No. 20-1709

In the Supreme Court of the United States

DAVID MING PON,
PETITIONER,

v.

UNITED STATES,
RESPONDENT

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

BRIEF OF LEGAL SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an appellate court reviewing a cold criminal trial record may determine that an error at trial was harmless by applying an "overwhelming evidence of guilt" test that considers the potential effect of the error only on the government's case and not on the case as a whole.

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions, Statutes, and Rules

Other Authorities

INTRODUCTION AND INTERESTS OF *AMICI CURIAE*[*]

A divided panel of the Eleventh Circuit affirmed Dr. David Pon's conviction by interpreting this Court's precedents to "dictate" a "duty" for courts to "rely on overwhelming evidence of guilt to find an error harmless." *United States* v. *Pon*, 963 F.3d 1207, 1238–39 & n.10 (11th Cir. 2020) (citations omitted). This Court's precedents dictate no such thing. To the contrary, this Court has warned that courts "should *not* find [an] error harmless" if, as here, a defendant contested an element of conviction and "raised evidence sufficient to support a contrary finding." *Neder* v. *United States*, 527 U.S. 1, 17, 19 (1999) (emphasis added). Over a dissent that was rooted in this Court's precedent, a majority of the Eleventh Circuit placed that court on the wrong side of a deep circuit split of extraordinary practical and constitutional importance.

Amici are legal scholars with decades of experience studying criminal law, federal courts, the harmless error doctrine, and the impact of that doctrine on the criminal justice system and the judiciary. See Appendix (listing the scholars joining this brief). They recognize, as Judge Martin explained in dissent, that "[i]t is important to remember that harmless error review is no substitute for a jury trial." *Pon*, 963 F.3d at 1245)

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[*] Consistent with Rule 37.2, counsel for amici provided ten days' notice of its intention to file this brief. All parties provided written consent. No counsel for any party authored this brief in whole or in part, and no person or entity has made a monetary contribution intended to fund the preparation or submission of this brief. See R. 37.6.

(Martin, J., concurring in part and dissenting in part) (quoting *Neder*, 527 U.S. at 19).

Amici respectfully submit this brief to alert the Court to the Eleventh Circuit's problematic application of the harmless error doctrine and to urge this Court to grant review to resolve the split on this important and recurring question. This Court should clarify that a reviewing court must analyze the arguments and evidence offered by both the prosecution *and* the defense to determine the error's effect on the verdict. Otherwise, harmless error review enables the reviewing court to assume a role not permitted by our Constitution, "'becom[ing] in effect a second jury to determine whether the defendant is guilty.'" *Neder*, 527 U.S. at 19 (citation omitted).

STATEMENT

Dr. Pon is an eye doctor who was convicted of defrauding Medicare by diagnosing his patients with an eye disorder called wet macular degeneration (WMD) and then billing the government for specialized treatments. The government alleged that Dr. Pon's diagnoses were false and his treatments unnecessary. It relied on testimony from doctors that the 11 patients in the indictment did not have "WMD when Pon diagnosed them with it" and that the patient's eyes did not have the "scar" that "laser photocoagulation always leaves." *Pon*, 963 F.3d at 1217. But Dr. Pon spent more than three days on the stand testifying that he "absolutely [did] not" intend to defraud Medicare and that, in reality, he "treated thousands of patients," virtually all of whom told him their vision improved. More than a dozen witnesses testified that he had successfully treated them or a spouse with his specialized

methods—including patients whom the government admitted had WMD.

After Dr. Pon originally rested his defense, the government presented what even the district court described as "very damming" rebuttal evidence. One of the patients had testified that Dr. Pon had restored vision in the patient's right eye. On cross examination, however, the patient testified that Dr. Pon had not performed a particular kind of test on his *left* eye. So, in rebuttal, the government introduced evidence from an investigator showing that Dr. Pon billed Medicare for various kinds of tests and treatments on the patient's left eye more than fifty times over eleven years, charging Medicare up to $19,350. This had nothing to do with WMD; the tests and treatments on the left eye were for different disorders. The clear inference was that Dr. Pon fraudulently billed Medicare not only for WMD but for other procedures as well.

