No. 22-7784

IN THE

# Supreme Court of the United States

DEMARCUS DONTE IVEY,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

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

## BRIEF OF *AMICUS CURIAE* NORTH CAROLINA ADVOCATES FOR JUSTICE IN SUPPORT OF PETITIONER


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The North Carolina Advocates for Justice respectfully submits this brief as *Amicus Curiae* in support of Petitioner.[1]

## STATEMENT OF INTEREST OF *AMICUS CURIAE*

The North Carolina Advocates for Justice (the "NCAJ") is a professional organization of more than 3,500 North Carolina lawyers. The NCAJ's Criminal Defense Section is composed of 360 lawyers. One of the NCAJ's primary purposes is to advance and protect the rights of the vulnerable, including defendants charged with and convicted of crimes. In furtherance of its mission, the NCAJ regularly conducts continuing legal education seminars and appears as *amicus curiae* before state and federal courts. Protecting the rights of those charged with and convicted of crimes in the State of North Carolina is critical to the goals of NCAJ.

Challenging appellate decisions that deny a criminal defendant's right to a fair trial under the Sixth Amendment of the Constitution is a timely and important part of the mission of the NCAJ.

## SUMMARY OF ARGUMENT

At stake in this case is the constitutional entitlement emphasized in *Sullivan v. Louisiana*, 508 U.S. 275 (1993) – that a criminal defendant has a Sixth Amendment right

1. No party or counsel for a party, and no other party other than *Amicus Curiae* and its counsel, authored or contributed monetarily to the preparation or submission of any portion of this brief. Petitioner received sufficient notice per SCR 37.2. Respondent did not, but does not object to the late notice.

to have a jury be the ultimate arbiter of guilt beyond a reasonable doubt. A criminal defendant's entitlement to a trial by jury is integral to both the fairness and the constitutional legitimacy of government-imposed criminal punishment. The requirement of a unanimous verdict by a jury of one's peers, after live testimony and deliberation, serves "as the great bulwark" of civil and political liberties "to guard against a spirit of oppression and tyranny on the part of rulers." *Neder v. United States*, 527 U.S. 1, 19 (1999). This Court's prior decisions have also guarded against judges usurping the role of juries as well, making clear that harmless-error review must not "fundamentally undermine the purposes of the jury trial guarantee." *Id.* Appellate judges reviewing a criminal conviction should not impose their own view that a defendant is guilty, "regardless of how overwhelmingly the evidence may point in that direction." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977); *see also Rose v. Clark*, 478 U.S. 570, 578 (1986). An error at a jury trial cannot be harmless if it may have affected the jury's verdict. As a result, deciding whether a constitutional error is harmless, therefore, must not focus on whether a panel of appellate judges thinks the defendant was guilty despite the constitutional error.

The harmless error standard adopted by this Court in *Chapman v. California,* 386 U.S. 18, 22 (1967) provides that in order for error to be harmless, a Court must have a belief beyond a reasonable doubt that the error did not contribute to the verdict obtained. Despite what seems like a clear standard on its face, lower federal courts are in conflict over how to conduct harmless error review. The Fourth Circuit below, and many other courts, focus on whether the evidence – minus whatever tainted portion

was wrongly admitted – supports the conviction beyond a reasonable doubt, usually by finding that evidence "overwhelming" (and thus that the error was harmless). On the other hand, a larger number of federal courts focus instead on the error, asking whether it likely affected the verdict. This conflict in the application of the harmless error analysis is entrenched and calls out for this Court's resolution. Having panels of appellate judges conclude that there was enough evidence for conviction is not a substitute for the right to a fair jury trial, fails to faithfully follow the *Chapman* standard, and could lead to dangerous consequences including wrongful convictions. This Court should grant certiorari to resolve this conflict and clarify the harmless error standards to be applied on appellate review.

