No. 24-23

IN THE

Supreme Court of the United States

MICHAEL BASSEM RIMLAWI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF OF PETITIONER

DAVID GERGER*
**Counsel of Record*
GERGER HENNESSY
MARTIN & PETERSON
700 Louisiana Street, Suite 2300
Houston, TX 77019
(713) 224-4400
dgerger@ghmfirm.com

Counsel for Petitioner

December 16, 2024

120169

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

Cases

Cited Authorities

Cited Authorities

Page

Constitutional Provisions

Statutes

Scholarly Authorities

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

Petitioner Michael Bassem Rimlawi ("Dr. Rimlawi") raised, on appeal, a serious claim that his constitutional right to confront his accusers was violated under the teachings of *Bruton v. United States*, 391 U.S. 123 (1968), and its progeny. But, although suggesting that Dr. Rimlawi's claim had merit, Pet. App. 53a-60a, the Fifth Circuit ultimately declined to decide that question, holding instead that any error would be harmless due to the weight of the other evidence against Dr. Rimlawi. Pet. App. 60a-61a. Dr. Rimlawi here claims that the Fifth Circuit's guilt-based harmless-error analysis was not only erroneous, but was also emblematic of a deeper problem, pervasive through the courts, with how lower courts are conducting harmless-error analysis. Pet. Cert. 15-25.

As an initial matter, the government is incorrect when it asserts that Dr. Rimlawi has not "identifie[d] a conflict with this Court's precedent{dots4}" Br. Opp. 10. To the contrary, Dr. Rimlawi asserts that the court of appeals' decision in his case contravened *Chapman v. California*, 386 U.S. 18 (1967). In *Chapman*, this Court, in overturning a harmless-error determination by the California Supreme Court, criticized that court's "emphasis, and perhaps overemphasis" on the weight of the evidence of guilt. *See id.* at 23. Ultimately, looking at

how the constitutional error figured into the context of the trial (by looking at the arguments and comments by the prosecutor), the Court found that the error could not be excused as harmless beyond a reasonable doubt. *See id.* at 24-26; *see also id.* at 26-42 (reproducing the arguments and comments in question in an appendix to the Court's opinion). *Chapman* thus stands for the proposition that the default mode of analyzing whether constitutional errors are harmless beyond a reasonable doubt should not focus myopically on the appellate court's view of the weight of the evidence of guilt, but rather should be a more holistic endeavor that examines how the error fit into the whole trial.

To be sure, there may be rare cases where the evidence is truly so overwhelming that virtually any error is going to be found to be harmless beyond a reasonable doubt. But the fact of the matter is that in many cases that go to trial, the case against guilt is plausible (meaning that the case for guilt is not overwhelming) – and this is such a case.

Indeed, if one looks at the cases from this Court that are frequently cited in support of the guilt-based approach to harmless error, those cases support the notion that this mode of harmless-error analysis is an outlier for exceptional or unusual cases and was never intended to supplant *Chapman*'s holistic approach to harmless error. For example, in *Harrington v. California*, 395 U.S. 250, 253-54 (1969), the Court found that a *Bruton* error was harmless where the out-of-court confessions of codefendants did no more than place defendant at the scene of the crime, but defendant had himself admitted to being there. And, in *Schneble v. Florida*, 405 U.S. 427, 430-32 (1972), the Court found a *Bruton* error was

harmless where the improperly admitted co-defendant's out-of-court confession did nothing more than corroborate the defendant's own "comprehensive confession." Finally, in *Neder v. United States*, 527 U.S. 1, 15-20 (1999), the Court held that the failure to submit the element of materiality to the jury for its decision was harmless because the omitted element was not only supported by overwhelming evidence but was uncontested.

The instant case provides a needed opportunity for the Court to confirm the continuing vitality of *Chapman* (and the limited role of cases like *Harrington*) because this case is a paradigmatic example of how the guilt-based approach has begun to swallow up the error-based approach of *Chapman*. Moreover, in addition to trenching on the guilt-judging prerogative of the jury, Pet. Cert. 21-22, the Fifth Circuit's use of the guilt-based approach in this case suffers from other flaws that this Court should note and correct, namely:

- The Fifth Circuit looked *only* at the government's evidence – and that in the light most favorable to the government – without considering the defense evidence or defense theory. Pet. Cert. 25-26.
- The Fifth Circuit failed to examine contextual factors – like the government's closing argument (a factor deemed dispositive in *Chapman*) – indicating the *Bruton* error did indeed have an effect on the verdict. Pet. Cert. 26-27.
- The Fifth Circuit did not even acknowledge the serious and highly prejudicial nature of the evidence in question. Pet. Cert. 27.

