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General, Department of Justice, Washington, D.C.;

for Respondent.

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1 P R O C E E D I N G S

2 (10:28 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 first this morning in Case 11-199, Vasquez v. United  
5 States.

6 Mr. Brindley.

7 ORAL ARGUMENT OF BEAU B. BRINDLEY

8 ON BEHALF OF THE PETITIONER

9 MR. BRINDLEY: Mr. Chief Justice, and may it  
10 please the Court:

11 When determining whether an error affects  
12 substantial rights pursuant to the harmless-error  
13 statute, courts should first begin the analysis with the  
14 error itself, consider it in the context of the entire  
15 record, determine what potential impact it may have, and  
16 then ask the question: Can the government prove to the  
17 requisite degree of certitude -- in this case, fair  
18 assurance -- that the error did not substantially impact  
19 the verdict of the jury that heard the case?

20 It is impermissible for the reviewing court  
21 to merely ask the question of whether some other jury, a  
22 reasonable jury that didn't hear the error that this  
23 jury heard, would convict him and determine harmlessness  
24 on that basis.

25 Kotteakos --

1 JUSTICE KENNEDY: My problem --

2 MR. BRINDLEY: Yes.

3 JUSTICE KENNEDY: -- is I can accept that  
4 formulation certainly for purposes of this case. I just  
5 don't see where in the opinion -- I have the opinion of  
6 the court of appeals -- it focused on the wrong test.

7 It didn't use the magic words, and it  
8 started out with let's look at the big picture, and it  
9 said, well, here's the defense he elected to put on, and  
10 this is a tough sell because. But then it quotes what  
11 happens with the jury. It -- and it -- and it ends its  
12 analysis for -- saying: We -- this evidence would have  
13 moved the jury to convict Vasquez without a nudge from  
14 anything it heard in the government's case.

15 I just -- I just don't see that you have  
16 supported your theory by what the -- by what the court  
17 says.

18 MR. BRINDLEY: Before the harmless-error  
19 analysis, the question the Court asks is, what we have  
20 to decide is whether a reasonable jury would convict him  
21 absent the error. And so, the question that they ask  
22 doesn't require any consideration of the error. And the  
23 conclusion they reach that he would be convicted without  
24 any consideration of the error also doesn't consider the  
25 error.

1           They do not address the error or its impact  
2   at all, despite a robust dissent, which set forth the  
3   extraordinary prejudicial possible impact of this error.  
4   They don't disagree with the dissent; they simply don't  
5   address it at all.

6           JUSTICE SOTOMAYOR: Could you tell me what  
7   the error actually was? I see -- and you can add  
8   another -- three potential things about these calls or  
9   three potential errors: One, that they proved as a  
10  matter of fact that she was biased. But, as the  
11  majority points out, she already said she was before the  
12  tapes were played. So, whatever error may have been  
13  occasioned by the jury using the tapes as for the truth,  
14  it really was cumulative to an already admitted bias.

15           The second is some sort of ambiguous  
16  statement by her that all of them were in trouble,  
17  meaning all the defendants, and a similar statement by  
18  the -- by Petitioner's lawyer. So, what was it that was  
19  error that affected or influenced the jury among these  
20  three choices?

21           MR. BRINDLEY: The -- the statements from  
22  counsel, two statements: One, that everyone was going  
23  to lose the case, which was repeated several times by  
24  government counsel during the cross-examination of Ms.  
25  Perez.

1 JUSTICE SOTOMAYOR: It was never referenced  
2 in the summations, however, or in the reply.

3 MR. BRINDLEY: They were not specific -- the  
4 recordings were referenced, and they told them to look  
5 at the recordings. They didn't reference that specific  
6 statement. It was referenced three times in the  
7 cross-examination. When the witness suggested that  
8 it -- who was going to lose the case only referred to  
9 her husband, the government corrected her and said, no,  
10 it was everyone. And then they played the tape to make  
11 that clear.

12 They also played a portion of a recording  
13 where it said that counsel was talking to Mr. Vasquez  
14 about pleading guilty. Now, if you take those two  
15 statements together for their truth, what they mean is  
16 that counsel believes he's guilty and was telling him he  
17 should plead that way.

18 JUSTICE SOTOMAYOR: So, that's the error  
19 that you think --

20 MR. BRINDLEY: I think that's --

21 JUSTICE SOTOMAYOR: -- influenced this  
22 trial?

23 MR. BRINDLEY: I think that's the most  
24 substantial one.

25 JUSTICE SOTOMAYOR: All right. Now, tell me

1     what in this record reflects that influence.

2                     MR. BRINDLEY:   Well --

3                     JUSTICE SOTOMAYOR:   The fact that they asked  
4     for her testimony -- well, she was your client's entire  
5     defense.   So, what does the asking for her testimony  
6     show that they were interested in that particular part  
7     of the transcript?

8                     MR. BRINDLEY:   Well, asking for her  
9     testimony shows that they were focused on the -- they  
10    were asking for a transcript that would have contained  
11    that part of the record.   We don't -- we can't prove,  
12    and we don't have the burden -- I think that's  
13    important -- to prove that she -- they were focused on  
14    that specific statement.   However, they did ask for that  
15    transcript.

16                    I also think they rendered the split verdict  
17    in the case, which is --

18                    JUSTICE SOTOMAYOR:   Which transcript?   The  
19    transcript of her testimony?

20                    MR. BRINDLEY:   Her testimonies, both on  
21    direct -- and then they asked for both, plural,  
22    indicating they wanted the rebuttal testimony, which  
23    would have included these statements.

24                    And I don't think there's any way for the  
25    government to prove on this record to any degree of

1 assurance that they weren't concerned about that error,  
2 an error that I think if they took these things for  
3 their truth, then they could have thought he essentially  
4 confessed to his lawyer. His lawyer knew he was guilty.  
5 Those are fair inferences if taken for their truth. And  
6 then they could have disregarded all arguments that were  
7 made on his behalf. That's a sort of error that could  
8 infect the entire proceeding.

9 And when you ask --

10 JUSTICE ALITO: Is it correct that the  
11 difference between your position and the Government's  
12 position is that the Government says the focus should be  
13 on a rational jury, and you say the focus should be on  
14 this particular jury?

15 MR. BRINDLEY: That is one of the important  
16 differences. I think --

17 JUSTICE ALITO: Well, that I understand.  
18 But beyond that I really don't understand the difference  
19 between the two positions.

20 MR. BRINDLEY: I -- well, in the  
21 Government's brief, at some times, as we indicate in our  
22 reply, it seems that they support a very similar test to  
23 ours, and at others, it seems like they want to say that  
24 you can just look at a reasonable jury and how they  
25 would view the evidence.



1 JUSTICE ALITO: Well, let me -- let me read  
2 you two sentences and tell me whether you think there's  
3 a difference between them. First one: "Is there a fair  
4 possibility that this particular evidence caused the  
5 jury to convict?" Second statement: "Is there a fair  
6 possibility that this jury would have" -- "that this  
7 jury would have convicted without the evidence?"

8 Do you see a difference between those two?

9 MR. BRINDLEY: I do.

10 JUSTICE ALITO: What is the difference?

11 MR. BRINDLEY: The difference is one of them  
12 was going to focus on the entire record, which includes  
13 the error. The other is going to focus on the evidence  
14 in the record without the error, and that's important,  
15 particularly with an error like this, an error that  
16 could have a pernicious effect that could affect a  
17 large, substantial part of this evidence, everything the  
18 defendant presented. It's really --

19 CHIEF JUSTICE ROBERTS: Could I --

20 MR. BRINDLEY: Yes.

21 CHIEF JUSTICE ROBERTS: -- stop you there?

22 I -- where in the Government's brief do you  
23 see the statement that the analysis should not look to  
24 the error, should not include the error?

25 MR. BRINDLEY: Part of the Government's

1 brief asserts that you can look at whether a reasonable  
2 jury would convict him absent the error. That  
3 assessment doesn't require a consideration --

4 CHIEF JUSTICE ROBERTS: Where -- where --

5 MR. BRINDLEY: -- of the error.

6 CHIEF JUSTICE ROBERTS: Where exactly is  
7 that in their brief? That the -- the question is  
8 whether a jury would convict him without considering the  
9 error. Because I look at the Government's brief, and  
10 they have fairly extensive analysis of -- of the error,  
11 why they think it's not important, why they -- you know.  
12 But I don't see them saying you don't look at the error  
13 at all.

