No. _____

IN THE

Supreme Court of the United States

Levar Brown,

Petitioner,

v.

KELLY SANTORO,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the Ninth Circuit's denial of habeas relief in conflict with the prejudice analysis required by this Court's decision in *Brecht v. Abrahamson*, 507 U.S. 619 (1993)?

PARTIES TO THE PROCEEDING

The habeas petitioner is Levar Brown, currently imprisoned at Salinas Valley State Prison in Soledad, California. The current warden of that facility is Kelly Santoro. Prior case captions listed Charles Schuyler, the former warden of Salinas Valley State Prison, as respondent.

LIST OF PRIOR PROCEEDINGS

U.S. Supreme Court

- *Brown v. California*, No. 18-9813; petition for writ of certiorari denied October 10, 2019.
- *Brown v. California*, No. 18-5167; petition for writ of certiorari denied October 1, 2018.

U.S. Court of Appeals for the Ninth Circuit

- *Brown v. Schuyler*, No. 23-55536, 2026 WL 473941 (Feb. 19, 2026).

U.S. District Court for the Central District of California

- *Brown v. Martel*, No. 2:21-cv-03355-VAP-JC (May 17, 2023).
- *Brown v. Muniz*, No. 2:19-cv-02293-VAP-JC (Dec. 9, 2019).

California Supreme Court

- On habeas review
    - *In re Brown*, No. S254825; denied June 19, 2019.
    - *In re Brown*, No. S251178; denied March 13, 2019.
    - *In re Brown*, No. S248462; denied August 8, 2018.
    - *In re Brown*, No. S213087; denied October 10, 2013.
    - *In re Brown*, No. S206664; denied January 3, 2013.
    - *In re Brown*, No. S203725; denied September 12, 2012.
- On direct review
    - *People v. Brown*, No. S247216; petition for review denied April 11, 2018.

California Court of Appeal

- *In re Brown*, No. B289139; petition for writ of habeas corpus denied April 12, 2018.
- *People v. Brown*, No. B269810, 2018 WL 525642 (Jan. 24, 2018).

Los Angeles County Superior Court

- *People v. Brown*, No. BA426270; judgment entered January 20, 2016

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OPINIONS BELOW

The Ninth Circuit denied habeas relief in an unpublished opinion, *Brown v. Schuyler*, No. 23-55536, 2026 WL 473941 (Feb. 19, 2026). It is reproduced in the appendix at Pet. App. A. The district court's order denying relief is unpublished and reproduced in the appendix at Pet. App. B.

JURISDICTION

The Ninth Circuit's opinion denying relief was filed February 19, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1) and Supreme Court Rule 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment to the U.S. Constitution

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Section 1 of the Fourteenth Amendment to the U.S. Constitution

"No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

A. The Murder of Claudio Johnson

On the morning of May 30, 2010, Claudious Johnson woke up just before seven when his twin brother, Claudio,[1] went outside. 6-ER-1033–34.[2] This was part of Claudio's morning routine—he would get up, go out to his car, then come back to smoke on the porch of the family's apartment at the corner of 59th Place and Figueroa Street in Los Angeles. 6-ER-1026, 6-ER-1032–33. The Johnsons had moved into the apartment just three weeks prior. 6-ER-1027.

The next thing Claudious heard was the voice of an unknown man, yelling repeatedly "where you from?" and "what you got?" 6-ER-1035–36. He went to the porch and saw the man pointing a gun at his brother just inside the opening to the building's driveway. 6-ER-1037–38. The man was wearing

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[1] Members of the Johnson family are referred to by their first names where necessary to avoid confusion.

[2] Citations to "ER" and "RJN" refer to the Excerpts of Record and Request for Judicial Notice, filed in the Ninth Circuit and available on the Ninth Circuit PACER page at Dockets 26 and 27, *Brown v. Schuyler*, No. 23-55536.

a gray hoodie and jeans, with something that looked like a stocking cap pulled down to cover his face. 6-ER-1046–47.

The man told Claudious to come down the stairs or he would shoot, but Claudious instead ran inside to get help. 6-ER-1040–41, 45. The next thing he heard was a gunshot. 6-ER-1045. He rushed back out to see the man running away towards 59th Place and his brother lying on the ground, dead. 6-ER-1045–46.

Latriva Douglas, the Johnsons' downstairs neighbor, heard the yelling too and went to her back window, where she saw the shooting happen. 7-ER-1311–13. As the shooter was running away, she saw him stop, pull down his hood, and look back. 7-ER-1314. She thought he made eye contact with her and quickly shut her blinds, afraid she had been seen. 7-ER-1328.

