NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

KATHERINE O'NEAL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

# PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Eight years ago, this Court granted review in Vasquez v. United States, No. 11-199 (U.S.) , to consider the proper approach to determining whether a constitutional error is harmless, an issue that arises in countless cases every year in both the federal and state courts. The Court did not decide the matter, as it later dismissed the writ of certiorari as improvidently granted. This case raises a similar issue to the one that went unresolved in Vasquez.

Specifically, the issue is:

> **In determining whether constitutional error in the admission of evidence is harmless, should a reviewing court focus on whether the error contributed to the verdict, or does an appellate court's view of the untainted proof as strong or overwhelming render the constitutional error harmless?**

## STATEMENT OF RELATED CASES

There are no related cases.

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## PRAYER

Petitioner, Katherine O'Neal, respectfully prays that a Writ of Certiorari be issued to review the opinion of the United States Court of Appeals for the Tenth Circuit that was handed down on December 5, 2019.

## OPINIONS BELOW

The decision of the United States Court of Appeals for the Tenth Circuit, United States v. O'Neal, No. 18-1365, slip op. (10th Cir. Dec. 5, 2019), is found in the Appendix at 1. The decision of the United States District Court for the District of Colorado is found in the Appendix at 26.

## JURISDICTION

The United States District Court for the District of Colorado had jurisdiction over this criminal action pursuant to 18 U.S.C. § 3231. The United States Court of Appeals for the Tenth Circuit had jurisdiction under 28 U.S.C. § 1291.

This Court's jurisdiction is premised upon 28 U.S.C. § 1254(1). Justice Sotomayor has extended the time in which to petition for certiorari to, and including, May 4, 2019, see Appendix at 55, so this petition is timely.

## CONSTITUTIONAL PROVISION AND FEDERAL RULE INVOLVED

This petition involves appellate review of preserved, constitutional error in a criminal proceeding for harmlessness, an issue that can arise in a state or federal proceeding. This Court has, in its case law, addressed the harmlessness of constitutional error. E.g., Chapman v. California, 386 U.S. 18 (1967). Review in such matters implicates the Sixth Amendment to the Constitution, which provides:

> In 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 defence.

U.S. Const., amend. VI.

In federal cases, like this one, whether an error warrants reversal is also addressed in Federal Rule of Criminal Procedure 52(a), which reads as follows:

> **(a) Harmless Error.** Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

Fed. R. Crim. P. 52(a).

## STATEMENT OF THE CASE

Katherine O'Neal was a specialist in the United States Army. She served this country for more than a decade, and was deployed to Iraq and Kuwait.

Ms. O'Neal, a naturalized citizen, was born in the Dominican Republic. In June 2015, she traveled back to that country, taking a Delta Airlines flight from Denver, through New York City, to Santiago. She checked three bags. The bags contained eleven guns, nine of which were Glock .9-millimeter pistols. Ms. O'Neal declared the guns to Delta.

Ms. O'Neal's bags did not make it to Santiago when she did. She filled out claim forms and, when her bags arrived the next day, she returned to the airport late that afternoon to retrieve them.

After she stopped at the information booth, Vol. 5 at 955, she was met by Jorge Novas Madrano, a major and inspector in the intelligence unit of the Dominican Republic Army, id. at 58, 68.[1] When he asked why she was at the airport, she freely told him she was there to pick up her bags and

[1] Citations to the record on appeal in the Tenth Circuit are provided for the Court's convenience, in the event this Court deems it necessary to review the record to resolve this petition. See Sup. Ct. R. 12.7.

that there were guns in them. Id. at 98. He then arrested her, id. at 100; see also id. at 80, as Dominican law did not allow guns to be brought into the country, id. at 81; see also id. at 132.

On orders from his superiors with the joint-intelligence service, he took Ms. O'Neal in her van to the service's headquarters in Santo Domingo. There, she would eventually be interviewed by Dominican officials. Id. at 131-32, 135-36, 152-54.

She was also interviewed there by Matthew Larko, id. at 171, 172-73, 175, 179, a special agent with the United States Department of Homeland Security who was posted to the American embassy in the Dominican Republic. Agent Larko's questioning included what permission Ms. O'Neal had to travel from the United States with the guns. Id. at 180. He did not advise Ms. O'Neal of her rights under Miranda v. Arizona, 384 U.S. 436 (1966). See Vol. 5 at 174.