14 MR. BRINDLEY: I think there's a  
15 significant -- I don't have the exact citation.

16 On page 29, Your Honor, it indicates:  
17 "Although the Court's analysis often has not focused  
18 exclusively on the overall strength of the government's  
19 proof, its decisions demonstrate that a court's  
20 determination of harmlessness can properly rest on the  
21 conclusion that the admissible evidence of guilt is  
22 sufficiently strong such that the prejudicial effect of  
23 erroneously admitted evidence can be deemed not to have  
24 altered the outcome."

25 CHIEF JUSTICE ROBERTS: Yes, exactly. In

1 other words, you look at the prejudicial effect of the  
2 erroneously admitted evidence and see if that altered  
3 the outcome.

4 MR. BRINDLEY: If that's the -- and there's  
5 parts of -- the Government's brief, I think, agrees with  
6 us in large part on what this test should be. And as  
7 far as that goes, I think the problem is the majority  
8 below asked a different question and appeared to do a  
9 different analysis.

10 JUSTICE KAGAN: What would you point at in  
11 the majority opinion below that suggests that they did  
12 an analysis that didn't look at the error and its  
13 possible prejudicial effect?

14 MR. BRINDLEY: Two things: First, the  
15 question that they asked. The question that they asked  
16 was whether a reasonable jury would convict him absent  
17 the error. There is no focus on this jury that heard  
18 the case or this verdict. And --

19 JUSTICE KENNEDY: Where -- where is that  
20 statement? Where is that statement?

21 MR. BRINDLEY: In the -- you mean in the  
22 majority opinion?

23 JUSTICE KENNEDY: Yes.

24 MR. BRINDLEY: It's immediately prior to the  
25 harmless-error analysis.

1           If we go to page 16A of the appendix to our  
2 cert petition, it states at the bottom of that first  
3 paragraph: "On appeal, the burden lies on the  
4 government to prove that a reasonable jury would have  
5 reached the same verdict without the challenged  
6 evidence."

7           That's the question they're asking. That  
8 question doesn't --

9           JUSTICE KENNEDY: But -- but in the context  
10 of the opinion -- and this was my first question -- they  
11 then proceed to analyze -- and that's toward the very  
12 end of its discussion -- what happened in this  
13 particular case. And it concludes, from this evidence  
14 we believe -- "This evidence we believe would have moved  
15 the jury to convict."

16           MR. BRINDLEY: I think the problem is they  
17 asked that question, which I think is the wrong  
18 question. Kotteakos says you can't ask that question  
19 because you can't strip the error from the whole.  
20 That's the question they ask. And to answer that  
21 question, you don't have to consider the error.

22           Then I think it's important they didn't  
23 address the error at all; they didn't address its  
24 potential impact, despite that dissent which laid out  
25 that this is one of the most prejudicial errors you

1     could have in a trial. They ignored it.

2                   CHIEF JUSTICE ROBERTS: They say --  
3     immediately after the sentence you gave us, they say  
4     "looking at the evidence as a whole."

5                   MR. BRINDLEY: They do say that. But then  
6     later on, in that same paragraph, they indicate that  
7     here's where the evidence was. And I think it's  
8     important that the only evidence they talk about is the  
9     government's evidence, and they talk about it in a way  
10    that views the evidence in the light most favorable to  
11    the government.

12                   In their harmless-error analysis, they don't  
13    address Mrs. Perez's testimony, and they -- the more  
14    important thing is they don't address the error at all.  
15    They don't even disagree with the dissent's contention  
16    that it's this terribly prejudicial error.

17                   Instead, they do what many of the courts  
18    below have been doing when they do this guilt-based  
19    approach to answer this question. They focus on the  
20    government's evidence viewed in the light most favorable  
21    to the government and then find, well, he could be  
22    convicted on that basis by a reasonable jury.

23                   JUSTICE BREYER: You didn't -- you didn't  
24    read the whole thing. I -- it's a little hard to  
25    understand. And looking at the transcript on page 769,

1 am I right? I want to get my own understanding right.

2 At that moment your client's lawyer, who they call

3 "Beau" -- is that right?

4 MR. BRINDLEY: Yes, that was me, Judge.

5 Yes, Your Honor, yes, it was me.

6 JUSTICE BREYER: Okay. All right.

7 Your client's lawyer, namely you --

8 (Laughter.)

9 MR. BRINDLEY: Yes.

10 JUSTICE BREYER: -- has not yet seen the  
11 client; is that right? They think you haven't seen the  
12 client yet. They say somewhere you haven't even talked  
13 to him yet or -- he hasn't even talked to Beau. He  
14 hasn't seen his lawyer yet. They say that two  
15 paragraphs earlier.

16 So, is that right, basically, that they  
17 think that, anyway? You see at the top of the page,  
18 about six lines down: He hasn't even talked to the  
19 lawyer yet. He hasn't even talked to Beau.

20 MR. BRINDLEY: I think that actually what  
21 they're talking about was whether Mr. Perez's lawyer had  
22 talked to me, Mr. Vasquez's lawyer.

23 JUSTICE BREYER: Oh, they're talking about  
24 the lawyer. All right. And what you're trying to do,  
25 as far as I can read this, is they think what you're

1     trying to do is you want Perez to plead guilty. Is that  
2     the fair thrust of this?

3                 MR. BRINDLEY: There's some discussion  
4     between them --

5                 JUSTICE BREYER: What do you think it means?

6                 MR. BRINDLEY: There's -- it's hard for me  
7     to tell exactly what --

8                 JUSTICE BREYER: All right. So, it's hard  
9     to tell what they're talking about, I grant you that. I  
10    thought they were talking about trying -- that you  
11    thought it would be better if everybody got some kind of  
12    agreement worked out.

13                And then she says, Perez's wife: "How can I  
14    not worry?" He says: "I don't understand what's going  
15    on." Which is fair comment. "But it's not the way  
16    Beau -- he's putting it two different ways. If he  
17    didn't explain to you the way, then, either -- then it's  
18    a different story. If you don't ask him" --

19                Then she says: "Yes, he's saying that  
20    everybody's going to lose. He's saying that whatever  
21    he wants to say. I don't believe him."

22                Well, by the time I got through reading  
23    that, I wasn't certain what they were talking about, and  
24    I thought it sounded like they're talking about: Let's  
25    all make an agreement or everybody's going to lose.

1                   And -- and I could see that you could say  
2   that's prejudicial. I could also see that the  
3   government could say it isn't prejudicial. And it's  
4   pretty hard for me to read their opinion as thinking  
5   they were really not thinking about that error. I mean  
6   that was -- or not an error. I mean, of course, they'd  
7   be thinking about that; that was the issue.

8                   And as I read the opinion, they  
9   said, well, there's so much other evidence in the case,  
10   and in our opinion, this is weak enough that it didn't  
11   -- wouldn't have made a difference and -- and if you  
12   didn't, say, take it for the truth.

13                  And the other, dissenting judge, common, is  
14   thinking: No, I don't know; you know, it's pretty hard  
15   to understand what it means, but there's an implication  
16   there the lawyer thinks he's guilty of some kind, and in  
17   context that might have made a difference. So, he comes  
18   to a different conclusion.

19                  That's what I saw going on. And I didn't  
20   see some big war of standards. I just saw judges  
21   disagreeing about a fairly tough question in an  
22   individual case. So, what can you say to make me change  
23   my mind and think this is a war of standards that we  
24   ought to --

25                  MR. BRINDLEY: Well, because -- I think -- I



1 think the most important thing is what I've already  
2 said, is the question they ask isn't about the error,  
3 and they don't address it at all. And when you consider  
4 a dissent with that robust of language, the idea that  
5 they wouldn't address it at all is problematic.

6 JUSTICE BREYER: Okay. So, would it satisfy  
7 you in your opinion if we said: We aren't finding your  
8 opinion totally clear. And, luckily, people don't have  
9 the right to send cases back to us on that basis, but we  
10 have the right to send cases back to you on that basis.

11 (Laughter.)

12 JUSTICE BREYER: And, therefore, we would  
13 like you to clarify whether you do or did or did not  
14 take in the actual transcript page there, when you  
15 reached your conclusion.

16 MR. BRINDLEY: I don't think that would be  
17 sufficient, because I think the important thing here is  
18 that they be required to ask the right question, to  
19 focus on this jury that heard the case.

