on the other evidence admitted at trial, the court would have first addressed the nature of the error in the context of the trial.

The Third Circuit has rejected an approach that focuses solely on overwhelming evidence. *Gov't of the V.I. v. Martinez*, 620 F.3d 321 (3d Cir. 2010). In *Martinez*, the Third Circuit noted "[T]he relevant question is … not whether in a trial

that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." *Id.* at 337.

The Fourth Circuit considers three factors in determining whether an error is harmless: (1) the centrality of the issue affected by the error; (2) the steps taken to mitigate the effects of the error; and (3) the closeness of the case." *United States v. Ince*, 21 F.3d 576, 583 (4th Cir. 1994). The Fourth Circuit also looks to factual indications that the jury may have viewed the case as close. *United States v. Curbelo*, 343 F.3d 273, 287 (4th Cir. 2003).

The Sixth Circuit has found that the proper analysis focuses on whether the error in question affected the jury that decided the case, not whether there was overwhelming evidence such that an error-free trial would surely result in a guilty verdict. *Wilson v. Mitchell*, 498 F.3d 491, 504 (6th Cir. 2007) (the proper analysis looks to "whether the error had an actual impact on the verdict … and not … whether a hypothetical new trial would likely produce the same result)."

The Seventh Circuit appears to have endorsed a test focused solely on the overwhelming nature of untainted evidence. In *Lanier v. United States*, 220 F.3d 833, 839 (7th Cir. 2000), the court explicitly endorsed the overwhelming untainted evidence test. The panel stated that the test was "is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?" *Id*. citing *Neder v. United States*, 527 U.S. 1, 18 (1999).

The Tenth Circuit has phrased the test differently, sometimes asking "whether the jury would have returned the same verdict absent the error," *United States v. Nash*, 482 F.3d 1209, 1220 (10th Cir. 2007), and other times asking whether "the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the (improper evidence) is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use (of evidence) was harmless error." *United States v. Glass*, 128 F.3d 1398, 1403 (10th Cir. 1997).

This Court has issued various versions of the harmless error test. In *Kotteakos v. United States,* 328 U.S. 750 (1946), the Court stated:

> [I]t is not the appellate court's function to determine guilt or innocence …. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own. *Kotteakos*, 328 U.S. at 763-64.

In *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963), the Court stated, "The question is whether there is a reasonable probability that the (improper evidence) might have contributed to the conviction."

Harrington v. California, 395 U.S. 250 (1969) caused appellate courts to find harmless error when it found properly admitted evidence overwhelming.

In *Schneble v. Florida,* the Court seemed to combine the standards, stating that:

> In some cases, the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the (improper evidence) is so insignificant by comparison, that it is clear beyond a reasonable doubt that the (error) was harmless. *Schneble v. Florida*, 405 U.S. 427, 430 (1972).

Schneble contains what has become one of the most troublesome formulations of the test, stating: "we conclude that the 'minds of an average jury' would not have found the State's case significantly less persuasive had the (improper evidence) been excluded." *Schneble*, 405 U.S. at 432.

The approach taken in this case by the court of appeals effectively substituted its own judgment in place of the jury's, who no doubt, were greatly influenced by the improper evidence at the center of the dispute between Petitioner and the government.

The Sixth Amendment guarantees criminal defendants the right to trial by jury. U.S. Const. amend. VI. "The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered." *Duncan v. State of La.*, 391 U.S. 145, 155 (1968). When harmless error analysis is not conducted carefully according to this Court's precedents, it wrests from the hands of the jury the power the Constitution has assigned to juries alone: the power to determine guilt or innocence.

To protect one's right to trial by jury, the Court should grant this petition and enunciate a rights-based approach to harmless error. The task for appellate courts should not be to replace the jury's judgment but should begin with the question of whether a conviction was obtained in violation of one's rights under the Constitution, the Federal Rules of Evidence and the Federal Rules of Criminal Procedure.

The Court should grant this petition to provide guidance to appellate courts by creating a uniform standard for determining whether harmless error occurred when a defendant's rights have been violated by erroneous district court decisions.