The trial court's error arose from its handling of the surrebuttal. Dr. Pon's counsel offered a surrebuttal to explain the medical reasoning for each of the supposed unnecessary billings for the left eye. But the court limited his surrebuttal to explaining just three entries. Then, to make matters worse, the government implied during cross-examination that Dr. Pon had nothing to say about the other billings, knowing that he had an explanation but was unable to provide it. The jury then went to deliberate without hearing Dr. Pon's explanation for the supposedly unnecessary treatments.

Without the full context, the jury convicted Dr. Pon of healthcare fraud. On appeal, the Eleventh Circuit majority assumed that Dr. Pon's right to present a complete defense was violated when he was denied the opportunity to provide a full surrebuttal to the

uncharged accusations. Even so, a split panel affirmed Dr. Pon's conviction, with the majority concluding that "even if the district court erred in partially limiting Pon's surrebuttal evidence, and that error violated the Sixth Amendment, it was harmless beyond a reasonable doubt." *Pon*, 963 F.3d at 1228 (citations omitted).

REASONS TO GRANT THE PETITION

One does not have to look hard to find "commonly occurring situations" with "different answers with respect to the availability or application of a harmless error analysis." *United States* v. *Omer*, 429 F.3d 835, 843 (9th Cir. 2005) (Graber, J., dissenting). When it comes to analyzing the propriety of convictions in federal court, the "assessment of harmlessness is probably the single most recurring issue presented." *Peck* v. *United States*, 102 F.3d 1319, 1327 (2d Cir. 1996) (Newman, C.J., concurring). Likewise, our state courts recognize that "the applicability of harmless error doctrine is a recurring issue in appellate adjudication." *People* v. *Blackburn*, 354 P.3d 268, 286 (2015) (Liu, J., concurring).

Given how frequently this issue arises, it is simply untenable to have such a profound conflict of authority remain unresolved. Indeed, the harmless error doctrine is the "most far reaching" doctrine in American procedural jurisprudence. Wayne R. LaFave, *et al.*, 7 *Crim. Proc.* § 27.6(a) (4th ed. 2020). This Court should grant review to clarify that it is improper to use the harmless error doctrine without looking at the effect of the trial court's error on the jury's verdict, which requires an evaluation of the defense. The Eleventh Circuit focused on the amount of evidence supporting the government's case without evaluating the defendant's case. The court found the error "harmless" even

though it deprived Dr. Pon of the opportunity to rebut "very damning" evidence. *Amici* believe it is of paramount importance that this Court step in to resolve the split of authority and reject the view of the minority of circuits that evaluate harmless error without considering the error's effect on the jury's verdict and particularly its effect on the defense's case.

I. There is a deep split of authority on the application of harmless error doctrine.

Harmless error review has evolved from a method of preventing reversal for hyper-technicalities into the most impactful rule in criminal appeals. This Court's opinions over time have expanded the rule's scope, producing complexity and inviting arbitrary results that undermine constitutional values. As a result, federal and state courts remain divided in how to decide whether an error is harmful or harmless.

Before the Twentieth Century, errors at trial were "presumptively prejudicial." Roger A. Fairfax, Jr., *A Fair Trial, Not a Perfect One: The Early Twentieth-Century Campaign for the Harmless Error Rule*, 93 MARQ. L. REV. 433, 435 (2009). Over time, however, both Congress and the states enacted legislation to limit reversals of convictions for perceived hyper-technicalities. *Id.* at 444 (citing *U.S.* v. *Lane*, 474 U.S. 438, 471–72 (1986) (Breyer, J., concurring)). Decades after these laws passed, this Court approved of those changes by applying a harmless error analysis for constitutional and nonconstitutional errors alike, bringing errors within the doctrine's ambit on an ad hoc basis. John M. Greabe, *The Riddle of Harmless Error Revisited*, 54 HOU. L. REV. 59, 74–75 (2016). In *Chapman* v. *California*, for example, while this Court acknowledged that some constitutional errors may be