*The seventeen charges and sixteen acquittals*

Ms. O'Neal was ultimately tried on seventeen counts in the United States District Court for the District of Colorado. Twelve of the counts were for making a false statement, in violation of 18 U.S.C. § 924(a)(1)(A),

when she bought Glock pistols on various occasions from April 2014 through June 2015. Most of those counts claimed she had represented her name was Carmen Katherine O'Neal, rather than Katherine O'Neal. See Vol. 1 at 269-73 (Counts 4-7, 10, 12-13 and 16-17). The jury acquitted her on all of those counts. Vol. 1 at 623-27 (verdict sheets).

The three remaining § 924(a)(1)(A) counts were for falsely claiming she was not buying guns for someone else. See id. at 268, 271-72 (Counts 2, 9 and 11). The counts involved another person making the payment for the guns. The jury acquitted her of those counts as well. Id. at 622, 625. And the jury also acquitted Ms. O'Neal of four counts of money laundering, which were based on the theory that she caused money to be sent into the United States for use in the smuggling of weapons, contrary to the interests of the Dominican Republic. See id. at 268-69, 271, 274 (Counts 3, 8, and 14-15), 623-24, 626-27 (verdict sheets).

*The exporting charge -- the sole count of conviction -- and the proof the jury properly heard on that count*

The only charge of which Ms. O'Neal was convicted was for taking the guns outside of the United States without a "Department of State

license and other written authorization required by 22 U.S.C. § 2278," the the Arms Export Control Act, in violation of 18 U.S.C. § 554(a). Vol. 1 at 267-68 (Count 1); see also id. at 622 (verdict sheet). There was no dispute as to two of the three elements of that offense: that Ms. O'Neal knowingly took the guns out of the country, and that doing so was contrary to the Arms Control Export Act and regulations under the Act.

The dispute on the export count centered on the knowledge element: whether Ms. O'Neal knew it was unlawful to take guns out of the country. Id. at 599-600. In denying that she did, Ms. O'Neal noted she had told Delta her bags contained guns when she checked in, and had filled out the declaration it provided. Id. at 834-35. Her bags had then been screened by the TSA. Id. at 819, 830, 847; see also Vol. 1 at 513-14 (stipulation).

In 2015, Delta's website had two sections dealing with the carriage of firearms. Neither mentioned the need for government permission to take a firearm out of the United States. One section states ammunition cannot be taken on any Delta flight to the United Kingdom or to South Africa. Supp. Vol. 1 at 27 (Def. Exhibit P at 1). The other states that if a firearm is being transported to the United Kingdom, "a permit from the United Kingdom is

specifically required." Id. at 33 (Def. Exhibit Q at 4). It does not mention any other country. A Delta representative agreed the reason for this specific mention might be that Delta has a lot of flights to the U.K. Vol. 5 at 846.

But this American-based airline did not mention on its website that United States law required anything to take a firearm out of the country. All the website said was that the passenger was "responsible for knowledge of and compliance with all Federal, State or local laws regarding the possession and transportation of firearms." Supp. Vol. 1 at 19 (Def. Exhibit P at 2), 33 (Defense Exhibit Q at 4). It then stated that "more information about this regulation" could be found on the TSA website. Id. at 19 (Def. Exhibit P at 2), 33 (Defense Exhibit Q at 4). The prosecution did not present evidence about the contents of the TSA website on this (or any other) matter.

The prosecution would rely in summation on a statement on each of the ATF-4473 forms Ms. O'Neal completed when she bought guns that led to the false-statement charges of which she was acquitted. The third page of the form has a section about the exportation of firearms. It consists of a

single sentence. The sentence does not say that a license is needed to export a firearm, but only that it might be needed: "The State or Commerce Department may require you to obtain a license prior to export." Supp. Vol. 1 at 20 (Gov. Exhibit 97). It does not define "export." Id. at 18-23.

The prosecution also presented evidence about an incident that occurred ten years before the June 2015 trip to the Dominican Republic, and almost thirteen years before trial. In June 2005, Ms. O'Neal was in a car that was turned around at the border by Canadian officials, at the border near Port Huron, Michigan. They did so because Canadian law prevents firearms from being taken into Canada without a permit.

One of the American border-patrol agents, Matthew Howie, did not testify to telling Ms. O'Neal that a gun could not be taken out of the United States without authorization. Vol. 5 at 1057-68. The other two did, and claimed they remembered the incident specifically, without the need to consult a report. Id. at 1070 (Agent Wilbur), 1077 (Agent Fletcher).

Each of those two pointed to the Bureau of Alcohol, Tobacco and Firearms as imposing a requirement for exporting a firearm. Ian Wilbur

testified that, especially with military personnel like Ms. O'Neal, he will give a warning that certain guidelines must be followed to export a gun from the United States. Id. at 1071-72. He said he would have told her that "with the ATF statutes," the failure to export properly can lead to fines or criminal penalties. Id. at 1073.

