No. _____

IN THE SUPREME COURT OF THE UNITED STATES

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**AARON MICHAEL AGUILERA,** Petitioner

**v.**

**STATE OF CALIFORNIA,** Respondent

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On Petition for Writ of Certiorari to the
California Court of Appeal,
Fifth Appellate District

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# PETITION FOR WRIT OF CERTIORARI

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## Questions Presented

1. Consistent with a criminal defendant's fundamental right to testify in his or her own defense — as well as the right to present a complete defense, the right to a fundamentally fair trial, and the presumption of innocence with corresponding burden of proof beyond a reasonable doubt — may a trial court direct jurors not to accept the defendant's uncorroborated testimony as proof?

2. Where a trial court violates a criminal defendant's right to testify, does the violation undermine a "protected autonomy right" under *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), amounting to structural error and requiring reversal?

3. If not structural error, may a trial court's right-to-testify violation — instructing jurors that defendant's testimony must be corroborated to "prove any fact" — be deemed harmless beyond a reasonable doubt where, among other factors, the prosecutor concedes the defendant's testimony addressed every element of the state's case; and the court finds the jury's task in evaluating evidentiary conflicts was as "demanding" as it could possibly be?

## List of Parties

The parties to the proceeding in the California Court of Appeal were defendants-appellants Aaron Michael Aguilera (petitioner in this Court), Randy Jonathan Sifuentez, and Joe Luis Ramirez; and plaintiff-respondent People of the State of California.

## List of Proceedings

1. State trial court: *People v. Aguilera, et al.*, Stanislaus County Superior Court Nos. 1432429, 1482016; judgment and sentence, April 18, 2016.

2. State appellate court: *People v. Aguilera, et al.*, California Court of Appeal, Fifth Appellate District, No. F073866; opinion (including dissent), March 20, 2020.

3. State Supreme Court: *People v. Aguilera, et al.*, California Supreme Court, No. S261742; order denying review (with one vote to grant review), July 8, 2020.

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## Petition for Writ of Certiorari

Petitioner Aaron Michael Aguilera respectfully prays that a writ of certiorari issue to review the judgment of the California Court of Appeal, Fifth Appellate District, which affirmed the judgment of the Superior Court of California, Stanislaus County, convicting petitioner of murder and sentencing him to life in prison without the possibility of parole.

## Opinions Below

The Court of Appeal — the highest state court to review the merits — issued its unreported decision on March 20, 2020. A copy of the court's majority and dissenting opinions appears at Appendix A (App. A), *post*.

Petitioner filed a timely petition for review in the California Supreme Court, which denied review on July 8, 2020. A copy of the order (including Justice Liu's statement that review should be granted) appears at Appendix B (App. B), *post*.

## Jurisdiction

The instant petition is filed within 150 days of the California Supreme Court's order denying review, under this Court's March 19, 2020 COVID-19 order.

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1257(a), on the ground that his rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution were violated.

## Constitutional Provisions Involved

Petitioner relies on rights guaranteed by three amendments to the United States Constitution:

*Fifth Amendment*: "No person … shall be compelled in any criminal case to be a witness against himself[.]"

*Sixth Amendment*: "In all criminal prosecutions, the accused shall enjoy the right … to have compulsory process for obtaining witnesses in his favor[.]"

*Fourteenth Amendment*: "No state shall … deprive any person of life, liberty, or property, without due process of law[.]"

## Statement of the Case

### Introduction and procedural background; federal claim presentation

Petitioner's claims arise from an instructional error that undermined his right to testify. Relying on an apparent misinterpretation of pattern instruction use notes, App. A (majority opinion) 82-83, n.71, the trial court instructed jurors that as to "any fact" petitioner's already-completed testimony otherwise might establish, it wasn't established — unless corroborated by "supporting evidence" from another source:

> *Except for the testimony of* Ray [L.], Miguel [A.], Rafael [J.], Richard [G.], and *Aaron Aguilera, which requires supporting evidence, the testimony of only one witness can prove any fact.* Before you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence.

App. A (majority opinion) 81, italics added; CALCRIM No. 301 as modified.[1]

After sorting through several months of evidence (7CT 2030-31; 8CT 2317-19) and deliberating for five days (8CT 2329; 9CT 2406-08, 2453; 33RT 7803, 7806, 7811, 7815),[2] a jury found petitioner and codefendants Randy Sifuentez and Joe Ramirez guilty of two counts of murder with firearm and gang enhancements and a multiple-murder special circumstance; petitioner and Sifuentez were also convicted of firing at an inhabited building. The court sentenced petitioner to two consecutive terms of life in prison without parole and a consecutive term of 15 years to life. App. A (majority opinion) 2.

Among other appellate claims, petitioner argued that the erroneous corroboration requirement violated his fundamental right to testify and other constitutional guarantees. App. A (majority opinion) 87. The California Court of Appeal addressed the claim on its merits, App. A (majority opinion) 78-84, 87-89, noting that the Attorney General hadn't argued forfeiture. App. A (majority opinion) 82, n.70, and 85, n.73; Calif. Pen. Code § 1259 (appellate court may "review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby").

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[1] The other named witnesses were in-custody informants, subject to a state corroboration requirement. App. A (majority opinion) 80-81, 84. Petitioner was the only defendant to take the witness stand. App. A (majority opinion) 65.

[2] "CT" refers to the trial court clerk's transcript; "RT," to the reporter's transcript. All transcripts were before the California Court of Appeal.

All appellate parties and all Court of Appeal justices agreed that the trial court improperly modified the single-witness jury instruction as to petitioner. App. A (majority opinion) 78, 82-84, 87, (dissenting opinion) 2. But while Justice Smith found the error to be particularly serious and of federal constitutional dimension, requiring reversal, App. A (dissenting opinion) 5-12, the majority held no federal violation had occurred and the error wasn't prejudicial under California law. App. A (majority opinion) 87-89.[3]

The California Supreme Court denied review, although Justice Liu was "of the opinion the petitions [for review] should be granted." App. B.

**Material evidence**[4]

The months-long trial featured evidence that seemingly clashed at every turn. After the verdicts, the court commented, "I don't know that you could find a jury that heard more evidence and was charged with a more demanding task than

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[3] Among additional appellate issues not pursued in this petition, the justices agreed that admission of certain gang expert testimony violated the Sixth Amendment's Confrontation Clause. App. A (majority opinion) 89-92, (dissenting opinion) 19-22. For the majority, the constitutional error was harmless, App. A (majority opinion) 92-93, while Justice Smith would have reversed. App. A (dissenting opinion) 22-29. See also *id.* at 29-31: In a cumulative error analysis, Justice Smith found additional cause for reversal.

The Court of Appeal affirmed petitioner's convictions and life without parole sentence but remanded the matter for a hearing on whether to impose or strike the firearm enhancements. App. A (majority opinion) 95-97. As of this writing, the remanded proceeding has yet to occur in the trial court; but in any event it will have no impact on the criminal convictions he challenges here.

