No.

In the Supreme Court of the United States

JAIME GALVEZ,
PETITIONER

v.

WILLIAM MUNIZ, WARDEN,
RESPONDENT

On Petition for Writ of Certiorari to the
United States Court of Appeals
For the Ninth Circuit, No. 18-56303

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is it clearly established federal law within the meaning of 28 U.S.C. § 2254(d)(1) that a trial court's error, of forcing a criminal defendant to testify before hearing all of the prosecution's evidence, requires automatic reversal without resort to harmless error analysis?

2. Does the clearly established federal law prohibiting a trial court from directing a verdict against a defendant who has pled not guilty in a criminal case likewise prohibit directing a verdict against the defendant on his plea of not guilty by reason of insanity?

LIST OF PARTIES

All parties appear in the caption on the cover page.

RELATED CASES

Galvez v. Muniz, No. CV 16-7626-AG (GJS), United States District Court for the Central District of California. Judgment entered on September 16, 2018.

People v. Galvez, No. S231393, California Supreme Court. Petition for review denied on February 24, 2016.

People v. Galvez, No. B254807, California Court of Appeal, Second District, Division Five. Judgment entered on November 9, 2015.

People v. Galvez, No. KA097565, Los Angeles County Superior Court. Judgment entered on February 20, 2014.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jaime Galvez respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The California Court of Appeal issued an unreported opinion on November 9, 2015. *People v. Galvez*, No. B254807, 2015 WL 6859877; Appendix A (App. A).

The California Supreme Court denied review on February 24, 2016. *People v. Galvez*, No. S231393, 2015 WL 9957946; App. B.

The United States District Court for the Central District of California denied Mr. Galvez's 28 U.S.C. § 2254 petition in an unpublished order on September 16, 2018. *Galvez v. Muniz*, No. CV 16-7626-AG (GJS); App. C. The order accepted the unpublished findings and recommendations of the magistrate judge issued on May 29, 2018. 2018 WL 4566143; App. D.

The United States Court of Appeals for the Ninth Circuit denied Mr. Galvez's appeal in an unpublished memorandum issued on March 1, 2021. *Galvez v. Muniz*, No. 18-56303, 845 Fed. Appx. 542; App. E.

STATEMENT OF JURISDICTION

The district court had jurisdiction over Mr. Galvez's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The court of appeals had jurisdiction over the appeal pursuant to 28 U.S.C. § 2253(c) and issued its judgment on March 1, 2021. Mr. Galvez petitioned for rehearing on March 15, 2021. Rehearing was denied on July 1, 2021. The filing deadline for the petition for certiorari was extended by this Court's March 19, 2020 order, to November 29, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment states, in relevant part: "No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ."

The Sixth Amendment states, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to have the assistance of counsel for his defense."

The Fourteenth Amendment states, in relevant part: ". . . No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

A. Procedural History

Mr. Galvez was convicted in Los Angeles County Superior Court of several offenses resulting from a car chase during which he drove while intoxicated and fired a shot out of the window, allegedly directed at the police. His case proceeded through the California and federal courts as set forth above. He exhausted his state remedies before filing his federal habeas petition by raising the two claims herein in his direct appeal to the California Court of Appeal, App. A at 19, 31, and in his petition for review to the California Supreme Court, which was denied, App. B.

B. Factual Background

The facts of case are not directly pertinent to the questions presented and are therefore summarized only briefly for background. A more detailed factual summary can be found in Appendix A, pages three to nine. On April 10, 2012, Mr. Galvez, an Army veteran who struggled with anxiety disorder, depression, possible traumatic brain injury, and substance abuse, suffered a "mental breakdown" and drove on the Los Angeles freeway while brandishing a shotgun. He had remained sober for several years. But when his teenage daughter ran away and his wife suffered a congestive heart failure, he was unable to cope and returned to substance abuse. When the police attempted to detain him, he fled at high speed. At one point, he fired a single shot out

the window, which an officer believed was directed at him. It wasn't possible to see the direction of the shot in the dashboard video of the chase. The incident ended when Mr. Galvez crashed into another vehicle. No one was injured.

Mr. Galvez, a religious man, testified that the combination of his preexisting mental disorders and extreme intoxication caused him to experience a delusion that he was being chased by Satan rather than by the police. A forensic psychologist testified that depression can get so severe that a person can become psychotic.

Mr. Galvez was convicted and sentenced to 38 years and four months in state prison, reduced on appeal to 33 years and four months.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD REAFFIRM THAT REVERSAL IS MANDATORY WHEN A TRIAL COURT FORCES A DEFENDANT TO TESTIFY BEFORE HEARING ALL OF THE PROSECUTION'S EVIDENCE -- A FUNDAMENTAL CORRUPTION OF THE TRIAL PROCESS THAT RENDERS THE VERDICT UNRELIABLE.

A. Importance of the Issue Presented

Merely to save an hour of time when the state didn't have its next witness ready, the trial court forced Mr. Galvez to testify in the middle of the prosecution's case or else give up his right of testimony. At that time, half of the state's evidence had yet to come, including the video of the incident.

No reviewing court has doubted that this was a violation of Mr. Galvez's constitutional right to hear all of the prosecution's evidence before deciding whether to testify, as well as his right to the effective assistance of counsel in making that most critical defense decision. *See Brooks v. Tennessee*, 406 U.S. 605, 607-09, 612 (1972). Indeed, Mr. Galvez's entitlement to a new trial is even stronger than in *Brooks* because the defendant there was only required to testify before other *defense* witnesses, whereas Mr. Galvez had to take the stand before he had even heard all of the *prosecution* evidence he was defending against. This Court gave Brooks a new trial without requiring that he show prejudice, and Mr. Galvez is owed the same. *Id*. at 613.

In the Ninth Circuit's decision in the case at bar, Judge Hunsaker wrote separately to emphasize "the seriousness of the state court's seemingly cavalier error" of denying Mr. Galvez his constitutional rights, only to save an hour of court time when the prosecution didn't have a witness ready. App. E. at 5 (Hunsaker, J., concurring).

