No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

EDUARDO IVANEZ- PETITIONER

vs.

THE STATE OF WISCONSIN- RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

THE WISCONSIN SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under this court's holding in *Harrison v. United States,* 392 U.S. 219, 88 S.Ct. 2008, 20 L.Ed.2d 1047 (1968),[1] must the appellate court make the harmless error determination *before* considering whether the defendant's trial testimony was impelled by the improper admission of the defendant's police confession, or is the impelled testimony analysis an integral part of the harmless error determination?

Answered by the lower court: Once briefs were submitted, the Wisconsin Court of Appeals remanded the matter to the circuit court for a "*Harrison/Anson"* analysis of whether Ivanez's trial testimony was impelled by the improper admission of his confession to police. (App. C) In doing so, the court of appeals wrote, "[W]e remand to the circuit court to conduct a review under *Harrison/Anson* and then, if appropriate, to conduct a harmless error review . . ."

Thereafter, the Wisconsin Court Appeals issued an opinion in which the court assumed, without deciding, that the circuit court's order denying

[1] The holding of *Harrison* is that where an appellate court finds that a defendant's confession to police was improperly admitted at trial, and the matter is reversed remanded for a new trial, the court must determine whether the defendant's testimony from the first trial is admissible in the state's case-in-chief in the second trial. The court held that if the defendant's testimony at the first trial was impelled by the improper admission of the police confession, then, at the second trial, the defendant's testimony at the first trial is not admissible.,

Ivanez's motion to suppress his police confession was error; and further assumed, without deciding, that the admission of the police confession at trial impelled Ivanez to testify at trial; and then conducted a harmless error analysis by disregarding Ivanez's confessions to police *and* his trial testimony, and found that the remaining evidence was "overwhelming" and sufficient to support the jury's guilty verdict. Disregarding Ivanez's exculpatory trial testimony that he acted in self-defense, though, unfairly made it seem that the state's evidence was uncontroverted.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is unpublished.

JURISDICTION

The date on which the highest state court denied discretionary review of the case was June 12, 2015. A copy of that order appears at Appendix B.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Ivanez filed a pretrial motion to suppress, on Fourth Amendment grounds, his confession to police. The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Wisconsin Court of Appeals assumed that Ivanez's confession to police was improperly obtained under the Fourth Amendment, and improperly admitted at trial, but found that the constitutional error was harmless. Where federal constitutional rights are involved, the harmless error doctrine invokes a defendant's Fifth Amendment right to due process of law, as applied to the states by the Fourteenth Amendment. *See*, *Chapman v. California*, 386 U.S. 18 The Fifth Amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Section 1 of the Fourteenth Amendment provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

I. Procedural History

The petitioner, Eduardo Ivanez (hereinafter "Ivanez") was charged with first degree intentional homicide, use of a dangerous weapon, and hiding a corpse arising out of an incident that occurred in Milwaukee, Wisconsin, on or about April 13, 2012. Ivanez waived the preliminary hearing, and he entered not guilty pleas to the charges.

Ivanez filed a pretrial motion to suppress the three custodial statements he made to police. Ivanez alleged that the statements were subject to suppression under the Fourth Amendment because he was unreasonably arrested without a warrant.

The motion was heard on August 24, 2012. Following the submission of briefs by the parties, the circuit judge denied the motion on October 8, 2012.

After four days of trial, the jury returned verdicts finding Ivanez guilty of both counts. Later, the court sentenced Ivanez to life in prison on count one, and eight years consecutive on count two, bifurcated as four years initial confinement and four years extended supervision.

Ivanez timely filed a notice of intent to pursue postconviction relief. He then filed a notice of appeal to the Wisconsin Court of Appeals. There were no postconviction motions.

After the parties had submitted their briefs, the appeals court remanded the case to the circuit court with instructions that the circuit court

conduct an *Anson-Harrison* hearing.[2] The circuit judge found that the admission of Ivanez's statement to police did not impel him to testify; and, therefore, the admission of the defendant's custodial statement was harmless error.