[4] The lion's share of the Court of Appeal majority opinion is a detailed review of the trial court proceedings and evidence. App. A (majority opinion) 2-78.

to evaluate the credibility of conflicting evidence." (34RT 7914.) Below, petitioner highlights key disputed points.

## I. Prosecution theory, evidence, and charges

The underlying case arose from two shooting incidents in the summer of 2009 — and, more broadly, what the prosecution presented as an ongoing conflict between the Norteño criminal street gang and E.R., a former member who openly sold methamphetamine from his garage without paying the Norteño "taxes." App. A (majority opinion) 2-6. According to jailhouse informant witnesses Rafael J., Ray L., Richard G., and Miguel A., along with police gang expert Detective Sean Martin, the defendants — petitioner Aguilera, Randy Sifuentez, and Joe Ramirez — were active Norteños/Northerners during at least some of the period including the charged incidents. App. A (majority opinion) 25-32, 35-50.

The first incident occurred on June 16: As the prosecution presented it, following an E.R.-Sifuentez shootout in front of the latter's home the previous evening, petitioner drove by E.R.'s house as Sifuentez shot at it while E.R. fired back. App. A (majority opinion) 6-8.

Then on the night of July 28, two armed men approached the double-draped entrance of E.R.'s garage, opening fire at those gathered inside. E.R. was hit in the hand, while his friend Jason C. and E.R.'s 10-year-old son were both killed. App. A (majority opinion) 9-12, 14. E.R., his girlfriend C.M., and E.R's friend and neighbor Wayne W. identified petitioner and/or Sifuentez as the shooters. App. A (majority

opinion) 9-10, 16-21. And the prosecution presented jailhouse informant testimony (through Ray L. and Richard G.) that Ramirez ordered the hit and (through Rafael J., Ray L., and Richard G.) that petitioner had admitted carrying it out or (through Richard G.) had expressed an intent to kill E.R. and later asked for help to create a false alibi. App. A (majority opinion) 27, 30, 33-34, 37-38.

Accordingly, the prosecutor charged all three defendants with two counts of premeditated murder, augmented by gang and firearm enhancements and a multiple-murder special circumstance. Based on the earlier incident, petitioner and Sifuentez were also charged with firing at an inhabited building and a corresponding gang enhancement. App. A (majority opinion) 2.

## II. Defense; significant factual issues at trial

Petitioner's constitutional claims stem from a single jury instruction — but one that erroneously targeted the entirety of his testimony as subject to a corroboration requirement in order to "prove any fact." App. A (majority opinion) 81. Accordingly, he begins by reviewing the significant evidentiary issues placed before the jury aside from his own testimony. Part A, *post*. Next, he summarizes central areas and points of that testimony — noting to what extent other evidence did or didn't provide any potential corroboration. Part B, *post*.

### A. Evidence other than petitioner's testimony

The defendants relied on substantial challenges to the prosecution evidence; for example:

- The in-custody informants were impeached through their extensive criminal backgrounds, App. A (majority opinion) 22-24, 28-29, 31-36; common jail housing with opportunities to communicate with each other and/or E.R., App. A (majority opinion) 57; testimonial agreements with the prosecution in exchange for benefits, App. A (majority opinion) 22-23, incl. n.29; *id.* at 28, 31, 34-35, 58; and a statutorily mandated cautionary instruction based on their in-custody informant status, App. A (majority opinion) 81-82; CALCRIM No. 336; App. A (dissenting opinion) 24 ("much of their testimony was legally considered suspect and subject to jury instructions that both require corroboration and inform the jury that, even with certain types of corroboration, it must still carefully weigh their testimony against their interests in testifying"). And as dissenting Justice Smith observed, the four informants' testimony wasn't "particularly consistent" and its details were "all contradicted at various times in the testimony presented." App. A (dissenting opinion) 25-26.

- After subtracting the large majority of incidents that were erroneously admitted as bases for Detective Martin's gang opinions, App. A (majority opinion) 42-50, 92; (dissenting opinion) 20-22, "the proper testimony he presented was severely limited and essentially boiled down to minimal contacts with hints of gang

affiliation and several tattoo pictures, many of which could be understood not to be direct gang insignia." App. A (dissenting opinion) 26.[5]

- E.R. and Wayne W. were also impeached with their lengthy criminal histories, App. A (majority opinion) 3-6, 20; E.R.'s unusually generous (according to expert testimony) federal plea agreement, App. A (majority opinion) 12, inc. n.20; *id.* at 62-63; 22RT 4899-4901, 4940-42; and Wayne W.'s arguable bias: E.R. was his lifelong friend and meth supplier, App. A (majority opinion) 20; 9RT 1842-43, 1891, 1923.

- As to the first charged incident, police found no physical evidence of a shootout at E.R.'s house. App. A (majority opinion) 8, n.11. And Wayne W. recalled E.R. not knowing who was responsible. 9RT 1927; 10RT 2135.

- As to the double homicide incident, a great deal of evidence impeached the eyewitness identifications:

  - Although E.R. claimed to have recognized petitioner as one of the men running from the scene, E.R.'s neighbor C.G. and an expert-directed, tes-

[5] Focusing on petitioner: Although the majority opinion summarized all 16 opinion-basis incidents, App. A (majority opinion) 42-44, and found confrontation error occurred, *id.* at 92, the opinion didn't specify which, or even how many, incidents were erroneously admitted. Instead, the majority simply asserted that "a significant amount of Martin's testimony did not run afoul of" the Sixth Amendment. App. A (majority opinion) 92. Review of the opinion's factual summary, however, makes it quite clear that Martin's personal, non-hearsay involvement was confined to just three of the 16 incidents: AA12, AA13, and AA16. App. A (majority opinion) 42-44; see dissenting opinion 21 (noting the expert "was only present for three of these contacts"). In state briefing, the California Attorney General conceded confrontation error as to a majority of the incidents. App. A (dissenting opinion) 20.

timony-based reenactment suggested the shooters had already driven off before E.R. emerged from the house. App. A (majority opinion) 11, 17, 51, 61-63.

- Although E.R. added that he'd recognized petitioner by voice in saying a few words at the scene, they'd spoken only once before — two months earlier, for a couple minutes — and an identification expert, psychologist Dr. Scott Fraser, believed such a claimed recognition would be unreliable. App. A (majority opinion) 10, incl. n.14; *id.* at 60, 62.

- E.R., C.M., and Wayne W. initially told police they couldn't identify either suspect; and C.M. told her psychologist that the shooter "looks like a lot of others." App. A (majority opinion) 11, incl. n.16; *id.* at 13, 15-17; 8RT 1694.

- Before C.M. identified petitioner and Sifuentez to police, E.R., then in jail, told her that "we'll start getting some results, if you keep calling the detectives … and tell them what I tell you to tell them[.]" 8RT 1706-09; 11CT 2998.

