No. 17-_____

IN THE
SUPREME COURT OF THE UNITED STATES

ANDRES LOPEZ-MARTINEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether it is time to revisit the harmless error standard when a defendant is deprived of his constitutional right to present a defense.

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Petitioner, Andres Lopez-Martinez, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The March 29, 2018 unpublished opinion of the United States Court of Appeals for the Eleventh Circuit in this case is included as Appendix A.

JURISDICTION

The Eleventh Circuit entered its judgment on March 29, 2018. This Court has jurisdiction to consider this petition pursuant to 28 U.S.C. § 1254(1) as this petition is being filed within 90 days of the judgment below, namely on June 27, 2018. The district court had jurisdiction pursuant to 18 U.S.C.S. § 3231.

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment

> No person shall be . . . be deprived of life, liberty, or property, without due process of law.

Sixth Amendment

> In all criminal prosecutions, the accused shall . . . be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Federal Rule of Criminal Procedure 17

> A subpoena must state the court's name and the title of the proceeding, include the seal of the court, and command the witness to attend and testify at the time and place the subpoena specifies.

STATEMENT OF THE CASE

The Eleventh Circuit held that any constitutional error, if there was error, in denying Mr. Lopez his constitutional right to present a defense was harmless beyond a reasonable doubt. (Pet. App. A). Mr. Lopez asks this Court to end this practice of harmless error review and hold that the denial of the right to present a defense is structural error.

In a naturalization fraud trial where the government relied on a state court guilty plea as evidence that his naturalization application was false, the district court denied Mr. Lopez his constitutional right to present a defense when it refused to admit evidence showing his state of mind at the time he entered the plea of guilty. Mr. Lopez entered a plea of guilty in 2014 to conduct that occurred, allegedly, in 1999. The government relied on this guilty plea as evidence that he did not truthfully answer questions on his naturalization application. Specifically, the government contended that Mr. Lopez provided a false answer to the question whether he had ever committed a crime for which he was not arrested, and the government relied on his plea of guilty as evidence that he falsely answered "no" to this question. The district court, however, prevented Mr. Lopez from countering the government's evidence in the Mr. Lopez's federal naturalization fraud trial in 2016. Mr. Lopez's evidence would have shown the jury that he entered the plea of guilty in state court not because he was guilty but because he was not being effectively represented. By depriving him of the opportunity to explain *why* he entered the guilty plea, the district court denied Mr. Lopez the right to present a defense. The question for the jury to

answer at trial was what was in Mr. Lopez's mind when he completed the naturalization application in 2012.

To answer this question, Mr. Lopez asked the court to allow him to present evidence that he was forced to enter a plea of guilty in Oregon because it disputed the government's argument that Mr. Lopez was in fact guilty of the state charges. Mr. Lopez sought to counter the government's contention with testimony and with letters he wrote to the Oregon State Bar and to the state court judge complaining about the representation his court-appointed counsel provided. (Def's Ex. 13). Also, Mr. Lopez was denied the opportunity to admit evidence that he only entered the plea of guilty in state court after the court incorrectly advised him that he would not lose his United States citizenship by entering the guilty plea and that he would not be allowed to leave the country after entering the guilty plea. (Doc. 127 at 128). In excluding this evidence, the district court ordered, "Defendant cannot introduce evidence in this trial that would operate to collaterally attack his 2014 Oregon guilty plea on the basis of ineffective assistance of counsel or the voluntariness of his plea." (Doc. 75 at 3).

Mr. Lopez was denied the ability to tell the jury the complete story of the reasons for his plea of guilty. This denial goes right to the heart of the case, what was in his mind when he indicated on the naturalization form in 2014 that he had not committed a crime for which he had not been arrested. The court of appeals affirmed the district court by finding that even if there were error, the error was harmless.

REASONS FOR GRANTING THE WRIT

The Denial of the Right to Present a Defense is Structural Error Because the Harmless Error Standard is Impossible for Judges to Apply, Leading to Both Incarcerating the Innocent and Police and Prosecutorial Misconduct.