20 JUSTICE KAGAN: Well, Mr. Brindley, I mean,  
21 I guess one difficulty -- and this is really repeating  
22 Justice Alito's question, but it seems that you're  
23 parsing things pretty closely. If I ask the question  
24 whether an error altered the verdict, it seems to me I'm  
25 asking pretty much the same question as whether without

1     that verdict the -- whether without that error, the  
2     verdict would be the same. That seems like just two  
3     ways of saying the same thing.

4                 Now, if what you're saying is put aside that  
5     formulation, there are lots of courts that are doing  
6     something wrong, which is that they're not looking at  
7     the error and its possible prejudicial effect at all,  
8     then I understand the argument; but then I ask the  
9     question, well, is that what this court did?

10                MR. BRINDLEY: And I think that the -- by  
11     asking the question in that way and talking only about a  
12     reasonable jury absent the error, when you start saying  
13     absent the error and you start looking at the evidence  
14     without the error, you're looking at a case the jury  
15     didn't hear. And I think that's the biggest problem.  
16     If you're looking at a case the jury didn't hear, then  
17     the reviewing court sort of makes its own guilt judgment  
18     about a case they didn't hear.

19                JUSTICE ALITO: Well, look, if you -- if you  
20     win, your client will get a new trial. Let's suppose  
21     that the new trial is exactly like the trial that took  
22     place. Every single thing is the same except the error  
23     is corrected. All right. Isn't that essentially the  
24     harmless-error analysis?

25                MR. BRINDLEY: No, I don't think so.

1 JUSTICE ALITO: No?

2 MR. BRINDLEY: I don't think so, because I  
3 think if you do the analysis that way and you say the  
4 error is corrected, you don't take into account its  
5 impact. The question has been to be whether it  
6 contributed to the jury's verdict, not whether the  
7 verdict would be the same in another trial. That's  
8 where that Sixth Amendment problem that this Court was  
9 worried about all the way back in Kotteakos, and even in  
10 Neder, where this Court said to safeguard the jury's  
11 province, we have to do an exacting review of the entire  
12 record including -- that would include the error,  
13 obviously, and its impact.

14 And here this court didn't address the error  
15 or its potential impact, and I think --

16 JUSTICE SCALIA: Are you -- are you saying  
17 that it doesn't matter that the verdict would have been  
18 the same by this jury if the error had not been made?  
19 You're --

20 MR. BRINDLEY: Yes, I am saying that. I'm  
21 saying that the question --

22 JUSTICE SCALIA: You're saying that the test  
23 is whether it contributed to the verdict, and if it did,  
24 it doesn't matter whether the same verdict would have  
25 been pronounced absent that evidence?

1                   MR. BRINDLEY: That is correct, Your Honor,  
2   yes.

3                   JUSTICE SCALIA: Well, then, what is  
4   harmless error? Every error is harmful. Every error  
5   that's -- that's there contributes to the verdict.  
6   There's no such thing as harmless error.

7                   MR. BRINDLEY: I think -- I don't think that  
8   should be the formulation of the test. I think it has  
9   to have a -- what the government has to be able to do is  
10  prove to the necessary degree of certitude that the  
11  error doesn't substantially impact the verdict. And the  
12  reason I --

13                  JUSTICE SCALIA: What -- what does that  
14  mean? To say that it doesn't substantially impact the  
15  verdict means the verdict would have been the same  
16  despite this evidence. But you're saying, no, that's  
17  not the test; you have to ask whether it contributed to  
18  the verdict. The Government says, well, it did, but the  
19  verdict would have been the same anyway.

20                  That's what harmless error is, it seems to  
21  me.

22                  MR. BRINDLEY: I think what the -- when you  
23  ask the question about whether the verdict contributed  
24  substantially to -- or, I'm sorry, whether the error  
25  contributed substantially to the verdict, what you're

1 doing is you're -- you have to then look at the entire  
2 record and you have to look at the error's impact. And  
3 when you do that, you can make a determination whether  
4 there's anything in the record that would allow the  
5 government to prove to the right degree of assurance  
6 that it didn't.

7 Now, you could -- it could be the case that  
8 you look at all of the evidence and you can say, well,  
9 in light of all the other evidence, the error was  
10 cumulative, or it was essentially uncontested. And then  
11 you can find that error is harmless. It couldn't have  
12 contributed to the verdict, and we know that to the  
13 right degree of certitude.

14 I think the problem comes in when you're  
15 talking about this reasonable jury and whether they  
16 would convict without the error. That's some other  
17 trial.

18 JUSTICE SOTOMAYOR: Could we get a little  
19 more practical here? I think I understood your basic  
20 argument, which is: My defense was by this one woman,  
21 the wife of one of the codefendants. She tells a story,  
22 and if the jury had believed her story they would have  
23 acquitted your client.

24 MR. BRINDLEY: Yes.

25 JUSTICE SOTOMAYOR: All right. So, I am

1     assuming what you're saying -- and you can correct me if  
2     I'm wrong -- which is if we believe that the error  
3     committed affected her credibility in a meaningful way,  
4     that that deprived you of a defense. Is that what  
5     you're saying?

6                 MR. BRINDLEY: Yes.

7                 JUSTICE SOTOMAYOR: Of the potential of  
8     convincing the jury.

9                 MR. BRINDLEY: Yes, absolutely, in addition  
10    to the fact that the error -- if those things are taken  
11    for their truth, they serve as an independent basis for  
12    conviction, believing he had essentially confessed.

13                JUSTICE SOTOMAYOR: Okay. Now, assuming  
14    that's your argument --

15                MR. BRINDLEY: Yes.

16                JUSTICE SOTOMAYOR: -- I go back to my  
17    question. Okay? Because what you said to me earlier,  
18    it wasn't about believing her or not; it was about  
19    believing the defense attorney when -- whether the  
20    defense attorney thought the defendant was guilty or  
21    not.

22                MR. BRINDLEY: I think that -- well, I think  
23    the two go hand in hand. I think that if they take these  
24    statements for their truth, they could disbelieve her  
25    and the defense attorney who called her because the

1 defense attorney knew he was guilty and then called this  
2 witness to say otherwise. I think that would in that  
3 situation make it appear as if she wasn't telling the  
4 truth. And I think the important thing about this whole  
5 analysis --

6 JUSTICE SOTOMAYOR: Let's -- let's --

7 MR. BRINDLEY: Okay.

8 JUSTICE SOTOMAYOR: Are you -- are you  
9 taking the position in this case that a reviewing court,  
10 under no circumstance, could conclude that this error  
11 was harmless? Or are you taking the position in this  
12 case that the court here, the Seventh Circuit, I think,  
13 committed review error and we should send it back for  
14 them to do it the right way?

15 MR. BRINDLEY: I -- I am first saying that  
16 the court committed review error. But I think -- I'm  
17 also saying on top of that if you do the error -- review  
18 properly in these cases, as we've asked the test to be  
19 formulated, then what this -- this case is going to come  
20 down to is really one question, and --

21 JUSTICE GINSBURG: Well, you're -- and  
22 you're agreeing with the dissenting judge, who I think  
23 did say this error is harmful.

24 MR. BRINDLEY: Yes, of course.

25 JUSTICE GINSBURG: And so, you're not saying

1     that it's just that they didn't use the right formula,  
2     but you would say, given what occurred here, the  
3     importance of this witness, that -- that this was a --  
4     this was a harmful error?

5                 MR. BRINDLEY:  Yes, absolutely.  I -- I  
6     think if you do the test appropriately and do the proper  
7     analysis focused on this jury and the potential impact  
8     of the error, then this is a harmful error.

9                 JUSTICE BREYER:  Back to Justice --

10                JUSTICE KENNEDY:  Is your argument something  
11     like this?  Let's assume there are 10 pieces of  
12     evidence.  Evidence 1 through 9 are properly admitted.  
13     Evidence item 10 is (a) wrongfully admitted and (b) so  
14     prejudicial that that's all the jury looked at.  There  
15     is a substantial likelihood of that.

16                I think this is your argument:  If the jury  
17     was so obsessed, focused, transfixed by item 10, which  
18     was improperly admitted, what would happen if we  
19     concluded that this jury in this case on these facts, if  
20     they had looked at 1 through 9, would have convicted?  
21     What result?