David Fletcher stated he had asked Ms. O'Neal if she had "obtained the proper paperwork to export a firearm from the U.S." Id. He said that she told him that she had not, id., and that "she didn't know there was a law about taking the gun out of the U.S." Id. Mr. Fletcher then told her she needed an ATF Form 6 to export a firearm. Id. at 1081.

The district court would charge the jury that the Department of State issues the regulations under the Arms Control Export Act. Vol. 1 at 601. The court also gave the jurors a copy of the second superceding indictment, id. at 611-19; see also Vol. 5 at 1328, which accused Ms. O'Neal of exporting firearms without a State Department license and other written authorization required by the Act, Vol. 1 at 611.

*The introduction at trial of Ms. O'Neal's statements to Agent Larko and related proof, and the prosecution's reliance on this evidence*

At trial, the government called Agent Larko to testify to statements Ms. O'Neal made to him. At a hearing held shortly before trial, the district court had denied suppression of these statements, promising that it would soon issue a written ruling. After trial, the district court would hold that the statements were in fact suppressible, as they had been taken in violation of Ms. O'Neal's rights under Miranda v. Arizona, 384 U.S. 436 (1966).

Agent Larko testified that Ms. O'Neal had told him she had flown from Denver to New York, and then to the Dominican Republic. Vol. 5 at 746. Agent Larko reported that Ms. O'Neal stated that Sergeant Lane, at her base in Fort Carson, told her all she needed to do to take a firearm from the United States was to have a concealed-carry permit and to declare the firearm to the airline:

> Q. . . . . Did you discuss with her any conversations she had with an individual at Fort Carson regarding what she would need to take firearms to the Dominican Republic?
>
> A. Yes. I asked her to explain if she -- if she received permission. She said that she spoke with her Sergeant Lane out of Fort Carson, I believe, and he said that all

> that's required was a conceal[ed-]carry permit and that she reported the weapons to the airline.

Id. at 746.

Immediately before Agent Larko testified, the prosecution called Sergeant Lane to the stand to deny the statement the agent would soon recount. The sergeant explained that he was known at the base for his knowledge of guns, and that he had looked into taking rifle with him when he was to be stationed in Germany, but that the paperwork was "insane." Id. at 735. He affirmed that Ms. O'Neal never approached him about "taking a firearm from the United States." Id. The prosecution then had the sergeant deny that he would "have ever told her that all she needed was a concealed carry permit and a military ID." Id.

The prosecution referred to Ms. O'Neal's statement and Sergeant Lane's denial in its initial closing and -- even though the defense did not discuss the matter in its closing -- in rebuttal too. It urged the jury to consider it as proof that Ms. O'Neal was deliberately ignorant of the fact that a license or other authorization was needed to take guns out of the United States.

When the prosecution first summarized its case to the jury, it "invite[d the jury] to look at the statements [Ms. O'Neal] made to show her state of mind." Id. at 1281. Discussing the statement to Agent Larko about what Sergeant Lane told her was needed to take weapons out of the country, the prosecution declared that Ms. O'Neal "didn't tell the truth about that." Id. at 1282. It pointed to its questioning of Sergeant Lane, in which he denied telling her that "all you need is a conceal weapons permit and telling the airline [sic]." Id.

The prosecution returned to the matter in its rebuttal. Ms. O'Neal had told Dominican Republic officials after her arrest that she had brought guns into the country in December 2014, and had later brought them back to the United States and sold them. Id. at 668, 674-75, 713. She had given somewhat more information to Agent Larko, saying that she brought the guns that December to protect construction of a house she planned to build when she retired there. She took the guns back to the United States when construction did not begin, and sold them here. Id. at 748. Mocking this as an "idiotic story," id. at 1322, that was the best one she was able to make up, id. at 1323, the prosecution said her claim that she brought guns back

to the United States was "just like when she" said Sergeant Lane had told her she only needed a concealed-weapon permit and to inform the airline to take guns abroad, id. The prosecutor reiterated that Sergeant Lane had denied the latter account, describing him as saying, "'No, I didn't. She's lying." Id.

As for its other arguments as to deliberate ignorance, the prosecution invoked the fact that Ms. O'Neal had a concealed-carry permit, and had filled out almost a dozen forms to buy a gun in the fifteen months before the June 2015 trip, including once for a private sale. Id. at 1278-79. From this, and the fact that she was in the army, id. at 1279, it argued, Ms. O'Neal knew there were regulations, id. at 1278, and that "there are rules in society," id. The prosecution also pointed to what Delta's website said about entry permits to the destination country, and the need for the traveler to comply with all federal, state and local law about possessing and transporting firearms. Id. at 1281. And then it noted the ATF-4473 forms Ms. O'Neal completed say that the State or Commerce Department "may require a license prior to export." Id. The prosecution did not refer, in either its initial closing or its rebuttal, to the testimony of Border Patrol

Agents Wilbur and Fletcher of what they claimed to recall telling Ms. O'Neal in 2005.

