No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2020

JACOB TOWNLEY HERNANDEZ,

Petitioner,

vs.

SUZANNE M. PEERY, Warden,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

Before trial began, the trial court issued a concededly unjustified gag order that prohibited defense counsel from discussing with the defendant or anyone else, the existence and contents of a declaration from the former co-defendant who became the state's critical witness. The declaration contained the witness's proposed testimony which was described as the state's theory of the case. The order was never lifted, and it extended throughout trial and state appellate litigation.

The state appellate court unanimously held that the trial court violated petitioner's Sixth Amendment right to counsel and held that the error was structural error requiring reversal without a showing of prejudice pursuant to this Court's holdings in *Perry v. Leeke*, 488 U.S. 272, 281, 284 (1989) and *Geders v. United States*, 425 U.S. 80 (1976). The State Supreme Court, however, disagreed, reversed the appellate court and affirmed the convictions. *People v. Hernandez*, 53 Cal.4th 1095, 273 P.3d 1113, 139 Cal.Rptr.3d 606 (2012).

Despite the debate and conflicting opinions among the state courts, the District Court denied habeas relief and denied a Certificate of Appealability ("COA") and the Ninth Circuit also denied a COA.

The questions presented are:

I. Whether a COA should routinely be granted where the state courts and state judges have divided on the merits of the constitutional question as held by the Fifth and Seventh Circuits, several District Courts and three justices of this Court (*see Jordan v. Fisher*, 135 S.Ct. 2647, 2651(2015) (Sotomayor, Ginsburg, &

Kagan, JJ., dissenting from denial of certiorari)), or should courts deny a COA despite the dispute among reasonable state jurists as held by the Ninth Circuit and District Court below.

II. Whether, as a threshold matter, Petitioner made a showing that reasonable jurists could debate whether his petition should have been resolved in a different manner where the California Supreme Court's published opinion *created a split* with *every state and lower federal court* since *Perry* which have held that a trial court order that violates the "defendant's right to unrestricted access to his lawyer for advice on a variety of trial-related matters" is structural error, reversible per se.

III. Whether the Ninth Circuit improperly looked beyond the threshold inquiry of whether a COA is merited and decide the merits without jurisdiction in contravention of this Court's holding in *Buck v. Davis*, 137 S.Ct. 759 (2017), where different state court judges reached opposite conclusions on Petitioner's constitutional claim and where all lower federal and state court authority disagrees with the California Supreme Court's holding on this constitutional claim.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Jacob Townley Hernandez respectfully prays that a Writ of Certiorari issue to review the order of the United States Court of Appeal for the Ninth Circuit denying him a Certificate of Appealabilty ("COA") for his habeas petition.

OPINION BELOW

The unpublished Ninth Circuit summary order denying Petitioner a COA on June 11, 2020, appears at Appendix A. The unpublished Ninth Circuit summary order denying rehearing on July 13, 2020 appears at Appendix B.

The unpublished District Court order denying Petitioner's petition for federal writ of habeas corpus and denying a COA on December 18, 2018, appears at Appendix C.

Petitioner's federal habeas writ challenged the *published* April 19, 2012 opinion (and subsequent proceedings on remand) of the California Supreme Court reversing the decision of the California Court of Appeal, published at *People v. Hernandez*, 53 Cal.4th 1095, 273 P.3d 1113, 139 Cal.Rptr.3d 606 (2012), and appears at Appendix D.

The California Supreme Court's decision, *disagreed with and overruled* the November 9, 2009 unanimous decision of the California Court of Appeal, Sixth District, which had reversed the conviction and which was formerly published at *People v. Hernandez*, 101 Cal.Rptr.3d 414 (2009), and appears at Appendix E.

The July 29, 2013 decision of the California Court of Appeal, Sixth District affirming the conviction on remand from the California Supreme Court appears at Appendix F.

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JURISDICTION

On June 11, 2020, a two judge panel of the United States Court of Appeal for the Ninth Circuit issued an order denying Petitioner's motion for COA. On July 13, 2020, Petitioner's motion for reconsideration of the June 11, 2020 order was also denied by a two judge panel. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2253(c) provides:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from–
>
> > (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
> >
> > * * *
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

28 U.S.C. § 2254(d) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

A. Introduction and Summary of Argument

Petitioner in this case only seeks the modest relief of an issuance of a COA and appointment of counsel.