22                MR. BRINDLEY:  I think if you did the  
23     examination that way and didn't consider 10 at all, what  
24     you're saying is it's possible to convict on 1 through  
25     9, but you're not considering the possibility that you



1     could convict as an independent basis on 10. And the  
2     government would have to --

3                 JUSTICE KENNEDY: We're not only saying it's  
4     possible to convict, but that likely, probably would  
5     have happened.

6                 MR. BRINDLEY: I don't -- well, if the error  
7     is the error in this case, that's number 10, then I  
8     think when you consider the possible impact, sweeping as  
9     it might be, I don't think there's any way on this  
10    record that the government can prove with fair assurance  
11    that that didn't infect the jury.

12                JUSTICE KENNEDY: No, my hypothetical is  
13    that the court of appeals says that if the jury had  
14    looked at 1 through 9, which was properly admitted  
15    before them in this trial, they would have convicted,  
16    likely.

17                Now, we -- then the hypothetical is: We  
18    don't think they did because this item was so  
19    prejudicial that all they looked -- that's all they  
20    looked at. Is that what your argument is? It seems to  
21    me that's stronger than the argument you're making. I'm  
22    not sure even that works for you.

23                MR. BRINDLEY: I -- the formulation you've  
24    stated, I agree with that. If number 10 is such that  
25    there's no way that they can prove that it didn't impact

1 the jury's verdict substantially -- and I don't think  
2 they can in this case -- then, yes, that's -- that's our  
3 argument. And the one reason I think it's most  
4 important in this case is because this case comes down  
5 to -- at the end, we have -- you know, you have --  
6 essentially it's a circumstantial case. This isn't like  
7 Harrington or Schneble or the cases with direct evidence  
8 where this Court has found harmless error.

9           This is a case where the ultimate question  
10 is, if you believe Mrs. Perez is credible, he's not  
11 guilty; if you don't, he is. And in order to find  
12 harmless, you have to have a reviewing court on a  
13 cold record making that credibility determination,  
14 something that this Court has continually said a  
15 reviewing court is not in a position to do. And when a  
16 case can be ground down to the point where it's going to  
17 come to a credibility determination about a witness the  
18 reviewing court did not see --

19           JUSTICE ALITO: Well, maybe the majority in  
20 the court of appeals was wrong in its application of the  
21 harmless-error test. I didn't think that was the reason  
22 why we took this, why we took this case. What I'm  
23 concerned about is the test. Now, the only aspect of --  
24 the only thing that I understand that really  
25 differentiates your position from the Government with

1     respect to the test is whether the focus is on a  
2     rational jury or on this particular jury.

3                     And when you say the focus should be on this  
4     particular jury, aren't you calling for a speculation by  
5     the -- by an appellate court? How is an appellate court  
6     supposed to tell whether this particular jury was  
7     different from a hypothetical rational jury?

8                     MR. BRINDLEY: Because this -- the reviewing  
9     court has to look at everything in the entire record.  
10    That includes in this case the jury note. It includes  
11    in this case the split verdict. All of those things.  
12    And when you look at all of those things, you can get  
13    insight into the jury that heard the case and how they  
14    viewed it.

15                    You can also look at how a reasonable jury  
16    would view the case as heuristic device to get back to  
17    what this jury thought. But --

18                    JUSTICE GINSBURG: I thought -- I thought  
19    your main point -- yes, you said "this jury" rather than  
20    a hypothetical jury. But I thought your main point is  
21    that what's wrong is to say strip out the infected  
22    testimony, take that out, look at the rest of the  
23    record, and if the rest of the record warrants  
24    conviction, no harmless error.

25                    I thought that what you're saying is that

1 the basic mistake is what -- what are they looking to;  
2 are they looking to all of the evidence, or are they  
3 just asking the question, let's take out the tainted  
4 evidence, see if there's enough to convict?

5 MR. BRINDLEY: Yes. Yes, Your Honor. I  
6 agree with that. The problem is the question asked by  
7 the majority strips out the error and it also focuses on  
8 the reasonable jury rather than this jury.

9 And with that, if there aren't any further  
10 questions, I would like to reserve the remainder of my  
11 time.

12 CHIEF JUSTICE ROBERTS: Thank you,  
13 Mr. Brindley.

14 Mr. Yang.

15 ORAL ARGUMENT OF ANTHONY A. YANG

16 ON BEHALF OF THE RESPONDENT

17 MR. YANG: Mr. Chief Justice, and may it  
18 please the Court:

19 The harmless-error inquiry, as this Court  
20 explained in Neder and prior decisions, turns ultimately  
21 on one question: Whether a rational jury -- and this is  
22 a quote -- "whether a rational jury would have found the  
23 defendant guilty absent the error." Now --

24 JUSTICE KAGAN: Mr. Yang, that does raise  
25 the question that I think most separates you and Mr.

1 Brindley, and it's the question that Justice Alito  
2 suggested. So, let me give you a hypothetical.

3 Let's say that this jury was not out for 8  
4 hours but was out for 8 days. And on the 7th day, a  
5 note came from the jury, and the note said we really  
6 think that these tape recordings are extremely  
7 important, but we're -- we're having a dispute about how  
8 important they are, and we'd like to listen to them  
9 again. And they do that, and then they come back with  
10 this compromise verdict.

11 Now, what you are suggesting is that we  
12 cannot look at any of that. Essentially, the best proof  
13 that's available to us about whether the error in fact  
14 affected this jury's decision, you would have a court  
15 close its eyes to. And I guess -- why would that be?

16 MR. YANG: Well, I don't believe our view is  
17 quite so firm. I think, as a general matter, our view  
18 is that indications mid-deliberation of what a jury  
19 might or some subset of the jury might be considering is  
20 generally very unreliable. And that, in your case, the  
21 Court shouldn't shut its eyes to that question, but what  
22 it should do is redirect the court back to the evidence  
23 that was before the jury. Because if we're assuming a  
24 rational jury, there often is some correspondence; it  
25 should be an indication to go back and look again.

1           If the Court were to conclude, wow, the  
2 evidence was so overwhelming, so overwhelming that no  
3 rational jury would have, you know, had a problem with  
4 convicting absent the error, it's very unlikely that the  
5 situation that your hypothetical poses would result.  
6 So --

7           JUSTICE KAGAN: So, let me make sure I  
8 understand what you're saying to me, that you're saying  
9 to me: No, we didn't mean to say that that was  
10 irrelevant; we just mean to say that an appellate court  
11 should be cautious about it and look at that kind of  
12 evidence in the -- in light of everything else that  
13 happened at the trial.

14           MR. YANG: Ultimately, the appellate court  
15 should look back at what the jury was supposed to  
16 consider, the evidence in light of the instructions. It  
17 should be a cautionary note but ultimately should  
18 redirect the court back to the evidence.

19           And I think that focuses on, again, one of  
20 the two related legal points that Petitioner made in  
21 argument that I think there's real disagreement between  
22 the Government and Petitioner on: one, the inquiry of a  
23 reasonable jury or a rational jury, which is the  
24 Government's view, versus this particular jury; and the  
25 related claim that the inquiry is how this influenced

1 the deliberative process, if it was like a factor that  
2 this jury might have considered in reaching its  
3 verdict --

4 JUSTICE SOTOMAYOR: I don't know how to  
5 separate out an admitted error situation. And let me  
6 explain why, okay? Let's assume the facts of this case,  
7 but instead of this tape recording, the improperly  
8 admitted evidence was a confession by the defendant.  
9 Would you be prepared to say that in a circumstantial  
10 case of guilt -- now, we've already said that  
11 confessions are one of the most powerful pieces of  
12 harmful error -- that in this, in a confession, that  
13 somehow this was still harmful -- harmless?

14 MR. YANG: Are we taking Marina's testimony  
15 out now?

16 JUSTICE SOTOMAYOR: Yes. Yes.

17 MR. YANG: Okay. If Marina's testimony was  
18 not in and you had the evidence here -- now, an  
19 unconstitutional confession, of course, would raise the  
20 bar, right?

21 JUSTICE SOTOMAYOR: That's a different  
22 standard.

23 MR. YANG: We're going to --

24 JUSTICE SOTOMAYOR: Let's -- let's talk  
25 about it under the Kehota standard. Let's talk about

1 the standard we're assessing.