harmless, it was careful to circumscribe that analysis by preserving a rule of automatic prejudice for some violations and criticizing an overemphasis on "overwhelming evidence" for violations subject to harmless error. 386 U.S. 18, 23 (1967). Over time, however, the Court subjected additional errors to harmless error analysis without repeating its warnings against focusing on "overwhelming evidence." See*, e.g.*, *United States* v. *Hasting*, 461 U.S. 499, 510–12 (1983) (harmless error given the "overwhelming evidence of guilt"); *Milton* v. *Wainwright*, 407 U.S. 371, 377–78 (1972) (same); *Brown* v. *United States*, 407 U.S. 371, 372, 378 (1972) (same).

Over time, some courts started to focus on the amount of evidence underpinning a conviction rather than the effect of the error. These courts did so without distinguishing between constitutional and nonconstitutional errors, creating a functionally similar analysis for both types of errors. See Lisa Kern Griffin, *Criminal Adjudication, Error Correction, and Hindsight Blind Spots*, 73 WASH. & LEE L. REV. 165, 198 (2015).

Additionally, courts arguably "shifted the evidentiary burden of proving error not harmless to criminal defendants." Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 WISC. L. REV. 35, 38, 58–60 (2005) ("[W]ithout changing the standard on its face, the Court has shifted the evidentiary burden by asking whether error can be excused by other evidence of guilt. * * * Rather than the government having the burden to show harmless error beyond a reasonable doubt, it can instead avoid the question of error entirely.").

Yet this Court's position on whether the amount of evidence underpinning a conviction could overcome the effect of an error has been less than clear. Different opinions of the Court seem to answer the question in different ways. See Jeffrey O. Cooper, *Searching for Harmlessness: Method and Madness in the Supreme Court's Harmless Constitutional Error Doctrine*, 50 U. KAN. L. REV. 309, 323–24 (2002) (contrasting the Court's focus on an error's effect on the jury in its unanimous opinion in *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993), with its embrace of overwhelming-evidence review in its five-justice majority opinion in *Neder*).

As a result, lower courts have become split in their approaches, producing arbitrary results and undermining the purpose of the harmless error rule. Eight circuits adhere to the central principle that this Court established in *Chapman* by assessing the cases presented by *both* the prosecution and the defense—as is necessary to determine the error's effect on the jury's verdict. See*, e.g.*, *Reiner* v. *Woods*, 955 F.3d 549, 557 (6th Cir. 2020).[1] These circuits are joined in their approach by multiple states. See*, e.g.*, *Ventura* v. *State*, 29 So.3d 1086, 1088–89 (Fla. 2010).[2] Meanwhile, four

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[1] See also*, e.g.*, *U.S.* v. *Cudlitz*, 72 F.3d 992, 999 (1st Cir. 1996); *Wray* v. *Johnson*, 202 F.3d 515, 526 (2d Cir. 2000); *Virgin Islands* v. *Martinez*, 620 F.3d 321, 338 (3d Cir. 2010); *U.S.* v. *Mitchell*, 1 F.3d 235, 245 (4th Cir. 1993); *U.S.* v. *Lopez*, 500 F.3d 840 (9th Cir. 2007); *U.S.* v. *Holly*, 488 F.3d 1298 (10th Cir. 2007); *U.S.* v. *Cunningham*, 145 F.3d 1385 (D.C. Cir. 1998).