The dilution of the harmless error standard results in a deterioration of the overall criminal justice process that flows through the courts and down to the prosecutors who bring the cases and the law enforcement officials that investigate the underlying crimes. As this case demonstrates, the dilution of the harmless error standard has sent the message to law enforcement and prosecutors that there are no material consequences for sloppy, or worse, intentionally unconstitutional methods. When the courts bend over backwards to find evidentiary errors and constitutional rights violations "harmless", the incentive to use constitutional procedures disappears. The lower courts have fallen into the trap of "guilt based" standards, by which the appellate courts' distant assessment of the evidence and probability of guilt has become the driving factor. The integrity of the entire criminal justice system has suffered. Looking across the current landscape of the lower federal courts, it is necessary for this Court, as

the ultimate guardian of the system, once again to make absolutely plain the appropriate harmless error standard and the mandate for the lower courts to apply it.

What distinguishes this case from others seeking harmless error review – and why certiorari should be granted – is that the Petitioner: (a) was first tried on murder charges arising from the same events that are the subject of this case in a state court trial which resulted in a hung jury; and (b) was then tried on federal charges in a district court trial that was tainted by the improper admission of three critical pieces of direct evidence tying Petitioner to the scene of the crime. Aside from the improperly admitted evidence, there was no direct evidence tying Defendant to the crime scene. In concluding that the improper admission of this direct evidence was harmless error, the Fourth Circuit placed itself in the jury box and concluded that the remainder of the Government's evidence tying Petitioner to the crime scene – all of which was circumstantial – was enough to convict Petitioner beyond a reasonable doubt. However, this Court's harmless error doctrine requires proof beyond a reasonable doubt that that the errors did not contribute to the jury verdict obtained. The NCAJ submits that this reasonable doubt standard could not have been satisfied in this close case since the remainder of the Government's untainted evidence tying Petitioner to the crime scene was circumstantial, and a prior trial of the Petitioner arising from the same events resulted in a hung jury. Could Petitioner have been convicted by a jury solely on the Government's untainted circumstantial case? The Sixth Amendment requires that question to be answered by a jury, not a panel of appellate judges.

The NCAJ urges the Court to clarify the meaning and application of the current harmless error doctrine because, while the *Chapman* standard exists, it is being applied in conflicting ways by different panels in circuit and state courts. Petitioner's rights under the Sixth Amendment – as well as those of countless other defendants – are therefore being violated without remedy.

## REASONS FOR GRANTING THE PETITION

### I. RESOLVING THE CONFLICT AMONG LOWER COURTS IS THE ONLY WAY THAT THE HARMLESS ERROR TEST WILL BE APPLIED CONSISTENTLY.

The importance of a clear and consistent harmless error doctrine cannot be overstated. The harmless error doctrine is "almost certainly the most frequently-invoked doctrine in all criminal appeals." Daniel Epps, *Harmless Errors and Substantial Rights*, 131 Harv. L. Rev. 2117, 2119 (2018); *see also* William M. Landes & Richard A. Posner, *Harmless Error*, 30 J. Legal Stud. 161, 161 (2001) (the doctrine is "probably the most cited rule in modern criminal appeals"). Harmless error review is also "one of the most significant tasks of an appellate court, as well as one of the most complex." Roger J. Traynor, *The Riddle of Harmless Error* 80 (1970). Nonetheless, the harmless error doctrine has "remain[ed] surprisingly mysterious" and challenging for lower courts to apply consistently. Epps, *supra*, at 2120. Despite this, some courts now find constitutional errors harmless "with remarkable frequency." Justin Murray, *A Contextual Approach to Harmless Error Review*, 130 Harv. L. Rev. 1791, 1793-94 (2017).

