No. _____

In the Supreme Court of the United States

ALONZO VERNON,

Petitioner,

Versus

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

RACHAEL E. REESE, ESQ.
Counsel of Record
Attorney at Law
O'BRIEN HATFIELD, P.A.
511 West Bay Street
Suite 330
Tampa, Florida 33606
(813) 228-6989
rer@markjobrien.com

QUESTION PRESENTED

The Constitution, through both the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment, guarantees criminal defendants the right to present evidence in their favor. The Supreme Court has held that harmless error analysis applies when reviewing a Sixth Amendment violation. See, Satterwhite v. Texas, 486 U.S. 249, 257 (1988). However, the burden for finding such harmless error in light of a constitutional question is high. In order to find harmless error, this Court must be satisfied that, "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Chapman v. California, 386 U.S. 18, 24 (1967).

In the Second Circuit, the test for determining when a violation of this constitutional right requires a reversal is "whether the exclusion of [witnesses'] testimony violated [defendant's] right to present a defense depends upon whether "the omitted evidence [evaluated in the context of the entire record] creates a reasonable doubt that did not otherwise exist." Jones v. Stinson, 229 F.3d 112 (2d Cir. 2000). The question presented is:

Whether the Second Circuit's decision in the instant case created a conflict with the Court's decision in Chapman, supra?

Further, whether the Second Circuit's decision in the instant case created precedent that will allow the government to change its theory of a case, at the eleventh hour, without any proof of that theory and violate defendants' rights to due process as a result?

PARTIES TO THE PROCEEDING

All the parties to this proceeding are named in the caption.

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PETITION FOR WRIT OF CERTIORARI

Alonzo Vernon respectfully petitions for a writ of certiorari to review the opinion of the United States Court of Appeals for the Second Circuit entered in this matter on March 1, 2019, affirming the judgment of the United States District Court for Southern District of New York, Foley Square Division.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is unpublished and appears at *United States v. Sterling*, 763 Fed. Appx. 63 (2d Cir. 2019). It is also attached as **Appendix A**. The order denying Mr. Vernon's Motion for Rehearing is unpublished and is attached at **Appendix B**.

The judgment of the United States District Court for the Southern District of New York, Foley Square Division, is unpublished and is attached at **Appendix C**. The district court's order addressing the issue discussed below was filed by Honorable Judge Lewis A. Kaplan on May 24, 2017, and is attached as **Appendix D**.

JURISDICTION

The court of appeals entered its opinion on March 1, 2019. Pursuant to Federal Rule of Appellate Procedure 35 and 11th Circuit Rule 35, a timely petition for rehearing and rehearing *en banc* was filed on March 14, 2019. Ultimately, the United States Court of Appeals for the Second Circuit denied the petition on April 22, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves application of the Sixth Amendment to the United States Constitution, and the Due Process Clause. Specifically, the application that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to 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."

STATEMENT OF THE CASE

A. Statement of jurisdiction in the lower courts, in accordance with this Court's Rule 14(1)(g)(ii), and suggestion of justification for consideration, as suggested under Rule 10.

The Petitioner, Alonzo Vernon, faced federal criminal charges in the district court under 18 U.S.C. § 3231, which grants exclusive original jurisdiction to district courts over offenses against the laws of the United States. The district court entered judgment on July 20, 2017. Mr. Vernon filed a timely notice of appeal on July 28, 2017. The Second Circuit exercised jurisdiction over Mr. Vernon's appeal under 28 U.S.C. § 1291, which authorizes review of final judgments of the district courts, and 18 U.S.C. § 3742(a), which authorizes review of sentences.

This case concerns two important Constitutional questions about what a defendant is required to prove on appeal before he is entitled to a new trial for a constitutional violation. Specifically, the first question presented is whether the

Second Circuit's decision in the instant case created a conflict with the Court's decision in Chapman by applying an improper standard, resulting in a violation of Mr. Vernon's constitutional right to present a defense at trial? Secondly, whether the Second Circuit's decision in the instant case created precedent that will allow the government to change its theory of a case, at the eleventh hour, without any proof of that theory and violate defendants' rights to due process as a result?

