No. 21-6492

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

REPLY TO PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT

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.

Mr. Galvez has explained that his petition should be granted because the decisions of the state court and the Ninth Circuit directly conflict with this Court's jurisprudence holding that forcing a defendant to testify in the middle of the prosecution's case requires automatic reversal. *See Brooks v. Tennessee*, 406 U.S. 605, 613 (1972); *accord 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). In its opposition, the state maintains that this Court hasn't in fact found *Brooks* error to require automatic reversal, that this case isn't a good vehicle for resolving the issue because Mr. Galvez didn't properly raise the claim below, and that this isn't a matter of sufficient importance. None of the state's contentions has merit. Rather, this case is an excellent vehicle for the Court to provide manifestly needed guidance, reaffirming that *Brooks* error fundamentally undermines the fairness and reliability of the trial and is therefore reversible per se.

A. The State Advocates an Incorrect Standard of Review.

Initially, the state advocates an incorrect standard of review when it asserts that "a reasonable jurist applying this Court's precedent could have

concluded that the trial court's error was not structural." Brief in Opposition ("Opp.") at 10. The state appears to be referring to the rule that a state court's *application* of clearly established federal law won't be held to be unreasonable under AEDPA if "fairminded jurists could disagree" on the correctness of the decision. *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (addressing whether state's application of the *Strickland* standard was unreasonable).

That isn't the issue in the present case. *Brooks* error is conceded here. Instead, the question is what is the appropriate rule of law (automatic reversal or harmless error analysis) to be applied to the established error. That inquiry doesn't look to whether the lower courts' decisions on the matter were reasonable. Rather, "a decision by a state court is 'contrary to' [the] clearly established law [of the Supreme Court] if it '*applies a rule that contradicts the governing law set forth in [Supreme Court] cases*.'" *Price v. Vincent*, 538 U.S. 634, 640 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 405 (2000)) (emphasis added). Here, the lower courts applied an incorrect reversal standard to *Brooks* error, and thereby violated clearly established federal law, because this Court has held that reversal is required without resort to harmless error analysis. This isn't a question of whether the lower courts acted reasonably; it is a question of the correct rule of law to be

applied. In that inquiry, the lower courts' decisions aren't accorded any deference.

B. This Court's Cases Clearly Establish That *Brooks* Error Requires Automatic Reversal.

On the merits, the state claims that *Brooks* error isn't structural because it doesn't "'*necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.'" Opp. at 11 (quoting *Greer v. United States*, 141 S. Ct. 2090, 2099 (2021)) (italics in original). On the contrary, forcing a defendant to testify before the prosecution has concluded its case necessarily renders the trial unreliable because it corrupts "the framework within which the trial proceeds . . . ." *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). The defendant's right of testimony is one of the "constitutional rights so basic to a fair trial that [its] infraction" critically undermines the trial and "can never be treated as harmless error." *Chapman v. California*, 386 U.S. 18, 23 (1967). It is a structural error because it "always results in fundamental unfairness" when the defendant is made to testify without hearing all of the evidence he is to defend against. *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908 (2017). And *Brooks* error makes prejudice too difficult to determine, *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 n.4 (2006), 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.

The state also misses the mark when it claims that this Court's repeated statements that *Brooks* error requires automatic reversal are only dicta. Opp. at 15 & n.5. It is true that clearly established federal law is determined by holdings, not dicta. *Williams v. Taylor*, 529 U.S. 362, 412 (2000). But the state's assertion is misplaced here. *Brooks* itself reversed without requiring any showing that the defendant had been prejudiced by being required to testify out of order. *Brooks*, 406 U.S. at 613. That was a holding, not dictum.