When this Court established the current harmless error doctrine in *Chapman*, it warned "that harmless-error rules can work very unfair and mischievous results when, for example, highly important and persuasive evidence, or argument, though legally forbidden, finds its way into a trial in which the question of guilt or innocence is a close one." *Chapman*, 386 U.S. at 22. Today, state and lower federal courts are applying incompatible variants of the harmless error rule established in *Chapman*. The potential for dangerous results for criminal defendants is real – including wrongful convictions. The empirical evidence proves the falsehood of the assumption that the harmless error standard is being applied so as to protect the innocent. [2]

### A. State and Lower Federal Courts Are in Conflict and Apply Two Distinct Variants of the Harmless Error Doctrine.

The *Chapman* standard is simple on its face: "[b]efore 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." *Chapman*, 386 U.S. at 24. To carry this burden, the beneficiary of the error must show that "there is [no] reasonable possibility that the evidence complained of might have contributed to the conviction."

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2. A "central finding" of one of the definitive studies on the issue of post-conviction process was that appellate or post-conviction courts reversed only fourteen percent of the convictions of those in the study who were ultimately exonerated and only nine percent if capital cases are excluded, where "reversal" is, an order upheld on appeal that resulted in the grant of a new trial and a vacating of the conviction or convictions. *See*, B. L. Garrett, *Judging Innocence*, 108 Col. L. Rev. 55, 99-100 (Jan. 2008).

*Chapman*, 386 U.S. at 24 (quoting *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963)). While certain errors may be "so unimportant and insignificant" that they may be deemed harmless, this is not true where the error is "plainly relevant" and "possibly influenced the jury." *Chapman*, 386 U.S. at 22, 23. "[T]he beneficiary of a constitutional error [is required to] prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman*, 386 U.S. at 24.

The analysis does not consider defendant's guilt or innocence, *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963); whether defendant "got what he deserved," *Bumper v. North Carolina*, 391 U.S. 543, 553 (1968); or whether, absent the error, "a guilty verdict would surely have been rendered," *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993). Even a "reasonably strong circumstantial web of evidence" is not enough on its own. *Chapman*, 386 U.S. at 23-26. Instead, the analysis must consider, through a fact-intensive inquiry of the entire record, whether the verdict "was surely unattributable to the error." *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993).

The principle undergirding the harmless error doctrine is sensible. There is no perfect trial, and, in the face of marginal errors, judicial resources must be protected. *U.S. v. Hasting*, 461 U.S. 499, 508-09 (1983). At core, the doctrine recognizes that "the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence . . . and [the doctrine] promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986) (citations omitted).

However, the factual question of guilt or innocence does not belong to the judiciary, but to the jury. The judiciary must maintain the underlying fairness of the trial process. If similarly situated defendants receive different outcomes based on the court that hears their appeal, the judiciary is failing to protect that underlying fairness. If, instead of focusing on fairness, the court focuses on the decision of guilt or innocence, an appellate court usurps the role of the jury. The right to a jury trial is sacrosanct, as is the necessity of having guilt or innocence decided by jurors rather than judges.

State and lower federal courts are moving in conflict between two general, incompatible inquiries that mirror the fairness/outcome distinction in *Van Arsdall*: the "effect on the verdict" inquiry and the "guilt-based" inquiry. Harry T. Edwards, *To Err is Human, But Not Always Harmless: When Should Legal Error Be Tolerated*, 70 N.Y.U. L. REV. 1167, 1171 (1995). The choice of standard correlates with outcome: in habeas proceedings, courts that focus on the effect of the error 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). The effect on the verdict inquiry is grounded in a reading of the law consistent with *Chapman*, *Fahy*, and *Sullivan* which asks how the jury processed, experienced, and possibly weighed the error. The guilt-based inquiry is grounded in the creation of a hypothetical rational jury that weighs a cold record after excising the error. While both require judges to imagine worlds that do not exist, the effect-on-the-verdict inquiry should be the preferred approach that remains faithful to

*Chapman* because it does not ask judges to become juries, but to stay within their appropriate roles.