B. Factual Background.

The government sought to prove at trial that the Petitioner, Alonzo Vernon, and co-defendant Sterling were involved in, and actually the leaders of, a drug conspiracy that transported crack cocaine and heroin from the Bronx to Ithaca, New York. The government's case revealed that in addition to Mr. Vernon and Sterling, they were assisted in this conspiracy by several other individuals including Sterling's younger brother, Leonard Sterling, and at least two other individuals who testified at trial for the government: Christian Cosme and Roshane Henry. The government's case revolved mainly around the testimony of Cosme and Henry.

During Henry's testimony, he identified Kevin Sterling as "the boss" who would give them the drugs to sell and would pay them later. (Doc. 167 at 705). Henry was asked several questions about his mental health after he was evaluated by a psychiatrist following his subsequent arrest in the county jail.

> Q: Prior to that incident did you suffer from mental health problems?
> A: Yes.
> Q: What were some of the mental health problems that you've suffered from?
> A: Anger explosive disorder, schizophrenia, a couple others that I can't remember.

Q: Are there others that you are not remembering right now?
A: **Yes**.
Q: Okay. Do you know if you're bipolar?
A: Yes, that's one of them.
Q: Okay. Are there others that we haven't mentioned?
A: Yes.
Q: When were you first diagnosed with these disorders?
A: Since I was a little kid.
Q: Were you diagnosed with all of them when you were a little kid or some of them?
A: Some of them.
Q: What are some of the symptoms you've experienced in connection with your mental health problems?
A: Hallucinations.
Q: What kind of hallucinations?
A: Seeing things, hearing things.
Q: Okay. And what kinds of things do you hear?
A: People.
Q: What kinds of things do you see?
A: People.
Q: When you hear things, can you distinguish between when something is really being said in real life versus when you're hallucinating it?
A: Yes.
Q: And when you see things, can you distinguish between when something is really there in real life versus when you're hallucinating it?
A: Yes.

(Doc. 167 at 707-08) (emphasis added). On cross-examination, Henry was asked what schizophrenia was, and Henry could not answer. "I don't have the full explanation for that...I don't really understand [it]." (Doc. 169 at 798). Henry did not understand what the word "anxious" meant. (Doc. 169 at 836).

The only testimony offered by Henry that was in relation to Count Two of the Indictment was surrounding meetings that took place in Sterling's vehicle. Henry alleged that after his second trip to Ithaca, he met up with Sterling in his vehicle. Sterling was driving and Vernon was in the passenger seat. (Doc. 167 at 753). While

in the vehicle, Henry noticed a black handgun in the back by a spare tire. (Doc. 167 at 754). Prior to this incident, Henry had seen guns in the vehicle on one other occasion. Henry had seen a shotgun and a magnum that were kind of close to the black handgun. (Doc. 167 at 756).

During Mr. Vernon's jury trial, he sought to call Dr. Rory P. Houghtalen as a Defense witness. Outside the presence of the jury, Dr. Houghtalen provided proffered testimony. Dr. Houghtalen was a psychiatrist who, on occasion, conducted forensic psychiatric evaluations of prisoners. In September of 2015, Dr. Houghtalen interviewed and examined Roshane Henry at the Tompkins County Jail after he was arrested on a drug possession charge. The interview with Henry lasted approximately six hours. In addition to the interview, Dr. Houghtalen spoke with Henry's attorney, Henry's mother, and reviewed several binders full of documents. Following this interview and evaluation, Dr. Houghtalen opined that Henry suffered from mental illnesses. Dr. Houghtalen believed that Henry had two major problems: a long history of mood instability that was consistent with schizoaffective disorder and he had developmental intellectual deficits that were consistent with borderline intellectual function. Dr. Houghtalen explained what schizoaffective disorder was, how it likely would affect Henry for the entirety of his life, as well as the side effects he suffered as a result. Dr. Houghtalen also discussed the medications that Henry had taken, or refused to take at times, as well as the side effects of doing so. Dr. Houghtalen further testified about the stress being incarcerated causes individuals. Dr. Houghtalen admitted that he did not come to any conclusions about Henry's competency, whether

he was a reliable witness, or whether he had the ability to be truthful. However, Dr. Houghtalen was able to comment on the fact that someone who suffers from psychotic episodes may have a difficult time differentiating between what is real and what is not, and also believing that something is real when its actually a delusion.