The Ninth Circuit held, however, that habeas relief was unavailable because this Court hasn't clearly established that *Brooks* error is one of the structural errors that requires automatic reversal. App. E. at 2-3, 11-15; *see Glebe v. Frost*, 574 U.S. 21, 23 (2014) (state prisoner may only be granted habeas relief for a violation of federal law that is clearly established by Supreme Court decisions). Instead, tacitly applying the harmless error

standard of *Brecht v. Abrahamson*, 507 U.S. 619 (1993), the Ninth Circuit found that Mr. Galvez hadn't demonstrated sufficient prejudice. *See* App. E at 2-3. The underlying decision of the California Court of Appeal similarly held that *Brooks* error doesn't require automatic reversal. App. A at 21-22.

This Court should grant Mr. Galvez's petition because the decisions of the state court and the Ninth Circuit directly conflict with this Court's jurisprudence. *See* SUP. CT. R. 10(c). Four times, this Court has said that *Brooks* error mandates reversal. *Brooks*, 406 U.S. at 613; *United States v. Cronic*, 466 U.S. 648, 659 n.25 (1984); *Strickland v. Washington*, 466 U.S. 668, 692 (1984); *Bell v. Cone*, 535 U.S. 685, 696 n.3 (2002). The Court has explained that forcing the defense to decide prematurely whether the defendant will testify, based on insufficient information, denies the defendant "'the guiding hand of counsel'" for a crucially important part of the trial. *Brooks*, 406 U.S. at 612 (quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932)). And the actual or constructive denial of counsel at a "critical stage" of the proceedings always requires reversal. *Cronic*, 466 U.S. at 659 n.25 (citing *Brooks*); *accord Strickland*, 466 U.S. at 692; *Bell*, 535 U.S. at 696 n.3.

The Ninth Circuit's opinion in Mr. Galvez's case also conflicts with other decisions in the circuit, and those of numerous other circuits, which have recognized that *Brooks* error is the constructive denial of counsel at a critical stage under *Cronic*, and that such denial mandates reversal. *See* SUP. CT. R.

10(a); *Musladin v. Lamarque*, 555 F.3d 830, 837 (9th Cir. 2009) (*Cronic* rule of automatic reversal is clearly established federal law, binding in habeas cases); *Loher v. Thomas*, 825 F.3d 1103, 1122 (9th Cir. 2016) (*Brooks* violation "results in a presumptively unfair trial"); *accord Maslonka v. Hoffner*, 900 F.3d 269, 279 (6th Cir. 2018); *Schmidt v. Foster*, 911 F.3d 469, 479 (7th Cir. 2018); *United States v. Lustyik*, 833 F.3d 1263, 1270 (10th Cir. 2016); *United States v. Hughes*, 514 F.3d 15, 18 (D.C. Cir. 2008); *Harrison v. Motley*, 478 F.3d 750, 755-56 (6th Cir. 2007); *French v. Jones*, 332 F.3d 430, 437 n.5 (6th Cir. 2003); *United States v. White*, 341 F.3d 673, 677 (8th Cir. 2003); *Lainfiesta v. Artuz*, 253 F.3d 151, 155, 157 (2d Cir. 2001); *Burdine v. Johnson*, 262 F.3d 336, 354 (5th Cir. 2001) (en banc) (Higginbotham, J., King, J., Davis, J., and Wiener, J., concurring); *Shillinger v. Haworth*, 70 F.3d 1132, 1141 (10th Cir. 1995). The Ninth Circuit's decision muddies the water, to the detriment of all defendants who suffer this grievous error in their state trials and come to the federal courts for relief. Moreover, the fact that the state court and the Ninth Circuit in this case failed to recognize that *Brooks* error requires automatic reversal demonstrates the need for an opinion from the high court reaffirming this principle.

This Court's review is also necessary because this is a matter of exceptional importance that has the potential to affect literally every criminal trial in the United States. An accused person's rights of testimony

and the effective assistance of counsel are core constitutional rights. It is axiomatic that our system of justice doesn't tolerate forcing a defendant to decide whether to testify before all of the evidence against him has been presented. "[A] defendant's choice to take the stand carries with it serious risks" and "may pose serious dangers to the success of an accused's defense." *Brooks*, 406 U.S. at 609. When counsel can't make an informed decision in providing advice to a defendant at that critical stage in the proceedings, because the prosecution hasn't put on all of its evidence, the fairness of the adversarial system is fatally undermined. *See Cronic*, 466 U.S. at 658-59.

Yet the prejudice can be extremely difficult for a defendant to demonstrate. It isn't possible to know with reasonable certainty how the trial would have unfolded if its proper structure hadn't been corrupted. Nor can it be known whether the defendant would have made the same decision to testify or not to testify if he and counsel hadn't been forced to make that choice without the benefit of all of the state's evidence. If reviewing courts don't enforce the rule of automatic reversal when a trial court upends the trial process, our most fundamental constitutional rights will be in jeopardy. A court could force a defendant to testify at the beginning of the trial, having heard none of the evidence against him, with no remedy if he were later unable to prove, on that tainted record, how exactly the trial would have evolved differently. This Court must intervene.

B. Background

After the prosecution's first witness, Officer Mullane, finished his testimony at approximately 10:40 a.m., the prosecutor indicated that the People's next witness would be ready at 1:30 p.m. 3-ER-648.[1] The court stated, "[W]e have roughly a good solid hour and fifteen minutes of court time this morning, which we can make good use of it in the event there is a defense witness that is available to testify between now and noon." 3-ER-649. Defense counsel said that, other than Mr. Galvez, she had no witnesses present. 3-ER-649. The court inquired whether Mr. Galvez had definitely decided to testify, and counsel said that he had. 3-ER-649.

The court asked Mr. Galvez whether he wanted to waive his constitutional right not to testify. 3-ER-649. He responded, "Yes, Your Honor, but not now." 3-ER-650. There was subsequently a recess for Mr. Galvez to consult with counsel. 3-ER-651-54.

At approximately 11:00 a.m., counsel informed the court that Mr. Galvez wanted to testify at the end of the defense case. 3-ER-654. The court admonished him:

> [Y]ou can't put conditions on your testimony. Either you want to testify or you don't. And we have available time this morning, so if you wish to testify, now is your time. If not, then you certainly can exercise your right to remain silent and not testify, but I will not allow you to put conditions on your availability to testify.

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[1] Citations in this format refer to the Excerpts of Record filed in the Ninth Circuit.

3-ER-655. Under those circumstances, Mr. Galvez chose to testify at the present time. 3-ER-655.