The court of appeals assumed, without deciding, that it was error for the circuit court to deny Ivanez' motion to suppress his custodial statement; and, further, that the erroneous admission of the statement impelled Ivanez to testify at trial. Nevertheless, according to the court of appeals, the error was harmless because of the weight of the remaining evidence presented by the state.

Ivanez timely petitioned the Wisconsin Supreme Court to review the matter. On June 12, 2015, the Wisconsin Supreme Court declined to review the matter.

II. Factual Background

A. Generally

Ivanez testified at trial that on April 13, 2012 he was in the vicinity of 21st and Greenfield Avenue in Milwaukee with a friend, Eric. While there, he saw a girl at a bus stop. The girl, Stephanie R., called Ivanez by name, and then he recognized her. The three left together; however, Eric went home.

Ivanez and Stephanie went to an abandoned house. After a while,

[2] This is a paper review of the record. The circuit judge determines: (1) whether the erroneous admission of the defendant's statement impelled the defendant to testify at trial; and, (2) whether the defendant would have repeated the same statements had the prosecutor not "spread out" for the jury the defendant's custodial statements.

according to Ivanez, he and Stephanie went to the home of Eduardo Garcia; however, they did not stay long because Stephanie wanted to drink. Therefore, they went to a liquor store and gave a man $20 to buy some “Lokos” (apparently an alcoholic drink).

They took the drinks and went back to the abandoned house. After having some drinks, Stephanie then began talking about having sex. According to Ivanez, Stephanie performed oral sex on him and, when he was finished, he started talking about the past with her. At that point, Stephanie got very angry and pulled out a knife. When Stephanie began attacking Ivanez with the knife, he hit her in the head. Then, according to Ivanez, he got on top of her and put his hands around her neck for about thirty seconds.

At just about that time, Ivanez heard other people coming into the house. He said it was Luciano Hernandez and Eduardo Garcia. The three of them later hid the body in the bathroom.

Augustin Santiago testified that he, along with his two cousins Eduardo Garcia and Luciano Hernandez, went to the vacant house and met Ivanez there. When they arrived, they saw Stephanie on the floor. Her face was swollen, she had no top on, but she was breathing. According to Santiago, Ivanez then went up to Stephanie and kicked her in the face. Santiago testified that he was present when, a short time later, Stephanie was killed. He said he saw Ivanez choking her, and she did not appear to be fighting back. Santiago did not see a weapon in Stephanie’s hand. Rather, according to Santiago, Ivanez had a knife, he stabbed her in the back with it, and then threw the knife away.

Jessica Hernandez-Salazar testified that she knows Ivanez. At one point she had been in his girlfriend. Hernandez said that on the night of April 13-14, Ivanez came to her house. He knocked on the window and he asked for money. According to Hernandez, Ivanez said that "something crazy" had happened, and that he needed to go to the north side. Ivanez said that he had stabbed a lady. Several days later, Ivanez called Hernandez and told her that on the night in question he had gone into the house and he saw a girl with a knife, and the girl attempted to stab him (Ivanez).

On April 20, 2012, Milwaukee police were summoned to the Rogers Academy because a student there, Joel C. claimed to have seen a dead body in an abandoned house two days earlier. Joel was questioned by Detective Carlos Negron. Joel told Negron that he had gone to the house with two friends, Luis and Tony, because they told him that there was a dead body there. At that point, Negron put Joel into a squad car, and Joel pointed out the house where he had seen the dead body. Joel further told Negron that, according to what he had heard, a boy named "Smokey" had killed the girl. Smokey, Joel said, lived two doors down from the house where the body was located. Joel, though, said that he had never spoken to Smokey.

The police searched the house that was pointed out by Joel. There, in a crawl space on the third floor, they found Stephanie's body. The body had puncture or stab wounds around the neck. It was determined that Stephanie died from manual strangulation. She also had numerous contusions on her face.

While officers were processing the scene, Det. Negron went outside, and he saw Ivanez standing on the porch of the house that Joel had identified as Smokey's house. Negron approached Ivanez and confirmed that he (Ivanez), lived at the house and that he was known as Smokey.