Following the proffer, counsel for the defense argued that under Rule 702, Dr. Houghtalen should be allowed to testify because his testimony would provide the jury "with information that will be of assistance to them, an explanation of the nature of the psychiatric examination, the nature of the diagnosis, the nature of the symptoms, the nature of the prognosis. They are all the kinds of things that will assist the jury in evaluating his capacity to be an accurate historian and whether his delusions or hallucinations will adversely impact on that." Additionally, Dr. Houghtalen would be able to explain things that Mr. Henry was not able to during his extensive cross-examination. Specifically, during his cross-examination, Mr. Henry could not explain his mental health history correctly or as in depth as Dr. Houghtalen would be able to.

Following argument from counsel, the district court ordered that the testimony of Dr. Houghtalen would be excluded in its entirety. The district court cited to several reasons for its decision on the record, and later issued a written opinion addressing those same reasons. Pet. App. A16. The main reasons provided by the district court were that (1) Dr. Houghtalen's testimony would be entirely cumulative of Henry's testimony; (2) the testimony would have proved unhelpful to the jury; (3) Dr. Houghtalen made clear that he would not opine that Henry was incapable of reliably

narrating past events; and (4) admitting the testimony would have risked intrusion on the jury's core function of evaluating witness credibility. Pet. App. A16-36.

In addition to proving the conspiracy, the government charged Mr. Vernon in Count Two with Using, Carrying and Possessing a Firearm, which was discharged, during and in relation to a drug trafficking crime. The government offered proof throughout trial about how this count could be found. However, the proof was all consistent with either Mr. Vernon or Mr. Sterling being in possession or carrying the firearm, and the other being guilty as a principal.

At the conclusion of the evidence, the jury was instructed on various theories of possible conviction as to Count Two. In total, the jury was instructed on three potential "legal theories" and advised about three distinct occasions relating to firearms that could be the basis of the firearms allegation in Count Two.

Soon after the jury was sent to begin deliberations, it became very clear that the jury was experiencing difficulty determining which of the three separate acts of using and carrying a firearm, under which of the three separate theories, had been proven beyond a reasonable doubt. The jury submitted several questions to the court, which revealed their particular confusion with liability under the aiding and abetting theory and the *Pinkerton* theory. Of particular importance to the instant petition, two questions asked by the jury were:

A. Can both parties be found guilty on the basis of aiding and abetting?
B. Similarly, can both parties be found guilty on the basis of the Pinkerton theory?

In discussing question A, all counsel agreed that both defendants could technically be convicted on an aiding and abetting theory, but only if there was evidence that a third person used and carried the firearm as a principal. Both defense counsel argued that no reasonable view of the evidence could support the participation of a third person as principal. In discussing question B, defense counsel argued that in order to assess *Pinkerton* liability for both defendants, there must be a third person, which there had been no evidence of at trial. The government responded that there could be a third "mystery" gunman.

By letter dated April 19, 2017, the government detailed for the court its new theory that there might have been a third "mystery" gunman whom defendants might have aided and abetted in the shooting of Amanda Aizpurua. Pet. App. A37. The letter acknowledged that they had not tried the case on this theory and even acknowledged it could have proceeded on a "mystery" gunman theory but chose not to. Pet. App. A39. Thereafter, the government filed another letter, that contained record citations to support its "mystery" gunman theory. Pet. App. A45. Ultimately, the trial court sided with the government, and instructed the jury that both defendants could be convicted on an aiding and abetting theory.

C. Procedural History in the District Court.

On July 19, 2016, a federal grand jury in the Southern District of New York, Foley Square Division, returned a two-count Indictment naming Mr. Vernon, and three other individuals, as charged defendants. (Doc. 1). On January 11, 2017, a Superseding Indictment was filed, naming Mr. Vernon and one co-defendant, Kevin

Sterling, as charged defendants. Mr. Vernon was named in count one, two, and four. Count One charged Mr. Vernon with Conspiracy to Distribute and Possess with the Intent to Distribute Crack and Heroin. Count Two charged Mr. Vernon with Using, Carrying and Possessing a Firearm, which was discharged, during and in relation to a drug trafficking crime. Count Four charged Mr. Vernon with being a felon in possession of ammunition.