[2] See also*, e.g.*, *State* v. *Alvarez-Lopez*, 98 P.3d 699, 709–10 (N.M. 2004); *Commonwealth* v. *Adams*, 753

circuits hold that an error is harmless when "overwhelming evidence" from the prosecution supports a conviction, regardless of the error's impact on the defendant's case. See*, e.g.*, *United States* v. *Davis*, 453 Fed. Appx. 452, 458 (5th Cir. 2011).[3] Likewise, some states focus on the strength of the prosecution's case to hold an error harmless. See*, e.g.*, *Haynes* v. *State*, 934 So.2d 983, 991–92 (Miss. 2006).[4]

These differences in approach carry significant consequences. Courts have applied the harmless error doctrine to evidence obtained in violation of the Fourth Amendment, ineffective assistance of counsel claims, involuntary confessions, and *Miranda* violations. Garrett, 2005 WISC. L. REV. at 39, 90–91. They have done so in affirming or reversing convictions for minor felonies and for capital crimes alike. More so than for any other rule of criminal procedure, how and when the harmless error rule applies will often determine whether a criminal defendant loses her liberty or her life. Charles S. Chapel, *The Irony of Harmless Error*, 51 OKLA. L. REV. 501, 504 n.26 (1998).

In each of these areas of law, an overwhelming-evidence standard undermines the right to a jury trial by enabling appellate courts to engage in a quantitative

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N.E.2d 105, 111 (Mass. 2001); *People* v. *Hardy*, 824 N.E.2d 953, 957–958 (N.Y. 2005).

[3] See also*, e.g., U.S.* v. *Vasquez*, 635 F.3d 889 (7th Cir. 2011); *U.S.* v. *Holmes*, 620 F.3d 836, 844–45 (8th Cir. 2001); *U.S.* v. *Willner*, 795 F.3d 1297, 1322 (11th Cir. 2015).

[4] See also*, e.g.*, *State* v. *Morris*, 24 N.E.3d 1153, 1161 (Ohio 2014); *State* v. *Watt*, 160 P.3d 640, 644–45 (Wash. 2007) (en banc).

assessment of the prosecution's evidence without considering how jurors process that evidence in light of the defendant's evidence. Roger A. Fairfax, Jr., *Harmless Constitutional Error and the Institutional Significance of the Jury*, 76 FORDHAM L. REV. 2027, 2056 (2008); see also *infra* Section III. The data reveals significant discrepancies in outcomes on appeal based on a given court's approach. For example, in habeas proceedings, courts focusing on the error's effect on the verdict affirmed 47% of the time versus 93% of the time when focusing on the strength of the evidence of guilt. Jason M. Solomon, *Causing Constitutional Harm: How Tort Law Can Help Determine Harmless Error in Criminal Trials*, 99 NW. U. L. REV. 1053, 1071 (2005). While the fact-specific nature of harmless error review justifies some deviations in outcomes, a systematic difference of this magnitude undermines fairness in, and respect for, criminal procedure: an appeal may be up to two times more likely to succeed depending on *where* that appeal is filed.

In sum, the lack of a principled harmless error analysis has bedeviled courts and undermined the doctrine's principles. Only a decision clarifying the mechanics of harmless error analysis can resolve these discrepancies, ensure respect for the criminal justice system and the constitutional values it advances, and return courts' attention to the doctrine's central purpose: evaluating an error's impact on the jury. *Chapman*, 386 U.S. at 23–24 (discussing the importance of considering how evidence influences the verdict) (citing *Fahy* v. *Connecticut*, 375 U.S. 85 (1963)).

II. The harmless error analysis should focus on an error's effect on a jury's verdict, considering the arguments of both the prosecution and the defense.

The harmless error doctrine has provided scholars with an evergreen "riddle,"[5] and *amici* agree on three unifying principles to resolve it. They agree that a proper harmless error analysis must center on the *effect of an error on the verdict*—that is, on the effect an error would have on a jury confronted with both the prosecution's case and the defendant's case. They agree that the rule's history and underlying logic call for such a standard. And they agree that an "overwhelming evidence" standard—the formulation applied by the Eleventh Circuit—subverts the objectives of the harmless error doctrine entirely.