### 1. The Effect on the Verdict Harmless Error Analysis.

Courts applying an effect on the verdict inquiry focus on the error and its contextual relationship to all other evidence at trial. Under the effect on the verdict inquiry, when assessing the importance of wrongly admitted evidence, courts will investigate whether the evidence was critical to the jury's decision; whether the evidence was material to establishing a critical fact; and whether the evidence was emphasized in the prosecution's argument. *Wray v. Johnson*, 202 F.3d 515, 526 (2d Cir. 2000). An effect on the verdict inquiry requires holistic review of an error's impact even if the other evidence against the defendant "standing alone, would have been sufficient to support the conviction." *Wray*, 202 F.3d at 526. For example, the Eleventh Circuit has inquired, in relation to erroneously admitted involuntary confessions, into the effect of the erroneously admitted statement upon: (1) the other trial evidence; and (2) the conduct of the defense. *U.S. v. Arbolaez*, 450 F.3d 1283, 1293 (11th Cir. 2006); *see e.g., U.S. v. Lopez*, 500 F.3d 840, 845-46 (9th Cir. 2007) (considering the "quantitative extent" of witness's testimony on post-Miranda silence, the "qualitative extent" of the testimony, the "manner of questioning" by the prosecution, the additional evidence presented, and the length of jury deliberations).

These courts "'demand[] a panoramic, case-specific inquiry considering, among other things, the centrality of the tainted material, its uniqueness, its prejudicial

impact, the uses to which it was put during the trial, the relative strengths of the parties' cases, and any telltales that furnish clues to the likelihood that the error affected the factfinder's resolution of a material issue.'" *United States v. Carrasco*, 540 F.3d 43, 55 (1st Cir. 2008) (citation omitted); *see Virgin Islands v. Martinez*, 620 F.3d 321, 338-39 (3d Cir. 2010) (error harmless despite lack of "overwhelming evidence" because jury was "unlikely to arrive at a negative inference" from error and error was "not a focal point" of prosecutor's argument); *United States v. Caruto*, 532 F.3d 822, 831 (9th Cir. 2008) (error not harmless after considering extent of impermissible argument, emphasis on impermissible argument by the prosecution, and amount of other evidence against defendant); *United States v. Makkar*, 810 F.3d 1139, 1148 (10th Cir. 2015) (error not harmless where impermissible evidence went to "heart of the defense" (citation omitted)); *United States v. Cunningham*, 145 F.3d 1385, 1394 (D.C. Cir. 1998) (error not harmless where "testimony [in error] was central to the Government's case").

While courts use "overwhelming evidence" under the effect on the verdict standard, it is not subject to "overemphasis." *Chapman*, 386 U.S. at 23. The question is not whether there is so much evidence that, absent the error, "a guilty verdict would surely have been rendered" but rather whether there is so much overwhelming evidence that the "guilty verdict actually rendered in this trial was surely unattributable to the error." *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993).

For example, in *Neder v. United States*, this Court relied upon "overwhelming evidence" only when evidence supporting an omitted element in jury charge "was so

overwhelming that [defendant] did not even contest that issue." 527 U.S. 1, 2 (1999). "Where . . . a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless." *Id.*

**2. The Guilt-Based Harmless Error Analysis.**

Alternatively, Courts applying a guilt-based inquiry focus on the likelihood that a *hypothetical* rational jury would find the defendant guilty absent the error. When courts apply a guilt-based inquiry, the outcome turns on the court's "judgement about the factual guilt of the defendant." Harry T. Edwards, *To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. Rev. 1167, 1171 (1995). The *court's* opinion is bound up in an appeal to a fictitious "rational jury." In *United States v. Garcia-Lagunas*, 835 F.3d 479 (4th Cir. 2015), the Fourth Circuit embodied this approach when it claimed "[w]e are satisfied beyond a reasonable doubt that—even without the government's [error]—a rational jury still would have arrived at that verdict." *Id.*, at 489; *see United States v. Staggers*, 961 F.3d 745, 762 (5th Cir. 2020) ("Thus, the operative inquiry is whether a reasonable jury could have found, beyond a reasonable doubt" the defendant guilty). Instead of relying upon the "guilty verdict actually rendered in *this* trial," *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993), the Fourth Circuit hypothesizes a "rational jury" independent of the jury that actually arrived at the verdict. *Garcia-Lagunas*, 835 F.3d at 489.