A defendant has rights under the Fifth and Sixth Amendments to the United States Constitution to present witnesses that are both material and favorable to his defense. *Rock v. Arkansas*, 483 U.S. 44, 46, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987) (holding Arkansas *per se* rule excluding all hypnotically refreshed testimony impermissibly infringes on a criminal defendant's right to testify on his or her own behalf); *Chambers v. Mississippi*, 410 U.S. 284, 302-03, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) (holding that the defendant was denied the right to present a defense by excluding evidence that someone else committed the crime); *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967) (holding that criminal defendant has a Sixth Amendment right to compel the testimony of principals, accomplices, or accessories in the same crime). In addition, the Compulsory Process Clause of the Sixth Amendment and Rule 17 of the Federal Rules of Criminal Procedure provide a defendant with the right to compel appearance of witnesses and evidence in Court.

Mr. Lopez was denied the right to present a defense when the court prevented him from offering evidence of *why* he entered a plea of guilty to charges that he did not commit and that he was truthful on the naturalization application. The court denied him the opportunity to present evidence that he was forced to enter a plea of guilty in the State of Oregon - a plea that the government relied on to argue that he

was guilty of immigration fraud - because his court-appointed counsel was not effectively representing him, counsel forced him to enter a plea of guilty, and Mr. Lopez did not receive correct legal advice about his immigration status.

Though the court of appeals did not find error, the court said any error in excluding the evidence was harmless. The Eleventh Circuit held that Mr. Lopez got "the essence of the desired evidence before the jury." (Pet. App. A at 6). However, the Court should hold that the denial of the right to present a defense is structural error. Harmless error should not apply because the standard is difficult, if not impossible, for courts to apply, it fails to protect those who are actually innocent, and it encourages police and prosecutorial misconduct.

I. Denial of the Right to Present a Defense is Structural Error.

Prior to *Chapman* in 1967, all properly preserved constitutional errors were grounds for automatic reversal. *Chapman v. California*, 386 U.S. 18, 20, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). This Court changed that rule in 1967 when it announced that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that [the error] was harmless beyond a reasonable doubt." *Id.* at 24. Although applying the harmless error analysis to most constitutional errors, this Court identified three examples of constitutional errors that could never be harmless. *Id.* at 23, n.8. Admitting evidence of a coerced confession in violation of the defendant's due process rights, denial of the right to assistance of counsel, and being tried by a partial judge in violation of due process are all errors that require reversal without harmless error review. *Id.* They are said to be structural.

In the years since *Chapman*, the list of constitutional error that is deemed structural has grown. The abridgement of the right to self-representation, *McKaskle v. Wiggins*, 465 U.S. 168, 177, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984), the abridgement of the right to a public trial, *Waller v. Georgia*, 467 U.S. 39, 49-50, n.9, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984), the unlawful exclusion of members of the defendant's race from a grand jury, *Vasquez v. Hillery*, 474 U.S. 254, 263-64, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986), the failure to assure an impartial jury in a capital case, *Gray v. Mississippi*, 481 U.S. 648, 688, 107 S.Ct. 2045, 95 L.Ed.2d 622 (1987), and the appointment of an interested party's attorney as prosecutor for contempt charges are all deemed structural. *Young v. United States*, 481 U.S. 787, 809-14, 107 S.Ct. 2124, 95 L.Ed.2d 740 (1969). These structural errors require reversal without harmless error analysis.

The right to present a defense has all the same qualities as other rights protected by structural error. In holding that the right to self-representation is structural and not subject to harmless error analysis, the Court said, the right to speak for oneself entails more than the opportunity to add one's voice to a cacophony of others. *McKaskle v. Wiggins*, 465 U.S. 168, 177, 104 S. Ct. 944, 950, 79 L. Ed. 2d 122 (1984). In citing the reasons that denial of a public trial is structural error, the Court in *Waller* cited *State v. Sheppard*, which held "[w]hile the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance, the Framers plainly thought them nonetheless real." 182 Conn. 412, 418, 438 A.2d 125, 128 (1980). *Waller* at 50, n.9. We have recognized that "some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error." *Chapman*

v. California, 386 U.S., at 23, 87 S.Ct., at 827.