The jury convicted Ms. O'Neal on the export charge. Vol. 1 at 622.

*The district court's written order granting Ms. O'Neal's motion to suppress her statements to Agent Larko*

After the trial, the district court issued its written order on Ms. O'Neal's suppression motion. It held, as relevant here, that the statements Agent Larko elicited were unconstitutionally obtained, as he failed to give Ms. O'Neal Miranda warnings. Vol. 1 at 699. And so, the court continued, the statements were inadmissible and the "Motion to Suppress is granted to this extent." Id.

Recognizing that it should not have allowed Agent Larko's testimony about statements Ms. O'Neal made to him, id. at 700, the court proceeded to hold the error harmless, id. As to the statement about what Sergeant Lane told her, the court recognized that a jury "could infer that O'Neal lied to Larko about her efforts to understand the process for taking firearms outside the United States." Id. at 702. But, it continued, "any inference specifically as to [the element that she knew her actions to be unlawful] is

more attenuated." Id. It reasoned that her account of what the sergeant told her could suggest awareness about the impropriety of taking guns out of the country, the jury would not have had to reach that conclusion. It could, theorized the court, have simply "conclude[d] that she fabricated a story on the spot to suggest innocent mistake," without also concluding she knew at the time she left the United States with the guns that this was illegal. Id.

The court considered any inference that could have been drawn to be "insignificant" to what it heard from other government witnesses, pointing specifically to the Port Huron evidence of what occurred in 2005. Id. The court stated that it was convinced beyond a reasonable doubt that "O'Neal's purported interaction with Lane had no effect on the jury's decision" to find she knew taking the guns out of the United States was unlawful. Vol. 1 at 703. The wrongly admitted evidence, the court continued, was "in no way a 'tipping point, without which a jury might have harbored serious doubts about O'Neal's knowledge." Id.

*The Tenth Circuit's decision*

The Tenth Circuit affirmed by a divided vote, holding that the error in admitting Ms. O'Neal's un-Mirandized statements was harmless beyond a reasonable doubt. In doing so, the majority framed the issue in terms of whether there the evidence was "'otherwise strong' or 'overwhelming' on the disputed issue." App. at 6 (quotation omitted). In contrast, the dissenting judge asked whether the "un-Mirandized statement . . . did not contribute to the verdict." Id. at 15 (Bacharach, J., dissenting).

The majority began by echoing the district court that the combination of what Ms. O'Neal said Sergeant Lane had advised her was needed to take a gun out of the country, and his denial of that, was susceptible of two readings. Id. at 7. One was that she knew her actions were unlawful and made up a false story as a cover. Id. The other was that she made up a story without knowing her actions were unlawful. Id. The majority never said which view it considered preferable, or that it was assuming that the jury gave the proof its more damaging impact.

Instead, the majority said that the other proof was "overwhelming" on the knowledge issue. Id. The Port Huron evidence, the majority wrote,

"tended to show" Ms. O'Neal was aware of what was needed to take guns out of the country, or at least her willful blindness to what was necessary. Id. The majority next recounted that the government had presented evidence of warnings on the ATF forms and on the Delta website, and that, as a long-time gun owner, Ms. O'Neal was aware that possession of guns is regulated by complex rules. Id. The majority, referencing what Ms. O'Neal had said about her reasons for buying the guns and what she planned to do with them in the Dominican Republic, id. at 4-5, also looked to what it termed testimony her "shifting, and sometimes contradictory, explanations for her actions," id. at 7.

The dissent viewed matters very differently. It began by noting the government had "implor[ed] the jury to focus on Ms. O'Neal's statements to Agent Larko" about what Sergeant Lane had told her about taking guns out of the country. Id. at 3. The dissent thus took those statements, and Sergeant Lane's denial of what he had purportedly said, to take on their more damning meaning and to have weighed heavily in the jury's determination. As the dissent put it: the government's focus "left little

room for reasonable doubt because it'd be hard to imagine why Ms. O'Neal would have lied unless she knew she'd violated the law." Id.