At trial, the state played for the jury portions of the April 21, 2012 interrogation of Ivanez conducted by Det. Steven Cabellero In this statement to police, Ivanez did not deny killing Stephanie; rather, he admitted that he choked her, punched her, and stabbed her. Nevertheless, he steadfastly maintained that she had a knife, and mentioned that he believed he was the target of a robbery. He admitted that, after Stephanie was dead, it was he, Eddie Garcia, and Luciano Hernandez who moved Stephanie's body to the bathroom. Two days later, he and Garcia moved the body to the attic crawl space.

Near the end of the interrogation, Ivanez wrote a letter of apology to Stephanie's family. In the letter he said that "we all make mistakes, and this is a mistake I will always regret doing."

Ronald Witucki, a DNA analyst called by the state, testified that a swab of genetic material taken from Stephanie's right breast included DNA from Eduardo Ivanez.[3]

B. Motion to Suppress Statement

Evidence was presented at the pretrial motion hearing that on April 20, 2012, Detective Negron was dispatched to the Rogers Academy

[3] Witucki testified that he came to his own conclusion after reviewing Sharon Polatkowski's notes and data. (R:49-57, 58) In other words, Witucki did not actually do the lab work of extracting the genetic material from the swabs.

located at 2430 W. Rogers Street in Milwaukee. Negron was accompanied by his partner, Malcolm McNeilly. When the detectives arrived at the Academy, they met with the principal and a student named Joel C., who appeared to be ten to twelve years old. Joel told the detectives that two days earlier he had been to the house at 2512 W. Rogers and, while there, he saw a dead body. Joel said he was with two friends, Luis and Tony. According to what Joel told Negron, people were saying that a high school student named "Smokey" was responsible for killing the person. Joel never spoke to Smokey; rather, it was Joel's friends who said that Smokey was responsible.

Negron and Joel rode in the squad car, and Joel pointed out the house where he had seen the body. This was at approximately 2:00 p.m. Joel also pointed out what he believed to be Smokey's house, which was two houses away from the first house. Negron then took Joel back to school.

Negron returned to the house that Joel had identified as the one containing the dead body. He entered the house with other officers, including McNielly and officer Bradley Blum. The officers found a dead body in the house. Thus, they summoned the Milwaukee Fire Department.

When the fire department arrived, Negron went outside to retrieve a notebook from the squad car. While outside, Negron looked at "Smokey's house" and saw an older woman and two Hispanic boys on the front porch at 2504 W. Rogers. He did not recognize any of the people.

Negron went and introduced himself to the people on the porch. According to Negron, one of the boys told him (later identified as Ivanez)

that he (the boy) was Smokey and that he lived at that address. Negron invited Ivanez to come off the porch. On the sidewalk, Negron frisked Ivanez. Negron then took Smokey by the elbow and escorted him to Officer Blum. Negron directed Blum to detain Ivanez in the back of the squad car. The back doors to the squad car were locked (i.e. they cannot be opened from inside). Blum testified at the motion hearing that Ivanez was in custody, and he was not free to leave.

Within minutes of being placed in the squad car, Ivanez asked to be allowed to go the bathroom. Blum informed Negron of this, and Negron directed that Ivanez be taken to the District 2 police station to use the restroom, and that Blum was to maintain custody of him. *Id*. Blum placed Invanez in handcuffs. Ivanez arrived at the police station at approximately 2:46 p.m.

After Ivanez used the restroom, he was escorted back to the squad car, and he was held there. The car remained parked in the sally port. At approximately 3:48 p.m., Blum received a call from a colleague directing him to arrest Ivanez. At 5:10 p.m., Ivanez was transported from District 2 to the Police Administration Building (PAB) in downtown Milwaukee.

Thereafter, Ivanez was interrogated on three separate occasions, and he gave inclupatory statements.

REASONS FOR GRANTING THE PETITION

I. The Wisconsin Courts violated Ivanez's due process rights by improperly applying the holding of *Harrison* to the harmless constitutional error analysis; and the state's court's application of the harmless error rule was unreasonable.