To find a structural error, the court must find that the error: (1) did not occur during the presentation of the case to the jury; (2) cannot be quantitatively assessed on appeal; or (3) affects the framework in which the trial proceeds. *Arizona v. Fulminante,* 499 U.S. 279, 307-10, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991).

Like the right to public trial, the right to present a defense is a constitutional right that "the Framer's plainly thought was real." It is a right that is named in the constitution within the Fifth and Sixth Amendments. The right to present a defense is central because it adds more than one's voice to the cacophony others, similar to the right to represent oneself. It *is* their defense. It is structural error because the error cannot be quantitatively assessed on appeal and because it affects the framework in which the trial proceeds.

II. Harmless Error Review is Impossible for Courts to Apply, is Inconsistent with Public Policy, and Should be Eliminated when a Defendant is Denied the Right to Present a Defense.

From state court in Oregon to federal district court in the Northern District of Georgia to the Eleventh Circuit Court of Appeals, the courts have consistently told Mr. Lopez the same thing: "you get court appointed counsel and you have to live with the consequences." Despite his protests about court-appointed counsel in Oregon, Mr. Lopez received a 100-month sentence in Oregon without the Court even addressing his complaints, as if they did not exist. It is time for this Court to right these wrongs.

The Eleventh Circuit ruled "even if the district court erroneously excluded

evidence, we will not reverse if the 'error was harmless beyond a reasonable doubt.'" Pet. App. A at 6. It is time for this Court to rethink the harmless error analysis.[1]

1. Harmless Error Analysis Should Not Apply in Cases where the Right to Present a Defense was Denied Because it is Difficult to Apply, Imprisons the Innocent, and Incentivizes Police and Prosecutorial Misconduct.

Chief Justice Rehnquist noted, "any time an appellate court conducts harmless-error review it necessarily engages in speculation as to the jury's decision making process," because "no judge can know for certain what factors led to the jury's verdict." *Sullivan v. Louisiana*, 508 U.S. 275, 284, 113 S.Ct. 2078, 124 L.Ed. 2d 182 (1993) (Rehnquist, C.J., concurring). Other justices of the Supreme Court have commented on the challenges of harmless error analysis. Justice Scalia commented that harmless error analysis creates "ineffable gradations of probability . . . beyond the ability of the judicial mind (or any mind) to grasp." *United States v. Dominguez Benitez*, 542 U.S. 74, 86, 124 S.Ct. 2333, 159 L.Ed.2d 157 (2004) (Scalia, J., concurring in the judgment). And, Justice O'Connor said that the analysis requires an "exercise

[1] While Mr. Lopez argued before the Eleventh that the district court's errors were not harmless, Mr. Lopez did not argue that the harmless error standard did not apply. And, how could we? Every circuit court and this Court has said that the harmless error of *Chapman* applies in cases analyzing claims of Constitutional error, including errors that involve preventing a criminal defendant from presenting a defense. *Pettijohn v. Hall*, 599 F.2d 476, 482 (1st Cir. 1979); *United States v. Khalil*, 241 F.3d 111, 122 (2nd Cir. 2000); *United States v. Herbst*, 668 F.3d 580, 585 (3rd Cir. 2012); *United States v. Rand*, 835 F.3d 451, 461 (4th Cir. 2016); *United States v. Stanford*, 823 F.3d 814, 836 (5th Cir. 2016); *Ferensic v. Birkett*, 501 F.3d 469, 481 (6th Cir. 2007); *United States v. Coleman*, 930 F.2d 560, 563 (7th Cir. 1991); *United States v. Turning Bear*, 357 F.3d 730, 741 (8th Cir. 2004); *United States v. Stever*, 603 F.3d 747, 757 (9th Cir. 2010); *United States v. Markay*, 393 F.3d 1132, 1135 (10th Cir. 2004); *United States v. Hurn*, 368 F.3d 1359, 1362-63 (11th Cir. 2004).

of judicial judgment that cannot be captured by the naked words of verbal formulate." *Brecht v. Abrahamson*, 507 U.S. 619, 656, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) (O'Connor, J., dissenting).

