

Opinion of STEVENS, J.

SUPREME COURT OF THE UNITED STATES

No. 97–1985

ELLIS E. NEDER, JR., PETITIONER v.
UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

[June 10, 1999]

JUSTICE STEVENS, concurring in part and concurring in the judgment.

Although I do not agree with the Court’s analysis of the harmless-error issue in Part II of its opinion, I do join Parts I and III and concur in the judgment.

I

This is an easy case. The federal tax fraud statute, 26 U. S. C. §7206(1), prohibits the filing of any return that the taxpayer “does not believe to be true and correct as to *every material matter*.”¹ (Emphasis added.) The Court of Appeals, in accordance with other courts, construed “material matter” to describe “any information necessary to a determination of a taxpayer’s income tax liability.” 136 F. 3d 1459, 1465 (CA11 1998) (citing *United States v. Aramony*, 88 F. 3d 1369, 1384 (CA4 1996); *United States v.*

— — — — —
¹Section 7206 provides, in relevant part:

“Any person who—

“(1) Declaration under penalties of perjury.

“Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that is made under the penalties of perjury, and which he does not believe to be true and correct as to *every material matter* . . .

shall be guilty of a felony.”

Opinion of STEVENS, J.

Klausner, 80 F. 3d 55, 60 (CA2 1996); *United States v. Holland*, 880 F. 2d 1091, 1096 (CA9 1989)). Petitioner has not challenged this legal standard.

The jury found that petitioner knowingly and “falsely reported [his] total income in his 1985 return . . . and in his 1986 return.” App. 256 (jury instructions). A taxpayer’s “total income” is obviously “information necessary to a determination of a taxpayer’s income tax liability.” 136 F. 3d, at 1465. The jury verdict, therefore, was not merely the functional equivalent of a finding on any possible materiality issue; it necessarily included a finding on that issue. That being so, the trial judge’s failure to give a separate instruction on that issue was harmless error under any test of harmlessness.

But the Court does not rest its decision on this logic. Rather, it finds the instructional error harmless because petitioner “did not, and apparently could not, bring forth facts contesting the omitted element.” *Ante*, at 16. I cannot subscribe to this analysis. However the standard for deciding whether a trial error was harmless is formulated, I understand that there may be disagreement over its application in particular cases. The three contrasting opinions in *Arizona v. Fulminante*, 499 U. S. 279 (1991), vividly illustrate this point: Justice White stated that the admission of a defendant’s coerced confession, by its very nature, could never be harmless, *id.*, at 295–302; JUSTICE KENNEDY stated that such evidence can be harmless but that the appellate court “must appreciate the indelible impact a full confession may have on the trier of fact,” *id.*, at 313 (opinion concurring in judgment); and THE CHIEF JUSTICE, joined by JUSTICE SCALIA, stated that the admission of such evidence presents “a classic case of harmless error” when other evidence points strongly towards guilt, *id.*, at 312 (dissenting opinion). There is, nevertheless, a distinction of true importance between a harmless-error test that focuses on what the jury did decide, rather than

Opinion of STEVENS, J.

on what appellate judges think the jury would have decided if given an opportunity to pass on an issue. That is why, in my view, the “harmless-error doctrine may enable a court to remove a taint from proceedings in order to *preserve* a jury’s findings, but it cannot constitutionally *supplement* those findings.” *Pope v. Illinois*, 481 U. S. 497, 509 (1987) (STEVENS, J., dissenting).

The Court of Appeals’ judgment could, and should, be affirmed on the ground that the jury verdict in this case necessarily included a finding that petitioner’s tax returns were not “true and correct as to every material matter.” I therefore cannot join the analysis in Part II of the Court’s opinion, which—without explaining why the jury failed necessarily to find a material omission—states that judges may find elements of an offense satisfied whenever the defendant failed to contest the element or raise evidence sufficient to support a contrary finding. My views on this central issue are thus close to those expressed by JUSTICE SCALIA, but I do not join his dissenting opinion because it is internally inconsistent and its passion is misdirected.

II

If the Court’s tolerance of the trial judge’s Sixth Amendment error in this case were, as JUSTICE SCALIA’s dissent suggests, *post*, at 1, as serious as malpractice on “the spinal column of American democracy,” surely the error would require reversal of the conviction regardless of whether defense counsel made a timely objection. Yet the dissent states that reversal is appropriate only when a defendant made a timely objection to the deprivation. *Post*, at 5–6. It is for that reason that I find tension between the force of JUSTICE SCALIA’s eloquent rhetoric and the far narrower rule that he actually espouses.

There is even more tension between that rhetoric and his perception of the proper role of the jury in cases that are far more controversial than the prosecution of white-

Opinion of STEVENS, J.

collar crimes. The history that he recounts provides powerful support for my view that this Court has not been properly sensitive to the importance of protecting the right to have a jury resolve critical issues of fact when there is a special danger that elected judges may listen to the voices of voters rather than witnesses. A First Amendment case and a capital case will illustrate my point.

In *Pope*, we found constitutional error in the conviction of two attendants in an adult bookstore because the trial court had instructed the jury to answer the question whether certain magazines lacked “serious literary, artistic, political, or scientific value” by applying the community standards that prevailed in Illinois. 481 U. S., at 500–501. As the history of many of our now-valued works of art demonstrates, this error would have permitted the jury to resolve the issue against the defendants based on their appraisal of the views of the majority of Illinois’ citizens despite the fact that under a proper instruction the jury would have acquitted if they thought a more discerning minority would have found true artistic value in the publications. Indeed, under the instruction given to the jury in that case, James Joyce would surely have been convicted for selling copies of the first edition of “*Ulysses*” in Rockford, Illinois, even though there were a few readers in Paris who immediately recognized the value of his work. The *Pope* Court’s conclusion that the unconstitutional instruction might have been harmless entirely ignored the danger that individual distaste for sexually explicit materials may subconsciously influence a judge’s evaluation of how a jury would decide a question that it did not actually resolve. It is, in fact, particularly distressing that all of my colleagues appear today to endorse *Pope*’s harmless-error analysis.

Admittedly, that endorsement is consistent with the holding in Part II of the Court’s opinion in *Walton v. Arizona*, 497 U. S. 639, 647–649 (1990), that a judge may

Opinion of STEVENS, J.

make the factual findings that render a defendant eligible for the death penalty. As I have previously argued, however, that holding was not faithful to the history that was reviewed by “the wise and inspiring voice that spoke for the Court in *Duncan v. Louisiana*, [391 U. S. 145 (1968)].” *Id.*, at 709–714 (STEVENS, J., dissenting). Nor was it faithful to the history that JUSTICE SCALIA recounts today. Of course, Blackstone was concerned about judges exposed to the voice of the higher authority personified by the Crown, whereas today the concern is with the impact of popular opinion. It remains clear, however, that the constitutional right to be tried by a jury of one’s peers provides “an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.” *Duncan v. Louisiana*, 391 U. S. 145, 156 (1968).

III

The Court’s conclusion that materiality is an element of the offenses defined in 18 U. S. C. §§1341, 1343, and 1344 is obviously correct. In my dissent in *United States v. Wells*, 519 U. S. 482, 510 (1997), I pointed out that the vast majority of judges who had confronted the question had placed the same construction on the federal statute criminalizing false statements to federally insured banks, 18 U. S. C. §1014. I repeat this point to remind the Congress that an amendment to §1014 would both harmonize these sections and avoid the potential injustice created by the Court’s decision in *Wells*.