C. Forcing Mr. Galvez to Testify in the Middle of the Prosecution's Case Was a Violation of Clearly Established Federal Law.

Petitioning a federal court for habeas relief from his state convictions, Mr. Galvez was required to demonstrate that the state court's denial of his *Brooks* claim "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[.]" 28 U.S.C. § 2254(d)(1).[2] This he amply did, which no reviewing court has questioned.

The right to testify on one's own behalf is a fundamental constitutional right, which this Court has held to emanate from the Fifth, Sixth, and Fourteenth Amendments. *Rock v. Arkansas*, 483 U.S. 44, 51-53 & n.10 (1987). When the government forces a defendant to testify before hearing all of the evidence against him, it violates both his right of testimony and his right to the effective assistance of counsel in advising him as to that core constitutional right. *See Brooks*, 406 U.S. 607-609, 612; *see also* App. E. at 6-7 (Hunsaker, J., concurring) (the trial court's action also violated "defendant's

[2] Section 2254(d) was amended to its present form as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).

right to 'remain inactive and secure, until the prosecution has taken up its burden and produced evidence and effected persuasion'") (quoting *Taylor v. Kentucky*, 436 U.S. 478, 483 n.12 (1978)).

Mr. Galvez's case for relief is even stronger than that of the defendant in *Brooks*. There, this Court struck down a state statute that required a defendant desiring to testify to do so before any other *defense* testimony was presented. *Brooks*, 406 U.S. at 606. The Court found that the rule was an unconstitutional burden on a defendant's decision whether to testify. *Id*. at 609. The Court explained:

> 'The decision as to whether the defendant in a criminal case shall take the stand is . . . often of utmost importance, and counsel must, in many cases, meticulously balance the advantages and disadvantages of the prisoner's becoming a witness in his own behalf. Why, then, should a court insist that the accused must testify before any other evidence is introduced in his behalf, or be completely foreclosed from testifying thereafter? . . . [Citation.]'

Id. at 607-08. The defendant and his counsel are "'not required to decide[,] until upon a *full survey of all the case*,'" the "'very serious question'" whether he should testify. *Id*. at 608 (emphasis added; citation omitted). To require the defendant to testify before other defense witnesses was "an impermissible restriction on the defendant's freedom of choice." *Id*.

These principles apply with even more force in the present case, where Mr. Galvez was required to testify not only before other defense witnesses but at a time when the prosecution had presented only half of its evidence. As

Brooks observed, "[a]lthough a defendant will usually have some idea of the strength of his evidence, he cannot be absolutely certain that his witnesses will testify as expected or that they will be effective on the stand." *Brooks*, 406 U.S. at 609. This is all the more true in the case at bar, in which Mr. Galvez was denied the benefit of surveying all of the prosecution evidence before deciding whether to take the stand.[3] Forcing the defendant to testify early or not at all is an unconstitutional burden on the right not to testify because "it may compel [a defendant,] who might otherwise decline to testify for legitimate reasons, to subject himself to impeachment and cross-examination at a time when the strength of [the] other evidence is not yet clear." *Id*. at 612.

The trial court's ruling was also an impermissible infringement of Mr. Galvez's constitutional right *to* testify in his defense. He was denied the ability to let the state's evidence guide the contours the defense, and to have a fully informed defense attorney aid him in preparing it. The defendant has a Fourteenth Amendment due process right to "'the guiding hand of counsel at every step in the proceedings against him,'" which includes the decision to

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[3] In *Loher*, the Ninth Circuit held that *Brooks* doesn't prohibit a court from requiring a defendant to testify before other *defense* witnesses if it is the defendant's fault that his other witnesses aren't present. *Loher*, 825 F.3d at 1116. That opinion, even if correct, is readily distinguishable, both because Mr. Galvez was required to testify before the prosecution had rested, and because it was the prosecution who failed to have its next witness ready.

testify. *See Brooks*, 406 U.S. at 612 (quoting *Powell*, 287 U.S. at 69). "[R]equiring the accused and his lawyer to make that choice without an opportunity to evaluate the actual worth of [the] evidence . . . restricts the defense -- particularly counsel -- in the planning of its case." *Id*.

Accordingly, the trial court's action in this case was contrary to, or an unreasonable application of, clearly established federal law, bringing Mr. Galvez's claim squarely within the protection of the federal habeas statute. 28 U.S.C. § 2254(d)(1).

D. The Court Should Reaffirm That Clearly Established Federal Law Requires Per Se Reversal for *Brooks* Error.

For most constitutional errors, reversal is required on direct review unless the state can demonstrate beyond a reasonable doubt that the error was harmless. *Chapman v. California*, 386 U.S. 18, 24 (1967); *Neder v. United States*, 527 U.S. 1, 8 (1999). When a state prisoner petitions for federal habeas relief, the court ordinarily applies the more judgment-favoring *Brecht* standard, asking whether the error had a "'substantial and injurious effect or influence in determining the jury's verdict.' [Citation.]" *Brecht*, 507 U.S. at 637. But "there are some constitutional rights so basic to a fair trial that their infraction" undermines the trial process itself and "can never be treated as harmless error." *Chapman*, 386 U.S. at 23; *accord Brecht*, 507 U.S. at 629-30. All criminal defendants are entitled to a trial free from error

that calls into question the fairness of the proceeding and strikes a blow to the framework -- the structure -- of the proceeding itself. *See Cronic*, 466 U.S. at 657-60.

This type of constitutional error, known as "structural error," occurs when there are "circumstances that are so likely to prejudice the accused that . . . litigating their effect in a particular case is unjustified," *Cronic*, 466 U.S. at 658, or when the effects of the error are too speculative and therefore defy harmless error analysis, *see United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 n.4 (2006). This doesn't mean the whole trial must be unfair for an error to be structural; rather, structural error exists when the defendant has been denied "a particular guarantee of fairness." *Gonzalez-Lopez*, 548 U.S. at 146. To earn automatic reversal, a habeas petitioner must show that the Supreme Court has clearly established that the type of error at issue in his case is structural. *Glebe*, 574 U.S. at 23.