The trial court in this case issued a gag order on defense counsel which precluded counsel from discussing with the defendant, his investigator or anyone else, the existence or contents of declarations executed by his former codefendants. (3 Reporter's Transcript ["RT"] 550-552, 583; 8RT 1921; Augmented Clerk's Transcript ["Aug. CT"] 34.) One of these codefendants became the state's star witness. The declarations contained the witness's proposed testimony which the prosecutor described as the state's "theory of the case." The state has now conceded that the trial court's order "unjustifiably interfered with appellant's access to counsel," as the state appellate courts have found. (Respondent's Supplemental Brief on Remand at 3).

The state appellate court unanimously held that the trial court's unjustified order violated petitioner's Sixth Amendment right to counsel by preventing his counsel from discussing anything in the declaration containing the proposed testimony of the state's star witness with counsel. Because the gag order lasted throughout the trial and covered a host of trial-related matters, the state appellate court unanimously held that the error was structural error requiring reversal without a showing of prejudice. *See Perry v. Leeke*, 488 U.S. 272, 281, 284 (1989); *Geders v. United States*, 425 U.S. 80 (1976), Appendix E at 67-77. The State

Supreme Court, however, disagreed, reversed the appellate court and affirmed the convictions. *People v. Hernandez*, 53 Cal.4th 1095, 273 P.3d 1113, 139 Cal.Rptr.3d 606 (2012), Appendix D at 50-58. The California Supreme Court's decision created a split with *every other court* since *Perry* which have held that a trial court order that violates the "defendant's right to unrestricted access to his lawyer for advice on a variety of trial-related matters" is structural error, reversible per se. *See, e.g., United States v. Johnson*, 267 F.3d 376, 377-380 (5th Cir. 2001) (structural constitutional error where court's order precluded consultation with counsel during overnight recesses); *Jones v. Vacco*, 126 F.3d 408, 416 (2d Cir. 1997) (structural constitutional error where court's order precluded consultation with counsel during weekend recess); *United States v. Cobb*, 905 F.2d 784, 791-793 (4th Cir. 1990), *cert denied*, 498 U.S. 1049 (1991) (structural constitutional error where court's prohibition of defendant's discussions with counsel concerning his testimony over weekend recess required reversal per se); *Mudd v. United States*, 798 F.2d 1509, 1512 (D.C. Cir. 1986) (with Justice Scalia concurring, the Court held prior to *Perry*, that the error was reversible per se where attorney told not to discuss defendant's testimony with defendant during overnight recess).

After exhausting his claims on remand. Petitioner filed a pro per federal writ of habeas corpus which the District Court denied without appointing counsel. The Court also denied a COA. Petitioner filed a pro per motion for COA in the Ninth Circuit, which was also denied without appointing counsel.

This Petition raises questions about whether a Petitioner meets the standard for issuance of a COA–whether reasonable jurists could debate the merits of the petition–where different courts of the same state have in fact *debated the merits* and reached *opposite conclusions* about whether Petitioner's convictions must be reversed for federal constitutional error. This question has resulted in at least an

implicit split in Circuit authority.

The Fifth and Seventh Circuits and several District Courts adhere to the Seventh Circuit's holding: "'When a state appellate court is divided on the merits of the constitutional question, issuance of a certificate of appealability should ordinarily be routine.'" *Rhoades v. Davis*, 852 F.3d 422, 429 (5th Cir. 2017) (quoting *Jones v. Basinger*, 635 F.3d 1030, 1040 (7th Cir. 2011)); *see*, *e.g.*, *Lee v. Warden, Georgia Diagnostic Prison*, 2019 WL 1292313, *5 (S.D. Georgia 2019); *Smith v. Winn*, 2017 WL 2351743, *10 (E.D. Mich. 2017); *Frazier v. Bell*, 2013 WL 5902480, *8 (E.D. Mich. 2013).