See also Pet. Cert. 21-25 (discussing flaws with guilt-based approach generally).

Although the government complains that "[Dr.] Rimlawi's discussion of this question presented [] cites no case law and instead relies exclusively on academic articles," Br. Opp. 25, the government fails to acknowledge that those academic articles are based on numerous case-law examples cited and discussed at length in those articles. Indeed, the petition cites academic articles because there are *so many* cases applying harmless-error review in a problematic way that it would be well-nigh impossible to cover them all given the word limits for a petition for certiorari. To lay out all the problematic case law as an original matter would require a treatise-length work.

This is especially true because harmless error arises only at the appellate level, so erroneous applications of harmless-error doctrine can fly under the radar, except in those rare cases where an appellate judge is moved to write a dissenting opinion on the subject. Even so, there are enough opinions to show the divisions in how appellate judges believe harmless-error analysis should properly be applied.[1]

At bottom, the problem is that in numerous cases – including the instant case – the courts "recit[e] the correct

1. *Compare, e.g.*, *United States v. Pon*, 963 F.3d 1207, 1226-40 (11th Cir. 2020) (finding denial of surrebuttal to be harmless beyond a reasonable doubt), *with id.* at 1242 & 1245-47 (Martin, J., concurring in part and dissenting in part); *United States v. O'Neal*, 796 Fed. Appx. 513, 517-30 (10th Cir. 2019) (unpublished) (finding admission of statement in violation of *Miranda v. Arizona*, 384 U.S. 426 (1966), to be harmless beyond a reasonable doubt), *with id.* at 520-25 (Bacharach, J., dissenting); *United States v. Sarli*, 913 F.3d 491, 496-99 (5th Cir. 2019) (finding alleged confrontation error to be harmless beyond a reasonable doubt), *with id.* at 499 & 501-03 (Duncan, J., dissenting in part).

harmless error standard," *Sarli*, 913 F.3d at 501 (Duncan, J., dissenting in part), but then fail to apply that standard correctly. *See*, *e.g.*, *id.* at 501-03 (Duncan, J., dissenting in part). This Court has previously found that question to be certworthy, although the Court ultimately did not reach a decision in that case. *See Vasquez v. United States*, 565 U.S. 1057 (2011) (order granting certiorari), *dismissed as improvidently granted*, 566 U.S. 376 (2012).

Because the problem with the application of harmless-error review of constitutional error has persisted unabated to the present day, and because this case presents an ideal vehicle for addressing that problem, Pet. Cert. 25-27, this Court should grant certiorari and set that issue for merits briefing and argument.[2] In the alternative, the Court should at least summarily vacate the judgment below and remand with instructions for the Fifth Circuit to perform the sort of holistic, error-based harmless-error review mandated by this Court's decision in *Chapman*.

---

2. Although the government employs its usual tactic of listing cases in which the Court has denied certiorari in cases raising the same, or a similar, question, Br. Opp. 22 & n.5, those denials should not dissuade the Court from granting certiorari in this case. We believe that this case presents a better vehicle for addressing the question than most of the cases the government lists. Furthermore, the sheer number of cases the government is able to list attests to the frequently recurring nature of this question.

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

Dr. Rimlawi and his codefendants Mrugeshkumar Kumar Shah ("Dr. Shah") and Jackson Jacob ("Mr. Jacob") have (in this case and case numbers 24-25 and 24-5032, respectively) asked this Court to grant certiorari to determine whether the Constitution confers a right to a jury determination, beyond a reasonable doubt, of facts necessary to establish the amount of mandatory restitution that must be imposed under the Mandatory Victims Restitution Act ("MVRA"), 18 U.S.C. {S}3663A. Dr. Rimlawi adopts and incorporates by reference all arguments on this point made by Dr. Shah and Mr. Jacob, but submits the following brief rejoinder to the government's arguments.

The government mentions, but does not appear to place great reliance on, the fact that "[s]ome courts have [] reasoned that 'restitution is not a penalty for a crime for *Apprendi* purposes,' or that, even if restitution is criminal, its compensatory purpose distinguishes it from purely punitive measures." Br. Opp. 14 (citations omitted). The government is wise not to put all its eggs in this basket, since that position is not only a distinct minority position in the federal circuits,[3] but is also contrary to this Court's cases. *See Hester v. United States*, 586 U.S. 1104, 1107

3. The Seventh Circuit has noted that only it and the Eighth and Tenth Circuits have adopted this position. *See United States v. Wolfe*, 701 F.3d 1206, 1217 (7th Cir. 2012) (citing cases).