2 MR. YANG: If you're -- all you're asking is  
3 a fair assurance, then I think you could get to the same  
4 result here, because what you -- when you take Marina's  
5 testimony out of the picture, there was really no  
6 defense at all. What the government had was a strong  
7 case --

8 JUSTICE SOTOMAYOR: No, no, no. He  
9 testifies, but he testifies to everything Marina said.  
10 Meaning, he -- when I used the word "confession," I'm  
11 sorry, I misspoke.

12 He takes the stand. He -- or doesn't take  
13 the stand. He says everything he said to the police.  
14 And that confession that he was there, et cetera --

15 MR. YANG: So, he testified to the substance  
16 of Marina's testimony, that he happened to just drive  
17 there?

18 JUSTICE SOTOMAYOR: She called him --

19 MR. YANG: Right.

20 JUSTICE SOTOMAYOR: -- et cetera.

21 MR. YANG: And then the error is the same  
22 error?

23 JUSTICE SOTOMAYOR: It was improperly  
24 admitted. Without Miranda --

25 MR. YANG: The tapes were --



1 JUSTICE SOTOMAYOR: -- Miranda warnings.

2 MR. YANG: The tapes?

3 JUSTICE SOTOMAYOR: Uh-huh. Not the tapes,  
4 just the story.

5 MR. YANG: I'm a little confused --

6 JUSTICE SOTOMAYOR: All right.

7 MR. YANG: -- because if he's testifying in  
8 court, the government is not putting him on. He's going  
9 on as -- there's no Miranda question or anything.

10 JUSTICE SOTOMAYOR: My hypothetical is not  
11 working for this reason, and I understand what you're  
12 saying. It's hard to identify a comparable mistake.  
13 But my point is that -- doesn't the harmfulness of the  
14 error sort of vary with the strength of the government's  
15 case?

16 MR. YANG: Undoubtedly. I think that's right.  
17 Now, let --

18 JUSTICE SOTOMAYOR: If he had not run away,  
19 and the tapes were admitted --

20 MR. YANG: We would have a weaker case, and  
21 it would be -- ultimately, these lines that the Court  
22 has to draw between a fair assurance or harmless beyond  
23 a reasonable doubt are guides to reasoned judgment by  
24 the court of appeals. The Court has repeatedly  
25 recognized that this is a reviewing court's judgment

1 based on the record.

2 JUSTICE SOTOMAYOR: Exactly.

3 MR. YANG: Now -- now --

4 JUSTICE SOTOMAYOR: And what the defense  
5 said was there's only one defense here, and it's the  
6 wife's defense that he was there by accident, not  
7 intentionally. There was a lot of countervailing  
8 evidence to disprove that, but the question is could a  
9 reasonable jury have -- might have or could have  
10 credited that defense?

11 MR. YANG: Well, I'm not sure that that's  
12 Petitioner's view. I mean, I would -- there's two  
13 aspects to this case. We can talk about the fact-bound  
14 ins and outs of that, which is interesting in its own  
15 right. But I think one of the key legal questions for  
16 the Court is what's the standard that the Court must  
17 apply. And there's a real difference between  
18 Petitioner's and the Government here.

19 And that standard the Petitioner has  
20 advocated is that this jury, as opposed to the  
21 reasonable jury, and that looking at this jury, you must  
22 look at the thought process of this jury to decide  
23 whether the error might have had some influence.

24 JUSTICE SOTOMAYOR: No, you look at how the  
25 case was tried.

1                   MR. YANG: Well, no, I think the position  
2 about this jury versus a rational jury, in looking at  
3 the deliberative process, is entirely foreclosed by this  
4 Court's decision in Shinseki.

5                   JUSTICE GINSBURG: But, Mr. Yang --

6                   JUSTICE KAGAN: Well, you just told me it  
7 wasn't, Mr. Yang. Because -- well, I think that the --  
8 that the reason why this jury versus a reasonable jury  
9 is important is whether you're going to take into  
10 account what you know about what this jury did: how  
11 long it stayed out, what notes it wrote to the court,  
12 what eventual verdict it reached.

13                   And you just suggested to me that that was  
14 fair game to consider in this analysis, although one  
15 should be cautious about doing it.

16                   MR. YANG: I should qualify that. I didn't  
17 intend to give the Court the misconception that we're  
18 looking at this jury. The ultimate question is whether  
19 a rational jury would have convicted absent the error.

20                   JUSTICE KAGAN: Well, a rational jury is not  
21 the jury that I said stayed out for 8 days and sent back  
22 a note on the 7th day. That's this jury.

23                   MR. YANG: And the reason that I believe  
24 that the Court can use that as a benchmark to look back  
25 at the evidence is it is some indication of perhaps what

1 the evidence should be saying to a rational jury. But  
2 the ultimate question is the rational jury.

3 And let me give you a few examples from the  
4 Court's case law, because I think this really puts it  
5 beyond dispute that the real question is the question of  
6 a rational jury, what they would do absent the error.

7 First, in Neder the Court explained that  
8 erroneous admissions of evidence or exclusions of  
9 evidence, just like an erroneous instruction on an  
10 element of the offense, or failure to instruct on a  
11 necessary element of the offense as was the case in  
12 Neder, will infringe on the jury's factfinding role and  
13 will affect the deliberative process in ways that are  
14 not readily calculable.

15 The error in Neder was that the jury was  
16 instructed not to consider the question of materiality,  
17 which was an essential element of the defense. And the  
18 Court specifically rejected that the -- that the fact  
19 that this jury didn't actually make a finding based on  
20 the evidence was not -- did not foreclose harmless-error  
21 analysis.

22 JUSTICE GINSBURG: You're going back then to  
23 your position in your brief where you said that you  
24 would not include, in the harmless-error calculus, that  
25 the jury requested to hear Marina's testimony again, the

1 length of their deliberations, the divided verdict? You  
2 said in your brief, at pages 32 to 35, that you would  
3 not include those.

4 MR. YANG: That's right. Those types of  
5 indications are entirely unreliable and --

6 JUSTICE GINSBURG: But I thought you  
7 answered Justice Kagan that you could take them into  
8 account, the court could take them into account but  
9 cautiously, not give them -- not give them undue weight.

10 MR. YANG: What I think the court should do  
11 is when you have a -- what is a much better indication  
12 or at least a -- of what this jury might have been  
13 doing, you use that as a reason to go back and look  
14 again at the evidence.

15 JUSTICE BREYER: I suspect --

16 JUSTICE KENNEDY: Suppose you have a case in  
17 which, after the verdict of guilty, there's a motion for  
18 a new trial, and it's being heard by the trial judge,  
19 and the trial judge said: I now acknowledge that this  
20 court committed error in introducing item 10 in  
21 evidence. And the court remembers that when this came  
22 into evidence, the courtroom was quiet, the jury was  
23 transfixed, jurors were weeping. This was the high  
24 point of the trial.

25 That's wrong for the judge to say. All he

1 has to say is, well, I have to ask whether items 9 -- 1  
2 through 9 would have been in, and some other jury, a  
3 rational jury -- so, that's the end of it. Judges do  
4 the -- do what I suggested all the time.

5 MR. YANG: Well, we think that, again, the  
6 -- the inquiry that needs to be focused on is what a  
7 rational jury would do. And let me give you an  
8 example --

9 JUSTICE KAGAN: That's starting to look, Mr.  
10 Yang, very much like a directed verdict for the  
11 government on the part of a judge, because you're so  
12 abstracting it from this case and this jury and what  
13 this jury's reactions to everything that happened was  
14 that, you know, why not just go to the directed verdict  
15 route?

16 MR. YANG: This Court has repeatedly  
17 rejected that. The reason it's not a directed verdict  
18 is you have a jury verdict. You have a jury verdict  
19 that beyond a reasonable doubt, the jury has factually  
20 determined that this defendant is guilty of the offense  
21 charged, on proper instructions. Then the question is:  
22 What remedy do you have?

23 JUSTICE KAGAN: You do have a jury -- excuse  
24 me. You do have a jury verdict, but you are giving us a  
25 formulation of the test that essentially pretends that

1 the jury is not there and that we know nothing about how  
2 it reacted to various things.

3 MR. YANG: The reason --

4 JUSTICE KAGAN: Sorry. A question mark.

5 (Laughter.)

6 MR. YANG: This I think can be answered if I  
7 could just get out a few of the Court's cases, because I  
8 think this shows the Court's rationale here and shows  
9 that our view has to be the right view.