- E.R.'s neighbors C.G. and her sister testified they couldn't see through the two garage screens at night. So did E.R.'s friend R.C., who was in the garage just minutes before the shooting. And Eric O., in the garage throughout the entire incident, told police he could see only a silhouette. App. A (majority opinion) 51, 77.

- Based on C.M.'s version of the incident and a scene recreation, Dr. Fraser believed her identifications were unreliable; it should have been impossible to recognize facial features. App. A (majority opinion) 61-62, incl. n.57.

- In identifying petitioner, Wayne W. admitted being influenced by C.M. having showed him petitioner's photograph. App. A (majority opinion) 22; 10RT 1984-86; 11RT 2202-03. And given hypothetical facts based on Wayne W.'s circumstances, Dr. Fraser believed any such identification would be unreliable. A reenactment based on Wayne W.'s version of events and relative locations showed that he would have arrived at his front gate around five seconds after the shooters had already run past it. App. A (majority opinion) 20-21, 63.

- No physical evidence linked the defendants to either of the charged incidents. App. A (majority opinion) 57, 65.

### B. Petitioner's testimony, the prosecutor's implicit concession, and the presence or absence of corroborating evidence

Through five days of narrative testimony and cross-examination,[6] petitioner denied any involvement in the Norteño gang and the charged crimes. App. A (majority opinion) 65-76; see also 19-20 (interviewed by police, petitioner "denied any responsibility in this case approximately 40 times" and "requested a polygraph test three times, but was never given one"). Before summarizing his testimony, though, petitioner turns to an important procedural point based in California law: The prosecutor implicitly conceded that petitioner's testimony addressed every element of the state's case.

Initially, the prosecutor had requested pattern instruction CALCRIM No. 361: Jurors may consider a testifying defendant's "failure to explain or deny" any

evidence against him.[7] But after petitioner's testimony the court questioned the instruction's evidentiary support. 31RT 7249-50; see, *e.g.*, *People v. Grandberry*, 35 Cal. App. 5th 599, 605-606 (2019) (instruction applies only where defendant "'completely fails to explain or deny'" "'any fact of'" incriminating evidence). And the prosecutor promptly withdrew his request. 31RT 7250.

In light of the primary issue on appeal and in this petition, petitioner reviews his major testimonial points for which corroborating evidence was and wasn't produced (with the latter highlighted):

- He recounted his life story up to the period including the charged incidents, contrasting the backgrounds of E.R., Wayne W., and the in-custody informants. App. A (majority opinion) 65-70. *There was no other defense evidence covering this area.*

- As of the incidents charged in this case, he didn't know or know of E.R. or Miguel A. App. A (majority opinion) 71-72, 75. Although he knew Rafael J., Richard G., and codefendants Sifuentez and Ramirez, he didn't know of their gang connections. App. A (majority opinion) 68-73, 75-76. *There was no other defense evidence as to petitioner's lack of knowledge of these facts.*

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[6] Four full and two partial days: August 28 and September 1, 2, 3, 4, and 8, 2015. 8CT 2300-11, 2312-16 (69th through 74th trial dates).

[7] "If the defendant failed in his testimony to explain or deny evidence against him, and if he could have reasonably been expected to do so based on what he knew, you may consider his failure to explain or deny in evaluating that evidence. Any such failure is not enough by itself to prove guilt. The people must still prove the

- He denied gang involvement. App. A (majority opinion) 65-69, 73-76.

As corroboration, Raquel B. (petitioner's fiancée as of trial) testified she was unaware of any gang affiliation on his part. App. A (majority opinion) 63-65; 25RT 5644.

- As to the three (out of 16) properly admitted incidents that Detective Martin relied on in concluding petitioner was a gang member — i.e., the only ones where Martin was directly involved and offered no hearsay — petitioner gave specific innocent explanations. App. A (majority opinion) 42-44 (re incidents AA12, AA13, and AA16); 30RT 6954-55, 6957-58, 6971-73; 31RT 7138; see n.5, *ante*.) *There was no other defense evidence as to any of these incidents*.

- He denied involvement in the first charged incident, the June 16, 2009 drive-by shooting. App. A (majority opinion) 71. As corroboration, Raquel B. confirmed having heard the same story from petitioner, *id.* at 64; and in speaking to police, Sifuentez also denied involvement, 12CT 3159-62.

- Disputing Richard G.'s testimony about petitioner admitting involvement in the first incident and expressing an intent to kill E.R., petitioner denied having had such a conversation. App. A (majority opinion) 33; 29RT 6786-87. He also denied having confessed the killings to Rafael J., App. A (majority opinion) 27; 30RT 6894. *There was no other defense evidence on either point*.

- He gave alibi testimony as to his whereabouts during the second charged incident (the double homicide). App. A (majority opinion) 71-72. Petitioner's

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defendant guilty beyond a reasonable doubt. If the defendant failed to explain or deny, it is up to you to decide the meaning and importance of that failure."

friend Phillip C. and fiancée Raquel B. confirmed his alibi. App. A (majority opinion) 63-64.

- He challenged Ray L.'s testimony about hearing from Sifuentez that petitioner was concerned about their fate "because they had killed a kid": petitioner's point was simply that although they were innocent, the case was especially serious because a child had been killed. 13RT 2809-10; 30RT 6898-6900. *There was no other defense evidence on this point*.

- He testified that in jail, informants Rafael J. and Richard G. told him they knew he was actually innocent. 30RT 6895, 6906. *There was no other defense evidence on this point*.

## Reasons for Granting the Writ

### I. This Court should determine whether, consistent with a criminal defendant's right to testify and related constitutional guarantees, a trial court can direct jurors not to accept the defendant's uncorroborated testimony as proof.

#### A. Introduction

One might guess there's little to explore here; after all, a defendant's right to testify had already been "well established" as of a quarter-century before petitioner's trial. *Riggins v. Nevada,* 504 U.S. 127, 144 (1992)

(Kennedy, J., concurring). "The right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution." *Rock v. Arkansas*, 483 U.S. 44, 51 (1987); *id.* at 51-53 (citing Fourteenth Amendment due process,

Sixth Amendment compulsory process, and Fifth Amendment non-compelled testimony). And the testimonial right is as fundamental as they come. *Id.* at 52 ("[e]ven more fundamental to a personal defense than the right of self-representation]").

But in hazarding such a guess, one would be wrong — as this case demonstrates:

- Relying on an apparent misinterpretation of pattern instruction CALCRIM No. 301's use notes, the trial court instructed jurors that as to "any fact" petitioner's already-completed testimony otherwise might establish, it *wasn't* established — unless corroborated by "supporting evidence" from another source. App. A (majority opinion) 81.