First, under a proper formulation of the rule, a court reviewing for harmless error must focus its analysis on the effect of the error on the verdict; it may not substitute its own view of the defendant's guilt or innocence based on the judges' opinions about the strength of the prosecution's case alone. That is because "the Constitution does not trust judges to make determinations of guilt." 527 U.S. at 32 (Scalia, J., concurring in part and dissenting in part). It instead reserves that role for a jury of one's peers. U.S. Const. amend. VI. As Judge Martin aptly explained in her dissent below, just as "a federal judge may direct a judgment of acquittal but never a judgment of guilt," the "right to a jury trial forbids us from * * * invoking 'overwhelming evidence' to hold an error harmless."

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[5] See generally Roger J. Traynor, *The Riddle of Harmless Error* (1970).

Pon, 963 F.3d at 1246 (Martin, J., concurring in part and dissenting in part) (citing *Rose* v. *Clark*, 478 U.S. 570, 578 (1986), and Fed. R. Crim. P. 29).

Focusing on the effect of the error comports with this Court's precedents because, among other things, "there are some * * * rights so basic to a fair trial that their infraction can never be treated as harmless error." *Chapman*, 386 U.S. at 23. After all, this Court has long held that certain errors inherently undermine the verdict's validity and therefore require automatic reversal—even in the face of "overwhelming evidence" of guilt. In *Chapman*, for example, this Court recognized that violating the right to counsel can never be harmless error. 386 U.S. at 23, n. 8. In *Waller* v. *Georgia*, this Court held the same to be true for the guarantee of a public trial. 467 U.S. 39, 49 (1984). And in *Vasquez* v. *Hillery*, 474 U.S. 254 (1986), this Court found no immunity from automatic reversal for "the unlawful exclusion of members of the defendant's race from the grand jury that indicted him, despite overwhelming evidence of his guilt." See *Arizona* v. *Fulminante*, 499 U.S. 279, 294 (1991) (citing *Vasquez*, 474 U.S. at 263–64). If even the most airtight prosecution can be invalidated by error, then error (not guilt) must lie at the heart of the analysis.

Second, the approach for which *amici* advocate finds substantial support in the law. Since its adoption, this Court has "clearly viewed [the harmless error doctrine] as essential to the safeguard of federal constitutional rights." *Brecht* v. *Abrahamson*, 507 U.S. 619, 645 (1993) (White, J., dissenting). That much is clear from the rule's statutory correlates. Indeed, the federal harmless error statute enjoins appellate courts from reversing for errors that "do not affect substantial rights." 28 U.S.C. § 2111. So does its companion in

the Federal Rules. See Fed. R. Crim. P. 52(a). And so too do their state-law equivalents. See Daniel Epps, *Harmless Errors and Substantial Rights*, 131 HARV. L. REV. 2117, 2128 (2018). By necessity, then, any analysis under a codified harmless error standard turns on the nature and effects of the error on a protected right—not solely on the strength of the prosecution's case. Cf. Daniel J. Meltzer, *Harmless Error and Constitutional Remedies*, 61 U. CHI. L. REV. 1, 20–21 (1994).

A majority of courts endorse this approach. For example, the Ninth Circuit provides context-specific factors to guide its analysis of harmlessness and center the error's effect on the jury's verdict. *E.g.*, *Lopez*, 500 F.3d at 845–46 (considering extent of witness's testimony about post-*Miranda* silence, extent to which inference of guilt from silence was emphasized to jury, length of jury deliberations, and extent of other evidence indicating guilt). Similarly, the Second Circuit's harmlessness factors focus on how an error impacts the verdict, even if the other evidence against the defendant "standing alone, would have been sufficient to support the conviction." *Wray*, 202 F.3d at 526. Thus, for an erroneous evidence ruling, the Second Circuit considers, among other factors, whether that evidence "bore on an issue that is plainly critical to the jury's decision." *Id.*