The dissent continued that the jury did not have to view the other evidence as the majority did. The ATF forms, the dissent noted, did not say that an export license was required and also did not define "export," id. at 22, a term that, as case law bears out, a layperson like Ms. O'Neal might well consider to refer to commercial transactions, id. at 21 n.4. The Delta website also did not speak to exporting. Id. at 22. And that Ms. O'Neal knew possession of guns were regulated, and gave the conflicting accounts the majority noted, "do not establish her knowledge of the licensing requirements for exporting firearms." Id. at 23.

As for the testimony of the border-patrol agents, the dissent thought a jury could have had its doubts. The jury could "reasonably question" whether the agents could really recall what they had told Ms. O'Neal thirteen years before trial, or what Ms. O'Neal remembered about her encounter with them ten years she took guns out of the country. Id. at 22.

The dissent also invoked the central theme of the defense. The dissent noted that Ms. O'Neal had acted in an above-board way in taking

the guns out of the country. She "didn't hide the fact" that she was carrying the guns, but rather "declared all the guns to the airline." Id. at 20. The case, the dissent observed, thus came down to the credibility of the two competing versions. Id. And so, the government's reliance on the un-warned statements and Sergeant Lane's related denial was even more likely to have played a role in the verdict. That evidence "shattered Ms. O'Neal's credibility," id., was "devastating" to her defense, id. at 16, and played a "vital role" in the case, id. at 18, and "led to [her[ conviction for unlicensed export of a firearm," id. at 16.

The majority had given reasons why it thought the testimony of the border-patrol agents had "considerable force." Id. at 11 (majority opinion). It cited their explanation for why they remembered one event from so long ago (although that would not necessarily go to their remembering of what they said to Ms. O'Neal, which is what mattered). And, it reasoned, Ms. O'Neal did not need to remember the exact content of the conversation. Id. This was because the jury was only being "asked to conclude that she remembered being turned around and infer that she understood there were steps she needed to take to legally export a firearm. Id. But the

turnaround was by *Canadian* authorities, and it was because she could not take a gun *into Canada* as a matter of *Canadian law*.

The dissent stressed that the majority's was not the only permissible view of the border-patrol agent's testimony, and that the majority' handling of that proof was emblematic of flawed approach to the harmlessness inquiry. The majority, the dissent explained, got backwards how the proof should be viewed given that the government bore the burden of proving the error to be harmless beyond a reasonable doubt. Putting the point in terms of the border-patrol agent's testimony, the dissent wrote that "the majority appears to view the agents' testimony in the light most favorable to the government. But for harmlessness, it is Ms. O'Neal -- not the government -- who should obtain the benefit of the[] favorable inferences." Id. at 22 (Bacharach, J., dissenting).

## REASONS FOR GRANTING THE WRIT

**This Court should grant review to settle the confusion that exists as to the role of "overwhelming evidence" in review for constitutional error, an issue on which this Court granted review in Vasquez v. United States, but that it did not resolve.**

How to review the effect of the admission of evidence obtained in contravention of the federal constitution is an issue that arises in countless cases, both federal and state, every year. Despite the frequency with which the question is confronted, the courts are still not uniform in how they consider the strength of the untainted proof in determining whether the Constitution requires a new trial. Can the error be tolerated because that other proof is, in the appellate court's estimation, "overwhelming"? Or must the focus always remain on the effect of the constitutional error on the verdict?

The confusion can be traced to how the courts have viewed this Court's decisions in Chapman v. California, 386 U.S. 18 (1967), and Harrington v. California, 395 U.S. 250 (1969). That the confusion, well-recognized by scholars and commentators, persists more than a half century later, on such a common and important issue, is good reason to take up the issue.

Indeed, only eight years ago, this Court saw fit to do so, granting review in Vasquez v. United States, No. 11-199. See Vasquez v. United States, 565 U.S. 1057 (2011) (order granting certiorari). The questions there were whether a reviewing court is wrong to "focus its harmless error analysis solely on the weight of the untainted evidence without considering the potential effect of the error . . . on th[e] jury at all," Petition for Writ of Certiorari in Vasquez v. United States, No. 11-199, at i (first question presented), and whether doing so works a violation of the Sixth Amendment right to a jury trial, id. (second question presented). But this Court did not resolve the questions, as it dismissed the writ as improvidently granted. Vasquez v. United States, 566 U.S. 376 (2012).

This case offers the Court the opportunity to clarify how review of federal constitutional error is to be conducted. The majority and dissent in this case took very different approaches in how they considered the proof that was not infected with error in determining whether the constitutional error here was harmless. And they took different approaches as well on when proof apart from the error can be said to be overwhelming.

A. There is confusion as to how the strength of the untainted proof should factor in to the determination of whether a constitutional error is harmless, an issue that implicates the Sixth Amendment right to a jury trial.