Mr. Galvez readily satisfies that standard. It has long been clearly established that *Brooks* error is structural and requires reversal per se. In *Brooks*, this Court reversed the defendant's conviction without requiring any showing that he had been prejudiced. *Brooks*, 406 U.S. at 613. The Court concluded: "Petitioner, then, was deprived of his constitutional rights when the trial court excluded him from the stand for failing to testify first. The State makes no claim that this was harmless error, *Chapman v. California*,

386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), and petitioner is entitled to a new trial." *Id*.

The state in *Brooks* didn't argue that the violation was harmless because it couldn't be, as this Court found by reversing without any such inquiry. *Brooks*'s reference to *Chapman* shouldn't be misunderstood as a holding that the *Chapman* harmless error standard applied but that the state had waived it. If a harmless error standard had applied, the state couldn't have waived it. *See Vizcaino v. Microsoft Corp.*, 120 F.3d 1006, 1022 n.4 (9th Cir.1997) (O'Scannlain, J., concurring and dissenting) ("a party cannot, by waiver or estoppel, change the applicable standard of review"); *Hernandez v. Holland*, 750 F.3d 843, 856 (9th Cir. 2014) ("the AEDPA standard of review itself cannot be waived"); *see also Biestek v. Berryhill*, 139 S. Ct. 1148, 1155 (2019) (substantial evidence standard can't be waived).

Moreover, *Brooks*'s reference to *Chapman* reinforces that *Brooks* applied automatic reversal. *Chapman* recognized, "[W]hen counsel has not been provided at a critical stage, 'we do not stop to determine whether prejudice resulted.'" *Chapman*, 386 U.S. at 43 (quoting *Hamilton v. Alabama*, 368 U.S. 52, 55 (1961)). "[W]e have refused to consider claims that [such] constitutional error might have been harmless." *Id*. The reference to *Chapman* in *Brooks* is a recognition that *Brooks* error is never harmless because it is the denial of effective counsel at a critical stage.

Any asserted ambiguity in *Brooks* about whether this error requires reversal per se has been eliminated by this Court's subsequent jurisprudence.[4] In *Cronic*, the Court explained that "the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *Cronic*, 466 U.S. at 658. "The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial." *Id*. at 659 (footnote omitted). *Cronic* listed past examples in which the Court had found such errors to be structural, including *Brooks*: "The Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding. *See*, *e.g.*, . . . *Brooks v. Tennessee*, 406 U.S. 605, 612-613 . . . ." *Id*., n.25. Thus, this Court has clearly regarded *Brooks* error as structural.

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[4] To be clearly established, the federal rule doesn't need to be contained all in a single opinion. Rather, it can be based on a combination of the Court's decisions, as is the case here with the development of the "critical stage" doctrine post-*Brooks*. *See*, *e.g.*, *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 246-55 (2007) (discussing evolution of the Court's jurisprudence as creating clearly established federal law); *see also Lockyer v. Andrade*, 538 U.S. 63, 72 (2003) ("Through this thicket of Eighth Amendment jurisprudence, one governing legal principle emerges as 'clearly established' under § 2254(d)(1) . . . ."); *White v. Woodall*, 572 U.S. 415, 432 (2014) (Breyer, J., Ginsburg, J., and Sotomayor, J., dissenting) ("As long as fairminded jurists would conclude that two (or more) legal rules considered together would dictate a particular outcome, a state court unreasonably applies the law when it holds otherwise.").

Indeed, *Brooks* error has the key features that the Court has identified as markers of structural error. Forcing a defendant to testify before hearing all of the evidence against him "always results in fundamental unfairness." *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908 (2017). It corrupts "the framework within which the trial proceeds . . . ." *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). And it makes prejudice too difficult to determine, *Gonzalez-Lopez*, 548 U.S. at 149 n.4, because it is not possible to know with reasonable certainty whether the defendant would have decided to testify, or how the trial would have evolved, if he and counsel had been allowed to make a fully informed choice with the benefit of knowing the entirety of the prosecution's case. That difficulty of assessing prejudice is attributable to the state's interference with the defendant's constitutional rights. The consequences are therefore lain at the feet of the state. *See Strickland*, 466 U.S. at 692.

In subsequent cases, this Court has reaffirmed that *Brooks* is a structural error. In *Strickland*, the Court reiterated that prejudice is presumed for certain Sixth Amendment violations, including that in *Brooks*. *Strickland*, 466 U.S. at 692. The Court explained that the presumption of prejudice applies to the "[a]ctual or constructive denial of the assistance of counsel altogether," as well as to "various kinds of state interference with counsel's assistance." *Id*. (citing the examples listed in *Cronic* footnote 25,

including *Brooks*). *Strickland* described *Brooks* as an example of such state interference with the right to counsel because forcing the defendant to testify prematurely "interferes . . . with the ability of counsel to make independent decisions about how to conduct the defense." *Id*. at 686. Reversal is mandatory because "[p]rejudice in these circumstances is so likely that case-by-case inquiry" is unjustified. *Id*. at 692. "Moreover, such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the [state] is directly responsible, easy for the [state] to prevent." *Id*.

In *Bell*, the Court reiterated that it had previously found *Brooks* error to be structural. *Bell*, 535 U.S. at 696 n.3 (relating certain situations where the Court had "found a Sixth Amendment error without requiring a showing of prejudice" because the defendant was actually or constructively denied counsel and citing *Brooks* as an example); *see also Wright v. Van Patten*, 552 U.S. 120, 125 (2008) (affirming that *Cronic* establishes that no showing of prejudice is required when "'counsel [is] either totally absent, or prevented from assisting the accused during a critical stage of the proceeding'") (quoting *Cronic* n. 25); Wayne R. LaFave et al., Criminal Procedure 1072 (6th ed. 2017) (describing *Brooks* as exemplifying the prohibition against "unconstitutional state imposed interference with counsel" which is "presumed prejudicial and therefore requires automatic reversal").

In light of these repeated statements that *Brooks* error is structural, the Ninth Circuit's and the California Court of Appeal's rulings directly conflict with those of this Court on a critical matter of nationwide importance, justifying the granting of Mr. Galvez's petition.

II. BY TOLERATING DIRECTED VERDICTS OF SANITY, CALIFORNIA HAS ERRONEOUSLY DEPARTED FROM CLEARLY ESTABLISHED FEDERAL LAW BARRING COURTS FROM DIRECTING VERDICTS AGAINST CRIMINAL DEFENDANTS.