Indeed, three justices of this Court have previously quoted this holding of *Jones v. Basinger* with approval. *See Jordan v. Fisher*, 576 U.S. 1071, 135 S.Ct. 2647, 2651, 192 L.Ed.2d 948 (2015) (Sotomayor, Ginsburg, & Kagan, JJ., dissenting from denial of certiorari).

Here, before the California Supreme Court affirmed his convictions, a three-justice panel of the Sixth District Court of Appeal *unanimously reached the opposition conclusion* and *reversed his convictions.* The state appellate court held that the trial court's ban throughout the trial on discussion between counsel and defendant of the declaration containing the proposed testimony of the state's primary witness and the state's "theory of the case," violated the defendant's "absolute right" to consult with counsel when not testifying, and his right "right to unrestricted access to his lawyer for advice on a variety of trial-related matters" (*Perry*, 488 U.S. at 281, 284), and thus required reversal without a showing of prejudice.

Ordinarily, the holdings of *Jones* and *Rhoades* would require issuance of a COA because three justices of the state appellate court have not only debated, but agreed that Petitioner's constitutional claim has merit. Yet, the Ninth Circuit

summarily denied relief without appointing counsel. This implicit split of authority demonstrates that this Court's further guidance is needed. *See* Supreme Court Rules 10(a), (b), (c).

Further, on the merits, the California Supreme Court's decision created a split of authority on the application of *Perry* to trial court orders that prevent open consultation between counsel and a defendant on trial-related topics for more than an overnight recess. California's holding conflicts with essentially every other court that has considered a similar question.

This Court should grant review, vacate the Ninth Circuit's order and remand with instructions to grant a COA and appoint counsel.

B. Statement of the Case

On February 22, 2006, Petitioner, who was then a seventeen-year-old minor, was charged along with Noe Flores by complaint filed directly in adult court; the complaint charged one count of attempted murder of Javier Lazaro (Cal. Penal Code § 664/187) with an allegation that the attempted murder was premeditated and deliberated. Enhancements were added alleging the crime was for the benefit of a gang per Cal. Penal Code § 186.22, for personal use of a firearm, discharge of a firearm, and discharge of a firearm causing injury (Cal. Penal Code §§ 12022.5(a)(1), 12022.53(b), (c), (d)), and for great bodily injury per Cal. Penal Code § 12022.7(a).

Eventually, two other defendants, Jesse Carranco and Ruben Rocha were added as codefendants. On April 17, 2007, Flores and Rocha entered guilty pleas to lesser charges. (RT 4/17/06 1003-16, 1253-65). Flores and Rocha were required to sign declarations under penalty of perjury in order to plead guilty. The trial court originally ordered that the declarations remain sealed and that their existence not be revealed to defense counsel for Townley and Carranco. (3RT 583).

Counsel for Petitioner Townley and codefendant Carranco were eventually given a chance to review the declarations. Over objections, however, they were given the copies only upon agreeing that they were not permitted to show the declarations to their clients or discuss the existence or contents of the declarations with their clients, with other attorneys or with defense investigators or with anyone else. (3RT 550-552, 8RT 1921; Aug. CT 34). When the matters were discussed in court, the trial court required that the discussions take place outside the presence of the defendants. (3RT 530-534, 548-585). The state has now conceded that the trial court's order "unjustifiably interfered with appellant's access to counsel," as the state appellate courts have found. (Respondent's Supplemental Brief on Remand at 3).

On June 13, the jury returned verdicts of guilty for Petitioner Townley on all Counts and enhancements. (CT 2004, 2024-30). On August 24, 2007, the court sentenced Townley to life in prison on Count One with a consecutive twenty-five-years-to-life sentence on the gun enhancement. (12CT 2884-88; 24RT 6013-19.)

On November 9, 2009, the Sixth District Court of Appeal reversed Townley's convictions. (Appendix E at 77). The Court held that the restrictions on consultation with counsel interfered with Petitioner's constitutional right to counsel and required reversal without a showing of prejudice. (Appendix E at 67-77).