10 For instance, in a series of cases, this  
11 Court has concluded that the unconstitutional admission  
12 of a confession, either of the defendant or the  
13 codefendant, can be harmless when there is overwhelming  
14 evidence such that a rational jury would convict without  
15 the evidence.

16 Now, if we're looking at what a jury would  
17 have considered, whether they were brought to tears or  
18 whatever, when you're talking about a confession,  
19 there's no doubt that a rational jury or any jury is  
20 going to have that far in the forefront of their minds  
21 when they are deciding guilt or innocence. But the  
22 question --

23 JUSTICE SOTOMAYOR: Counsel, I just don't  
24 see how you can do it without the error. I keep going  
25 back to this point. How about if the prosecutor had

1 done in summation the following: Ladies and Gentlemen,  
2 whatever the wife told you disbelieve because the lawyer  
3 said he was guilty.

4 MR. YANG: I'm sorry. I just --

5 JUSTICE SOTOMAYOR: The lawyer -- the  
6 prosecutor got up at the end of trial and said:  
7 Disbelieve everything the wife told you, because the  
8 lawyer said the defendant was guilty. All right? I'll  
9 go through all the other evidence I have that might  
10 prove that she was not telling the truth, but the  
11 central, most important piece of evidence in this case  
12 about his guilt is that the lawyer said he's guilty.

13 Can you say that this jury was uninfluenced  
14 by that error?

15 MR. YANG: No.

16 JUSTICE SOTOMAYOR: Because under your  
17 formulation --

18 MR. YANG: No. You can't --

19 JUSTICE SOTOMAYOR: -- a rational jury would  
20 have convicted absent the lawyer saying that.

21 MR. YANG: That's right. But this Court has  
22 repeatedly said, for instance in Rose, where the  
23 question was the jury was told to presume certain malice  
24 in a -- in a homicide, the fact that the error may have  
25 altered the basis on which the jury decided the case is



1 not the question; you look to the reasonable juror.

2 Similarly in Pope, the Court said the  
3 question does not turn on whether the jury did not, in  
4 fact, have this error in mind when it found the  
5 defendant guilty beyond a reasonable doubt, because --

6 JUSTICE GINSBURG: You would -- you would  
7 take into account that the prosecution apparently  
8 thought this was important, so important. The trial was  
9 over. The prosecutor said: Judge, I'd like to come  
10 back so these tapes can be introduced.

11 That -- the -- we have the witness  
12 testifying that defendant is there by chance; he was not  
13 part of the scheme. We have no direct evidence, because  
14 Cruz never spoke to this defendant, to Vasquez. He's at  
15 the scene, we know that. And an explanation, an  
16 innocent explanation, is given why he's at the scene.  
17 And then the government comes back, after everything is  
18 done, and says: We want the jury -- we want these tapes  
19 to be before the jury.

20 Isn't that -- don't we take into account  
21 that the government itself thought this was very  
22 important?

23 MR. YANG: I -- I think it's a factor that  
24 you consider, again, in directing the courts look at  
25 really what the trial evidence was. I mean it, I think,

1    believes the facts of this case -- obviously, that's a  
2    hypothetical. But when you look at how cases really  
3    develop, prosecutors don't focus on a fleeting, you  
4    know, sentence in a series of -- series of long tapes  
5    that weren't transcribed --

6                   JUSTICE GINSBURG: But my point to you is it  
7    wasn't fleeting if the government says we want to extend  
8    the trial so that we can play these tapes, all of them.  
9    And they contain not just the one statement. There's  
10   the one statement that the trial will be bad, a trial  
11   will be bad for all of them, and they all -- that --  
12   they should take a blind plea.

13                  MR. YANG: I think when you look at what  
14   happened at trial, you see that the tapes were played  
15   for two reasons: one, to show that Marina had bias  
16   because she was told by Petitioner's counsel that  
17   Petitioner's counsel -- well, she thought this --  
18   Petitioner's counsel would be able to make motions and  
19   arguments on behalf of her husband at sentencing.  
20   And --

21                  JUSTICE SOTOMAYOR: The dissent pointed out  
22   that she admitted that before the tapes were played.

23                  MR. YANG: Correct.

24                  JUSTICE SOTOMAYOR: That she was testifying  
25   in the hopes of getting a lesser sentence for her

1 husband. So, she -- the tapes weren't necessary for  
2 that.

3 MR. YANG: Well, the tapes certainly were  
4 reinforcing of that. And, in fact, when the  
5 government's closing argument -- it did not reference  
6 anything about this -- what I think you and  
7 Justice Breyer correctly identified as a very ambiguous  
8 sentence in a series of long tapes. And, remember,  
9 these --

10 JUSTICE GINSBURG: What was --

11 MR. YANG: -- the transcripts that are in the  
12 record are only one portion of the tapes. So --

13 JUSTICE SOTOMAYOR: What was your second --

14 JUSTICE GINSBURG: What was the line that  
15 the government, the prosecutor, repeated three times  
16 while she was on the stand, the exact line?

17 MR. YANG: The exact lines?

18 JUSTICE GINSBURG: Yes.

19 MR. YANG: This is --

20 JUSTICE GINSBURG: The government thought --  
21 thought it was important for the jury to hear it,  
22 because they said it three times.

23 MR. YANG: Well, to be fair, I think you  
24 need to look at what's before and after it. The  
25 government is focusing on three different statements

1     that are at issue in the case.

2                   The first one is that -- with some  
3     profanity, suggesting that her husband is not likely to  
4     succeed at trial. The second one is that defense  
5     counsel suggested -- that she said that defense counsel  
6     suggested that everybody was going to lose. And then,  
7     third, she thought everybody was in, again with  
8     profanity -- I'm going to paraphrase -- a bad situation.

9                   JUSTICE SCALIA: Mr. Yang, why does any of  
10    this have to do with her credibility? Did the dissent  
11    say that the way this affected the jury was that it  
12    rendered her less credible? I thought --

13                  MR. YANG: The --

14                  JUSTICE SCALIA: -- that the dissent just  
15    said it's bad to tell the jury that even the defendant  
16    thought he was guilty -- or even the defendant's lawyer  
17    thought he was going to lose.

18                  MR. YANG: The reason that this was in --  
19    and I don't -- it's not contested here -- is because the  
20    argument was made that these statements equating  
21    Petitioner and Perez in terms of their level of guilt or  
22    their likelihood of being convicted is inconsistent with  
23    Marina's subsequent testimony that all of us -- you  
24    know, Vasquez just -- or Petitioner just showed up  
25    unknowingly because she asked him. That was the theory.

1           It's not contested. And, in fact, nothing  
2   that the jury heard in this case under Petitioner's  
3   theory would be different. The only difference would be  
4   a limiting instruction that would simply say you can't  
5   take these statements for the truth of the matter.

6           So, nothing that the jury heard would have  
7   been different. When you read the short passage in the  
8   context of these tapes -- and the tapes, again, are not  
9   fully transcribed. Petitioner asked for the entire  
10  tapes to come in at the -- at the tail end of the trial,  
11  which -- which was -- based on the government's showing  
12  that was uncontested that Petitioner was at the scene,  
13  he drove the \$23,000 there, he waited with Perez and  
14  Cruz while the informant was coming back, he was there  
15  when the call was made to the informant that said they  
16  had the money.

17           Now, there's some dispute over whether he  
18  said that, but certainly he was there when that call was  
19  made because that's what triggered the raid. All of  
20  that was basically undisputed. You've got all these  
21  calls that tie Petitioner to Perez -- to Perez,  
22  27 calls --

23           CHIEF JUSTICE ROBERTS: You're going over  
24  the evidence. And I may simply be asking the same  
25  question Justice Kennedy asked earlier. But let's say

1     you have a situation where it's the same thing, and at  
2     the -- you, know, and the improperly admitted evidence  
3     has the defendant saying: I'm guilty, I'm guilty. And  
4     the evidence is the same as all you've set forth at  
5     pages 2 through 9, very complicated, who's driving what,  
6     you know, kind of car where, and where they're meeting.  
7     And the jury goes out and comes back in 2 minutes: You  
8     know, the guy said he was guilty.

9                 Is that a situation in which we're supposed  
10    to then go back, look at all the complicated evidence,  
11    and see if a jury would have convicted? Or can we with  
12    a fair degree of confidence say that the error is what  
13    led the jury to convict?