In Chapman v California, this Court held that constitutional error may only be held harmless if it is "harmless beyond a reasonable doubt." Chapman, 386 U.S. at 24. In doing so, this Court recognized that harmless-error rules have the potential to work "very unfair and mischievous results." Id. at 22. Although there may be some errors that are "so unimportant and insignificant" that they can be considered harmless, that is only the case where there is not "'a reasonable possibility that the evidence complained of might have contributed to the conviction.'" Id. at 24 (quoting Fahy v. Connecticut, 375 U.S. 85, 87 (1963)). And in focusing the inquiry on the effect on the verdict, this Court cautioned against an appellate court's emphasis on its belief that the evidence of guilt was overwhelming. Id. at 22.

Two years later, in Harrinton v. California, the Court returned to the harmlessness of constitutional error. The assumed error there was the admission of statement of a non-testifying codefendant, in violation of Bruton v. United States, 391 U.S. 123 (1968). See Harrington, 395 U.S. at

252, 253. This Court considered any error in admission of the statements to be harmless, saying the statements were cumulative and that the evidence apart from them "so overwhelming" as to render any error harmless. Id. at 254.

The Court in Harrington did note its caution in Chapman against "giving too much emphasis to 'overwhelming evidence,'" id., and stated it was reaffirming that decision. Still, the opinion in Harrington led to confusion about the role of an appellate court's view of the strength of the evidence that has persisted to this day.

Scholars have long-recognized the confusion that had its roots in those decisions. This Court's decisions have been seen as articulating two tests, one "based upon whether the error contributed to the verdict" and the other "based upon whether the residual error was overwhelming." R. Fairfax, Jr., Harmless Constitutional Error and the Institutional Significance of the Jury, 76 Fordham L. Rev. 2027, 2037 (2008). As a leading treatise has put it, this "Court has appeared to move back and forth between relying heavily on the presence of proof of guilt in its harmless error analysis, and considering that proof less central to the inquiry." 7 Wayne R. LeFave, et

al., Criminal Practice and Procedure, § 27.6(e) (3d ed. 2007). And Texas's highest court in criminal matters has remarked on the "ambivalence on the part of the Supreme Court with respect to the proper role of so-called 'overwhelming evidence' in the conduct of a constitutional harmless error analysis." Snowden v. State, 353 S.W. 3d 815, 818-19 & n.14 (Tex. Crim. App. 2011). The state and federal courts have proceeded to apply one or the other of the two approaches, or else a hybrid of them. G. Mitchell, Against "Overwhelming" Appellate Activism: Constraining Harmless Error Review, 82 Calif. L. Rev. 1335, 1346-47 & nn. 77-79.

One prominent jurist has warned against the overuse in the appellate courts of an approach that focuses on the strength of the proof apart from the error, while at the same time recognizing that this all too often occurs. Judge Edwards observed that appellate courts "more often than not" look to the remainder of the proof rather than to whether the error contributed to the verdict, and urged that the "stranglehold of the guilt-based approach to harmless error" be broken. Harry T. Edwards, To Err is Human, but not Always Harmless: When Should Legal Error be Tolerated, 70 N.Y.U. L. Rev. 1167, 1171 (1995).

Indeed, it is not hard to find appellate decisions that embrace the notion that untainted evidence that is (in their view) overwhelming negates any possible harm. The Supreme Court of Washington has held that "[u]nder our 'overwhelming untainted evidence' test, we look to the untainted evidence to determine if it was so overwhelming that it necessarily leads to a finding of guilt." State v. Lui, 315 P.3d 493, 511 (Wash. 2014). The Supreme Court of New Hampshire has explained that where the "properly admitted evidence . . . [is] of overwhelming weight," the government has "met its burden to prove" a constitutional error harmless. State v. Wall, 910 A.3d 1253, 1262 (N.H. 2006). And in North Carolina, a reviewing court can hold an error harmless is by "determining [that] the independent non-tainted evidence is 'overwhelming.'" State v. Peterson, 652 S.E.2d 216, 222 (N.C. 2007); accord Bartley v. People, 817 P.2d 1029, 1034 (Colo. 1991); State v. Shifflet, 508 A.2d 748, 752 (Conn. 1986) (similar). Some federal circuits also hold overwhelming untainted evidence to be dispositive. See, e.g., United States v. Holmes, 620 F.3d 836, 844 (8th Cir. 2010) (unconstitutionally admitted evidence harmless "as long as the remaining evidence is overwhelming").