This Court's subsequent reaffirmations in later opinions that *Brooks* error is structural are also relevant to whether the rule is clearly established, even though those cases didn't involve *Brooks* error, because (1) they incorporate *Brooks* into the *Cronic* doctrine of structural error, and (2) they contradict the state's assertion that *Brooks* itself wasn't a case of automatic reversal. *See Cronic*, 466 U.S. at 659 n.25; *Strickland*, 466 U.S. at 692; *Bell*, 535 U.S. at 696 n.3. As described, *Cronic* held that 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*). In its post-*Brooks* cases, this Court incorporated *Brooks* into its evolving jurisprudence

regarding structural errors involving the denial of counsel. To be clearly established, the federal rule doesn't need to be contained all in a single opinion. Petition ("Pet.") at 16 n.4. Moreover, in *Cronic*, *Bell*, and *Strickland*, the Court read *Brooks* the same way that Mr. Galvez does, thereby dispelling any doubt about whether *Brooks* was indeed a case of automatic reversal.

What's more, the state effectively concedes that *Brooks* error requires per se reversal when it acknowledges that the cases above "identified *Brooks* as one of several examples of cases that '*found constitutional error without any showing of prejudice*' . . . ." Opp. at 15-16 (quoting *Cronic*, 466 U.S. at 659 n.25) (emphasis added). The state concedes: "That was a correct characterization of *Brooks*: A defendant need not make a showing of prejudice to establish a constitutional violation under *Brooks*." Opp. at 16. Yet the state then maintains that this doesn't answer the "separate question" of whether the error is structural because it contaminated the entire proceeding. Opp. at 16.

The state's argument is a red herring. Constitutional errors that require no showing of prejudice are structural errors. There is no separate question of whether the error contaminated the entire proceeding. In fact, to ask whether the error infected the entire proceeding is to conduct harmless error analysis, whereas structural errors brook no harmless error analysis.

Mr. Galvez has explained both that this Court has specifically deemed *Brooks* error to require automatic reversal, and that such error has all of the features that the Court takes into account in determining which errors are per se reversible. That is the end of the inquiry. *Brooks* error so fundamentally undermines fairness and reliability that it is a structural error requiring reversal in every case. No separate question is posed here.

For these reasons, this Court's cases clearly establish that forcing a defendant to testify before hearing all of the prosecution's evidence demands automatic reversal.

C. This Case Is an Excellent Vehicle for This Court to Address the Claim Because Mr. Galvez Has Argued Structural Error at Every Stage of the Litigation, and the Ninth Circuit Directly Addressed the Question of Structural Error in the Opinion for Which Certiorari Is Sought.

The state additionally claims that this case isn't a good vehicle to address the question because, according to the state, Mr. Galvez didn't properly raise it below. Opp. at 12, 19-20. On the contrary, this case is an excellent vehicle because Mr. Galvez has argued that this error is structural at every stage of his proceedings, and the Ninth Circuit directly addressed the matter in the opinion for which certiorari is sought.

It is true that, in some of his briefing, Mr. Galvez argued that *Brooks* didn't expressly hold that the error required automatic reversal. But he

simultaneously argued that *Brooks* error has all of the features of a structural error. Appellant's Opening Br. at 63, No. B254807 (Cal. Ct. App., 2d Dist.) (Feb. 20, 2015) ("This error is structural and reversible *per se* because it undermined the fundamental fairness of the trial process, and it defies harmless error review . . . .") (capitalization omitted); Dkt. 2 at 57, No. 2:16-cv-07626 (C.D. Cal.) (same); Dkt. 23 at 33-35, No. 18-56303 (9th Cir.). And in his Ninth Circuit oral argument, Mr. Galvez relied on the *Brooks* case itself to claim structural, as well as on this Court's recognition in *Cronic*, *Strickland*, and *Bell* that *Brooks* error requires automatic reversal.[1] He made those same arguments in his petition for rehearing en banc. Dkt. 62, No. 18-56303 (9th Cir.). The state court directly ruled upon the question of structural error, as did the Ninth Circuit in the opinion for which certiorari is sought. Pet. Appendix A at 21-22; Pet. Appendix E at 2 ("Galvez contends that the error here is structural error, and was not subject to harmless error review."). At no time has any court found that this issue was waived.

Accordingly, the question is properly presented. While Mr. Galvez's specific case citations changed over time, he argued from the very beginning that *Brooks* error is structural and reversible per se. "It is claims that are deemed waived or forfeited, not arguments." *United States v. Lloyd*, 807 F.3d

[1] https://www.ca9.uscourts.gov/media/video/?20201116/18-56303/

1128, 1174-75 (9th Cir. 2015). "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Id*.; accord *United States v. Hong*, 938 F.3d 1040, 1052 (9th Cir. 2019).