A. Importance of the Issue Presented

In California, if the jury finds that the defendant was insane at the time of his acts, he is not guilty of the charged crimes and will be treated in the state hospital until he is well, instead of being consigned to prison. This is a reflection of the societal value that people who didn't understand the nature of their actions, or couldn't distinguish right from wrong at the time of the incident, aren't morally culpable. The State has appropriately recognized that such individuals need psychiatric treatment, not incarceration.

But the way California courts are adjudicating pleas of not guilty by reason of insanity conflicts with this Court's jurisprudence. The Court has long held that the constitutional rights to due process and a jury trial bar a trial court from directing a verdict against a defendant in a criminal case. A defendant's right to a jury determination of the charges against him is sacrosanct. No matter what a trial court thinks about the strength or

credibility of the evidence, the court can't take the decision away from the jury by directing a verdict against a criminal defendant. The defendant has an inviolate right to a jury determination.

That rule necessarily applies to a sanity verdict in California trials because the sanity phase is legally part of the same, single trial as the guilt phase. Moreover, a sanity verdict has precisely the same effect as a guilty verdict, which is to subject a defendant to criminal punishment for his acts, and it is therefore subject to the same prohibition against taking that decision away from the jury.

Yet California erroneously permits trial courts to direct a verdict against the defendant if they find there was insufficient evidence to support his insanity plea. That was the result in Mr. Galvez's case as well as in several published decisions, which erroneously carve out an exception for insanity pleas. California's rule directly conflicts with this Court's opinions on matters of federal constitutional law and can't be tolerated, nor can the Ninth Circuit's decision upholding this practice. *See* SUP. CT. R. 10(a) & (c).

This Court should grant Mr. Galvez's petition in order to instruct California, states with similar practices, and the federal courts reviewing their decisions, that clearly established federal law prohibits judges from directing verdicts against defendants on their not-guilty pleas, including pleas of not guilty by reason of insanity. This is a fundamental rule of

constitutional criminal procedure that has the potential to affect every defendant who pleads insanity. And it is a matter of great importance for defendants with mental illness. A study has found that approximately one percent of felony defendants plead not guilty by reason of insanity.[5] That is a high number. In California alone, there are nearly 200,000 felony prosecutions and more than 400,000 non-traffic misdemeanor prosecutions every year.[6] These defendants have the same right to a jury determination of their cases as do people without mental illness. The Constitution demands no less. Yet in California, the defendant can suffer an adverse verdict and be committed to prison, instead of receiving treatment in the state hospital, based solely on one judge's view of the evidence. Mr. Galvez respectfully urges the Court to put a stop to this unconstitutional practice.

B. Background

The trial court directed a verdict of sanity, finding that it had the inherent authority to do so under *People v. Ceja*, 106 Cal.App.4th 1071, 1084-85 (Cal. Ct. App. 2003) because there was insufficient evidence of insanity for the matter to go to the jury. 3-ER-723-26. The California Court of Appeal

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[5] Lisa A. Callahan et al., *The Volume and Characteristics of Insanity Defense Pleas: An Eight-State Study*, 19 Bull. Am. Acad. Psychiatry & L. 331, 334 (1991), available at: http://jaapl.org/content/jaapl/19/4/331.full.pdf

[6] Judicial Council of California, *2021 Court Statistics Report, Statewide Caseload Trends, 2010-11 Through 2019-20*, at 82, available at: https://www.courts.ca.gov/documents/2021-Court-Statistics-Report.pdf

(CCA) agreed. It rejected Mr. Galvez's argument that the constitutional rights due to process and a jury trial bar a court from directing a verdict in a criminal case. It observed that three published CCA opinions had held that a court has the authority to direct a sanity verdict where the defendant has not presented substantial evidence of insanity. App. A. at 33 (citing *Ceja*, 106 Cal.App.4th 1071, *People v. Severance*, 138 Cal.App.4th 305 (Cal. Ct. App. 2006), and *People v. Blakely*, 230 Cal.App.4th 771 (Cal. Ct. App. 2014)).

C. Insanity Principles

Where, as here, a California defendant pleads both not guilty and not guilty by reason of insanity (NGI), the trial is bifurcated, with the issue of guilt tried first and the issue of sanity tried second. Cal. Pen. Code § 1026(a).[7] In the guilt phase, the defendant is "conclusively presumed to have been sane at the time of the commission of the offense," § 1016, and it is the prosecution's burden to prove guilt beyond a reasonable doubt. *See People v. Figeroa*, 41 Cal.3d 714, 725 (Cal. 1986). In the sanity phase, a special plea of insanity effectively operates as an affirmative defense, for which the defendant has the burden to prove he was insane at the time of the crime by a preponderance of the evidence. *People v. Hernandez*, 22 Cal.4th 512, 520, 522 (Cal. 2000).

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[7] Unspecified statutory references are to the California Penal Code.

California follows the "*M'Naughton*"[8] test for insanity. *Ceja*, 106 Cal.App.4th at 1078. A defendant was legally insane if, "at the time the offense was committed, [he] was incapable of knowing or understanding the nature [and quality] of his act *or* of distinguishing right from wrong." *Hernandez*, 22 Cal.4th at 520-21 (emphasis added); *see* § 25(b).

C. The Rights to Due Process and a Jury Trial Bar a Trial Court From Directing a Verdict of Sanity in a Criminal Case.

"[A]lthough a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the State, no matter how overwhelming the evidence." *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993) (citing U.S. CONST. amends. VI & XIV); *accord United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977); *United Bhd. of Carpenters & Joiners of Am. v. United States*, 330 U.S. 395, 408 (1947); *Figueroa*, 41 Cal.3d at 724. This clearly established constitutional rule derives from the rights to a jury trial and due process. *Sullivan*, 508 U.S. at 277; *United States v. Gaudin*, 515 U.S. 506, 509-10 (1995); *Figueroa*, 41 Cal.3d at 725.

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[8] *M'Naghten's Case*, 10 Clark & F. 199, 203, 210 (1843), *as cited in Davis*, 160 U.S. at 479.

The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." This "clear command to afford jury trials in serious criminal cases" dictates that a trial court cannot take the issue of guilt or innocence away from the jury. *Rose v. Clark*, 478 U.S. 570, 578 (1986).