During Mr. Vernon's trial, counsel sought to introduce the testimony of Dr. Houghtalen. Following argument from counsel, the district court ordered that the testimony of Dr. Houghtalen would be excluded in its entirety. The district court later entered a "Memorandum Opinion", citing its reasons for excluding said testimony. Pet. App. A16.

At the close of the evidence, the jury was instructed on various theories of possible conviction as to Count Two. First, the district court instructed the jury on what the government was required to prove, per the statute. The district court then instructed the jury on two alternative theories. (Doc. 175 at 1334). The first alternative basis was the "aiding and abetting" theory. The jury was instructed that it could convict the defendant if the government "has proved that another person actually committed the offense charged in Count Two and that the defendant whom you are considering aided and abetted that other person in the commission of the offense." As to the final alternative theory, the district court gave the following instruction on the *Pinkerton* theory of criminal liability:

> There is yet a third basis on which you may evaluate the alleged guilt of the defendants with respect to Count Two, even if you find that the

government has not satisfied its burden of proof with respect to each element for the defendant whom you are considering and you don't find that either aided and abetted the crime charged in Count Two. Now we judges and lawyers call this, for reasons that are not quite lost in the history of time, but are way back there, the Pinkerton theory. And I'm going to call it that so you know what I'm referring to. It was just the name of somebody in a case once. It means nothing.

The Pinkerton theory is this: If, in light of my instructions, you find beyond a reasonable doubt that the defendant whom you are considering was a member of the drug conspiracy charged in Count One, then you may also, but you are not required to, find that defendant guilty on Count Two – the use and carrying of a firearm during and in relation to the charged conspiracy, or the possession in furtherance of the charged conspiracy – provided that you find each of the following elements have been proved beyond a reasonable doubt:

...

If you find all five of these elements to exist beyond a reasonable doubt, then you may find the defendant whom you are considering guilty on Count Two even though that defendant did not personally participate in acts constituting the substantive crime charged in Count Two or did not have actual knowledge of it and is not guilty on an aiding and abetting theory.

The reason for this Pinkerton rule is that a co-conspirator who commits a substantive criminal offense as part of the conspiracy is regarded as the agent of all the other conspirators. Therefore, all of the co-conspirators bear criminal responsibility for the commission of the substantive crime committed by other co-conspirators within the limits of the five elements that I just explained to you.

If you are not satisfied beyond a reasonable doubt as to the existence of any of these five elements, then you may not find the defendant whom you are considering guilty of Count Two on a Pinkerton theory. If you are to find such a defendant guilty on Count Two, it must be on one of the other two theories that I outlined to you.

(Doc. 175 at 1336).

After instructing the jury on the specific alternative theories, the district court advised the jury that there were three distinct occasions relating to firearms that could be the basis of firearms allegation in Count Two.

> "The first is in relation to the shooting in the Bronx on the night of May 31 to June 1 of last year, 2016. There is evidence also of two other occasions involving firearms. Both were occasions when Kevin Sterling, Alonzo Vernon, and Roshane Henry were, at least according to one witness, in what was described as Sterling's SUV in the Bronx. On one occasion there was evidence that a black handgun was in the back of the vehicle near a tire. There was evidence that a black handgun, a magnum, and a shotgun were observed in the vehicle on a different occasion."

(Doc. 175 at 1339-40).

During deliberations, the jury submitted several questions to the court about their confusion surrounding the aiding and abetting theory and the *Pinkerton* theory. The district court ultimately provided the jury with a very simple response to their questions:

> "Members of the jury, I brought you back in order to respond to questions A and B on your note of late yesterday. My response is simply to invite your attention to the instructions I've already given on aiding and abetting and on the Pinkerton liability, which appear at page 18, line 24 through page 21 at the bottom of the charge that you have with you in the jury room. And I have nothing to add."

(Doc. 175).

On April 19, 2017, Mr. Vernon was found guilty as charged. As to Count One, Mr. Vernon was found guilty and specifically responsible for 280 grams or more of a mixture or substance containing a detectable amount of cocaine base or "crack" and 100 grams or more but less than 1 kilogram of a mixture or substance containing

heroin. (Doc. 152). As to Count Two and Four, the jury found Mr. Vernon guilty as charged. (Doc. 152).