II. The Court should grant the writ to reconsider *United States v. Mezzanatto*, 513 U.S. 196 (1995) and limit its holding to prohibit the government from using a defendant's statements made during plea negotiations, in violation of Fed. R. Evid 410 and Fed. R. Crim. P. 11(f), during trial in its case-in-chief.

In its *sua sponte* application of the harmless error doctrine, the Fourth Circuit's opinion failed to recognize that the government extensively and repeatedly used Jenkins' highly inflammatory confession throughout the entirety of the jury trial, maximizing the psychological effect of primacy and recency. The government made maximum use of the district court's ruling, denying Jenkins the protections of Fed. R. Evid. 410 and Fed. R. Crim. P. 11(f). The district court's error allowed the government to taint the proceedings from start to finish, and to play a two-hour videotaped, inadmissible confession just before the jury began deliberations.

Petitioner had argued in his opening brief that any error was not harmless, citing authority and facts, and, as one panel judge observed near the end of oral argument, the government never raised harmless error in its brief or during oral argument.

By declaring the trial presentation as "one-sided", the court of appeals' opinion may be the first from the Fourth Circuit to change the standard for harmless error, changing the appellate court's role to analyzing how much, and what type of, evidence a defendant must present to avoid a *sua sponte* harmless error affirmance.

Plea negotiations are a critical point in federal criminal practice because federal criminal court "is for the most part a system of plea, not a system of trials…plea bargaining…is not some adjunct to the criminal justice system; it is the criminal justice system." *Laffler v. Cooper*, 566 U.S. 156, 162 (2012) (citing Scott & Stuntz, Plea Bargaining as Contract, 101 Yale L. J. 1909, 1912 (1992)).

The Fourth Circuit's opinion is unpublished. However, competent criminal law practitioners no doubt read that court's daily opinions. The Fourth Circuit does not "disfavor" unpublished decisions issued after January 1, 2007. *See* Fourth Circuit Local Rule of App. P. 32.1. Citations to unpublished opinions occur from time to time within Fourth Circuit opinions. District courts commonly cite unpublished circuit opinions in their orders. The Fourth Circuit opinion in this case will significantly affect federal criminal practice within the Circuit, and especially within the Eastern District of North Carolina.

The panel's opinion may embolden some prosecutors, knowing that if a district court admits confessions contrary to Fed. R. Evid. 410 and Fed. R. Crim. P. 11(f), the first and last things heard by the jury can be the most powerful proof known in criminal law. If the prosecution piles on the evidence, this opinion may result in routine application of the harmless error doctrine to affirm an erroneous result, whenever bad facts make correcting significant trial errors unpalatable. Moreover, Government appellate attorneys now realize that the appellate courts will find harmless error, even when the government fails to meet its burden to show harmless error occurred.

Criminal defense practice will also be adversely affected by this result. Defense lawyers now must advise the client that they not only must either waive Fed. R. Evid. 410 protections to enter plea negotiations, but if they fail to waive such protections, the court of appeals may find harmless error after the damage wrought by erroneous admission of the most powerful proof known under criminal law. Moreover, counsel must advise defendants that the appellate court may find harmless error, even when the government neglects or fails to show that the error was harmless. Defendants who waive their 5th and 6th Amendment protections to attempt to negotiate a deal directly with the prosecutor are now on notice that their statements will surely be used against them at trial if the plea deal falls through. Savvy prosecutors now know that it is to their advantage, when meeting with an unrepresented suspect, to never advise the defendant, nor seek a Rule 410 waiver, so long as they have informed the suspect of her Fifth and Sixth Amendment rights. Prosecutors can now be secure in the knowledge that the appellate court will find harmless error, even when the government does not raise the issue, unless the defense puts on extensive evidence.

Some prosecutors will be encouraged to "game" the negotiation process and the federal criminal justice system will suffer the results. The only recourse to protect defendants who have not yet confessed or cooperated before defense counsel learns about the case, will harm the fair administration of criminal justice. That is, after meeting with competent counsel familiar with the Fourth Circuit's opinion, a

defendant's best option will be to remain silent, seek no plea agreement, and force the government to prove the case at trial.

The Court should grant this petition and limit *Mezzanatto* to protect the plea-bargaining system so essential to the administration of justice throughout the United States.

CONCLUSION

The Court should grant this petition for writ of certiorari.

Respectfully submitted,

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