Likewise, state courts have endorsed this approach. *E.g.*, *Ventura*, 29 So.3d at 1091 (remanding where "the appellate court appear[ed] to have 'substitute[d] itself for the trier-of-fact by simply weighing the evidence' instead of focusing on the 'effect of the error on the trier-of-fact'"); *Hardy*, 824 N.E.2d at 957–58 (quotations omitted) (finding "overwhelming evidence" insufficient to establish harmlessness where

"there is a reasonable possibility that * * * the [error] may have contributed to the conviction"). This context-driven harmlessness analysis avoids shifting the burden of proof to the defendant because, as the D.C. Circuit has explained, "[w]here there is uncertainty as to [an error's] effect on the verdict, the error cannot be deemed harmless." *Cunningham*, 145 F.3d at 1394.

Third, and finally, focusing on "overwhelming evidence" of guilt presented by the prosecution—without evaluating an error's effect on the defense—contravenes the purpose of the harmless error doctrine. Where harmless error review draws with a fine-tipped pen, the overwhelming-evidence standard uses a wide brush. It obviates the need to review a trial record with care. It shifts the burden of persuasion from the government to the defendant. And by casting aside the proper object of harmless error review—the effect of the error on the verdict of a jury considering both the prosecution's case and the defendant's case—the overwhelming-evidence formulation undermines the rule's very *raison d'etre*. It does so in several ways.

Most importantly, it usurps the role of the jury. A court reviewing for overwhelming evidence will focus its inquiry on the strength of the government's case—before, or even without, evaluating the alleged error and its effect on the defense. But an appellate court does not sit as "a second jury to determine whether the defendant is guilty." *Neder*, 527 U.S. at 19 (cleaned up); see also *Fahy*, 375 U.S. at 86 ("We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of."). Under "*Chapman*'s reasonable-doubt standard," it is not "enough that the jury considered evidence from which it could have come to the verdict without reliance on

the" alleged error. *Yates* v. *Evatt*, 500 U.S. 391, 404 (1991). Rather, courts must identify error and evaluate its effect on a jury—determining whether, in light of the evidence on both sides, the jury could *not* have reached a different verdict even absent the error.

Further, the overwhelming-evidence standard distorts the proper burden of proof. This Court has always held that the obligation to prove harmlessness beyond a reasonable doubt lies with the government. See*, e.g.*, *United States* v. *Vonn*, 535 U.S. 55, 62 (2002) (requiring the government to "carry the burden of showing that any error was harmless"); *Chapman*, 386 U.S. at 24 ("Certainly error * * * casts on someone other than the person prejudiced by it a burden to show that it was harmless."). But an overwhelming-evidence test implicitly requires the defense to prove harm*ful*ness. For example, the test as applied by the Eleventh Circuit looks only at the effect of the error on the prosecution's case with no regard for the effect of the defendant's evidence—requiring the defense to carry a burden of proof by proving the error on the verdict. To be sure, a court cannot "escape altogether taking account of the outcome" below. See *Kotteakos* v. *United States*, 328 U.S. 750, 764 (1946). To do so "would be almost to work in a vacuum." *Ibid.* But a court may avoid working in a vacuum without closing its eyes to half the case.

The proper harmless error analysis requires the reviewer to consider the effect of the error *on the verdict*—not on the prosecution's case—and one cannot consider the effect of the error on the verdict without considering its effect on evidence from both the state and the defense. The inquiry is "whether the guilty verdict actually rendered in this trial was surely unattributable to the error" when considering the evidence

from both the defense and the prosecution. *Sullivan*, 508 U.S. at 279. That is not the focus of the "overwhelming evidence" test as applied generally or as applied by the Eleventh Circuit.