- All trial counsel — the prosecutor and three defense attorneys, including petitioner's counsel — accepted the use-note-derived modification as the court presented it. *Ibid.*

- During closing argument, when codefendant Ramirez's counsel quoted the prosecutor's original version of CALCRIM No. 301 and identified only the in-custody informants as subject to the supporting evidence requirement, the trial court "correct[ed]" him with the addition of petitioner. Not only was there no objection; Ramirez's counsel reminded jurors to "add Aaron Aguilera" to the witnesses whose testimony was insufficient without corroboration. 32RT 7470-71.

- The Court of Appeal majority held the modified instruction was erroneous only as a matter of state law. According to those justices, petitioner's right to

testify was fully honored because the instructional error didn't "virtually prevent[] [him] from testifying." App. A (majority opinion) 88 (citations omitted).

- Dissenting Justice Smith disagreed with that holding, App. A (dissenting opinion) 10, though without a full discussion of petitioner's constitutional right to testify. *Id.* at 10-12.

In sum, at least in California, a criminal defendant's fundamental right to testify doesn't appear to ensure anything more than the *act* of testifying. But doesn't that act have to be a meaningful one — not subject to an arbitrary and "artificial barrier" placed between the defendant's testimony and its evaluation by the jury? App. A (dissenting opinion) 12 (re petitioner's "right to present exculpatory evidence"). Petitioner asks this court to so hold, after examining the instructional error here as it impacted his rights to testify, to present a complete defense, and to a fundamentally fair trial, as well as its impact on the presumption of innocence and state's burden of proof.

### B. The right to testify — like other constitutional rights — must be meaningful.

The Court of Appeal majority cited no direct authority for its holding that the erroneously modified instruction "neither resulted in the exclusion of defense evidence nor virtually prevented Aguilera from testifying." App. A (majority opinion) 88. Instead, the majority offered "cf." citations to a decision from this court and another from the California Supreme Court: as to the testimonial right, *Rock v. Ar-*

*kansas, supra*, 483 U.S. 44, 56-57; as to exclusion of defense evidence, *People v. Thornton*, 41 Cal. 4th 391, 452-53 (2007). App. A (majority opinion) 88.

The California court's reliance on *Rock* misses the constitutional point, one that petitioner urges this Court to clarify. For in *Rock*, as in this case, the defendant was *allowed* to testify — but the court improperly limited the testimony's scope. There is a distinction, but it's one without a constitutional difference. In *Rock*, the limitation was evidentiary: the defendant couldn't testify about certain material matters. (*Id.* at 47-48.) Here, the limitation was instructional: although the defendant could testify about all matters, the jury was directed not to accept that testimony as proof of "any fact" unless it was *also* supported by independent corroboration — effectively, placing an improper filter over his entire testimony.[8]

The true constitutional point — the one petitioner asks this court to address — is that the right to testify is meaningless where its *exercise alone* is legally inadequate. (Cf. *Rock v. Arkansas, supra*, 483 U.S. 44, 55 (a State "may not apply a rule of evidence that permits a witness to take the stand, but arbitrarily excludes material portions of his testimony"), 57 (a rule is unconstitutional if it has "a significant adverse effect on [defendant's] ability to testify"), 62 (state can't "infringe[] impermissibly on the right of a defendant to testify on his own behalf"); *Portuondo v. Agard,* 529 U.S. 61, 70 (2000) ("impermissibly burden[ing] the defendant's right to

[8] Dissenting Justice Smith: The erroneous instruction "established there was something about Aguilera's status as a defendant that *imposed a special debility on his testimony* or triggered a special need for caution." App. A (dissenting opinion) 3, (original italics & n. omitted, italics added).

testify" is unconstitutional); *State v. Coleman,* 14 Conn. App. 657, 544 A.2d 194, 203 (1988) (the "constitutional right to testify … must … be regarded as being free from undue cost").

There should be no controversy about such a fundamental principle — which, after all, this Court and others have announced and/or applied in a number of similar contexts. See, *e.g.*, *Ramos v. Louisiana*, 140 S. Ct. 1390, part III (2020) (rejecting argument that would "leave the right to a 'trial by jury' devoid of meaning.
A right mentioned twice in the Constitution would be reduced to an empty promise. That can't be right."); *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) ("the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense'"); *United States v. Cronic*, 466 U.S. 648, 656, 659 (1984) (per right to effective assistance, counsel must subject prosecution's case to "meaningful adversarial testing"); *Smith v. Phillips*, 455 U.S. 209, 225 (1982) (Marshall, J., dissenting) ("The Court has insisted that defendants be given a fair and meaningful opportunity during *voir dire* to determine whether prospective jurors are biased"); *Williams v. Zbaraz,* 442 U.S. 1309, 1314 (1979) (given "a conceded constitutional right to have an abortion," "meaningful exercise of this constitutional right depends on the actual availability of abortions"); *Bivens v. Six Unknown Named Agents,* 403 U.S. 388, 415 (1971) (Burger, C.J, dissenting) ("I do not question the need for some remedy to give meaning and teeth to the constitutional guarantees against unlawful conduct by government officials"); *Douglas v. California*, 372 U.S. 353, 358 (1963)

(where right to appeal exists, due process requires it to be "a meaningful appeal" and not "a meaningless ritual"); cf. *Griffin v. California,* 380 U.S. 609, 614-15 (1965) (even where defendant has successfully exercised the right not to testify, state comment about that refusal "cuts down on the privilege by making its assertion costly" and is therefore unconstitutional); *Powell v. Alabama*, 287 U.S. 45, 59 (1932) ("'It is vain to give the accused a day in court with no opportunity to prepare for it'"); *United States v. Farias*, 618 F.3d 1049, 1053 (9th Cir. 2010) ("A criminal defendant does not simply have the right to represent himself, but rather has the right to represent himself meaningfully"); *People v. Mora and Rangel*, 5 Cal. 5th 442, 477 (2018) (confrontation clause guarantees "meaningful" and "effective" right to cross-examination); *Smith v. Ogbuehi,* 38 Cal. App. 5th 453, 469 (2019) ("federal and state constitutional rights to meaningful access to the courts").

### C. An instruction directing jurors not to accept the defendant's uncorroborated testimony as proof of any fact violates the testimonial right.

Surely, had the trial court instructed jurors to entirely *disregard* petitioner's testimony, his right to testify would be deemed meaningless — regardless of the fact that he was neither prevented "nor virtually prevented from testifying[,]" App. A (majority opinion) 88. Instead, the court erected an instructional hurdle separating all of petitioner's testimonial facts from the jury's reliance on them as proof. California courts recognize as much: CALCRIM No. 301 effectively instructs jurors that "*all of [the named witness's] testimony* … required corroborating evidence before the jury could accept it as true." *People v. Smith,* 12 Cal. App. 5th 766, 778-80 (2017) (original italics).