In contrast, many other courts are faithful to Chapman in focusing on whether the unconstitutional evidence contributed to the verdict. In New York, "'however overwhelming may be the quantum and nature of the other proof, the error is not harmless . . . if "there is a reasonable possibility that . . . the [error] may have contributed to the conviction."'" People v. Hardy, 824 N.E.2d 953, 957-58 (N.Y. 2005) (quotations omitted) (ellipses and brackets by the Court in Hardy). Likewise, the Florida Supreme Court has explained that "'[o]verwhelming evidence of guilt does not negate the fact that an error that constituted a substantial part of the prosecution's case may have played a substantial part in the jury's deliberation and thus contributed to the actual verdict reached.'" Ventura v. State, 29 So.3d 1086, 1089 (Fla. 2010) (per curiam) (quotation, and emphasis of entire passage by the Court in Ventura, omitted); see also State v. Van Kirk, 32 P.3d 735, 745 (Mont. 2001) ("time to abandon the use of the 'overwhelming evidence' test"); State v. Tollardo, 275 P.3d 110, 122 (N.M. 201) ("improper for 'overwhelming evidence" of guilt "to serve as main determinant of whether an error was harmless"); Higginbotham v. State, 807 S.W.2d 732, 734-35 (Tex. Crim. App. 1991) (noting it had rejected overwhelming-

evidence test). And this view can, of course, be found in the federal cases too. See, e.g., United States v. Cunningham, 145 F.3d 1385, 1396 (D.C. Cir. 1998) (that untainted evidence of guilt overwhelming is not dispositive; inquiry is instead "whether the error affected the jury's verdict").

The tendency of many courts to hold constitutional error harmless because of the strength of other proof distorts the inquiry of whether the error did not, beyond a reasonable doubt, contribute to the verdict. The reason why, and no doubt the reason for this Court's caution in Chapman, was well put by Judge Traynor a half century ago:

> Even overwhelming evidence in support of a verdict does not necessarily dispel the risk that an error may have played a substantial part in the deliberation of the jury and thus contributed to the actual verdict reached, for the jury may have reached its verdict because of the error without considering other reasons untainted by the error that would have supported the same result.

Roger J. Traynor, The Riddle of Harmless Error, 22 (1970).

Reliance on what an appellate court considers the overwhelming nature of the remaining proof poses other problems too. Chief among them is that it undermines the Sixth Amendment right to a jury trial. The weight-of-the evidence test is "inconsistent with the constitutional

framework of our judicial system." Edwards, To Err is Human, 70 N.Y.U. L. Rev. at 1192. By taking the focus away from the impact the tainted evidence had on the jury's decision, and putting it instead on (the appellate court's view of) the strength of the untainted evidence, it runs the risk of usurping the jury's function. See Tollardo, 275 P.3d at 122 (an appellate court that focuses too much on whether there is overwhelming proof "risks simply weighing the evidence in favor of and against guilt, which would usurp the role of the jury").

Appellate courts are also not institutionally well-suited to the task of gauging the trial evidence. The force of the proof is often a function of the strength of the witnesses, and of factors that a jury might take to cut against their accounts. Edwards, To Err is Human, 70 N.Y.U. Law. Rev. at 1193. And a focus on the strength of the untainted prof ignores the reality that not all proof is created equal. Even if the tainted proof is cumulative of other evidence, it may be of a kind that it likely to have an influence on the jury's decision. E.g., Van Kirk, 32 P.3d at 745 (Mont. 2011).

The question of how toe review constitutional error for harmlessness is an important and recurring one, as to which the state and federal courts

have not been able to reach consensus. It is one on which this Court's guidance is needed.

### B. This case is a good vehicle to resolve the important question presented.

This case is a good vehicle to decide the proper application of the constitutional harmless-error test. The majority looked to the strength of the untainted proof and the dissent looked to the effect that the tainted evidence had on the verdict. The two opinions thus typified the two main, competing approaches to harmlessness. Not only that, but the two opinions show how differently the untainted proof can be viewed. And the dissent called out the majority's approach as usurping the jury's approach and flawed on its own terms, as the majority did not consider whether a jury could have resolved the untainted evidence in Ms. O'Neal's favor. This case will thus not only give this Court the opportunity to clarify how the harmlessness test should be applied, but also to address how the strength of the untainted proof is to be assessed.

The majority opinion did, at the outset of its legal analysis, recite the effect-on-the-verdict standard. It stated the harmlessness test as being

whether it can be said, beyond a reasonable doubt, that the error "'"did not contribute to the verdict obtained."'" App. at 6 (quoting Yates v. Evatt, 500 U.S. 391, 403 (1991), in turn quoting Chapman, 386 U.S. at 24). But the majority very soon made plain that it equated this with a showing that the untainted proof was "overwhelming," or even just "strong." The majority wrote that the government "may meet its burden by showing 'otherwise strong' or 'overwhelming' evidence on the disputed issue." Id. So, despite its reference to the Chapman effect-on-the-verdict standard, the majority in fact used the weight-of-the-evidence test.