The California Supreme Court granted the People's Petition for Review. On April 19, 2012, the California Supreme Court reversed the Court of Appeal's ruling, holding that the interference with the right to consult with counsel did not require automatic reversal, and the Supreme Court remanded for a determination of whether Petitioner could demonstrate prejudice, a reasonable probability of a different result. (Appendix D at 50-58). The Court remanded to permit Petitioner to develop and show prejudice from the error. (Appendix D at 58).

Petitioner filed a Petition for Certiorari in this Court which was denied on October 15, 2012.

The case was remanded to Court of Appeal. On December 11, 2012, the Superior Court acted upon a motion by the District Attorney to unseal Flores's and Rocha's declarations.

Because the Superior Court's order did not explicitly remove the ban on discussion of the declaration with Petitioner, Petitioner's counsel asked the Attorney General to stipulate to an order from the Court of Appeal clarifying that counsel could share the declaration with Petitioner. The Attorney General rejected this request. On or about May 8, 2013, the state appellate court denied counsel's motion to permit counsel to discuss the declaration with Petitioner and an investigator for the purpose of demonstrating prejudice, denied counsel's motion for funds to investigate prejudice, and denied the motion for discovery of prior drafts of the declaration to demonstrate prejudice.

On remand, after considering additional briefing, the state appellate court affirmed the convictions holding that Petitioner–without being granted an opportunity to review the declarations, consult with counsel about the declarations or consult with an investigator regarding the declarations–had not shown prejudice on the record on appeal. (Appendix F at 99-102.)

The California Supreme Court denied review on November 13, 2013.

While Petitioner's Petition for Rehearing was pending in the Court of Appeal, Petitioner also filed a Petition for Writ of Habeas Corpus in the Court of Appeal, which attached evidence outside the record to demonstrate prejudice. On August 30, 2013, the Court of Appeal denied the writ without comment.

On October 23, 2013, Petitioner sought review of the denial of the habeas petition in the California Supreme Court by means of a renewed writ of habeas

corpus with additional evidence. That petition was summarily denied on November 13, 2013.

On April 8, 2014, Petitioner filed a petition for writ of habeas corpus in the District Court, in pro per. The Attorney General filed an Answer blaming state appellate counsel for not sharing the declarations with Petitioner, and argued that the ineffective assistance claim was not exhausted.

Petitioner sought and obtained leave to stay the proceedings in this Court while he exhausted that claim which the California Supreme Court summarily denied on January 21, 2015. This Court again denied certiorari.

On May 27, 2015, Petitioner filed a First Amended Petition. On July 30, 2015, the District Court ordered the Attorney General to serve Petitioner with the previously sealed declarations and granted Petitioner leave to file a Second Amended Petition which clarified how the unavailability of such exhibits in the state courts was prejudicial.

On September 1, 2015, the District Court signed an order which allowed Petitioner to discuss and share the previously sealed declarations with counsel, an investigator and witnesses.

In December, 2015, Petitioner filed a timely second amended Petition.

On December 18, 2018, the District Court issued an order denying Petitioner's petition for federal writ of habeas corpus and denying a Certificate of Appealability. (Appendix C at 6-10, 43).

On June 11, 2020, the Ninth Circuit issued a summary order denying Petitioner a Certificate of Appealability. (Appendix A at 2). The Court summarily denied a motion for rehearing on July 13, 2020. (Appendix B at 4).

C. Statement of Facts

On the evening of February 17, 2006, four young hispanic men in a white

Honda sedan drove into a neighborhood associated with the Sureño criminal street gang. The driver remained in the car, with the engine running. The other men, each of whom was wearing red clothing suggesting an association with the Norteño criminal street gang, approached the victim, Javier Lazaro, who was walking on the sidewalk across the street. Lazaro was not associated with any gang, but was wearing blue, a color linked with the Sureño criminal street gang. One of the men shot Lazaro five times, injuring but not killing him. The men then ran back to the car, jumped in, and sped away.