The right to a jury trial is "fundamental to our system of justice" because it provides "barriers . . . against the approaches of arbitrary power." *Duncan v. Louisiana*, 391 U.S. 145, 153-54 (1968). The Framers "insiste[d] upon community participation in the determination of guilt or innocence." *Id.* at 156. This Court has directed that "the right of the accused to a trial by a constitutional jury [must] be jealously preserved . . . ." *Singer v. United States*, 380 U.S. 24, 34 (1965).

In addition, since at least 1895, the Court has held that the right to due process, too, prohibits a trial judge from directing a verdict in a criminal case. *Sparf v. United States*, 156 U.S. 51, 105 (1895). Under the Due Process Clause, "it is not competent for the court, in a criminal case, to instruct the jury peremptorily to find the accused guilty of the offense charged . . . ." *Id.*; *see also Gaudin*, 515 U.S. at 509-10. "In a civil case, the judge may exercise the power of directing a verdict for the plaintiff when there is no conflict in the evidence and the only inference that can be drawn by reasonable minds

as to the ultimate facts in issue favors the plaintiff." *Konda v. United States*, 166 F. 91, 93 (7th Cir. 1908). "But in a criminal case, if the jury returns a verdict for the defendant, the judge, no matter how contrary to the evidence he may think the verdict is, cannot set it aside . . . ." *Id.*

In California, despite that the issues of guilt and sanity are bifurcated, the two phases are legally considered part of the same, single trial. *Hernandez*, 22 Cal.4th at 521 (the "'sanity trial is but a part of the same criminal proceeding as the guilt phase' [citation] . . .") "The requirement under the present system, that the two issues be separately tried . . . is but a departure in procedure." *People v. Troche*, 206 Cal. 35, 44 (Cal. 1928) (discussing the then-new system of bifurcating the trial), *overruled on another point by People v. Wells*, 33 Cal.2d 330, 355 (Cal. 1949). "It is to be remembered that in the eyes of the law there is still only one trial." *Wells*, 33 Cal.2d at 349, *superseded by statute on another point as stated in People v. Saille*, 54 Cal.3d 1103, 1119 (Cal. 1991). "The guaranteed right of a trial by jury is as inviolate and just as much secured to all under the new system as it was under the old." *Troche*, 206 Cal. at 44.

Thus, in an insanity case, there is only one criminal trial, and the clearly established federal law holding that a judge can't direct a verdict in a criminal trial applies. The trial court violated Mr. Galvez's rights to due

process and a jury trial by removing the insanity plea from the jury's consideration.

D. The CCA's Decision That a Trial Court Can Direct a Verdict of Sanity Violated Clearly Established Federal Law.

The CCA and some other lower courts have drawn a distinction between directed verdicts of guilt and directed verdicts of sanity, permitting trial courts to direct sanity verdicts where the defendant has presented insufficient evidence of insanity. These decisions don't withstand analysis and are contrary to, or an unreasonable application of, the clearly established federal law presented above. 28 U.S.C. § 2254(d)(1).

1. California decisions

In *Hernandez*, the California Supreme Court found that no statute gives trial courts the authority to direct a verdict of sanity. *Hernandez*, 22 Cal.4th at 522. The majority didn't reach the question of whether the federal constitution prohibits a directed sanity verdict if the defendant fails to present substantial evidence of insanity because it found that, on the facts of that case, the defendant's evidence was substantial. *Id*. at 527. Justice Brown issued a concurrence in which she opined that an NGI plea is no different than other special pleas -- like once in jeopardy and former judgment of conviction or acquittal -- as to which California courts have held that a directed verdict is permitted "[w]here 'the evidence is uncontradicted

or leads to a single conclusion . . .' [citation] . . . ." *Id*. at 528 (Brown, J., concurring). But Justice Brown concurred in the result because she agreed that the defendant had presented substantial evidence of his insanity. *Id*. at 529-30.

CCA opinions have followed Justice Brown's reasoning and concluded that, despite the lack of statutory authorization, "a trial court retains *inherent authority* to dismiss an NGI plea if the defendant fails to present evidence sufficient to support such a plea . . . ." *Ceja*, 106 Cal.App.4th at 1085 (emphasis added); *Severance*, 138 Cal.App.4th at 315-16; *Blakely*, 230 Cal.App.4th at 773. Below, Mr. Galvez explains that this reasoning is faulty and departs from clearly established federal law.

2. The inherent power of courts doesn't extend to directing a sanity verdict in a criminal case.

Directing a sanity verdict is beyond the scope of courts' inherent authority. In *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991), this Court explained that courts' inherent power is limited and only applies where necessary to facilitate court functioning. "[C]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution . . . because they are necessary to the exercise of all others." *Id*. at 43. Courts thus have the inherent authority to "'impose silence, respect, and decorum in their presence, and submission to their lawful mandates.' [Citation.]" *Id*. In

addition, they may control admission to their bar, discipline attorneys, punish individuals for contempt of court, bar a defendant who disrupts a trial, and vacate a judgment due to fraud upon the court. *Id*. at 43-44 (holding that inherent power also extends to sanctioning a litigant for bad-faith conduct). In the civil context, a court may dismiss an action due to *forum non conveniens* or for failure to prosecute. *Id*. at 44. "These powers are 'governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.' [Citation.]" *Id*. at 43; *see also People v. Engram*, 50 Cal.4th 1131, 1146 (Cal. 2010) (courts have "the inherent authority and responsibility to fairly and efficiently administer . . . judicial proceedings . . .").

"A court must, of course, exercise caution in invoking its inherent power, and it must comply with the mandates of due process . . . ." *Chambers*, 501 U.S. at 50. "The extent of these powers must be delimited with care, for there is a danger of overreaching when one branch of the Government, without benefit of cooperation or correction from the others, undertakes to define its own authority." *Degen v. United States*, 517 U.S. 820, 823 (1996) (courts can dismiss an appeal if a party is a fugitive).

A directed verdict of sanity against a criminal defendant plainly does not fall within courts' limited, inherent power to manage court functions.

3. The fact that California places the burden on a defendant to prove his insanity by a preponderance of the evidence does not deprive him of his right to have the jury make the determination.