This appeal involves a contention that Ivanez's confessions to police were obtained contrary to the Fourth Amendment to the United States Constitution. The Wisconsin Court of Appeals assumed that this was true, but then found that the constitutional error was harmless. Thus, what is presented here is a question of federal constitutional law. As this court explained in *Chapman v. California*, 386 U.S. 18, 21, 87 S. Ct. 824, 826-27, 17 L. Ed. 2d 705 (1967):

> Whether a conviction for crime should stand when a State has failed to accord federal constitutionally guaranteed rights is every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied. With faithfulness to the constitutional union of the States, we cannot leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights. We have no hesitation in saying that the right of these petitioners not to be punished for exercising their Fifth and Fourteenth Amendment right to be silent—expressly created by the Federal Constitution itself—is a federal right which, in the absence of appropriate congressional action, it is our responsibility to protect by fashioning the necessary rule.

In *Chapman*, the court discussed at length the application of the harmless error rule to federal constitutional errors.

The Wisconsin Court of Appeals improperly applied this court's holding in *Harrison* to the harmless error analysis. In fact, *Harrison* does not involve the harmless error doctrine at all. Rather, in *Harrison*, the appellate court had already determined that the lower court had improperly admitted the defendant's police confession at trial, and had further determined that the matter would be remanded for a new trial with instructions to grant Harrison's motion to suppress his confession to police. The question in *Harrison* was whether, at the retrial, the state would be permitted to introduce evidence of the defendant's testimony at the first trial. This court held that unless the state could prove beyond a reasonable doubt that the defendant's testimony was not impelled by the improper admission of the police confession, the defendant's testimony at the first trial must be suppressed as well. The holding of *Harrison*, then, does not implicate the harmless error rule.

Nevertheless, in this case, the Wisconsin Court of Appeals ordered that the *Harrison* analysis be conducted *prior to* the harmless error analysis. From there, the court of appeals assumed that Ivanez's police confession was admitted contrary to the Fourth Amendment, and that Ivanez's trial testimony was impelled by the improper admission of the

police confessions, but then held that the error was harmless due to the "overwhelming nature" of the remaining evidence.

In making this determination, though, the Wisconsin Court of Appeals set aside both Ivanez's confession to police, *and his trial testimony,* which was, to a certain extent, exclupatory.[4]

The United States Supreme Court should review this holding because: (1) It is an improper extension of the court's holding in *Harrison* to the harmless constitutional error analysis; and, (2) The holding violates Ivanez's due process rights because, as this court has cautioned numerous times, the harmless constitutional error rule must be applied very sparingly where the evidence in issue is a confession by the defendant. Here, the court of appeals appeared to accept, without scrutiny, the truth of the evidence remaining in the record.

A. The Harrison *analysis should not be conducted until the appellate court has already found reversible error.*

As mentioned, the Wisconsin Court of Appeals remanded the matter to the Milwaukee County Circuit Court with instructions to the circuit judge to first conduct a *Harrison* analysis, and to then conduct a harmless error

[4] Ivanez testified that he stabbed the victim in self-defense.

analysis, if necessary. This procedure is not appropriate under *Harrison*. As mentioned, *Harrison* does not implicate the harmless error rule. Rather, in *Harrison*, the court had already found reversible error. The court had determined that the defendant's confession to police should be suppressed. The question was whether the defendant's trial testimony should also be suppressed.

Thus, *Harrison* assumes that the appellate court has already found reversible error. The case addresses only what evidence must be suppressed at the retrial.

Here, though, the Wisconsin Court of Appeals used the *Harrison* analysis as an integral part of the harmless error analysis. That is, in determining whether the trial evidence was "overwhelming" the court of appeals disregarded Ivanez's generally exculpatory testimony that he acted in self-defense.

Disregarding Ivanez's self-defense trial testimony, of course, left the state's evidence uncontroverted and unfairly gave the impression that the state's evidence was "overwhelming". In other words, by disregarding Ivanez's exculpatory trial testimony-- that is, by not considering it in the harmless error analysis-- the court of appeals eliminated an issue of

material fact that had been presented to the jury (i.e. whether the state had proved beyond a reasonable doubt that Ivanez was not acting in self-defense).