The hypothetical rational jury created by the judiciary is often convinced by a laundry list of "overwhelming evidence" laid out by the court. *See United States v. Nash*, 482 F.3d 1209, 1222 (10th Cir. 2007) (McKay, J., dissenting) (criticizing the majority for claiming a "laundry list of properly admitted evidence — much of it contested at trial — [was] sufficient to establish Defendant's guilt"); *United States v. Baptiste*, 935 F.3d 1304, 1314 (11th Cir. 2019) (harmless because even if one struck the improperly admitted evidence, still "gobs of . . . evidence" that amounted to "overwhelming evidence of guilt"); *United States v. Elliott*, 89 F.3d 1360, 1369 (8th Cir. 1996) ("if the District Court abused its discretion in excluding this testimony the error amounted to, at most, only harmless error given the weight of the government's massive case against [defendant]").

Courts may ask whether the "jury's finding was adequately supported by the evidence," *United States v. Staggers*, 961 F.3d 745, 762 (5th Cir. 2020); if alternative explanations were "rather implausible," *United States v. Ramos-Rodriguez*, 809 F.3d 817, 824 (5th 2016); or if the other facts "left no doubt" that defendant committed the crime, *United States v. Erickson*, 610 F.3d 1049, 1054 (8th Cir. 2010).

The use of "overwhelming evidence" in these cases has been stretched to erase any investigation of the error's effect on the verdict at all. *Chapman* cautioned against the "overwhelming evidence" standard applied by the California courts. *Chapman*, 386 U.S. at 23. Unfortunately, later decisions of this Court used the language of "overwhelming evidence" without encouraging similar caution. *See United States v. Hasting*, 461 U.S. 499, 510-

12 (1983) (harmless error because of 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).

In these cases, appellate courts are improperly usurping the role of the factfinder by imagining *themselves* as the rational jury because "[h]owever rigorous the standard is made to sound in the abstract . . . in practice it ultimately collapses into the equivalent of a directed verdict for the government." Jeffrey O. Cooper, *Searching for Harmlessness: Method and Madness in the Supreme Court's Harmless Constitutional Error Doctrine*, 50 U. Kan. L. Rev. 309, 334 (2002).

### B. Only the Effect on the Verdict Harmless Error Analysis Remains Faithful to *Chapman*, and the Court Should Explicitly Reject the Guilt Based Harmless Error Analysis.

The way that an appellate court applies the harmless error doctrine can determine the outcome of an appeal. 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). This Court's decisions in *Chapman* and *Fahy* are prime examples of this. In *Fahy*, the error was not harmless even though defendants gave a "full confession" of the crime because the error may have influenced defendants' willingness to give the full confession in the first place. *Fahy*, 375 U.S. at 90. Although the defendant in *Fahy* did not dispute he had committed the acts in question, the "evidence complained of might have contributed to the conviction" because of the possibility that learning of the

illegally obtained evidence could have changed defendant's behavior. *Fahy*, 375 U.S. at 86, 90. If the court had applied a guilt-based inquiry, instead of an investigation into the role that the illegal acts played, the appeal would likely have been affirmed.

