No. 26-377

IN THE
Supreme Court of the United States

FRANK PARASMO,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

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

BRIEF OF *AMICI CURIAE* NATIONAL LEGAL AID & DEFENDER ASSOCIATION, DUE PROCESS INSTITUTE, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND CATO INSTITUTE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Where a jury convicts a defendant after being erroneously instructed on an element of the offense that the defendant plausibly contested, do this Court's precedents and the Sixth Amendment permit an appellate court to find the error harmless based on the court's assessment of the strength of the government's evidence?

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INTEREST OF AMICI CURIAE[1]

The National Legal Aid & Defender Association (NLADA), founded in 1911, is America's oldest and largest nonprofit association devoted to excellence in the delivery of legal services to those who cannot afford counsel. For over 100 years, NLADA has worked to ensure indigent persons receive the same access to quality legal services as those who are able to retain private counsel, and since 1958, has specifically included indigent criminal defendants in that goal. NLADA's membership includes providers of public defense and civil legal aid services across the country, as well as the clients of those programs. NLADA promulgates and maintains nationally recognized standards governing the performance of criminal defense counsel, the administration of assigned counsel systems, and the negotiation and award of contracts for indigent defense services, and directly and indirectly supports and engages in appellate defender operations and capital case representation. NLADA's standards are cited with approval by courts and legislatures across the country and form part of the foundational architecture for measuring the adequacy of public defense delivery systems.

Due Process Institute is a nonprofit, bipartisan public interest organization that seeks to ensure fairness in the criminal justice system. Due Process

[1] Under Sup. Ct. R. 37.6, counsel for amici curiae states that no counsel for a party authored this brief in whole or in part, and that no person other than amici or their counsel made a monetary contribution to the preparation or submission of this brief. Counsel further states that amici gave each party timely notice under Sup. Ct. R. 37.2 of their intention to file this brief.

Institute considers the frequent use of the harmless error doctrine to sustain convictions even in the face of serious constitutional violations--as in this case--a matter of significant concern.

Founded in 1958, the National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. It has a nationwide membership of many thousands of direct members, up to 40,000 with affiliate members. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL files amicus briefs in this Court in cases presenting issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system. The proper application of the harmless error doctrine is such an issue.

The Cato Institute is a nonpartisan public-policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice, founded in 1999, focuses on the scope of substantive criminal liability, the proper role of law enforcement in communities and society, the protection of constitutional safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement.

SUMMARY OF ARGUMENT

1. The Sixth Amendment guarantees the right to trial by jury for serious crimes. The jury trial right bars federal judges from making independent determinations of a defendant's guilt. At the same time, Congress and the Court long ago determined that inconsequential errors found on appeal should not necessitate the expenditure of resources that a retrial entails or the societal cost of freeing a person determined by a jury to have committed a crime. The Court has accommodated both the absolute Sixth Amendment jury trial right and the interest in avoiding unnecessary reversals by insisting that harmless error review focus on the effect of the error on the verdict rendered, rather than on the verdict a hypothetical jury would have rendered in an error-free trial.

2. In *Neder v. United States*, 527 U.S. 1 (1999), the Court applied these principles to the erroneous omission of an element from jury instructions. Because the element--the materiality of $5 million in income omitted from tax returns--was uncontested and uncontroverted and the evidence of materiality was "overwhelming," the Court found the error harmless. But the Court made clear that an erroneous instruction on an element would not be harmless "where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding." *Id.* at 19; *see id.* ("[A] court, in typical appellate-court fashion, asks whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element.").

3. Three principles govern the determination whether the defendant "raised evidence sufficient to support a contrary finding" on the element in question. First, the government has the burden of proving the erroneous instruction harmless. Second, in determining whether the government has met its burden, the appellate court must examine the entire record, including defense cross-examinations and the defense case, rather than focusing solely on the strength of the prosecution evidence. And third, for reasons of institutional competence and constitutional allocation of factfinding responsibility in criminal cases, the appellate court must construe the evidence in the light most favorable to the defendant. The court of appeals in this case paid lip service to the first principle and ignored the second and third.

4. The proper approach to determining the harmlessness of erroneous elements instructions presents an important and recurring question. As the petition demonstrates, the question has split the circuits in the context of *Ruan v. United States*, 597 U.S. 450 (2022). But it is not limited to *Ruan* errors; whenever this Court narrows the prevailing interpretation of a federal criminal statute, cases on direct appeal in which an overly broad or otherwise incorrect instruction was given will turn on harmless error analysis. In such cases, the outcome often will depend on whether the appellate court assesses the strength of the prosecution case, as the majority did here, or instead applies *Neder* by its terms and finds the error reversible when the defendant contested the element and a juror could rationally conclude that the

prosecution had failed to meet its burden on that element.