None of the eyewitnesses to the shooting were able to identify Petitioner as one of the assailants who got out of the car and attacked Lazaro. (RT 1767-74, 1830-35, 1846-48, 2608-10, 2663-69, 4875-78). Moreover, the descriptions of the assailants were *inconsistent* with Petitioner. The witnesses described the shooter and the other two assailants who got out of the car as Hispanic and dark-complected. (RT 1525-27, 1779-82, 1824-25, 2598-2601). Yet, Townley was described as "white" or "really white," while Flores, Rocha and Carranco were all described as Hispanic. (RT 3121-23; CT 1910-2, 1910-7, 1910-11, 1910-80). Moreover, the witnesses stated that the assailants spoke in Spanish with a Mexican accent. (RT 1284-89, 1292-97, 2650-57, 2663-64, 2674-77, 2691-94, 3362-67, 4814-24). Yet, Townley does not speak Spanish, while Flores does speak Spanish. (RT 2832-33, 2859-60, 3379-80).

A short time later, police located the Honda near an apartment known to be a gang hangout, where they found a number of people, including Townley, then a minor. Officers transported him to the police station. A witness testified that Townley had told her that he had to get rid of a gun but did not want to leave it at the house. The officers searched Townley and found a .25-caliber handgun and a sack with bullets in Townley's shoes and in the other a velvet sack containing 20

live cartridges. Townley was wearing a red pendleton shirt and his hands and jacket sleeves tested positive for gun residue. It was later determined that bullet casings found at the scene of the shooting had been fired from the gun.

At trial, Noe Flores was the only witness to identify Townley as a participant and describe the roles of the four participants. Flores testified and blamed Townley for calling him to "do a ride." They picked up Carranco and Rocha, and drove to a location. Townley, Carranco and Rocha got out of the car, while Flores remained behind. Flores blamed Townley for bringing the gun and said Townley was wearing the red and black pendleton identified as the shooter's shirt. Flores's declaration, however, stated that Flores was wearing the red and black pendleton shirt.

The defense at trial pointed out that the description of the shooter and companions did not match Townley, and the witnesses had not identified him. But the witness descriptions matched the other three. The defense suggested that Flores was the shooter and had given the gun and bullets and shirt to the minor Townley to dispose of them. The defense suggested that Flores blamed Townley in order to obtain a time-served sentence instead of life in prison.

REASONS FOR GRANTING THE WRIT

I. This Court Should Grant Certiorari to Settle that Ordinarily a COA Should Issue where the State Courts that Reviewed the Case have been Divided on the Constitutional Question as Held by the Fifth and Seventh Circuits, Several District Courts and Three Justices of this Court.

This case presents a good vehicle for settling a persistent question that has created apparent confusion among lower courts regarding whether *actual debate and dissenting or conflicting opinions* among the state judges that review a constitutional question on direct view is sufficient for a petitioner to meet the required showing for a COA. This Court has held that to obtain a COA, a petitioner must "sho[w] that reasonable jurists could debate whether (or, for that matter,

agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.' " *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893, n. 4 (1983) (some internal quotation marks omitted)). This Court has stated that satisfying that standard, "does not require a showing that the appeal will succeed." *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). This Court has further stated that instead, "[a] prisoner seeking a COA must prove something more than the absence of frivolity or the existence of mere good faith on his or her part." *Id.*, at 338, 123 S.Ct. 1029 (internal quotation marks omitted).

Interpreting this Court's holding that a petitioner must show that reasonable jurists could debate or agree that the petition should have been resolved differently, the Fifth and Seventh Circuits and several District Courts adhere to the Seventh Circuit's holding: "'When a state appellate court is divided on the merits of the constitutional question, issuance of a certificate of appealability should ordinarily be routine.'" *Rhoades v. Davis*, 852 F.3d 422, 429 (5th Cir. 2017) (quoting *Jones v. Basinger*, 635 F.3d 1030, 1040 (7th Cir. 2011)); *see Lee v. Warden, Georgia Diagnostic* Prison, 2019 WL 1292313, *5 (S.D. Georgia 2019); *Smith v. Winn*, 2017 WL 2351743, *10 (E.D. Mich. 2017); *Frazier v. Bell*, 2013 WL 5902480, *8 (E.D. Mich. 2013).

Indeed, three justices of this Court have previously quoted this holding of *Jones v. Basinger* with approval. *See Jordan v. Fisher*, 576 U.S. 1071, 135 S.Ct. 2647, 2651, 192 L.Ed.2d 948 (2015) (Sotomayor, Ginsburg, & Kagan, JJ., dissenting from denial of certiorari).