In *Chapman*, a prosecutor's unconstitutional commentary on the petitioners' silence in a murder trial was held not harmless despite there being "overwhelming" evidence as noted by the California Courts. *Chapman*, 386 U.S. at 23. In dissent, Justice Harlan lists no less than twelve independent facts including that petitioners were seen leaving the crime scene, were the last ones at the crime scene, that a defendant had purchased a weapon similar to the murder weapon five days before the crime, that blood matching victim was on the floormat of defendants' car, and one defendant made admissions "amounting almost to a full confession." *Chapman*, 386 U.S. at 54-55 (Harlan, J., dissenting). Nonetheless, this overwhelming evidence, laundry list approach was deemed insufficient to the majority's harmless error analysis.

Today, cases with these same facts and evidence would surely come out differently in many state and lower federal courts utilizing the guilt based harmless error analysis, just as happened at the Fourth Circuit in this case.

## II. THE FOURTH CIRCUIT'S DECISION BELOW EMBODIES THE "UNFAIR AND MISCHIEVIOUS" RESULT THIS COURT WARNED OF IN *CHAPMAN*.

In *Chapman*, this Court recognized "that harmless-error rules can work very unfair and mischievous results

when, for example, highly important and persuasive evidence, or argument, though legally forbidden, finds its way into a trial in which the question of guilt or innocence is a close one." *Chapman*, 386 U.S. at 22.

In this case, without the tainted evidence, the question of Petitioner's guilt or innocence is a close one. The Petitioner's first trial in state court arising from the same events ended in a hung jury. Petitioner's Brief, p. 4. Moreover, the evidence admitted in error in this case was "highly important and persuasive" because it included the only direct evidence placing defendant at the scene of the crime. *Id.*, pp 4-5. Thus, without the erroneously admitted evidence, the circumstantial evidence of guilt was extremely tenuous.

In finding the constitutionally erroneous admission of this evidence to be harmless, the Fourth Circuit concluded that the "error complained of did not contribute to the verdict obtained" because the Government provided "overwhelming evidence of Appellant's involvement in the incident at Club Nikki's." *United States v. Ivey*, 60 F.4th 99, 111 (4th Cir. 2023). The question, however, is not whether petitioner was ***involved*** in the incident, but whether the tainted and inadmissible evidence ***contributed*** to the verdict obtained. This is best illustrated by the unconstitutional showup identifications that the jury was allowed to hear at Petitioner's trial.

In *United States v. de Jesus-Rios*, 990 F.2d 672 (1st Cir. 1993), defendant Eva Rios was convicted of drug-related charges based on a "highly suggestive, prejudicial, and unlawful showup procedure." *de Jesus-Rios*, 990 F.2d at 676. One other witness connected her to the criminal

activity based on a series of conversations he claimed to have had with her. *de Jesus-Rios*, 990 F.2d at 678. After determining that the showup violated Rios's due process rights, the First Circuit reviewed the error for harmlessness. *de Jesus-Rios*, 990 F.2d at 678. The showup was not harmless because first, "there is no way for us to discern the role that [witness's] identification played in the jury's deliberation." *de Jesus-Rios*, 990 F.2d at 679. It might have been the additional witness that persuaded the jury to convict. *de Jesus-Rios*, 990 F.2d at 679. In fact, "[i]t is also possible that the jury relied solely upon the testimony of [the witness] in reaching its conclusion." *de Jesus-Rios*, 990 F.2d at 679.

Unlike the First Circuit in *de Jesus-Rios*, the Fourth Circuit here does not ground its analysis first and foremost on the effect of the impermissible showup identification of Petitioner on the jury. As in *de Jesus-Rios*, it is possible: (a) that this evidence – the only evidence identifying Petitioner as the perpetrator – was what the jury relied on to convict Petitioner; or (b) that without the improper showup identification, the jury would have concluded that the remaining circumstantial evidence against the Petitioner was not enough to convict.[3] With no way to discern the role the improper showup identification had on the jury's deliberations at trial, the Fourth Circuit misapplied the harmless error doctrine, and deprived Petitioner of his constitutional right to a fair jury trial.