The dissent, in contrast, pointedly looked to whether the tainted proof contributed to the verdict. It stressed how the admission of the statements obtained in violation of Miranda, and Sergeant Lane's denial that he had said what was attributed to him about what was needed to take a gun out of the country, struck at the core of the defense, id. at 15-16 (Bacharach, J., dissenting), "devastating," id. at 16, "shattering," id. at 20, and "pulveriz[ing]" it, id. at 24. The dissent also emphasized how the government had heavily relied on the tainted proof in summation, a focus that "left little room for reasonable doubt." Id. at 16; see also id. at 23-24.

And it noted Ms. O'Neal's above-board conduct in "declar[ing] all the guns to the airline," id. at 20, a fact that the majority did not even mention and that supported her defense that she was unaware of the need for an export license.

The majority and the dissent did not just use different tests for assessing whether the constitutional violation here was harmless. They also had different approaches to how the strength of the proof should be assessed, a difference with implications for the Sixth Amendment jury right. The majority and the dissent disagreed on what could (or should) be said about the strength of the government's untainted proof.

For example, in determining that proof to be overwhelming, the majority pointed to warnings on the ATF forms and on Delta Airline's website. Id. at 7. But both of these pieces of proof, as the dissent pointed out, had problems in showing Ms. O'Neal knew about (or was on notice of) the need for a license to take guns out of the United States. The ATF forms "do not say that a license is required or define the term 'export," id. at 22 (Bacharach, J., dissenting), a term that is often equated with commercial actions, id. at 21 n.4. Delta's website "does not explain the

requirement of an export license" either. Id. at 22. Instead, it merely says the traveler is responsible for being aware of, and complying with, federal, state and local law regarding the transportation of firearms. Id. And, the dissent could also have added, one would expect an American-based carrier to note the need for an export license for a person to carry a gun out of the country if such a license were ordinarily required, especially as the website referred to foreign rule about taking guns into the United Kingdom.

The dissent most prominently disputed the force of the main proof on which the majority relied in characterizing the untainted evidence as overwhelming, namely the testimony of the Port Huron border agents. The dissent noted that a jury could easily find that testimony not to be very persuasive. The jurors might question whether the agents "remember[ed] precisely what they had said almost thirteen years earlier" or whether "like many of us, they simply th[ougt] that their memories of the incident were correct." Id. at 20; see also id. at 22 (similar). As well, the dissent noted, although one agent said he had told Ms. O'Neal she would need a form to export a gun from the United States, "there is no indication he explained

this requirement (for example, by defining the term 'export,' as the district court did for the jury)." Id. at 21.

Of course, the majority offered responses. It pointed out that the agents claimed to recall this incident "because border turnarounds were highly unusual and the event was so remarkable that it led to a change in policy." Id. at 11 (majority opinion). But remembering a turnaround is not the same as remembering, thirteen years after the fact, what specifically was said to the person turned around. The majority also wrote that the jurors were being "asked to conclude that Ms. O'Neal remembered being turned around and infer that she understood there were steps she needed to take to legally export a firearm." Id. The turnaround, though, was by *Canadian officials* who were enforcing *Canadian law* about taking guns *into Canada*, and not by American officials enforcing American law about taking guns out of the United States. So, no matter whether Ms. O'Neal could be expected to remember the turnaround, id., the turnaround itself would not confer any notice about the requirements for taking a gun out of this country.

The difference in approach to the evidence reflected, as the dissent pointed out, a key doctrinal difference. The dissent thought that the harmlessness standard called for all reasonable inferences from the proof to be drawn in Ms. O'Neal's favor. Id. at 22 (Bacharach, J., dissenting). The majority, on the other hand, did not ask what a reasonable jury could have found, but rather made its own independent judgment of the government's proof, one that overlooked notable defects in (or criticisms of) that proof. Id. (accusing majority of construing the testimony of the border-patrol agents in the light most favorable to the government).

In short, this case squarely presents the question presented. It does so in a way that highlights the differing approaches to the harmlessness of a constitutional error, and that will allow a rounded consideration of the important question raised. This Court should grant review and speak to the confusion about how to assess the harmlessness of constitutional error, confusion that can and does produce "very unfair and mischievous results." Chapman, 386 U.S. at 22.

## CONCLUSION

This Court should grant Ms.O'Neal a writ of certiorari.

Respectfully submitted,

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