ARGUMENT

I. HARMLESS ERROR REVIEW MUST BE CONDUCTED WITHIN THE CONSTRAINTS OF THE SIXTH AMENDMENT RIGHT TO TRIAL BY JURY.

The Sixth Amendment guarantees the right to trial by jury for serious crimes. The jury trial right bars federal judges from making independent determinations of a defendant's guilt. "[A]lthough a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the State, no matter how overwhelming the evidence." *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993). The right to a jury trial "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary." *Blakely v. Washington*, 542 U.S. 296, 305-06 (2004); *see Erlinger v. United States*, 602 U.S. 821, 832 (2024); *United States v. Gaudin*, 515 U.S. 506, 510-11 (1995).

At the same time, Congress and the Court long ago determined that inconsequential errors found on appeal should not necessitate the expenditure of resources that a retrial entails or the societal cost of freeing a person determined by a jury to have committed a crime. *See, e.g.,* 28 U.S.C. § 2111; Fed.

R. Crim. P. 52(a); *Kotteakos v. United States*, 328 U.S. 750, 757-59 (1946); *Bruno v. United States*, 308 U.S. 287, 294 (1939). The Court has thus determined that most errors--even constitutional errors--are subject to harmless error analysis, and that errors found to be harmless do not require reversal of a conviction. *See, e.g., Arizona v. Fulminante*, 499 U.S. 279, 306-12 (1991).

The Court has accommodated both the absolute jury trial right and the interest in avoiding the societal cost of unnecessary reversals by insisting that harmless error review focus on the effect of the error on the verdict rendered, rather than the verdict a hypothetical jury would have rendered in an error-free trial. As a unanimous Court explained in *Sullivan*:

> The inquiry . . . 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. That must be so, because to hypothesize a guilty verdict that was never in fact rendered--no matter how inescapable the findings to support that verdict might be--would violate the jury-trial guarantee.

508 U.S. at 279 (emphasis in original). The Court added: "The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be

sustainable on appeal; it requires an actual jury finding of guilty." *Id*. at 280; *see, e.g., Kotteakos*, 328 U.S. at 763 ("[I]it is not the appellate court's function to determine guilt or innocence. Nor is it to speculate upon probable reconviction and decide according to how the speculation comes out.") (citations omitted); *id*. at 764 ("[T]he question is, not were [the jurors] right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision.").

II. CORRECTLY APPLIED, *NEDER* ENFORCES THE SIXTH AMENDMENT RIGHT TO TRIAL BY JURY.

Correctly read, *Neder v. United States*, 527 U.S. 1 (1999)--the case that controls the harmless error issue here--reinforces the Sixth Amendment jury trial right spelled out in *Kotteakos*, *Sullivan*, *Gaudin*, *Blakely*, and *Erlinger*. As relevant to the petition, *Neder* was a prosecution for filing a false tax return under 26 U.S.C. § 7206(1). The government established that Neder failed to report over $5 million in income. His defense at trial was not that the omitted amount was immaterial, but that he did not believe the money was income. 527 U.S. at 16-17. Consistent with the law at the time, the district court decided materiality itself and instructed the jury not to consider that element.

In this Court, all agreed that omission of the materiality element violated the Sixth Amendment jury trial right in light of *Gaudin*, which held that materiality--like other elements--must be submitted

to the jury. The only issue was harmless error. The Court first held that the omission of the materiality element was subject to harmless error review. *Id*. at 15. Then, citing "overwhelming" evidence, the Court found the error harmless. *Id*. at 16-17.

The *Neder* Court's reference to "overwhelming" evidence did not authorize appellate judges to substitute their view of the record for the jury's merely because they deemed the prosecution's case strong. The Court was careful to note the limits of its harmless error finding. First, the Court observed repeatedly that Neder "did not contest the element of materiality at trial" and that the government's evidence was "uncontroverted." *Id*. at 15; *see, e.g., id*. at 17 (omitted element was "uncontested"); *id*. at 18 (evidence of materiality "uncontroverted"). Second, based on the trial evidence--omission of $5 million in income from tax returns--no rational juror could have had a reasonable doubt that the omitted income was material. The Court summarized its holding as follows: "[S]afeguarding the jury guarantee will often require that a reviewing court conduct a thorough examination of the record. If, at the end of that examination, the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error--*for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding*--it should not find the error harmless." *Id*. at 19; *see id*. ("[A] court, in typical appellate-court fashion, asks whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element.").