Worse, it was an insurmountable hurdle as to the many significant testimonial points for which no corroboration had been offered. In this petition's Statement of the Case, at part II-B of the Material Evidence section, petitioner summarized "his major testimonial points for which corroborating evidence was and wasn't produced" — three of the former points, six of the latter. That is, the trial court effectively directed jurors *not to accept as true* the majority — or at minimum, a quite substantial amount — of petitioner's testimony. Cf. *Rock v. Arkansas, supra*, 483 U.S. 44, 55 (arbitrarily excluding portions of material defense witness's testimony). And even for those points where supporting evidence existed, there's simply no way to know whether jurors accepted it as corroboration.

### D. An instruction directing jurors not to accept the defendant's uncorroborated testimony as proof of any fact violates additional rights.

As petitioner will explain at argument II, *post*, he seeks this Court's review in part to determine whether a right-to-testify violation amounts to structural error. But petitioner's testimonial right wasn't the only constitutional guarantee impacted by the defective jury instruction here. In the Court of Appeal, petitioner joined his co-appellants in arguing that the error violated three additional constitutional guarantees. The majority briefly rejected those theories as well, App. A (majority opinion) 87-88, while dissenting Justice Smith found them meritorious, App. A (dissenting opinion) 10-12. All merit this Court's scrutiny:

**1. Meaningful opportunity to present a complete defense**

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky, supra,* 476 U.S. 683, 690 (citations omitted). In short, a "meaningful … opportunity to be heard" — not an "empty one" arbitrarily limited by the state. *Ibid.* Here, the instructional error effectively pulled the rug out from under the entirety of petitioner's own testimony, denying him a meaningful personal defense.

For the Court of Appeal majority, it's enough that the error didn't "result[] in the exclusion of defense evidence[.]" App. A (majority opinion) 88. But it might as well have: for every testimonial point without specific corroboration elsewhere in the evidence — and there were plenty, as the trial court surely knew when directing jurors to look for it — that testimony was effectively excluded.

**2. Fundamentally fair trial**

A state court ruling denies due process if it results in a fundamentally unfair trial. *Donnelly v. DeChristoforo,* 416 U.S. 637, 643 (1974) (error may "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process"). Under California law — as well as federal constitutional law, argument I-C, *ante* — a defendant is entitled to offer his "uncorroborated testimony … as evidence raising a reasonable doubt that he is guilty as charged." *People v. Turner,* 50 Cal. 3d 668, 697 (1990) (citation omitted). Instead, and without any legal justification, the court

imposed a corroboration requirement on the entirety of petitioner's testimony; and that testimony in turn addressed the totality of the prosecution's case against him. As a result, the trial was fundamentally unfair. Particularly so, where the court didn't fashion the erroneous instruction — retroactively requiring corroboration for petitioner's testimony — until after he'd already completed it. 31RT 7174, 7249.

### 3. Presumption of innocence and burden of proof beyond a reasonable doubt

In his dissenting opinion, Justice Smith focused most of his discussion on this issue. App. A (dissenting opinion) 11-12, discussing and relying on *Cool v. United States,* 409 U.S. 100, 102-04 (1972). In *Cool*, this Court found unconstitutional an instruction that "place[d] an improper burden on the defense, and allow[ed] the jury to convict despite its failure to find guilt beyond a reasonable doubt." *Id.* at 103 (n. omitted). "By creating an artificial barrier to the consideration of relevant defense testimony putatively credible by a preponderance of the evidence, the trial judge reduced the level of proof necessary for the Government to carry its burden." *Id.* at 104.

Similarly, "[w]hile there was no direct shifting of the burden here, there was undoubtedly an artificial barrier presented with respect to [petitioner's] right to present exculpatory evidence … and the jury's ability to consider evidence that would, without a specific corroboration requirement, be putatively credible by a preponderance of the evidence." App. A (dissenting opinion) 12. A jury instruction

improperly weighted against the defendant-witness's credibility — here, by "requir[ing]" *additional* "supporting evidence" to "prove any fact" — "inferentially downgrad[es] the presumption of innocence[,]" "undermines the fairness of the fact-finding process[,]" and "dilute[es] … the principle that guilt is to be established … beyond a reasonable doubt." *United States v. Gaines*, 457 F.3d 238, 245 (2d Cir. 2006).

Moreover, in light of CALCRIM No. 336 — the special instruction on in-custody informants, App. A (majority opinion) 79-80 — the erroneous No. 301 weighed even heavier against petitioner's credibility. Among the witnesses whose testimony required supporting evidence (No. 301), he was the only one needing it to "prove *any* fact." 31RT 7323, italics added; compare CALCRIM No. 336 at 31RT 7327-28 (for five named in-custody informants, the supporting evidence "does not need to support every fact about which the witness testified.")

## II. Certiorari is necessary to determine the standard of reversal for violation of the right to testify.

### A. Background: trial error vs. structural error

In *Arizona v. Fulminante*, 499 U.S. 279, 306-08 (1991), this Court identified a basic framework for distinguishing two broad categories of constitutional error:

(1) As a "general rule" since *Chapman v. California*, 386 U.S. 18 (1967), harmless error analysis is applied to what *Fulminante* characterized as "'trial error' — error which occurred during the presentation of the case to the jury, and which

may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." 499 U.S. 279, 306-08.[9]

(2) Structural errors that "are not subject to harmless error" determination and therefore require reversal per se. These errors amount to "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless error' standards." They may be said to "'transcend[] the criminal process.'" *Id.* at 309, 311.

Several years ago this Court took a much deeper dive into the explanation — several explanations — for treating some errors as structural. *Weaver v. Massachusetts,* 137 S. Ct. 1899 (2017) discussed "at least three broad rationales":

> First, an error has been deemed structural in some instances if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest. This is true of the defendant's right to conduct his own defense, which, when exercised, "usually increases the likelihood of a trial outcome unfavorable to the defendant." That right is based on the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty. Because harm is irrelevant to the basis underlying the right, the Court has deemed a violation of that right structural error.
>
> Second, an error has been deemed structural if the effects of the error are simply too hard to measure. For example, when a defendant is denied the right to select his or her own attorney, the precise "effect of the violation cannot be ascertained." Because the government will, as a

[9] While *Fulminante* referred to "admission" and not "commission" of "'trial error,'" context suggests this Court had something like the latter in mind. The list of examples, *id.* at 306-07, included instructional and other errors as well as erroneous admission of evidence.

> result, find it almost impossible to show that the error was "harmless beyond a reasonable doubt," the efficiency costs of letting the government try to make the showing are unjustified.
>
> Third, an error has been deemed structural if the error always results in fundamental unfairness. For example, if an indigent defendant is denied an attorney or if the judge fails to give a reasonable-doubt instruction, the resulting trial is always a fundamentally unfair one. It therefore would be futile for the government to try to show harmlessness.
>
> These categories are not rigid. In a particular case, more than one of these rationales may be part of the explanation for why an error is deemed to be structural. For these purposes, however, one point is critical: An error can count as structural even if the error does not lead to fundamental unfairness in every case.

*Id.* at 1907-08 (citations omitted).