These opinions are, of course, eminently reasonable. If the state court justices that have reviewed the constitutional claim have *in fact debated and come to opposition conclusions*, then plainly by definition the claim is debatable among

reasonable jurists.

Here, of course, the three justice panel of the California Court of Appeal *all unanimously agreed* that Petitioner was correct. These three state appellate court justices all agreed that the trial court violated petitioner's Sixth Amendment right to counsel by preventing his counsel from discussing the proposed testimony of the state's star witness with counsel throughout the trial, which the court held was structural error requiring reversal without a showing of prejudice. *See Perry v. Leeke*, 488 U.S. 272, 281, 284 (1989); *Geders v. United States*, 425 U.S. 80 (1976); Appendix E at 67-77. These three jurists thus all concluded that Petitioner's constitutional claim should be resolved in a different manner than the latter Supreme Court decision.

Yet, despite the actual debate and documented differences of judicial opinion from the state judges who reviewed this constitutional question in this case, the Ninth Circuit refused to issue a COA or appoint counsel for Petitioner.

The Ninth Circuit's decision here is contrary to the holdings of the Fifth and Seventh Circuits, the holdings of several District Courts, and the opinion of three Justices of this Court. The Ninth Circuit's order thus indicates that there remains confusion regarding the standard for granting a COA.

This Court should grant review, vacate the Ninth Circuit's order and remand with instructions to grant a COA and appoint counsel.

II. This Court Should Grant Certiorari where a Threshold Inquiry Demonstrates that the California Supreme Court's Decision is not Only Debatable, but *Contrary to Every Other Court Decision* Applying *Perry* to Trial Court Orders Imposing Lengthy Limits on Discussion Between Counsel and the Defendant During Trial.

Additionally, a threshold inquiry into the merits indicates that the California Supreme Court's decision is contrary to every other court decision applying *Geders v. United States*, 425 U.S. 80 (1976) and *Perry v. Leeke*, 488 U.S. 272 (1989) to a

trial court's ban on attorney consultation with a defendant, even when limited to consultation on certain topics, so long as the ban concerns "trial-related matters" and so long as the ban lasts more than an overnight recess.

As this Court has emphasized, "[t]he COA inquiry ... is not coextensive with a merits analysis." *Buck v. Davis*, — U.S. —, 137 S.Ct. 759, 773 (2017). "When a court of appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction." *Id.* (internal quotes omitted).

Here, as a threshold matter, as described above, the California Supreme Court's decision resolved the matter differently from the unanimous three justice panel of the state appellate court. Moreover, the California Supreme Court resolved the matter differently from *every other court* that considered whether structural error occurs when a trial court bans attorney consultation with a defendant on certain topics, so long as the ban concerns "trial-related matters" and so long as the ban lasts more than an overnight recess.

The Ninth Circuit, however, appears to have improperly looked beyond the actual debate among judges of the California courts on the merits of Petitioner's constitutional claim, and beyond the actual debate among judges of the lower federal courts and state courts on the merits of similar claims. The Ninth Circuit appears to have improperly decided the merits of the case without jurisdiction in contravention of this Court's holding in *Buck*.

Moreover, a threshold inquiry clearly supports a COA. The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence." U.S. Const. amend VI. "The core of this right has historically been, and remains today, 'the opportunity for a defendant

to consult with an attorney and to have him investigate the case and prepare a defense for trial.'" *Kansas v. Ventris*, 556 U.S. 586, 590 (2009), quoting *Michigan v. Harvey*, 494 U.S. 344, 348 (1990), citing *Powell v. Alabama*, 287 U.S. 45, 58 (1932). The historical background suggests that "the core purpose" of the Sixth Amendment's counsel guarantee was "to assure '*Assistance*' at trial," and to reject the English common-law rule "which severely limited the right of a person accused of a felony *to consult with counsel*." *United States v. Henry*, 447 U.S. 264, 292 n.3 (1980) (emphasis added) (internal quotations omitted); *see Powell*, 287 U.S. at 61 (Sixth Amendment describing the "necessary conferences between counsel and accused").[1]

Thus, in *Geders*, 425 U.S. 80, this Court reversed where the trial court had prohibited counsel from consulting with his client "about anything" throughout a seventeen-hour, overnight recess, during a break in his testimony, and thus violated the defendant's Sixth Amendment "right to the assistance and guidance of counsel." *Id.* at 91.