It is undisputed that petitioner "contested" the subjective intent element on which the district court mis-instructed the jury. Indeed, as the dissent below points out, that was "the *only* element of the charged offense that Dr. Parasmo contested." Pet. App. 31a (Robinson, J., dissenting) (emphasis in original). The focus must be, therefore, on the second part of the *Neder* Court's formulation: whether petitioner "raised evidence sufficient to support a contrary finding"--that is, whether a properly instructed juror could rationally have found that the government failed to prove petitioner's subjective intent beyond a reasonable doubt. We turn to that inquiry.

III. THE COURT OF APPEALS DID NOT FOLLOW THE PRINCIPLES THAT GOVERN WHETHER THE DEFENDANT "RAISED EVIDENCE SUFFICIENT TO SUPPORT A CONTRARY FINDING."

Three principles govern whether a defendant has "raised evidence sufficient to support a contrary finding" on the element to which the erroneous instruction applies. The court of appeals paid lip service to one and ignored the other two.

First, the government has the burden of proving harmlessness. And when, as here, the error is of constitutional magnitude, the government must establish harmlessness beyond a reasonable doubt. *See Neder*, 527 U.S. at 15-16; *Chapman v. California*, 386 U.S. 18, 24 (1967). Although the court of appeals majority acknowledged this standard in passing, *see* Pet. App. 12a, it did not hold the government to its burden.

Second, the appellate court must search the *entire record* to determine if the defendant "raised evidence sufficient to support a contrary finding" on the element in question, including evidence the defense elicits on cross-examination of government witnesses and presents in its case. *See, e.g., Neder*, 527 U.S. at 19 ("thorough examination of the record"); *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993) (court must examine "the record as a whole"); *Kotteakos*, 328 U.S. at 764 (harmless error inquiry "must take account of what the error meant to [the jurors], not singled out and standing alone, but in relation to all else that happened"). The court of appeals majority flouted that principle here. It focused almost entirely on the prosecution's evidence, Pet. App. 12a-18a, and addressed the defense evidence only in its dismissive response to the dissent, *id*. at 18a-23a.

Third, in scouring the record to determine if the defendant "raised evidence sufficient to support a contrary finding" on the element in question, appellate judges must view the evidence in the light most favorable to the defense. This is so for both practical and constitutional reasons.

As a practical matter, appellate judges, unlike jurors, are not in the courtroom when the evidence is presented. Appellate judges thus cannot observe "the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985). Nor can appellate judges reading a transcript understand the courtroom dynamics that affect credibility determinations. A muttered sentence that draws derisive snickers from the jury

has the same weight in a transcript as a confident assertion that draws nods of agreement. Even a document may have a strikingly different effect when presented to a jury in the courtroom through a sponsoring witness than when reviewed in the cloister of an appellate judge's chambers. Appellate judges who attempt to assess the weight to be given a witness' testimony or the significance to be afforded a particular document engage in a task they lack the institutional competence to perform.

The constitutional reason to view the evidence in the light most favorable to the defense is straightforward: the Sixth Amendment categorically assigns the factfinding function to the jury, rather than to judges--"a fundamental reservation of power in our constitutional structure." *Blakely*, 542 U.S. at 306. Appellate judges

> are not authorized to look at the printed record, resolve conflicting evidence, and reach the conclusion that the error was harmless because we think the defendant was guilty. That would be to substitute our judgment for that of the jury and, under our system of justice, juries alone have been entrusted with that responsibility.

Weiler v. United States, 323 U.S. 606, 611 (1945). Given this constitutional allocation of responsibility, appellate judges may not weigh the evidence and make their own assessments of credibility and probative value. To the contrary, appellate judges conducting harmless error review must recognize the

possibility that jurors may disbelieve a prosecution witness because of impeachment, the witness' demeanor, or the inherent implausibility of the witness' testimony. Similarly, jurors--constantly urged by lawyers to use their common sense and life experience--may draw different inferences from the evidence than appellate judges. *See, e.g., Fulminante*, 499 U.S. at 298-300; *United States v. Kaiser*, 609 F.3d 556, 567 (2d Cir. 2010) (error prejudicial where government's case relied on cooperators, whose credibility the jury had "ample reason . . . to question"); *cf. Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986) (in assessing whether erroneous limitation of cross-examination is harmless, court must "assum[e] that the damaging potential of the cross-examination were fully realized").