Where the standard of reversal is unclear or unsettled, only this Court can provide resolution. Indeed, that's what triggered both the decisions discussed in this section:

> Because of differing views in the state and federal courts over whether the admission at trial of a coerced confession is subject to a harmless error analysis, we granted the State's petition for certiorari, 494 U.S. 1055 (1990).

*Arizona v. Fulminante, supra*, 499 U.S. 279, 284-85.

> There is disagreement among the Federal Courts of Appeals and some state courts of last resort about whether a defendant must demonstrate prejudice in a case like this one — in which a structural error is neither preserved nor raised on direct review but is raised later via a claim alleging ineffective assistance of counsel. Some courts have held that, when a defendant shows that his attorney unreasonably failed to object to a structural error, the defendant is entitled to a new trial without further inquiry. Other courts have held that the defendant is entitled to relief only if he or she can show prejudice. This Court granted certiorari to resolve that disagreement.

*Weaver v. Massachusetts*, *supra*, 137 S. Ct. 1899, 1907 (citations omitted).

**B. Violation of the right to testify: which type of error?**

As noted at argument I-A, *ante*, this Court has long been clear in recognizing violation of the right to testify as error. (Additionally see, e.g., *Harris v. New York,* 401 U.S. 222, 225 (1971); *In re Oliver*, 333 U.S. 257, 273, 275 (1948).) But analyzing the error's impact has proved more elusive: Either it's structural error, mandating reversal per se; or it's trial error, requiring the same result unless the state proves its harmlessness beyond a reasonable doubt. This Court hasn't directly reached the question — but it's calling for an answer. See, *e.g.*, *United States v. Gillenwater,* 717 F.3d 1070, 1083 (9th Cir. 2013) ("we have never said whether the denial of the right to testify is structural or trial error"); *Woolfolk v. Commonwealth*, 339 S. W. 3d 411, 419 (Ky. 2011) ("in the absence of pertinent authority that denial of a criminal defendant's right to testify is structural error, we will … treat such denial as subject to harmless error analysis"); *Commonwealth v. Teixeira,* 920 N. E. 2d 56, 61 (Mass. App. Ct. 2010) (while interference with the right to testify has not been characterized as structural error, "it is a grave violation of a fundamental right with effects that are often difficult, if not impossible, to measure"); *Arthur v. United States*, 986 A. 2d 398, 415-16 (D.C. 2009) ("Notwithstanding the obvious parallels between the right to self-representation and the right to testify in one's own trial, the trend in the Circuit Courts is to analyze errors concerning the right to testify for harmlessness under the *Chapman* standard for constitutional error," citing federal appellate cases); *Johnson v. State,* 169 S.W.3d 223, 236 (Tex. Crim. App. 2005) (noting that

this Court "has never specifically labeled violations of the right [to testify] as 'structural'"); *id.* at 237-38, including notes 88-89 (citing "vast majority" of federal and state courts that have treated right-to-testify violations as either trial error if judicial or *Strickland* error if committed by defense counsel).[10]

At least before the recent *McCoy v. Louisiana* decision, several of this Court's opinions could be read together as providing indirect support for treating right-to-testify error as structural. Surely it's significant that "[an] appellate court could not logically term 'harmless' an error that presumptively kept the defendant from testifying." *Luce v. United States*, 469 U.S. 38, 42 (1984). Additionally, *Fulminante* itself cited *McKaskle v. Wiggins* 465 U.S. 168, 177-78, n.8 (1984) in noting that "the right to self-representation at trial" is "a structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." 499 U.S. 279, 310. And by then this Court had characterized a defendant's right to testify as "[e]ven more fundamental" than that of self-representation. (*Rock v. Arkansas*, *supra*, 483 U.S. 44, 52.) If denial of self-representation is a structural error, how can denial of the "more fundamental" right to testify be somehow less worthy of protection from the error's impact?

But if these were arguable clues, they haven't been generally discovered as such. Most reported opinions have treated right-to-testify violations as requiring harmless error review. See, *e.g., Arthur v. United States*, *supra*, 986 A. 2d 398, 415-

[10] *Strickland v. Washington*, 466 U.S. 668, 687 (1984) requires a showing of prejudice as one prong of an ineffective assistance claim. Petitioner's case doesn't

16; *Johnson v. State, supra*, 169 S.W.3d 223, 237-38; both citing many cases from different jurisdictions. But not all. See, *e.g.*, *State v. Hampton,* 818 So.2d 720, 727-30 (La. 2002) (structural, following reasoning of *Fulminante* and *Rock*); *People v. Harris,* 191 Cal. App. 3d 819, 826 (1987) (California Court of Appeal viewed deprivation of right to testify as structural error, despite "seemingly overwhelming evidence of guilt"; but see next paragraph re *People v. Allen*); *United States v. Butts*, 630 F. Supp. 1145, 1148 (D. Me. 1986); *State v. Rosillo,* 281 N.W.2d 877, 879 (Minn. 1979) ("the right to testify is such a basic and personal right that its infraction should not be treated as harmless error"); *Wright v. Estelle*, 572 F.2d 1071, 1080-1082 (5th Cir. 1978) (Godbold, J., dissenting) (for a variety of reasons, the right to testify is "fundamental to the fairness, the dignity and the vitality of the twentieth century judicial process"); cf., *Alvarez-Perdomo v. State*, 454 P.3d 998, 999 (Alaska 2019) (effectively "compelling a criminal defendant to take the stand is a structural error because it implicates personal interests more fundamental than the ordinary risk of a wrongful conviction").

Because the Court of Appeal majority in this case deemed the instructional error only a state law matter, the opinion didn't reach the constitutional standard of reversal issue. App. A (majority opinion) 87-88. Not for want of presentation, though: In his opening brief, petitioner maintained that the structural error classification was appropriate, while acknowledging state appellate courts were bound by

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present such a claim. Cf. *Weaver v. Massachusetts, supra*, 137 S. Ct. 1899, 1910-12.

a California Supreme Court decision holding otherwise. AAOB 52-53, citing *People v. Allen*, 44 Cal. 4th 843, 871-72 (2008) (applying federal harmless error test; but see *In re Marriage of Carlsson*, 163 Cal. App. 4th 281, 291 (2008) (three months before *Allen*, a Court of Appeal cited state civil cases from 1939 through 1996 in declaring that "'[d]enying a party the right to testify or to offer evidence is reversible per se'")) and *Auto Equity Sales, Inc. v. Superior Court*, 57 Cal. 2d 450, 455 (1962) (California Supreme Court opinions bind lower courts). And in a pre-argument letter filed July 8, 2019, https://tinyurl.com/yxqubj3v (accessed Dec. 6, 2020), petitioner identified this Court's *McCoy v. Louisiana* decision (see next section) as relevant to his standard of reversal position.[11]

### C. *McCoy v. Louisiana*

Enter this Court's decision two years ago — while petitioner's appeal was pending — in *McCoy v. Louisiana*, *supra*, 138 S. Ct. 1500. *McCoy* looked directly to the Sixth Amendment in holding that when a defendant "expressly asserts that the objective of '*his* defence' is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt." *Id.* at 1509, quoting U.S. Const. Amdt. 6, italics added in *McCoy*.