In California, the defendant bears the burden of proving his insanity by a preponderance of the evidence. *Figeroa*, 41 Cal.3d at 725. *Ceja* relied upon this fact to find that a court can direct a sanity verdict where the defendant has presented insufficient evidence to meet his burden. *Ceja*, 106 Cal.App.4th at 1083.

Yet nothing about the fact that the defendant bears the burden of proof eliminates his constitutional right to have the jury make the determination about whether he has met it. "The [Sixth Amendment] right includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of 'guilty.'" *Sullivan*, 508 U.S. at 277 (citing *Sparf*, 156 U.S. at 105-06). Nowhere in the Sixth Amendment does it state that the accused has the right to a jury determination of the elements of the crime but not of his affirmative defense. And no court has held that, when it comes to a defendant's affirmative defense, he loses his constitutional right to a jury. Rather, as *Ceja* acknowledges, insanity "'is a factual question to be decided by the trier of fact.'" *Ceja*, 106 Cal.App.4th at 1078 (quoting *People v. Kelly*, 10 Cal.3d 565, 574 (Cal. 1973)); *see also Hernandez*, 22 Cal.4th at 524 ("The fact that it is conducted in a separate proceeding and

that the defendant bears the burden of proof does not convert it into a separate criminal . . . action.").

Nothing about California's assignment of the burden to the defendant alters that the jury is the trier of fact.

4. A directed verdict of sanity has the same effect as a directed verdict of guilt in a criminal case.

For its holding that a court can constitutionally direct a verdict of sanity, *Ceja* found that this was in part because "'the plea of not guilty by reason of insanity is a statutory defense that does not implicate guilt or innocence but, instead, determines 'whether the accused shall be *punished* for the *guilt* which has already been established.' [Citation.]'" *Ceja*, 106 Cal.App.4th at 1084 (emphasis in original; quoting *Hernandez*, 22 Cal.4th at 528 (Brown, J., concurring)). For that reason, found *Ceja*, the defendant's constitutional right to a jury determination of all of the elements of the offenses is not infringed. *Id.*; *accord Leach v. Kolb*, 911 F.2d 1249, 1255-57 (7th Cir. 1990).

There are several problems with this logic. First, it misapprehends the nature of the insanity defense. By invoking the defense, the defendant pleads *not guilty* by reason of insanity. When a trial court directs a verdict of sanity, it effectively directs a verdict of guilt in a criminal case.

It is true that, by the time of the sanity phase of the trial, the jury has already found that the defendant committed the elements of the offense, including the prohibited act and the requisite mental state. For instance, one of the offenses charged against Mr. Galvez was assault with a firearm, which requires that the defendant committed an act with a firearm, and that he did so with the following mental state: a reasonable person in his position would know that the act was likely to result in the application of force to another person. *See People v. Aledamat*, 8 Cal.5th 1, 15 (Cal. 2019). In the guilt phase, Mr. Galvez's jury found this act and mental state to be true.

But in another critical way, a finding of insanity means that Mr. Galvez lacked the necessary mental state or mental capacity to be guilty of the crime. The plea is "*not guilty* by reason of insanity." § 1016(6). An insane person is not guilty because he is not "capable in law of committing crime." *Davis v. United States*, 160 U.S. 469, 484 (1985), *superseded by statute on another point as stated in Dixon v. United States*, 548 U.S. 1, 12 (2006); *see also In re Winship*, 397 U.S. 358, 363 (1970) (the defendant "'is entitled to an acquittal of the specific crime charged, if upon all the evidence, there is reasonable doubt whether he was capable in law of committing crime.' . . . [Citation.]") With an insanity plea, "[c]ommission of the overt act is conceded but criminal guilt (the mental capacity to commit a criminal act) is denied [because] the defendant was suffering 'a defect of reason . . . .' [Citation.]"

Wells, 33 Cal.2d at 349-50. Thus, while the jury in the guilt phase found Mr. Galvez guilty of committing the elements of the offenses, it was still within the jury's power and vested role to nonetheless find him not guilty by reason of insanity because he lacked the mental state or mental capacity necessary for the crimes.

If a court cannot direct a verdict of guilt upon a plea of not guilty, it cannot direct a verdict of guilt upon a plea of not guilty by reason of insanity. The trial court here took the not-guilty issue away from the jurors and directed a verdict of guilt in a criminal case, which the Constitution prohibits.

Indeed, directing a verdict of sanity is the *functional equivalent* of directing a verdict of guilt. The effect is precisely the same. Directing a verdict against a defendant on his plea of not guilty by reason of insanity effectively directs a verdict of criminal guilt. A judicial act that has the exact same effect as one universally held to violate the Constitution must also violate the Constitution. *See United States v. Hayward*, 420 F.2d 142, 144 (D.C. Cir. 1969) (a jury instruction that effectively directs a verdict on the elements of the crime is prohibited just as much as an expressly directed verdict); *United States v. Taylor*, 11 F. 470, 471 (C.C.D. Kan. 1882) (a trial where the court has directed the jury to find the defendant guilty "is, in *substance and effect*, a trial by the court" (emphasis added); "[t]he constitution does not deal with the form, but with the substance . . ."),

cited with approval in Sparf, 156 U.S. at 51; *Figueroa*, 41 Cal.3d at 726 n.12 (since a criminal court lacks power to overturn a verdict of not guilty, it cannot effectively do the same by directing verdict of guilty) (citing *Konda*, 166 F. at 93 and *Sparf* at 106).

Moreover, *Ceja*'s argument -- that the insanity phase of the trial only addresses whether the defendant will be punished for his actions -- fails to support that a court can direct a sanity verdict. The constitutional right to due process is directly implicated when the government seeks to punish an accused for alleged criminal activity. The Due Process Clause protects against "'unjust . . . forfeitures of life, liberty and property.' [Citation.]" *Winship*, 397 U.S. at 362; *see also Betterman v. Montana*, 136 S. Ct. 1609, 1617 (2016) (due process applies at sentencing where punishment is to be determined); *People v. Burnick*, 14 Cal.3d 306, 319 (Cal. 1975) ("Nor is there any doubt that [a] commitment to a 'state hospital' [upon a finding of insanity] results in a real deprivation of liberty."). A directed verdict of sanity results in a verdict of guilt that triggers the imposition of criminal sanctions and the deprivation of an individual's liberty, without the jury determination required by due process. Furthermore, the Sixth Amendment requires that a jury be the one to decide whether a criminal defendant will suffer punishment for an alleged violation of the law. *Gaudin*, 515 U.S. at 510. When a trial court directs a sanity verdict and effectively removes from

the jury the issue of whether the defendant is subject to punishment for his actions, it violates the rights to a jury trial and due process.