This case is therefore an appropriate vehicle for this Court to address this claim.

D. This Is a Matter of Critical Importance to the Criminal Justice System.

Finally, the state contends that the Court needn't grant this petition because "there is no indication that errors like the one the trial court committed here occur with any frequency," and because "renewed vigilance on the part of state and local officials can be expected to help prevent similar errors from occurring in the future." Opp. at 21. Yet a search of Westlaw reveals that *Brooks* error has been raised in more than 50 cases just since 2017. Moreover, it is difficult to understand what will spur this "renewed vigilance" by the state courts if federal habeas courts refuse to provide a check against the trampling of defendants' constitutional rights of testimony as they did here. Yes, the courts recognized that burdening Mr. Galvez's testimonial right, merely to save an hour of court time, was an egregious error. But if courts fail to take the next step -- if they continue to misapprehend this Court's jurisprudence and find that the error isn't

structural -- the check they purport to provide is illusory. As a practical matter, it can be extremely difficult for a defendant to show how his trial would have unfolded differently if he had been allowed to testify after hearing all of the evidence, or if had been allowed to wait until the end to make that critical defense decision. Harmless error analysis is also perverted in such cases because the tainted record that results from *Brooks* error is an inherently altered version of the trial from which the reviewing court can then only speculate how the defendant might have been prejudiced.

Our system of justice simply doesn't tolerate forcing a defendant to decide whether to testify before all of the evidence against him has been presented. If reviewing courts don't enforce the rule of automatic reversal when a trial court upends the trial process, the core constitutional right of testimony will remain in jeopardy. There will be nothing to stop courts from making further "cavalier" errors like the one that occurred here. Pet. Appendix E at 5 (Hunsaker, J., concurring). A judge 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 how exactly the trial would have evolved differently. It is therefore of critical importance that this Court grant 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.

Mr. Galvez's petition explained that clearly established federal law prohibits courts from directing verdicts against a criminal defendant, whether upon a plea of not guilty or upon a plea of not guilty by reason of insanity. The state counters that this Court has held that a state's insanity rule is open to state choice, the state can place the burden on the defendant to prove insanity, and this Court has never "extended" the directed verdict rule to verdicts of sanity. Here again, none of these contentions is persuasive.

First, the state is off base with its citation to *Kahler v. Kansas*, 140 S. Ct. 1021 (2020) for the proposition that a "State's 'insanity rule is substantially open to state choice." *Id.* at 1029 (due process didn't require Kansas to follow a specific test for insanity); Opp. at 23. States may generally have flexibility in setting the parameters of the insanity defense, but as Mr. Galvez has explained, *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.]"). The state offers no response to this argument and authority.

Second, the state attempts to drive a wedge between directed verdicts of guilt and directed verdicts of sanity by pointing to the rule that states can place the burden of proving insanity on the defendant. Opp. at 23-24. However, the state fails to explain why this distinction matters. As explained in the petition, 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.

Finally, the state maintains that this Court has never "extended" the principle barring directed verdicts to directed verdicts of sanity. Opp. at 24. That is a misunderstanding of the concept of clearly established federal law for purposes of habeas relief. The fact that this Court hasn't yet had occasion to apply the directed verdict prohibition in the specific setting where the defendant is offering an insanity defense in no way alters that the directed verdict rule is clearly established federal law. Rather, it was unreasonable of the state court to carve out an exception for insanity cases where this Court hasn't indicated that any should exist. "Certain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt." *Yarborough v. Alvarado*, 541 U.S. 652, 666 (2004). "AEDPA does not 'require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied.' [Citation.]" *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007). The state can't get around this clearly established federal law by defining it unjustifiably narrowly and then asserting that the Supreme Court hasn't spoken on that narrow issue. The state unreasonably refused to apply the hallowed rule against directed verdicts to Mr. Galvez's case. He is therefore entitled to habeas relief.

CONCLUSION

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

Dated: February 15, 2022

Respectfully submitted,

s/ *David L. Annicchiarico*

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