In *Perry*, 488 U.S. 272, this Court held that an order banning communication with a defendant during a fifteen-minute recess did not violate the right to counsel. But this Court made clear that a criminal defendant "has an *absolute right* to . . .

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[1] The ABA Standards for Defense Function also emphasize the need for counsel to confer openly with the defendant about important developments during the trial. *See* Standard 4-5.2(b) (strategic decisions should be made "after full consultation with the client"); *see also, e.g.,* Standard 4-3.1(a) ("the necessity of full disclosure of all facts known to the client for an effective defense"); 4-3.8(a) (duty to "keep the client informed of the developments in the case and the progress of preparing the defense"); 4-3.8(b) (duty to "explain developments in the case to the extent reasonably necessary to permit the client to make informed decisions regarding the representation"); 4-5.1 (duty to "advise the accused with complete candor concerning all aspects of the case").

This Court has frequently cited the ABA Standards for determining the scope of defense counsel's duties. *See, e.g., Padilla v. Kentucky*, 559 U.S. 356, 366-367 (2010).

consultation" with counsel when he is not testifying (*id*. at 281 [emphasis added]), and a "right to unrestricted access to his lawyer for advice on a variety of trial-related matters" during any long recess. *Id.* at 284. Thus, a court order that restricts counsel's communication with the defendant on an important, trial-related subject, or which lasts for more than a brief recess, is reversible per se. *Id.* at 278-279.

Until the decision of the California Supreme Court in this case, every lower federal court and state court since *Geders* and *Perry* has agreed that a court order which prohibited all discussion with a defendant for more than a brief recess, or which prohibited a discussion of a trial-related subject, is per se reversible error. The list of such cases includes Justice Scalia's concurring opinion in *Mudd v. United States*, 798 F.2d 1509 (D.C. Cir. 1986): "[A] prohibition on attorney-defendant discussion during substantial recesses, even if limited to discussion of testimony, violates the sixth amendment and ... like the similar violation at issue in *Geders*, it constitutes per se reversible error." *Id.* at 1515. *See United States v. Cobb*, 905 F.2d 784, 791-793 (4th Cir. 1990), *cert denied*, 498 U.S. 1049 (1991) (order precluded consultation with counsel about defendant's ongoing cross-examination testimony during weekend recess); *Mudd*, 798 F.2d 1509, 1512; *United States v. Romano*, 736 F.2d 1432, 1439 (11th Cir. 1984), *vacated in part on rehearing on other grounds*, 755 F.2d 1401 (11th Cir. 1985) (court ordered defendant not to discuss his testimony with counsel during five-day recess); *Martin v. United States*, 991 A.2d 791, 793-795 (D.C. App. 2010) (order forbidding defendant from discussing testimony with counsel during a weekend recess in the middle of testimony); *State v. Futo*, 932 S.W.2d 808, 815 (Mo. App. 1996), *cert. denied*, 520 U.S. 1143 (1997) (two-and-a-half-day prohibition of defendant's discussions with counsel concerning his testimony); *State v. Fusco*, 93 N.J. 578, 461 A.2d 1169, 1174-75 (N.J. 1983) (overnight ban on

discussion of defendant's testimony); *see also United States v. Johnson*, 267 F.3d 376, 377-380 (5th Cir. 2001) (order precluded all consultation with counsel "about the case" during overnight recesses); *Jones v. Vacco*, 126 F.3d 408, 416 (2d Cir. 1997) (order precluded consultation with counsel "about anything" during weekend recess); *cf. United States v. Sandoval-Mendoza*, 472 F.3d 645, 650-652 (9th Cir. 2006) (finding *Geders* error where defendant ordered not to discuss testimony with counsel but declining to decide whether error was structural because Court reversed on other error); *Moore v. Purkett*, 275 F.3d 685, 688-689 (8th Cir. 2001) (prohibition on attorney consulting quietly with defendant during trial violated principle of *Geders* and required reversal per se); *United States v. Santos*, 201 F.3d 953, 965-966 (7th Cir. 2000) (per Judge Posner, finding *Geders* error where defendant ordered not to discuss testimony with counsel but declining to decide whether error was structural because Court reversed on other error). As these courts have pointed out, a prohibition on discussion of important evidence affects all manner of trial strategy. *See, e.g., Cobb*, 905 F.2d at 792; *Mudd*, 798 F.2d at 1512.