Forever Merritt was nearby, sitting on the porch of her house at the corner of 59th Place and Flower Street. 5-ER-629, 5-ER-637. She heard a gunshot, and soon after saw a man walking east down 59th, wearing a gray hoodie and black basketball shorts with a stocking covering his face. 5-ER-638–39, 5-ER-645. The man turned onto Flower and got into a gray Cadillac that was parked illegally near the street corner. 5-ER-635–36, 5-ER-646–47. The car hit another car parked on the street as it drove away. 5-ER-655–58. Merritt believed the car's license plate was 6LEW16. 5-ER-669–70.

At the scene of the shooting, police found two sets of keys about ten feet from Claudio Johnson's body. 4-ER-549–50. They did not find any bullets, casings, or evidence of projectile impacts in the area. 4-ER-549, 4-ER-595–96. Broken plastic that looked like pieces of a car's taillight was recovered from the scene of the crash on Flower Street. 5-ER-623–26.

B. The Johnson family points police toward a local gang member: Michael Hughley.

Tiffany Johnson, the twins' sister, spoke with detectives the day of the crime. She told them about a local gang member named Michael Hughley, whom she knew as Knockdown. 3-ER-193–94. Hughley and a friend had been constantly harassing the family since they moved into the neighborhood, asking them where they were from. 3-ER-213–14. He and his gang, the 59 Hoovers, were "dying to know" whether her brothers were in a gang. 3-ER-198–203. He tried to get her number, and she gave him one that did not work because he would not leave her alone. 3-ER-208–09. The harassment was serious enough that the family had considered getting a restraining order. 3-ER-198–99.

Claudious Johnson told police about Hughley too. The day of the shooting, he said Hughley—whose name he did not know at the time—had tried to get his sister's number. 3-ER-275, 3-ER-281. Hughley and a friend came by the family's apartment calling out for his sister and on other

occasions had ridden through on bikes, staring the family down as they went by. 3-ER-275. Hughley "had the same looks" as the shooter and usually wore gloves. 3-ER-276. The day before the shooting, a gang member who may have been Hughley approached his brother at his car and asked where he was from. 3-ER-266. When Claudio responded that he was not in a gang, the gang member assaulted him. 3-ER-266.

In a second interview two weeks later, Claudious said he thought Hughley's voice was similar to the shooter's and that he believed Hughley was the person who shot his brother. 3-ER-358-59. Two days before the shooting he heard Hughley and his friend out in the street, calling for his sister. 3-ER-355. He also confirmed that Hughley was the one who attacked his brother the day before the shooting. 3-ER-353–54. Claudio told his girlfriend that Hughley pulled a gun on him and wanted to kill him. 3-ER-350–52.

C. The physical evidence leads to Levar Brown.

A grocery store rewards card attached to the keys found at the scene of the crime was registered to Levar Brown. 7-ER-1185–86. Brown was also the registered owner of a gray Cadillac SLS, license plate number 6LEA210. 7-ER-1187. The Cadillac was tracked to a scrapyard, where it was recovered. 7-ER-1188–89. Its back left taillight was broken. 7-ER-1189–90. Police held the broken plastic pieces from the crash scene next to the Cadillac's broken light

and thought they fit. 7-ER-1258. They also recovered surveillance video showing Brown picking up the Cadillac from a tow yard on July 10, 2010. 5-ER-808–09, 7-ER-1194–95. When police searched Brown's apartment it was in disarray, with clothes, garbage, and cell phones strewn all over the floor. 7-ER-1220–21. One of the keys found at the crime scene unlocked his front door. 7-ER-1223. Brown was arrested and charged with murder.

D. Brown moves to present evidence of third-party culpability.

Brown filed a pre-trial motion to introduce evidence of third-party culpability. In it, he pointed to Claudious and Tiffany Johnson's various statements describing Hughley's harassment of the family, attack on Claudio, and resemblance to the shooter. 3-ER-179–86. He attached as exhibits transcripts of the Johnson siblings' interviews with detectives. He also stated that Hughley was arrested blocks away from the shooting a few months later, carrying a gun that the lead investigating officer on the case believed was an "exact match" to the one Claudious described the shooter using. 3-ER-186. When questioned, Hughley said he had owned the gun since 2009 and never lent it to anyone else. 3-ER-186. He knew specific, non-public facts about the crime, most notably that a set of keys was dropped at the scene. 3-ER-186.

E. Brown's first three trials fail to reach a verdict.

Brown was tried four times in total, each before a different judge. The first ended in a mistrial before it reached the jury and the second ended when the prosecution voluntarily dismissed the charges due to a missing witness. Pet. App. D-31 n.3. The court at the first trial excluded the third-party culpability evidence, while the court at the second admitted it. 4-ER-484.