[11] Dissenting Justice Smith applied the federal harmless error test in concluding reversal was necessary. App. A (dissenting opinion) 12. He didn't acknowledge the standard of reversal issue; but again, under California law, he was bound by *Allen* in any event.

As for the standard of reversal, *McCoy* went on to explain that where the constitutional guarantee at issue is a "protected autonomy right," its violation is structural error requiring per se reversal:

> Because a client's autonomy, not counsel's competence, is in issue, we do not apply our ineffective-assistance-of-counsel jurisprudence to McCoy's claim. To gain redress for attorney error, a defendant ordinarily must show prejudice. Here, however, the violation of McCoy's protected autonomy right was complete when the court allowed counsel to usurp control of an issue within McCoy's sole prerogative.
>
> Violation of a defendant's Sixth Amendment-secured autonomy ranks as error of the kind our decisions have called "structural"; when present, such an error is not subject to harmless-error review. See, *e.g., McKaskle*, 465 U.S., at 177, n. 8, 104 S.Ct. 944 (harmless-error analysis is inapplicable to deprivations of the self-representation right, because "[t]he right is either respected or denied; its deprivation cannot be harmless"); *United States v. Gonzalez-Lopez,* 548 U.S. 140, 150, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006) (choice of counsel is structural); *Waller v. Georgia,* 467 U.S. 39, 49-50, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) (public trial is structural). An error may be ranked structural, we have explained, "if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest," such as "the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty." An error might also count as structural when its effects are too hard to measure, as is true of the right to counsel of choice, or where the error will inevitably signal fundamental unfairness, as we have said of a judge's failure to tell the jury that it may not convict unless it finds the defendant's guilt beyond a reasonable doubt.
>
> Under at least the first two rationales, counsel's admission of a client's guilt over the client's express objection is error structural in kind. See *Cooke* [*v. State*], 977 A.2d [803] at 849 [(Del. 2009)] ("Counsel's override negated Cooke's decisions regarding his constitutional rights, and created a structural defect in the proceedings as a whole."). Such an admission blocks the defendant's right to make the fundamental choices about his own defense. And the effects of the admission would be immeasurable, because a jury would almost certainly be swayed by

> a lawyer's concession of his client's guilt. McCoy must therefore be accorded a new trial without any need first to show prejudice.

*Id.* at 1510-11 (additional citations and n. omitted).

Of course, the specific autonomy right at issue in *McCoy* wasn't the right to testify; it was the right "to decide that the objective of the defense is to assert innocence[.]" *Id.* at 1508. But *McCoy* made it quite clear: The *reason* for its holding was the constitutional need to strictly protect certain personal autonomy rights. *Id.* at 1507-1508, 1510-1511. And among those rights is indeed the one petitioner places at issue here: "Some decisions are reserved for the client — notably, whether to plead guilty, waive the right to a jury trial, *testify in one's own behalf*, and forgo an appeal. [Citation.] [¶] Autonomy to decide that the objective of the defense is to assert innocence belongs in this latter category." *Id.* at 1508, italics added. See also *Wright v. Estelle, supra*, 572 F.2d 1071, 1078 (Godbold, J., dissenting):

> The decision whether defendant will testify is a choice between mere passivity at trial and active participation through which the defendant can inject his own acts, voice and personality into the process. Taking the stand is the defendant's opportunity, if he wants it, to face his accusers and the jury, tell his story, submit to examination, and exercise such ability as he may have to persuade those who will make a decision that may vitally affect his life. And the witness box gives the defendant a forum to speak to a world larger than the courtroom.

**D. A right-to-testify violation should be treated as structural error.**

With *McCoy*, this Court has come closer than ever before to pinning down the standard of reversal applicable to judicial right-to-testify error. Given *McCoy*'s holding and reasoning, there's no justification for continuing to treat it as subject to *Chapman* review. And at least two courts have agreed, albeit in dicta. In *Yannai v.*

*United States*, 346 F. Supp. 3d 336 (E.D.N.Y. 2018), the court recognized the right to testify as "fall[ing] within the first of [*Weaver*'s] three categories"; i.e., "'the right at issue is not designed to protect the defendant from the erroneous conviction but instead protects some other interest[.]'" *Id.* at 346, quoting *Weaver*. The court continued, drawing on *McCoy* and other decisions from this Court:

> [The right to testify] is "based on the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty." *McCoy*, 138 S.Ct. at 1509 (citing *Weaver*, 137 S.Ct. at 1908). The right "implicates the [defendant's] autonomy and freedom." *Williams v. United States,* No. 3:15-CV-01301 (VLB), 2018 WL 4656231, at *5 (D. Conn. Sept. 27, 2018). It is "[e]ven more fundamental to a personal defense than the right of self-representation" because "an accused's right to present his own version of events in his own words" is rooted in the Fifth, Sixth, and Fourteenth Amendments. *Rock*, 483 U.S. at 51-53, 107 S.Ct. 2704. While the contours of a legal defense as presented in an opening statement remain firmly within the province of counsel, the defendant's right to convey his own narrative to the jury that will decide his fate protects the defendant's autonomy and ensures that a defendant will not feel unduly silenced by his (possibly court-appointed) attorney. *See id.*; *see also Harris v. New York,* 401 U.S. 222, 230, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971) ("The choice of whether to testify in one's own defense must therefore be 'unfettered' ...." (quoting *Griffin v. California,* 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965))). In sum, the right to testify falls within the first category of structural rights laid out in *Weaver* because it "is not designed to protect the defendant from erroneous conviction but instead protects some other interest," — namely, the defendant's right to choose how best to protect his liberty. *Weaver*, 137 S.Ct. at 1908. The decision to testify, then, is both a personal right, *see Brown*, 124 F.3d at 77-78, and a fundamental right.

*Ibid*.

So for *Yannai*, the import of *Harris>Rock>Weaver>McCoy* is clear: right-to-testify error is indeed structural — unless, as in *Yannai* itself, the issue is raised

only in the context of an ineffective assistance claim on collateral review: "Thus, even though Yannai's right to testify at his trial is a fundamental right and any denial of that right may have been 'structural error,' he is still required to show prejudice here." *Id.* at 347; see also *Williams v. United States*, cited in the *Yannai* quotation above (and also ultimately requiring *Strickland* prejudice): "This Court agrees with Mr. Williams that a violation of a defendant's right to testify is likely a structural error based on the Supreme Court's guidance in *Weaver* and *McCoy*, as it implicates the client's autonomy and freedom 'to make his own choices about the proper way to protect his own liberty.'" (Citations omitted.) After all, it is the "defendant, and not his lawyer or the State, [who] will bear the personal consequences of a conviction," *Faretta v. California*, 422 U.S. 806, 834 (1975) — here, life in prison without the possibility of parole.