Indeed, in the approximately eight years since the *Hernandez* opinion, *no court* outside of California has found the court's decision persuasive or worthy of citation. This further indicates, as a threshold matter, that the merits of the opinion are at least debatable.

To be sure, some lower courts have found exceptions to this general rule. But, those exceptions are not at issue here. Thus, the California Supreme Court noted that "it also has been held that under some circumstances an order limiting the ability of a defendant to consult with his attorney about some portion of the evidence may be justified." (Appendix D at 55, citing *United States v. Moussaoui*, 591 F.3d 263, 289 (4th Cir. 2010), and cases cited therein). Yet, here, as the California Supreme Court acknowledged, the state has not challenged the state

appellate court's conclusion that the trial court's order was *not justified* by concern for witness safety, or other reason. (Appendix D at 50, 59).

Nor has the state contended that the trial-length ban on discussion of the declaration of the state's critical witness fits within any possible exception for "trivial" violations of this core Sixth Amendment right. *See United States v. Triumph Capital Group, Inc.*, 487 F.3d 124, 135 (2d Cir. 2007).

All parties agree that the court's order limiting discussion was without adequate justification. Further, there is no dispute that the subject of the ban, the declaration and testimony of the state's key witness–was a critical trial-related subject. Nor is there any dispute that the ban on discussion of this subject lasted for more than an overnight recess, and indeed lasted throughout the trial. The state characterized the declaration as the state's theory of the case and as essential to proving Petitioner's guilt. The prosecutor stated that without the declaration there was a reasonable probability that Flores would exonerate Petitioner, which "would probably create reasonable doubt" as to Petitioner's guilt.

Further, as lower courts have noted, requiring a demonstration of prejudice where the court restricted attorney-client communication during trial (as the California Supreme Court has done) severely threatens the attorney-client privilege historically considered critical to the right to assistance of counsel. *See Mudd*, 798 F.2d at 1513; *see Fisher v. United States*, 425 U.S. 391, 403 (1976) (privilege is critical to defendant obtaining "fully informed legal advice"). As the *Mudd* Court explained, with the concurrence of then-Judge Scalia:

> The only way that a defendant could show prejudice would be to present evidence of what he and counsel discussed, what they were prevented from discussing, and how the order altered the preparation of his defense.

Id. The *Mudd* Court concluded: "Having already been subjected to an improper judicial order, it would be anomalous if defendant was also forced to relinquish the

right to have his discussions with his lawyer kept confidential." *Id.*

Petitioner has thus plainly made a threshold showing that the California Supreme Court's holding that there was no Sixth Amendment violation of the "absolute right" to *consultation* with counsel unless *Petitioner* can demonstrate prejudice for *ineffective* assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 687 (1984), is contrary to and an unreasonable application of this Court's decision in *Perry*, where the state court's decision conflicts with *every* other state or federal court that has considered a trial court's restriction on a defendant's consultation with counsel about trial-related matters.

This Court should grant certiorari, vacate the Ninth Circuit's improper order denying a COA, and remand with directions to issue a COA and appoint counsel for Petitioner. *See* Supreme Court Rules 10(a), (b), (c). *See, e.g.*, *Youngblood v. West Virginia*, 547 U.S. 867, 868-870 (2006) (per curiam) (summary order to "grant, vacate and remand"); *Presley v. Georgia*, 558 U.S. 209, 216 (2010) (per curiam) (summary reversal).

CONCLUSION

Petitioner respectfully requests that this Court grant certiorari and summarily reverse the decision below and remand with directions to issue a COA and appoint counsel, or set the case for briefing and argument to settle these important questions.

Dated: October 27, 2020

Respectfully submitted,

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