In sum, *amici* believe that a well-formulated and historically sound rule can "save the good in harmless error practices while avoiding the bad." See *Chapman*, 386 U.S. at 23. A harmless error rule that centers on the effect of an error on both the prosecution and the defense comports with this Court's precedent and with the doctrine's underlying sources and purposes; one that turns merely on "overwhelming evidence" does not. If "the problem with harmless error arises when we as appellate judges conflate the harmlessness inquiry with our own assessment of a defendant's guilt," then the only solution is a rule that does not enable it. See Harry T. Edwards, *To Err is Human, but not Always Harmless: When Should Legal Error be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1170 (1995). This Court should grant review to make this principle clear.

III. The Eleventh Circuit's approach invites arbitrary, harmful results.

Requiring courts to consider the effect of the error on the verdict when considering the arguments of both the prosecution and the defense also avoids a host of policy problems that arise from the Eleventh Circuit's "overwhelming evidence" approach. An overwhelming-evidence standard centers on the prosecution's case and, therefore, focuses a court's attention on guilt. But guilt is not the proper object of the harmless error analysis. As Judge Martin told the majority in this case: "We owe it to defendants who come before us to ask ourselves always whether a rational jury could acquit, and never whether we ourselves think the

defendant guilty." *Pon*, 963 F.3d at 1246 (Martin, J., concurring in part and dissenting in part). Appellate courts are not finders of fact. "The question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials." *Bollenbach* v. *United States*, 326 U.S. 607, 614 (1946). Courts that take the same misguided approach of the Eleventh Circuit in this case focus on the evidence of guilt without considering evidence of innocence. And proceeding with such a one-sided approach necessarily invites arbitrariness and undermines the policies animating the harmless error review.

First, focusing solely on the overwhelming evidence presented by the prosecution undermines a key purpose of the harmless error rule: to promote judicial economy by elevating substantive justice over formal technicalities. See *Hasting*, 461 U.S. at 508–09 ("The goal * * * is 'to conserve judicial resources by enabling appellate courts to cleanse the judicial process of prejudicial error without becoming mired in harmless error.'"); James Edward Wicht III, *There Is No Such Thing as a Harmless Constitutional Error*, 12 BYU J. PUB. L. 73, 99 (1997). Indeed, the overwhelming-evidence standard undermines judicial economy by inviting prosecutors to overwhelm courts and juries with mountains of evidence regardless of its reliability and probity. Instead of reviewing evidence for its value in the pursuit of justice, the overwhelming-evidence standard treats evidence as an end in and of itself. This threatens a mechanical approach to the evaluation of harm that undermines judicial economy, substantial justice for defendants at trial and on appeal, and the legal rights of suspects. For example, the opinion below implied that harm is determined by the

amount of evidence presented by the government. But the indiscriminate proliferation of evidence can undermine the quest for justice, making truth the proverbial needle in the haystack. And if the defense is not fully evaluated, the truth may not even be in the haystack. A more nuanced inquiry into an error's effect on the verdict would promote both efficiency and justice.

Second, focusing solely on evidence presented by the prosecution leads to arbitrary and unjust results on appeal. This is because it fails to recognize that the most persuasive evidence often is not the most voluminous. For example, a jury may well view the results of a DNA test as conclusive evidence of a sex crime. Thus, there should be no doubt that admission of an erroneous DNA test is harmful. See*, e.g.*, William C. Thompson, *The Myth of Infallibility*, *in* GENETIC EXPLANATIONS: SENSE AND NONSENSE 230–31 (Sheldon Krimsky & Jeremy Gruber eds., Harv. Univ. Press 2013) (describing cases where DNA mix-ups caused wrongful convictions). But such an error could not be corrected under a mechanical, quantity-based application of the overwhelming evidence rule, especially if presented in a lengthy trial. Similarly, if harmless error does not require an evaluation of the defense, the erroneous exclusion of an exculpatory DNA test could not be corrected.