As for the second *Weaver* category, the effects of right-to-testify error should be deemed "simply too hard to measure," 137 S. Ct. 1899, 1908. A reviewing court

> cannot weigh the possible impact upon the jury of factors such as the defendant's willingness to mount the stand rather than avail himself of the shelter of the Fifth Amendment, his candor and courtesy (or lack of them), his persuasiveness, his respect for court processes. These are elusive and subjective factors, even among persons who might perceive and hear the defendant, but more significantly, they are matters neither communicated to an appellate judge nor susceptible of communication to him. Appellate attempts to appraise impact upon the jury of such unknown and unknowable matters is purely speculative.

*Wright v. Estelle, supra*, 572 F.2d 1071, 1082 (Godbold, J., dissenting).

Of course, in this case petitioner did "mount the stand" in his defense. But as petitioner explained at argument I-C, *ante*, his exercise of that right was constitu-

tionally meaningless. The trial court's erroneous instruction effectively blew a giant hole through the entire analytical framework according to which jurors were supposed to evaluate petitioner's testimony. Did they find the requisite corroboration for all his testimonial facts? For many such facts, that would have been impossible, as petitioner was the only witness on point. And for the remainder, a reviewing court would have to engage in guesswork. See *Commonwealth v. Teixeira, supra*, 920 N. E. 2d 56, 61, citing *Rock v. Arkansas, supra*, 483 U.S. 44, 52 ("it is difficult to gauge the unique impact on a jury that may flow from a defendant's in-court denial of the crimes with which he has been charged").

Finally, under much the same reasoning, a trial marred by violation of the defendant's right to testify in his or her own defense is inherently and fundamentally unfair; "[i]t therefore would be futile for the government to try to show harmlessness." *Weaver v. Massachusetts, supra*, 137 S. Ct. 1899, 1908.

## III. If this Court believes that a right-to-testify violation is only trial error, certiorari is necessary to ensure the proper application of harmless error review in the California courts.

Should this Court find that petitioner's federal constitutional rights were violated but only trial error occurred, the Court may wish to grant certiorari, vacate the Court of Appeal decision, and remand for the purpose of testing the violation(s)

according to the *Chapman* standard.[12] But in the event of such a finding, petitioner urges a grant of certiorari for another reason: as reflected in the Court of Appeal majority opinion here and many other California decisions, that state's reviewing courts too often honor *Chapman* in the breach. See, *e.g.*, *Jackson v. California*, No. 14-5760, brief of *amicus curiae* California Appellate Defense Counsel in support of petitioner, filed Sept. 12, 2014, http://calapperrors.com/amicus/USSC_Jackson_v_CA_Amicus_Brief.pdf (accessed Dec. 6, 2020) (recounting many published and unpublished opinions that demonstrate "the widespread misapplication of *Chapman* throughout the appellate courts of this State"); *id.* at 1 ("In the nation's most populous State, constitutional errors at trial are all too frequently forgiven when reviewing courts cite the requisite harmless error standard but apply its virtual opposite"); *Montoya v. California*, No. 15-5194, petition for writ of certiorari, filed July 9, 2015, http://calapperrors.com/cert-petitions/B243042_Montoya_PFCert.pdf (accessed Dec. 6, 2020) 22-33 (listing 36 decisions, in addition to *Montoya*, illustrating the "widespread problem in the way California appellate courts conduct *Chapman* analysis, problems that the state supreme court has failed to correct").

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[12] Not just the instructional error discussed in this petition. As noted earlier, all three state justices agreed that certain gang evidence violated petitioner's confrontation right. App. A (majority opinion) 89-92, (dissenting opinion) 19-22. For the majority, the constitutional error was harmless, App. A (majority opinion) 92-93, while dissenting Justice Smith would have reversed, App. A (dissenting opinion) 22-29. But "[o]nce we are in 'harmless error' territory, the nature of the error[s] … are all relevant." *United States v. Warner,* 498 F.3d 666, 704 (7th Cir. 2007). And given multiple constitutional violations, as Justice Smith observed, App. A (dissenting opinion) 29-31, a cumulative harmless error analysis is necessary. *Taylor v. Kentucky*, 436 U.S. 478, 487-88 (1978).

Petitioner highlights Justice Smith's concern on this score: the majority's brief prejudice analysis (at 88-89) "fails to recognize the seriousness of the error, even under the *Watson* standard." App. A (dissenting opinion) 5; *People v. Watson*, 46 Cal. 2d 818, 836 (1956).[13] In essence, the majority is satisfied that "[a] good deal of Aguilera's testimony … was corroborated[.]" App. A (majority opinion) 89. But as petitioner has already shown, a very good deal of his testimony was *not* corroborated. (Statement of the Case, Material evidence, part II-B, *ante*.) And even to the extent limited corroboration existed in the record, it was up to the jury — not the Court of Appeal majority — to test it according to the erroneous instruction. Turning again to Justice Smith:

> The erroneous instruction did not, nor did any other instruction provided, command the jurors to search their memories of the 84 days of trial for corroboration of Aguilera's exculpatory testimony, to ensure it was given proper credit if corroborated. The instruction merely forbade the jury from using his testimony as proof of any fact unless they found supporting evidence. The jury could literally satisfy the letter of the instruction by simply not regarding Aguilera's testimony as proof of any fact regardless of whether it found corroboration or not.

App. A (dissenting opinion) 6, n. omitted.

Moreover, in conducting *Chapman* review, the entire relevant record must be examined. *United States v. Hasting*, 461 U.S. 499, 509 (1983). Here, for example,

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[13] Under California's *Watson* test, the defendant must "demonstrate[] that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." App. A (majority opinion) 88 (internal quotations and citation omitted). This standard is equivalent to the *Strickland* test for prejudice. *Richardson v. Superior Court*, 43 Cal. 4th 1040, 1050 (2008).

significant factors — all ignored by the Court of Appeal — demonstrated this case was a reasonably close one. Among them:

- As the prosecutor implicitly conceded, petitioner's testimony — the evidence subject to the error at issue — refuted every element of the state's case. See Statement of the Case, Material evidence, part II-B, *ante* (re CALCRIM No. 361).

- After the verdicts, the trial court commented, "I don't know that you could find a jury that heard more evidence and was charged with a more demanding task than to evaluate the credibility of conflicting evidence." 34RT 7914.

- As the California Attorney General admitted, petitioner's testimony was only part of "extensive defense evidence" introduced at trial. (Respondent's Brief 34.)

- As noted earlier (Statement of Case, Introduction and procedural background, federal claim presentation, *ante*), the jury deliberated through five court days before reaching verdicts.

Certiorari review is therefore necessary to determine — even if this Court disagrees that the error here was structural — whether it requires reversal under a properly applied harmless error standard.

## Conclusion

For the reasons expressed above, the petition for writ of certiorari should be granted.

Dated: December 7, 2020

Respectfully submitted,

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