14                MR. YANG: Well, I think the former, but let  
15    me explain. And again, I'm going to go back to Neder,  
16    if I may, for a second. In Neder, the jury never found  
17    an element of the offense. Never did. There's no  
18    question that the jury's verdict was affected by the  
19    failure to instruct. In fact, it was not just a failure  
20    to instruct. The district court told the jury this is  
21    not for them to consider. And --

22                JUSTICE KAGAN: But critical to the Court's  
23    view in that case was that the -- the defendant could  
24    not have contested that element.

25                MR. YANG: Well, but if we're -- again, if

1 we're focusing on the legal dispute between us and the  
2 other side about whether we're looking at this jury or  
3 what a rational jury would do when you excise the --

4 JUSTICE BREYER: Well, I would like very  
5 much to know what your answer is to Justice Kennedy's  
6 hypothetical and the Chief Justice's. As I understand  
7 those hypotheticals, they're trying to imagine a case --

8 MR. YANG: Right.

9 JUSTICE BREYER: -- where the particular  
10 piece of improperly admitted evidence -- we know from  
11 how the jury reacted, or the kind of evidence -- it's  
12 the kind of thing that could really make a difference.  
13 I mean, they were in tears, et cetera.

14 MR. YANG: And --

15 JUSTICE BREYER: All right. Now, in my  
16 reading of this, which I once had to read about 100  
17 harmless-error cases, and it seemed to me -- and you can  
18 confirm or deny this -- that in cases like that, the  
19 judge who knows this is a tough case when the jury's  
20 feeling this way, asks himself or herself the question,  
21 could this illegally admitted evidence make a  
22 difference? Could it have made a difference in this  
23 case? Could it have? And the answer is going to be  
24 "no" where that judge thinks a reasonable jury would not  
25 have thought it made a critical difference.

1                   And that's just putting the same thing I  
2   think slightly differently. But the answer in  
3   Justice Kennedy's case would be a judge just isn't going  
4   to think it has nothing to do with rationality. If the  
5   jury's in tears, they're going to think it's a close  
6   case. And, therefore, if in fact this could have made a  
7   difference, the judge says, yes, it's not harmless.

8                   And if the judge thinks, no, it couldn't  
9   have made a difference to any rational person, he's  
10  going to say "harmless." Period.

11                  Now, that was my impression reading those  
12   cases. And I felt that those hypotheticals were getting  
13   at that. And -- use them. Answer them rather than me,  
14   because that's what I'm interested in.

15                  (Laughter.)

16                  MR. YANG: The answer is that in a case  
17   where the jury -- where you have some very provocative  
18   evidence, but there's also a very strong case that  
19   exists -- it may depend on the level of certainty that  
20   you need to get to, whether it's a fair assurance or  
21   harmless beyond a reasonable doubt. But even in those  
22   cases, you can -- if the court looks at the evidence as  
23   a whole and says that there was so much evidence before  
24   this stuff came in, this bad -- this error came in, that  
25   a rational jury would have gotten to the same result,



1     that it would have convicted, then --

2                   JUSTICE KENNEDY:   Suppose -- suppose the  
3     judge concludes that both this jury that I had and some  
4     hypothetical rational jury would have been so focused on  
5     this evidence that that's all they would have looked at,  
6     but if they had looked at 1 through 9, the admissible  
7     evidence, they would still have found guilt.

8                   Is that -- is that what you're -- is that --

9                   MR. YANG:   I think so, but let me give you  
10    an example.

11                  JUSTICE KENNEDY:   -- a proper application of  
12    the -- of the framework?

13                  MR. YANG:   I think so, but it's not, again,  
14    what a -- what this particular jury was doing, because  
15    we know, for instance, from Neder or in the confession  
16    cases, the jury hears a confession, an  
17    unconstitutionally obtained confession,  
18    unconstitutionally admitted, from the defendant, that is  
19    going to be -- right there.  You know?  A jury -- a  
20    juror could say:  Let's go home, we have a confession.  
21    It's out of his own mouth.  There's very little else to  
22    debate.

23                  But when the evidence is beyond that  
24    confession, so overwhelming that no rational jury would  
25    have gotten to a different result, and you could say

1     that with a fair assurance or if there's a  
2     constitutional error as it would be with a confession  
3     beyond a reasonable doubt, the Court says that this is  
4     harmless.

5                     And the reason that the Court's taking that  
6     inquiry is because it recognized -- the Court's long  
7     recognized that no trial is perfect, that there are very  
8     significant costs of retrial. And so, the premise  
9     there --

10                    JUSTICE GINSBURG: But you -- you are  
11     essentially saying, as I understand you, that if there  
12     was such a thing as a directed verdict in a criminal  
13     case, if the judge would say, you know, I will direct a  
14     verdict here because there's only one way a rational --  
15     rational jury could come out.

16                    MR. YANG: This -- that argument was  
17     specifically rejected by this Court in Neder. The same  
18     question came up, and in fact, Neder is a much -- more  
19     difficult case for the government than this, because at  
20     least in Neder, the defendant had the argument that this  
21     jury could -- did not find guilt beyond reasonable doubt  
22     because it was never instructed to find an element of  
23     the offense.

24                    JUSTICE ALITO: Mr. Yang, I think you may be  
25     taking a harder position than you really need to. Why

1 shouldn't the rule be that the -- the appellate court  
2 should look at what would be done by a rational jury,  
3 except in the kind of extraordinary circumstances that  
4 have been posited by Justice Kagan's hypothetical and a  
5 few of the other questions, simply because it's so  
6 difficult to determine what a -- what the jury was  
7 actually doing?

8           We have a rule that prohibits consideration  
9 of what goes on in the jury room. But suppose we didn't  
10 have that. Suppose that it was all videotaped, and the  
11 jury didn't know what was going on, so you could -- you  
12 could watch it and see. If that were the case, then  
13 surely the rule would be what would this jury have done?  
14 But most of the time, it's just speculation to tell what  
15 a jury -- what they -- did they come back quickly?  
16 Well, that shows that this evidence was so bad that it  
17 caused them to render a quick verdict in what otherwise  
18 would have been a difficult case.

19           Did they take a long time? Well, it shows  
20 it was a close case, and, therefore, any error might  
21 have tipped them one way or the other.

22           You just can't tell.

23           MR. YANG: I'm -- I don't want to resist  
24 this too much, because I think we're fighting about  
25 things at the very extreme. Most of the times that

1 we're talking about these purported indications from the  
2 jury, it's entirely ambiguous. And the -- so, there may  
3 be well be extreme examples. And I think those would  
4 rightfully influence a court's consideration in a case.

5 But, again, when you have harmless-error  
6 cases in which we know for a certainty, as in Neder,  
7 that the jury did not find an element of the offense,  
8 the inquiry has to be, it has to be, on what the Court  
9 has repeatedly said in -- this is I believe on pages 19  
10 of our brief -- that the focus of the harmless-error  
11 inquiry is bringing the court's attention to the fact  
12 that the primary purpose of a trial is the factual  
13 question of guilt or innocence.

14 JUSTICE GINSBURG: And you read --

15 CHIEF JUSTICE ROBERTS: Counsel, when you  
16 began, if I'm remembering correctly, you said there were  
17 two ways in which your position was different from Mr.  
18 Brindley's.

19 MR. YANG: Right.

20 CHIEF JUSTICE ROBERTS: One I understand is  
21 that you look at a rational jury --

22 MR. YANG: Right.

23 CHIEF JUSTICE ROBERTS: -- and not the  
24 particular jury.

25 What's the second?

1                   MR. YANG: Well, it's related. His focus on  
2 the -- this jury I believe is seeing whether there's  
3 some influence on the process, deliberative process,  
4 even if the outcome would have been the same absent the  
5 error. And so, he's kind of trying to get into the  
6 minds of the jury. And this Court has repeatedly  
7 rejected that. Again --

8                   JUSTICE KAGAN: Can I ask you a different  
9 question, Mr. Yang, which is, you know, this difference  
10 in the formulation of the test, which I find it hard to  
11 wrap my mind around, but -- and it strikes me that  
12 there's two different ways of saying the same thing.  
13 But I'm told that there's a fair bit of scholarship out  
14 there which suggests that courts that use one  
15 formulation tend to come out one way, and courts that  
16 use the other formulation tend to come out the other  
17 way.