The same holds true for testimonial evidence. For example, in *State* v. *Watt*, an en banc panel of the Washington Supreme Court found the admission of a co-defendant's statement in violation of the confrontation clause harmless under an "overwhelming untainted evidence" standard that "looks only at the untainted evidence to determine * * * guilt." 160 P.3d 640, 644–45 (Wash. 2007) (en banc). While acknowledging that a retrial would focus on the defendant's

knowledge of and participation in the manufacture of methamphetamine, the court focused its harmlessness analysis on evidence that the manufacturing operation existed, rather than considering how the admission of testimony from the defendant's husband and co-defendant may have affected the jury's determination of the defendant's knowledge, intent, and participation in the crime. *Id.* at 645–47.

On the other hand, a relatively minor error—say, admission of hearsay by a witness who describes a tangentially relevant conversation at length—could justify reversal. Reversal for such an error would be particularly likely where a prosecutor relied on evidence that was succinct and forceful, such as sound DNA evidence. Ironically, reversal for such an error would be less likely if the prosecution's case turned on voluminous circumstantial evidence.

Third, and finally, focusing solely on the overwhelming evidence presented by the prosecution promotes unaccountable trial errors and invites prosecutors to take advantage of them, undermining respect for the rights of defendants. The more a prosecutor piles on weak, cumulative, or extraneous evidence, the more confident he or she can be in taking advantage of errors at the defendant's expense, if the defense case undermining this evidence is not considered as part of harmless error review. Such tactics mislead juries and undermine the rights of defendants. Gregory Mitchell, *Against "Overwhelming" Appellate Activism: Constraining Harmless Error Review*, 82 CAL. L. REV. 1335, 1355 (1994) ("This right to invoke public sympathy and opinion is guaranteed by the Sixth Amendment."). Without the deterrent force of reversal, prosecutors have no incentive to avoid compounding trial errors, particularly when they can point to other

evidence in the record to support a guilty verdict. Edwards, 70 N.Y.U. L. REV. at 1170 ("When we hold errors harmless, the rights of individuals * * * go unenforced * * * [and] the deterrent force of a reversal remains unfelt by those who caused the error."); see also Vilija Bilaisis, Comment, *Harmless Error: Abettor of Courtroom Misconduct*, 74 J. CRIM. L. & CRIMINOLOGY 457, 470 (1983) ("The affirmance of convictions obtained in violation of * * * rules [regulating the conduct of prosecutors and judges] discourages adherence to the rules.").

Appellate reversal for governmental errors and abuse serves the critical function of ensuring respect for the rule of law and constitutional values by deterring such conduct. Mitchell, 82 CAL. L. REV. at 1366. Without that mechanism, courts send a "message to law enforcement officers [] that unconstitutional ends justify the means to obtain evidence of guilt." Garrett, 2005 WISC. L. REV. at 61–62. An "overwhelming evidence" standard allows a prosecutor to take advantage of key evidence that was illegally obtained, as long as that evidence is succinct and volumes of other evidence are submitted. If courts will not consider the defendant's case in evaluating harm, law enforcement officers can expect that a skillful prosecutor will be able to obtain and preserve a conviction even if they violate a suspect's rights to complete a successful investigation. Deferential appellate review under this standard implicitly condones official misconduct by focusing on untainted evidence and ignoring an error's impact on jurors, undermining the constitutional values of criminal procedure. Edwards, 70 N.Y.U. L. REV. at 1195.

By reducing accountability for misconduct and suggesting that it can lead to convictions that withstand appeal, the overwhelming evidence rule reduces

respect for the rights of suspects. An inquiry focused on the effect of an error on the verdict, taking into account the entire case, would increase accountability by preventing law enforcement from relying on prosecutors to cover their material errors with voluminous evidence of lesser importance.

CONCLUSION

For all these reasons, and for those stated by the petitioner and the forceful dissent below, this Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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APPENDIX

APPENDIX

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