(2019) (Gorsuch, J., dissenting from denial of certiorari) (citing *Paroline v. United States*, 572 U.S. 434, 456 (2014), and *Pasquantino v. United States*, 544 U.S. 349, 365 (2005)). "Besides, if restitution really fell beyond the reach of the Sixth Amendment's protections in *criminal* prosecutions, [the Court] would then have to consider the Seventh Amendment and its independent protection of the right to a jury trial in *civil* cases." *Hester*, 586 U.S. at 1107 (Gorsuch, J., dissenting from denial of certiorari) (emphasis in original).

The government appears to place more stock in its argument that the MVRA does not set a statutory maximum within the meaning of the *Apprendi* rule because "when the court fixes the amount of restitution based on the victim's losses, it is not increasing the punishment beyond what is authorized by the conviction." Br. Opp. 14 (citation omitted). And, indeed, it is this "no statutory maximum" argument that underlies the Fifth Circuit's refusal to recognize a jury-trial right for restitution.[4] *See*, *e.g.*, *United States v. Rosbottom*, 763 F.3d 408, 420 (5th Cir. 2014).

4. At least in the Fifth Circuit, this reasoning sits uneasily alongside that court's holdings that a restitution order in excess of what is authorized under the MVRA ***is*** a sentence in excess of the statutory maximum and thus not subject to plea-agreement provisions waiving appeal of the sentence. *See*, *e.g.*, *United States v. Kim*, 988 F.3d 803, 809-11 (5th Cir. 2021); *United States v. Sharma*, 703 F.3d 318, 320 n.1 (5th Cir. 2012) ("At oral argument, the government conceded that the [plea agreement's appeal] waivers do not bar this appeal of restitution orders that purportedly exceed the statutory maximum authorized by the [MVRA].") (citation omitted).

Justice Gorsuch has, however, explained why this argument is unpersuasive, or at least highly questionable:

> But the government's argument misunderstands the teaching of our cases. We've used the term "statutory maximum" to refer to the harshest sentence the law allows a court to impose based on facts the jury has found or the defendant has admitted. *Blakely v. Washington*, 542 U.S. 296, 303 (2004). In that sense, the statutory maximum for restitution is usually *zero*, because a court can't award *any* restitution without finding additional facts about the victim's loss. And just as a jury must find any facts necessary to authorize a steeper prison sentence or fine, it would seem to follow that a jury must find any facts necessary to support a (nonzero) restitution order.

Hester, 586 U.S. at 1107 (Gorsuch, J., dissenting from denial of certiorari) (emphasis in original).

Furthermore, to the extent the government relies, for this argument, on the fact that restitution "is imposed to an indeterminate scheme," Br. Opp. 16 – meaning, we suppose, that the amount of restitution varies from case to case, depending on the unique facts of each case – that argument is unavailing because historical practice demonstrates that the requirements of grand jury indictment and proof to, and a finding by, a jury beyond a reasonable doubt applied to restitution notwithstanding its variable nature. *See id.* (Gorsuch, J., dissenting from denial of certiorari); *see also* James Barta, *Guarding the Rights of the Accused and the Accuser: The Jury's*

Role in Awarding Criminal Restitution Under the Sixth Amendment, 51 Am. Crim. L. Rev. 463, 472-76, 479-80 (2014).

Moreover, as Justice Gorsuch has highlighted, this question is an important one and worthy of this Court's review, given the ubiquity of restitution orders, especially in federal cases. *See Hester*, 586 U.S. at 1105-06 (Gorsuch, J., dissenting from denial of certiorari). Although the government takes the familiar tack of cataloguing denials of certiorari in previous cases raising the same, or a similar, question, Br. Opp. 11 & n.3, those denials import, of course, no view on the merits of the question presented. And, indeed, the sheer number of cases raising this issue on a recurring basis is a factor counseling that this Court should finally, in one or more of these cases, grant certiorari to settle that question.

Any one of these three cases is a good vehicle for deciding that question, although we have recommended that the Court grant certiorari in Dr. Shah's case and hold Dr. Rimlawi's and Mr. Jacobs's cases pending a decision in Dr. Shah's case. Pet. Cert. 30. Alternatively, should the Court find a vehicle problem with Dr. Shah's case, we ask that the Court grant certiorari in Dr. Rimlawi's case to consider this question. Pet. Cert. 30-31.

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

CONCLUSION

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

Respectfully submitted,

David Gerger*
*Counsel of Record
Gerger Hennessy
Martin & Peterson
700 Louisiana Street, Suite 2300
Houston, TX 77019
(713) 224-4400
dgerger@ghmfirm.com

Counsel for Petitioner

December 16, 2024