This use of the *Harrison* holding by the Wisconsin Court of Appeals is almost certainly beyond what the Supreme Court court intended.

B. The manner in which the Wisconsin Court of Appeals applied the harmless constitutional error rule in this case violated Ivanez's due process rights.

> "The test for whether a federal constitutional error was harmless depends on the procedural posture of the case. On direct appeal, the harmlessness standard is the one prescribed in *Chapman,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705: "[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." *Id.,* at 24, 87 S.Ct. 824."

Davis v. Ayala, 135 S. Ct. 2187, 2197, 192 L. Ed. 2d 323 (2015) reh'g denied, No. 13-1428, 2015 WL 4714169 (U.S. Aug. 10, 2015). "[T]he beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman, supra,* 386 U.S. at 24, 87 S. Ct.at 828.

Additionally, it should be noted that the harmless constitutional error rule ought to be applied very sparingly, especially where the evidence in question is the defendant's confession to police. As this court has noted:

> A confession is like no other evidence. Indeed, "the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him.... [T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so." *Bruton v. United States,* 391 U.S., at 139–140, 88 S.Ct., at 1630 (WHITE, J., dissenting). *See also Cruz v. New York,* 481 U.S., at 195, 107 S.Ct., at 1720 (WHITE, J., dissenting) (citing *Bruton*). While some statements by a defendant may concern isolated aspects of the crime or may be incriminating only when linked to other evidence, a full confession in which the defendant discloses the motive for and means of the crime may tempt the jury to rely upon that evidence alone in reaching its decision.

Arizona v. Fulminante, 499 U.S. 279, 296, 111 S. Ct. 1246, 1257-58, 113 L. Ed. 2d 302 (1991).

Plainly, then, an appellate court must be highly circumspect in applying the harmless constitutional error rule to the erroneous admission of a defendant's confession to police. Here, the Wisconsin Court of Appeals was hardly circumspect.

Firstly, the Supreme Court should understand that the State of Wisconsin, as represented by the prosecutor, was plainly of the opinion that Ivanez's confessions to police were likely to contribute to a guilty verdict. The state opposed every effort to suppress the

confessions. If it could be said, beyond a reasonable doubt, that Ivanez's confessions to police would not contribute to a guilty verdict, why, then, did the State of Wisconsin fight so hard to get the evidence of the confessions before the jury?

Secondly, the Wisconsin Court of Appeals, in its opinion, recited the evidence remaining in the record as though this were a question of the sufficiency of the evidence to support the jury's verdict[5]; rather than a question of harmless constitutional error.

For example, the court of appeals summarized the testimony of Augustin Santiago, who claimed to have been present at the time Ivanez stomped on the victim's head, and then strangled her for one minute. (App. A p. 8) The court of appeals concluded, "On cross-examination, Santiago testified that his testimony would provide no benefit to him. Santiago's testimony was not significantly challenged and Santiago did not have any apparent motive to lie." *Id.*

The court seems not to be concerned with the fact that Santiago's own words *place him at the scene of a murder*, during the time the victim is being killed, he does nothing to intervene, and he

[5] Where the court views the evidence in the light most favorable to the State, giving the State the benefit of any reasonable inference.

did not later call the police. Santiago has the most obvious motive of all to lie: To place the blame for the murder on someone else.

Nevertheless, the court of appeals was able to say, beyond a reasonable doubt, that the admission of Ivanez's confessions to police did not contribute to the jury's conclusion that Santiago was telling the truth. This is simply not a reasonable application of the harmless error rule.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

_____

Attorney Jeffrey W. Jensen
A member of the Supreme Court Bar

Date:

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EDUARDO IVANEZ- PETITIONER

vs.

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PROOF OF SERVICE

I, Jeffrey W. Jensen, do swear or declare that on this date, _____, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and address of those served are as follows:

Jeffrey J. Kassell, Asst. Attorney General
Wisconsin Department of Justice
Box 7857
Madison, WI 53707-7857

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____, 2015.

_____
Jeffrey W. Jensen