It is therefore no answer to say that insanity only affects a defendant's punishment. A directed sanity verdict deprives the defendant of his liberty without the constitutionally mandated jury determination.

5. Clearly established federal law doesn't allow removal of an insanity plea from the jury where the defendant has presented factual evidence.

Ceja held that, where the evidence is "'uncontradicted or leads to a single conclusion,'" the issue of insanity becomes a question of law, and the judge can direct the verdict. *Ceja*, 106 Cal.App.4th at 1083-84 (quoting *Hernandez*, 22 Cal.4th at 582 (Brown, J., concurring)). On the contrary, clearly established federal law holds that, even where the facts are undisputed, it is the jury's constitutional role to draw the inferences and make the conclusions from those facts. Where the defendant has presented any factual evidence as to his sanity, the Constitution dictates that the matter becomes a question of fact for the jury. It has long been held that, even where "the facts [are] admitted or settled beyond dispute," the matter does not become a question of law as to which a court can direct a verdict of guilt in a criminal case. *Taylor*, 11 F. at 471, *cited with approval in Sparf*, 156 U.S. at 105; *accord Blair v. United States*, 241 F. 217, 231 (9th Cir. 1917) (facts were agreed upon in writing and signed by the parties); *United States*

v. Gollin, 166 F.2d 123, 127 (3d Cir. 1948) (court could not instruct the jury that the truck was moving in interstate commerce even though no fact was in dispute) (citing *Sparf* at 105).

That is because inferences, deductions, and conclusions from the facts are for the jury to make. *Blair*, 241 F. at 231-32. This rule "is enforced no matter how conclusive the evidence in the case may be." *United States v. Hayward*, 420 F.2d 142, 144 (D.C. Cir. 1969); *see Bollenbach v. United States*, 326 U.S. 607, 614 (1946) ("[T]he question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials . . . ."); *Roe v. United States*, 287 F.2d 435, 440 (5th Cir. 1961) ("[N]o fact, not even an undisputed fact, may be determined by the judge."); *Konda*, 166 F. at 93 ("[A]n accused person has the same right to have 12 laymen pronounce upon the truth or falsity of each material averment in the indictment, if the evidence against him is clear and uncontradicted, as he unquestionably would have if it were doubtful and conflicting.").

That is all the more so where, as here, the determination involves an evaluation of a witness's credibility. *United States v. Scheffer*, 523 U.S. 303, 313 (1998) ("A fundamental premise of our criminal trial system is that 'the *jury* is the lie detector.' [Citation.]") (emphasis in original). Likewise, "it is for the jury, not the judge, to decide whether a given psychiatric diagnosis, if

accepted, brings the accused within the legal definition of insanity." *Taylor v. United States*, 222 F.2d 398, 404 (D.C. Cir. 1955).

Clearly established federal law thus contradicts *Ceja*'s assertion that a judge can direct a sanity verdict where the evidence is "uncontradicted or leads to a single conclusion." *Ceja*, 106 Cal.App.4th at 1083. Rather, the Constitution assigns to the jury the task of drawing conclusions from the evidence, even in cases where all of the facts are undisputed.

E. *Kahler v. Kansas* Doesn't Affect Mr. Galvez's Claim.

Despite the arguments above, the Ninth Circuit held that clearly established federal law doesn't prohibit directed sanity verdicts because this Court held in *Kahler v. Kansas*, 140 S. Ct. 1021 (2020) that a 'State's 'insanity rule is substantially open to state choice.' [Citation.]" *Id*. at 1029 (due process didn't require Kansas to follow a specific test for insanity); App. E at 3. *Kahler* is inapposite here because, once "a State creates a liberty interest, the Due Process Clause requires fair procedures for its vindication." *Swarthout*, 562 U.S. at 220; *see Cannon v. Lockhart*, 850 F.2d 437, 439 (8th Cir. 1988) ("Although not a constitutional right itself, the ability to use a peremptory challenge, once granted by statute, falls within the mandate of the Sixth Amendment."); *Aiken v. Blodgett*, 921 F.2d 214, 217 (9th Cir. 1990) (arbitrary denial of state-created right violates due process). Because California provides for a plea of not guilty by reason of insanity, due process

requires that the deeply rooted, fundamental rule entitling the defendant to a jury verdict must be respected. *See Kahler*, 140 S. Ct. at 1027 (A practice violates due process where it "'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' [Citation.]").

F. Penal Code § 29.8 Wasn't a Basis to Direct the Verdict.

Finally, apart from the constitutional issue, the Ninth Circuit found that the CCA's opinion upholding the trial court's directed verdict wasn't unreasonable because "Penal Code § 29.8 barred application of the insanity defense based on the use of drugs." App. A at 3-4. On the contrary, the CCA's holding was an unreasonable determination of the facts and the law. *See* 28 U.S.C. § 2254(d)(2). Section 29.8 provides, in pertinent part, "In any criminal proceeding in which a plea of not guilty by reason of insanity is entered, this defense shall not be found by the trier of fact *solely* on the basis of . . . an addiction to, or abuse of, intoxicating substances." (Emphasis added). Mr. Galvez's testimony provided substantial evidence that his state of insanity at the time of the incident was caused by a *combination* of underlying mental disorders, extreme stressors, and abuse of substances, which is a legally valid claim of insanity under California law. 3-ER-667-78, 705, 710-714; *People v. Robinson*, 72 Cal.App.4th 421, 428 (Cal. Ct. App. 1999) (error to instruct on § 29.8 when defendant didn't rely solely on drug

addiction). Section 29.8 was therefore no impediment to Mr. Galvez's insanity defense.

G. The Error Is Reversible Per Se.

In *Rose*, 478 U.S. at 587, this Court observed that directing a verdict for the prosecution in a criminal case is a structural error that always requires reversal, without resort to harmless error analysis. That is because "the error in such a case is that the wrong entity judged the defendant guilty." *Id.*

CONCLUSION

For the foregoing reasons, Mr. Galvez respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals.

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Respectfully submitted,

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