18                   And I'm just wondering what your view of  
19 that is, that somehow one formulation seems to put the  
20 emphasis on the entire case, whereas the other  
21 formulation seems to put the emphasis on only the  
22 government's evidence, and that that makes a difference  
23 in the end.

24                   MR. YANG: We don't think that there is this  
25 deep -- there are some disagreements or some things we

1 disagree with about what courts of appeals do in any  
2 particular cases. But with respect to this formulation  
3 of the -- I think Petitioner calls it the guilt-focused  
4 versus effect-of-the-error-focused approaches, the  
5 scholarship -- I think he relies principally on Judge  
6 Edwards' opinion about harmless error. That came out in  
7 1995, when it was already swimming against -- upstream  
8 against this Court's harmless-error decisions.

9 But he had in his pocket the Sullivan  
10 decision, which was admittedly a structural-error case,  
11 but there was language in Sullivan which suggested that  
12 you need to look at what this particular jury was going  
13 to do.

14 Then we have Neder and -- I can't pronounce  
15 this very well -- but Recuenco. It's the -- the  
16 Apprendi application of Neder, which specifically rejects  
17 this kind of broad logic in Sullivan as being  
18 inconsistent with the Court's harmless-error cases.

19 Now --

20 JUSTICE GINSBURG: You do agree -- you do  
21 agree that the government has the burden of showing that  
22 the error is harmless?

23 MR. YANG: Yes.

24 JUSTICE GINSBURG: It's the government's  
25 burden. And you also agree that we should look at the

1 evidence in the light most favorable to the defendant in  
2 making --

3 MR. YANG: No. The Court, even in -- I  
4 think most recently, the Court explained in *Shinseki*,  
5 talking about *Kotteakos*, that you don't use these kind  
6 of presumptions or rigid rules. And the reason that you  
7 do, that you're kind of looking from the perspective of  
8 a reasonable jury, is the jury has in fact found the  
9 defendant guilty beyond a reasonable doubt. And then  
10 the question is, are you setting aside that verdict  
11 because -- do you think that this error was the thing  
12 that tipped the scales from not guilty to guilty? And  
13 so, taking a look at the evidence, kind of with all  
14 presumptions favoring one side or the other, is not how  
15 this Court has conducted the --

16 JUSTICE GINSBURG: So, what does it mean  
17 that the government has the burden? What does the  
18 government have to do?

19 MR. YANG: The government has to show, as --  
20 this is the formulation in *Neder* and which the Court has  
21 said in *Neder* is the same thing that applied in  
22 erroneous admissions or exclusions of evidence, that a  
23 rational jury would have found the defendant guilty  
24 absent the error, and that involves the three core  
25 elements we explained in our brief. And then the Court

1 takes into account --

2 JUSTICE GINSBURG: The absent error. So,  
3 that means -- wait. You look at just the evidence  
4 that's not tainted?

5 MR. YANG: In some cases you can do that,  
6 where the evidence is so overwhelming -- if I -- if I  
7 may finish.

8 CHIEF JUSTICE ROBERTS: Briefly.

9 MR. YANG: Briefly. In some cases, you  
10 might do that. In other cases where it's close or the  
11 evidence is not so strong, you need to look at the error  
12 to see if that error was going to be a dispositive thing  
13 in getting to guilt.

14 JUSTICE KENNEDY: The Chief Justice allowed  
15 me to ask one question. Could I amend your statement so  
16 that you would say a rational jury in all the  
17 circumstances of this case, given what this jury heard,  
18 would have?

19 MR. YANG: Yes. It's -- in the position of  
20 this jury, based on the evidence presented to the jury,  
21 correct.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.

23 Mr. Brindley, you have 4 minutes remaining.

24 REBUTTAL ARGUMENT OF BEAU R. BRINDLEY

25 ON BEHALF OF THE PETITIONER



1                   MR. BRINDLEY: I first want to address  
2   Neder, which Government counsel continually referenced.  
3   Neder talks about the reasonable jury, but Neder also  
4   limits itself to situations where the evidence is  
5   uncontroverted and inconvertible, I think because in  
6   those situations the difference between the reasonable  
7   jury and this jury would be deemed to be nonexistent  
8   because it would be impossible for the error to have an  
9   impact.

10                  Secondly, I think it's important to note  
11   from Justice Sotomayor's hypothetical, if you don't  
12   consider the error, then even that extreme case, that  
13   would have to be ignored. And so, I think the  
14   Government's formulation and the formulation used by the  
15   appellate court below would justify -- would lead to  
16   that bad conclusion.

17                  I also think that when you do that  
18   formulation, where you're talking about the reasonable  
19   jury and absence of error, the reason those cases come  
20   out different is because those courts think they don't  
21   have to address the error, which is I think what  
22   happened in the majority below, why they didn't address  
23   it despite the dissent.

24                  The other thing I think it's important to  
25   note is the reason you have to look at the error and its

1 possible impact and not just whether you could be  
2 convicted on the other evidence is because you say,  
3 well, he could be convicted on the other evidence. If  
4 that's all that you're saying and you -- and it's not on  
5 the evidence which could independently in this case be a  
6 reason to convict, then I think you're making that guilt  
7 determination that this Court says is not supposed to  
8 happen. And I think the majority's opinion below is  
9 consistent with that approach, and there's nothing in it  
10 to suggest that's not exactly what they did.

11 I also think that in the end -- there was a  
12 mention of the limiting instruction; a limiting  
13 instruction would have cured this problem. We assume  
14 juries would follow it. That means they wouldn't have  
15 concluded that his lawyer thought him guilty and then  
16 put Mrs. Perez on the stand and concluded she wasn't  
17 telling the truth.

18 What this error allows, what -- if taken for  
19 its truth, a jury could believe that he confessed to his  
20 lawyer. They could disregard everything that was said  
21 on his behalf. They could say we know that he's guilty;  
22 his lawyer knew he was guilty; we can convict him on  
23 that basis. That's an error that can infect the  
24 entirety of the proceedings.

25 And if you look at this jury and what they

1 heard, and the question comes down to whether Mrs. Perez  
2 is credible or not, there is nothing in this record the  
3 Government can point to that would allow a reviewing  
4 court to make that determination. A reviewing court  
5 that didn't see --

6 JUSTICE ALITO: Did the panel majority in --  
7 did the panel majority in this case say anything that  
8 differs from what this Court has said about harmless  
9 error? If we were to reverse, what would we point to in  
10 the panel majority's opinion that was erroneous?

11 MR. BRINDLEY: I think you would point to  
12 that first statement of the test where they say whether  
13 the reasonable jury would convict him absent the error,  
14 because Kotteakos says you can't strip the error out.  
15 This Court has never overruled Kotteakos.

16 The other thing --

17 JUSTICE ALITO: Hasn't this Court said  
18 exactly what Seventh Circuit said there? In other  
19 cases?

20 MR. BRINDLEY: This Court has used, I think,  
21 dicta that has language of that sort. But in those  
22 cases, what the Court does -- like in Harrington, they  
23 look at what the error was; they put it in the context  
24 of the whole case, and they can say the government could  
25 prove the jury didn't look at this to the right degree

1 of assurance, because it was cumulative, because --  
2 there's no -- there's nothing --

3 JUSTICE ALITO: You want us to say -- you  
4 want us to say we're reversing you, Seventh Circuit  
5 panel, because you said what we have said in prior  
6 cases, but we were wrong?

7 MR. BRINDLEY: I think the reason to reverse  
8 them is because that formulation has proven to lead to  
9 the wrong analysis, in all of these lower courts, this  
10 guilt-based approach; and it is not the law of  
11 Kotteakos. This Court has never overruled Kotteakos.

12 And to focus on it allows a guilt  
13 determination by a reviewing court that would be  
14 violative of the Sixth Amendment that this Court was  
15 concerned about in Kotteakos, that this Court was  
16 concerned about in Sullivan, that this Court was even  
17 concerned about in Neder, outside the scope of cases  
18 where the evidence is uncontestable.

19 Because if you took these statements as true  
20 and then you came down to a question, well, is Marina  
21 credible or not, Mrs. Perez, there's nothing the  
22 government can do on this record to prove that the jury  
23 would have found her credibility differently because  
24 this Court can't figure that out on a cold record.

25 It said so, many times. It's not possible

1 to do, especially in a case that's based on  
2 circumstantial evidence like this one.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 The case is submitted.

5 (Whereupon, at 11:29 a.m., the case in the  
6 above-entitled matter was submitted.)

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