D. Second Circuit's Consideration of the Matter.

On appeal, Mr. Vernon challenged several of the district court's findings. First, Mr. Vernon challenged the district court's exclusion of Dr. Houghtalen's testimony in his briefing and at oral argument. Ultimately, a three-judge panel agreed with Mr. Vernon that Dr. Houghtalen's testimony **should not have been excluded**. Pet. App. A7. (Emphasis added). The panel then continued to find that regardless of the error, Mr. Vernon was not entitled to relief because the error was harmless.

> That said, however, we determine that the error was harmless beyond a reasonable doubt. See United States v. Mejia, 545 F.3d 179, 200-02 (2d Cir. 2008) (holding "vacatur is required unless we are convinced that the error was harmless beyond a reasonable doubt." (internal citations omitted)).
>
> Even assuming that, with the benefit of Dr. Houghtalen's testimony, the jury might have been unwilling to rely on Henry's evidence, we nonetheless conclude that its erroneous exclusion did not affect the verdict. Because Cosme participated in the drug conspiracy for a longer period than Henry and actually witnessed the shooting, Cosme's testimony, more than Henry's, directly linked the defendants to the conspiracy. In addition, other witnesses, cell-phone records, and recovered narcotics significantly corroborated Cosme's testimony about the conspiracy and the defendants' involvement in it.

Pet. App. A7-8.

In addition to the exclusion of a crucial witness, Mr. Vernon challenged the district court's abuse of discretion by allowing the government to one-sidedly change its theory of prosecution in order to conform it's case to the jury's questions, and as a result, violate Mr. Vernon's constitutional right to a fair trial. This issue was

addressed in Mr. Vernon's briefs and during oral argument. Ultimately, the panel chose not to address the merits of this claim and instead wrote: "[w]e have considered the defendant's remaining arguments, and find them to be without merit." Pet. App. A8. This issue was addressed by both Mr. Vernon and his co-defendant, Mr. Sterling.

Mr. Vernon challenged the panel's decision, on both issues, in a Motion for Rehearing, which was ultimately denied without opinion. Pet. App. A9.

REASONS FOR GRANTING THE PETITION

A. The Second Circuit's Opinion Rejecting Mr. Vernon's Constitutional Claim Of Excluding A Detrimental Defense Witness Decided An Important Federal Question In A Way That Conflicts With This Court's Decision In Chapman v. California, 386 U.S. 18 (1967).

Under Chapman v. California, 386 U.S. 18, 24 (1967), the Government bears the burden of showing that any constitutional error in excluding the testimony of Dr. Houghtalen was "harmless beyond a reasonable doubt" such that there is no "**reasonable possibility** that the error complained of **might have contributed** to the conviction." 386 U.S. 18, 22 (1967) (emphasis added). As this Court explained in Chapman, "[a]n error admitting plainly relevant evidence which **possibly influenced the jury adversely to the litigant cannot ... be conceived of as harmless**." *Id.* at 23 (citation omitted; emphasis added).

In the instant case, the panel denied Mr. Vernon's appeal and relied on the Second Circuit's opinion in United States v. Mejia, 545 F.3d 179 (2d Cir. 2008). In Mejia, the Second Circuit cited an identical rule as this Court did in Chapman, when discussing harmless error: "vacatur is required unless we are convinced that the error was harmless beyond a reasonable doubt." Id. at 200. However, the court went one

step further and outlined the relevant factors that the court was to consider when evaluating the error's likely impact. The court highlighted four relevant factors to consider:

> (1) the strength of the Government's case; (2) the degree to which the statement was material to a critical issue; (3) the extent to which the statement was cumulative; and (4) the degree to which the Government emphasized the inadmissible evidence in its presentation of its case.

Id. at 199 (internal citations omitted).

The Second Circuit's opinion in the instant case, which relies heavily on Mejia, resulted in a decision that conflicts with all decisions of this Court that discuss harmless error analysis. Particularly, the opinion conflicts with the Court's decision in Chapman, which was cited as the basis for the test in Mejia.