The Sixth Amendment jury trial right requires appellate judges assessing whether the defendant "raised evidence sufficient to support a contrary finding" on a mis-instructed element to view the record much as judges do in assessing the sufficiency of the evidence to support a defense jury instruction. As this Court has explained, "a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Mathews v. United States*, 485 U.S. 58, 63 (1988). Under the *Mathews* standard,

> a defendant is entitled to an instruction concerning his theory of the case if the theory is legally sound and evidence in the case makes it applicable, even if the evidence is weak, insufficient, inconsistent, or of doubtful credibility. A

> defendant needs to show only that there is evidence upon which the jury could rationally sustain the defense. Where, as here, factual disputes are raised, this standard protects the defendant's right to have questions of evidentiary weight and credibility resolved by the jury.

United States v. Kayser, 488 F.3d 1070, 1076 (9th Cir. 2007) (quotations and citations omitted). In assessing the evidence for harmless error purposes, appellate courts likewise should view the evidence in the defendant's favor to the extent the jury rationally could have done so; that is the only way to preserve the jury's constitutional role as exclusive factfinder.[2]

The court of appeals majority ignored this principle. For example, the majority credited the testimony of the government's expert witness, Dr. Waldman, finding it "particularly compelling." Pet. App. 13a. Most strikingly, the majority spent pages trying to discredit the evidence of good faith on which the dissent relied, drawing different inferences from the record, highlighting evidence that favored its position, and dismissing conflicting evidence as a

[2] The *Mathews* standard accords with the standard for reviewing the sufficiency of the evidence to support a conviction: viewing the evidence "in the light most favorable to the prosecution," a court must determine whether "a rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 324 (1979). The standards are mirror images of each other rooted in the same fundamental principle: it is for the jury, not appellate judges viewing a cold record, to make credibility determinations and draw inferences from the evidence.

"highly selective view of the record." Pet. App. 19a.[3] The majority judges thus played the role of jurors--exactly what the Sixth Amendment unequivocally prohibits.

IV. THE QUESTION PRESENTED HAS SPLIT THE CIRCUITS AND IS CERTAIN TO RECUR.

As the petition demonstrates, the proper harmless error analysis for an erroneous elements instruction has split the circuits in the context of *Ruan v. United States*, 597 U.S. 450 (2022). Pet. 17-24. But the confusion is not limited to *Ruan* errors.

In recent years, the Court has repeatedly narrowed lower courts' expansive interpretations of federal criminal statutes. *Ruan* is one example, but there are many others. *See, e.g., Thompson v. United States*, 604 U.S. 408 (2025) (18 U.S.C. § 1014); *Fischer v. United States*, 603 U.S. 480 (2024) (18 U.S.C. § 1512(c)); *Snyder v. United States*, 603 U.S. 1 (2024) (18 U.S.C. § 666); *Dubin v. United States*, 599 U.S. 110 (2023) (18 U.S.C. § 1028A); *Ciminelli v. United States*, 598 U.S. 306 (2023) (18 U.S.C. § 1343); *Percoco v. United States*, 598 U.S. 319 (2023) (18 U.S.C. § 1346). Each time this Court narrows the prevailing interpretation of a federal criminal statute, cases on

[3] For example, the majority dismisses out of hand evidence cited by the dissent that "in treating individual patients, Dr. Parasmo ordered numerous tests, referred his patients to a wide variety of specialists to treat their pain-inducing conditions, tried to wean them off the controlled substances, and looked for alternative treatments to control his patients' pain, including prescribing medications *other than* a controlled substance--all behaviors suggestive of a good faith effort to help his patients." Pet. App. 35a (Robinson, J., dissenting).

direct appeal in which an incorrect instruction was given will likely turn on harmless error analysis. In such cases, the outcome often will depend on whether the appellate court merely assesses the strength of the prosecution case and pronounces it overwhelming, as the majority did here, or instead applies *Neder* by its terms and finds the error reversible when the defendant contested the element and a properly instructed juror could rationally entertain a reasonable doubt on that element.

Because the question presented is both vitally important to federal criminal defendants and certain to recur, the Court should grant the writ.

CONCLUSION

The Court should grant the petition for writ of certiorari and, on consideration of the merits, hold that when the district court mis-instructs the jury on a contested element of the offense, the error is not harmless when the evidence, viewed in the light most favorable to the defendant, would permit a juror rationally to find that the government failed to prove the element beyond a reasonable doubt.

Respectfully submitted,

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