3. The impact of the improper showup identification on the jury at trial cannot be understated. Numerous studies have shown that a corroborating eyewitness identification of a defendant has a substantial impact in jury verdicts, with significant increases in the rates of conviction. Dennis J. Devine, *et al.*, *Jury Decision Making, 45 Years of Empirical Research on Deliberating Groups*, 7 Psychology, Public Policy and Law, 622, 685 (2001).

By relying on the "overwhelming evidence" in its guilt based harmless error analysis, the Fourth Circuit essentially usurped the function of the jury, effectively making the Fourth Circuit – based only on its review of a cold record – the ultimate arbiter of Petitioner's guilt in this case instead of a jury at trial. An appellate panel's conclusion that a verdict substantially tainted by inadmissible evidence is nonetheless supported by the prosecution's other evidence is not enough to find an error harmless and deny the Petitioner a constitutionally sound retrial. *Satterwhite v. Texas*, 486 U.S. 249, 258-59 (1988) ("The question . . . is not whether the legally admitted evidence was sufficient to support the [verdict]."). Depriving criminal defendants of their Sixth Amendment right to a fair jury trial will lead to wrongful convictions and other improper and unfair results.

Finally, the risk of unfair and mischievous results is exacerbated where, as in this case, there are multiple evidentiary errors. Here, the Fourth Circuit failed to consider the aggregate effect of the three evidentiary errors under the cumulative error doctrine, which is a paradigm of the failure of the lower federal courts forthrightly to address the analysis of multiple errors in the context of a harmless error standard. The circuit courts are in conflict over the application of the harmless error standard when multiple errors infect the outcome. Some courts apply the so-called "fundamental fairness" approach and consider whether the errors in combination "'so fatally infect the trial that they violated the trial's fundamental fairness.'" *United States v. Delgado*, 672 F.3d 320, 344 (5th Cir. 2012) (en banc) (quoting *United States v. Fields*, 483 F.3d 313, 360 (5th Cir. 2007)).

Some appellate courts follow the alternative aggregate error approach which aggregates all the errors that individually were found to be harmless and analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless. *United States v. Rivera*, 900 F.2d 1462, 1470 (10th Cir. 1990). In this approach, having already determined each error in isolation to be harmless, unsurprisingly, these appellate courts uniformly find the cumulative impact of harmless errors to be harmless. In truth, when the jury begins deliberations, the cumulative impact of multiple errors is already fully matured. A cumulative error analysis that pretends the impact of multiple errors can be analyzed *seriatim,* and with that comforting conclusion of harmlessness, does little to ensure the fairness of the trial.

This Court should grant certiorari and take the opportunity to clarify the cumulative error standard for multiple evidentiary errors committed at trial. The Fourth Circuit professed to apply the "fundamental fairness" standard and in doing so failed to place the burden on the government – where it belongs – to prove beyond a reasonable doubt that the totality of the errors did not contribute to the verdict obtained in contravention of this Court's harmless error standard. *See Chapman*, 386 U.S. at 24. The Fourth Circuit never considered the aggregate effect of the three errors and instead evaluated each item of tainted evidence in isolation. All three of the errors — which connected Petitioner to the crime scene, the victim, or the vehicle — were errors that, if corrected, would have left the government without a firsthand witness, without any way to connect Petitioner to the victim, and without a personal admission from Petitioner. To conclude that these three errors did not have a cumulative effect

on the verdict beyond a reasonable doubt ignores what a jury might have concluded in the absence of this evidence, and whether the inclusion of the evidence violated the fundamental fairness of Petitioner's trial. Establishing a clear standard for application of the cumulative error doctrine is a matter of intense interest for those like the NCAJ who are heavily invested in the fair and proper administration of the criminal justice system.

## CONCLUSION

For the foregoing reasons and the reasons stated in Petitioner's brief, the Court should grant the petition for a writ of certiorari to review the judgment of the Fourth Circuit Court of Appeals.

Respectfully submitted, this the 12 day of July, 2023.

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