Although the Second Circuit noted in passing that the error must be "harmless beyond a reasonable doubt," the court nevertheless applied an improper standard that focused on the purported sufficiency of the evidence presented, rather than focusing on the influence Dr. Houghtalen's testimony may have had on the jury and the verdict. The court concluded that the exclusion of Dr. Houghtalen's testimony "did not affect the verdict" and then offered improper reasons to support that conclusion, including: (1) Cosme participated in the drug conspiracy longer than Henry and actually witnessed the shooting; (2) Cosme's testimony directly linked the defendants to the conspiracy; and (3) other witnesses, cell phone records and recovered narcotics corroborated Cosme's testimony about the conspiracy. (pg. 8). The reasons provided were improper, under Chapman, because they took zero mind to how Dr.

Houghtalen's testimony could have provided a reasonable possibility of reasonable doubt.

Moreover, the court's own factual findings demonstrate that Dr. Houghtalen's testimony was relevant and would have presented a reasonable possibility of contributing to a finding of reasonable doubt. The court explained that:

> The district court precluded Dr. Houghtalen from testifying on the grounds that his testimony was cumulative (in relation to Henry's own testimony), unhelpful (because the doctor could not opine on Henry's ability to perceive reality accurately during the time the drug conspiracy was operating), and an intrusion on the jury's role of assessing witnesses' credibility. The district court's rationale, however, misunderstands the purpose for which Dr. Houghtalen's testimony would have indeed been relevant to the defense. Specifically, Dr. Houghtalen's inability to reach a professional opinion one way or the other as to Henry's ability to appreciate what was not real during the course of the conspiracy bolstered the defense's argument that Henry, who suffered from schizoaffective disorder and severe intellectual deficits, could well have been imagining the events about which he had testified. Although Henry professed that he was sure he was testifying about events that had actually occurred, Dr. Houghtalen's testimony would have been a basis for the jury to be persuaded otherwise. We agree with appellants that Dr. Houghtalen's testimony should not have been excluded.

Pet. App. A7. The panel highlighted the ways that Dr. Houghtalen's testimony would have helped the Defense argue reasonable doubt. Even thereafter, while explaining why any error was "harmless", the panel offered additional factual statements that supported Mr. Vernon's position: "[e]ven assuming that, with the benefit of Dr. Houghtalen's testimony, the jury might have been unwilling to rely on Henry's evidence..." Pet. App. A7.

The court's decision is further in conflict because of the court's finding that the erroneous exclusion of Dr. Houghtalen's testimony "did not affect the verdict." Pet.

App. A8. This five-word statement is synonymous with "the evidence was sufficient." Under both the Chapman framework and *habeas* review, in which the government has a **lower** burden for proving that an error was harmless, this Court has consistently held that an error is not harmless merely if the remaining evidence is "sufficient" to uphold the verdict:

> [I]t is not the appellate court's function to determine guilt or innocence. . . . Nor is it to speculate upon probable reconviction and decide according to how the speculation comes out. . . .
>
> **[T]he question is, not [was the jury] right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision.** The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting.

Kotteakos v. United States, 328 U.S. 750, 763–64 (1946) (emphasis added); see also Brecht v. Abrahamson, 507 U.S. 619, 638 (1993) (applying Kotteakos to *habeas* review); Sullivan v. Louisiana, 508 U.S. 275, 279 (1993) ("The inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error."); Fahy v. Connecticut, 375 U.S. 85, 86 (1963) (finding irrelevant "whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of").

Likewise, other federal courts of appeals have rejected the sufficiency of the evidence as a standard for determining whether a constitutional error was harmless beyond a reasonable doubt. See United States v. Jackson, 636 F.3d 687, 697–98 (5th Cir. 2011); Jones v. Basinger, 635 F.3d 1030, 1053–54 (7th Cir. 2011); United States

v. Chanthadara, 230 F.3d 1237, 1266 (10th Cir. 2000); United States v. Maynard, 615 F.3d 544, 568 (D.C. Cir. 2010); United States v. Burgess, 175 F.3d 1261, 1267–68 (11th Cir. 1999); United States v. Moses, 137 F.3d 894, 904 (6th Cir. 1998) (Ryan, J. concurring). To reject reviewing the court's opinion in this matter would result in a clear conflict between this Court's decision in Chapman, as well as decisions across the federal courts of appeals.

B. The United States Constitution Demands That All Defendants Receive A Fair Trial And The Second Circuit's Opinion Silently Decided An Important Question Of Federal Law That Conflicts With That Underlying Constitutional Principle.