Even more troubling than the justices concerns, there are cases where courts have found "overwhelming" evidence of guilt that were later exonerated by DNA testing. BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 202 (2011); Brandon L. Garrett, *Judging Innocent*, 108 Colum L. Rev. 55, 95 (2008). Judges may not only unduly focus on result at the expense of procedural fairness, they may deny relief even when error is found to an individual who is actually innocent. Brandon L. Garrett, *Patterns of Error*, 130 Harv. L. Rev. 287 (2017).

The justice's concerns are highlighted by individual cases finding harmless error on appeal in cases where the accused is later exonerated by DNA evidence. Although Justice O'Connor believed our Constitution offered "unparalleled protections against convicting the innocent," studies have shown otherwise. *Herrera v. Collins*, 506 U.S. 390, 420, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993) (O'Connor, J., concurring). Specifically, criminal defendants have been exonerated by DNA evidence after courts have found evidence at trial overwhelming. *People v. McSherry*, 14 Cal. Rptr. 2d 630, 632 (Cal. Ct. App. 1992) (unpublished) (concluding that the evidence "overwhelmingly identified appellant as the perpetrator" before being exonerated in 2001); *State v. Brown*, C.A. No. L-82-297, 1983 WL 6945, at 10 (Ohio Ct. App. Sep. 16, 1983) (unpublished) (finding "[t]he evidence overwhelmingly support[ed]

appellant's guilt before being exonerated in 2001"); *People v. Daye*; 223 Cal. Rptr. 569, 580 (1986) (unpublished) (finding that [t]he People's case against Daye was strong. There is overwhelming direct evidence of guilt" before being exonerated in 1994); *Holdren v. Legursky*, 16 F.3d 57, 63 (4th Cir. 1994) (finding "the evidence overwhelmingly [was] sufficient to support the jury's verdict" before being exonerated in 2000).

The harmless error analysis encourages police and prosecutorial misconduct because it provides an incentive for the police and prosecutors to seek and admit all evidence, even evidence illegally obtained, with the hopes the courts will find the error harmless. Chief Justice Rehnquist also said that a violation of an individual's rights will be weighed against the "fairness, integrity or public reputation of judicial proceedings." This means, the more firmly a judge believes a defendant guilty, the more likely the judge is willing to overlook a constitutional violation. David R. Dow & James Tytting, *Can Constitutional Error be Harmless?*, 2000 UTAH L. REV. 483. "[W]here the inquiry concerns the extent of accumulation of untainted evidence rather than the impact of tainted evidence on the jury's decision, convictions resulting from constitutional error may be insulated from attack." *Harrington v. California*, 395 U.S. 250, 256, 89 S. Ct. 1726, 1729, 3 L. Ed. 2d 284 (1969) (Brennan, J., dissenting). The harmless error analysis is contrary to public policy because it provides an incentive to the police and prosecutors to act improperly because their sins will be forgiven if they convince the judges that the evidence of guilt is overwhelming.

The denial of the right to present a defense is the denial of a constitutional right that is so basic to a fair trial that the infraction can never be treated as harmless. Many justices before have recognized the impossibility of an appeals court either determining what factors led to a jury's verdict or how defense evidence would have impacted the jury's decision. For judges on the court of appeals to analyze evidence that the jury was not allowed to consider is nothing more than pure speculation, as former Chief Justice Rehnquist stated in *Sullivan*. Because the denial of the defendant's right to present a defense cannot be quantitatively assessed on appeal, denial of the right to present a defense is structural error requiring a new trial.

CONCLUSION

The denial of the right to present a defense is structural error because the denial of the right to present a defense cannot be quantitatively assessed on appeal and affects the framework in which the trial proceeds. Therefore, petitioner submits that the petition for a writ of certiorari should be granted.

Dated: This 27th day of June, 2018.

Respectfully submitted,

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