Arguably the most important issue argued by Mr. Vernon and his co-defendant on appeal was whether their Due Process rights were violated when the district court allowed the government to change their theory of prosecution at the eleventh hour, after the jury had already been dismissed to begin deliberations. The Second Circuit chose to remain silent on the issue when issuing its ultimate opinion, and merely stated that it found the argument "to be without merit." Pet. App. A8. The Second Circuit's opinion silently decided an important question of federal law that conflicts with underlying principles of this Court and the entire justice system.

One of the basic principles outlined in the United States Constitution is the absolute guarantee that every defendant is entitled to a trial that comports with basic tenets of fundamental fairness. Lassiter v. Dept. of Soc. Servs., 452 U.S. 18, 24-25 (1981); Thompson v. Calderon, 120 F.3d 1045 (9th Cir. 1997). Former Supreme Court Justice Douglas highlighted the importance of the right to a fair trial in Donnelly v. DeChristoforo, 416 U.S. 637 (1974), where he asserted that "[t]hose who have

experienced the full thrust of the power of government when leveled against them know that the only protection the citizen has is in the requirement for a fair trial." The Supreme Court has long emphasized our Constitution's "overriding concern with the justice of finding guilt." United States v. Agurs, 427 U.S. 97, 112 (1976).

In the instant case, the jury was read the instructions of the case and began to during deliberations, posed three questions about which theories they could use to convict Mr. Vernon and his co-defendant. Since the beginning of the case, the government had only presented the theory that Mr. Vernon and Mr. Sterling had either aided and abetted the other, or conspired together and foresaw the acts of the other under Pinkerton. The government's theory was always that whoever was not acting as the "aider" or "abettor" was the principal who committed the substantive offense. The government did not realize the problem with their theory, in light of the numerous ways Mr. Vernon and Mr. Sterling had been charged, until the jury raised its questions. The questions put the government on notice that they had a problem: if the jury did convict both defendants simultaneously either under Pinkerton or aiding and abetting, the evidence would have been required to show that a third person had committed the substantive firearm offense. The government quickly realized this was not possible in light of the evidence presented. In an attempt to remedy their problem, the government imagined a new theory of prosecution, for the first time, **after** all evidence and argument had already been presented and the jury was sent to deliberate. The government's new theory created a third person who would act as a mystery gunman, which would allow both defendants to be found guilty

under a Pinkerton or aiding and abetting theory. Although the theory was never presented to the jury, the circumstances around how and why the new theory was presented revealed that the jury had questions that needed answers.

The district court allowed the government to draft up this mystery gunman and answered the jury's questions in a manner that would not legally been accurate in light of the evidence presented. The district court's actions, and the Second Circuit's affirmance of those actions without any comment, sets a dangerous precedent for future cases and defendants like Mr. Vernon and Mr. Sterling.

Under the United States Constitution, it has long been established that due process mandates that a defendant have notice of the crimes with which he is being charged and the opportunity to interpose a defense. This is one of the most crucial principles that our system is founded upon. However, the Second Circuit's opinion silently decided an important question that conflicts with those underlying principles and allows a defendant to be convicted on a theory that is not supported by any evidence, whatsoever. As identified by Mr. Sterling's appellate counsel, a trial is supposed to be more than just gamesmanship designed to secure a victory at the cost of the truth. The district court's allowance of the government's actions reduced Mr. Vernon's trial to exactly that: a game.

Moreover, the Second Circuit's affirmance of those behaviors caused further harm. Mainly, the Second Circuit's decision in the instant case created precedent that will allow the government to change its theory of a case, at the eleventh hour, without any proof of that theory. This Court should find that the Second Circuit's decision

silently decided an important decision of federal law that not only conflicts with underlying constitutional principles, but could have grave negative impacts in the future.

CONCLUSION

For the reasons stated above, the Petitioner respectfully submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

Alonzo Vernon, Petitioner

Date: July 22, 2019

RACHAEL E. REESE, ESQ.
Counsel of Record
Attorney at Law
O'BRIEN HATFIELD, P.A.
511 West Bay Street
Suite 330
Tampa, Florida 33606
(813) 228-6989
rer@markjobrien.com