Before the third trial, the court held a hearing on the admissibility of the third-party culpability evidence. (RJN, Ex. A 16–25.) After hearing argument from both parties, the judge ruled that he would allow the admission of the evidence, so long as the defense had a witness already under subpoena who could testify to it on a non-hearsay basis. (RJN, Ex. A 23–24.)

At trial, Claudious Johnson testified that he witnessed a confrontation between local gang members and his brother three days before the shooting, when his brother went to put new speakers into his car. (RJN, Ex. B 286.) He also testified that Claudio and his sister were confronted by gang members every time they went out. (RJN, Ex. B 287.) Detectives testified that Claudious told them the shooter looked like a "bike rider" who went by the moniker "Knockdown," and picked someone he "had seen riding around on a bicycle in his neighborhood" out of a photo lineup. (RJN, Ex. B 527, 578.)

In addition to the evidence from the motion, Latriva Douglas testified that the shooter "looked like the guy from around the corner who had been

banging on the tenants," and that "the victim got banged on a day before he got killed." (RJN, Ex. B 638.) She told police she had seen him before when she spoke with them the day after the crime. (RJN, Ex. B 624, 636–37.) The jury at the third trial deadlocked, and another mistrial was declared. 4-ER-407.

F. Brown's fourth trial.

1. The court excludes all evidence of third-party culpability.

Before the fourth trial began, the prosecution filed a supplemental motion to exclude the third-party culpability evidence. It pointed to other statements Claudious Johnson made indicating he had not seen the shooter before and did not recognize his voice. 3-ER-171. It also claimed that he picked Hughley out of a photo lineup, but said he thought Hughley's friend, not Hughley, was the shooter. 3-ER-171–72. Additionally, the motion argued that Latriva Douglas was shown a photo lineup that included Hughley and said she thought the shooter was someone she had seen hanging out with Hughley, but not him. 3-ER-173. Finally, the motion acknowledged that Hughley was interviewed by police on November 2, 2010, but denied any responsibility for the murder. 3-ER-173. The motion's citations all referenced "page line numbers for the transcripts previously provided to the court by the defense as attachments to defendant's Motion to Admit Third Party

Evidence." 3-ER-171, n.1. However, the citations do not correspond with the page and line numbers of the defense motion, and many of the documents referenced are not in the record at all. *See* 3-ER-179–370.

The trial court denied the defense motion to admit third-party culpability evidence, saying it had "scoured these facts and looked for direct or circumstantial evidence that [Hughley] was physically present at any time close to the shooting" but "saw nothing that would place [Hughley] at the crime scene, or acting in any way that might be called perpetration of the crime." 4-ER-496–97. The court thus excluded all evidence of Hughley's culpability, although it left open the possibility of changing its ruling based on the testimony to come. 4-ER-498.

2. The prosecution case.

At trial, the prosecution presented evidence that the keys at the scene belonged to Brown—grocery store rewards and library cards attached to the keys were registered to him, and one of the keys opened the door to his apartment. 5-ER-721–25, 7-ER-1185, 7-ER-1223. An expert testified that DNA on the keys came from a single source and matched a sample from Brown. 6-ER-1006–15.

Brown's ex-girlfriend testified that she recognized a clicker on the keys at the scene as opening a Land Rover owned by Brown because of a broken button. 6-ER-916–17. She never knew Brown to be in a gang or have any

gang member friends, and she never saw any gang members in his presence. 6-ER-946–47. He was a student during their relationship, first at Los Angeles Trade Tech and then at UCLA. 6-ER-919.

Forever Merritt identified Brown's Cadillac as the one she saw on the morning of the crime. 5-ER-675–76. She did not see the face of the man who got into the car and could not identify him. 5-ER-678. The prosecution played the video of Brown picking the Cadillac up from the tow yard on July 10, 2010. 5-ER-808–14. A police officer also testified that he pulled Brown over in the Cadillac for a broken taillight, and that Brown told him he was in a gang when asked. 5-ER-733–37, 5-ER-760–61.

Claudious Johnson identified Brown as the shooter. 6-ER-1048–49. He admitted he had previously testified under oath that Brown was not the shooter, at a preliminary hearing on November 10, 2011. 6-ER-1076–78. He said he was lying then because he "didn't want to be bothered" and wanted to "go [on] with [his] life." 6-ER-1078–79. On further prompting, he said that he was also angry and wanted to take matters into his own hands. 6-ER-1079. When Brown's counsel tried to ask about his prior statements implicating Hughley, the court reiterated its ruling on the third-party culpability evidence and refused to allow any questioning beyond a general statement that Johnson indicated "someone other than Mr. Brown" was the shooter. 7-ER-1157–58.

There were only two witnesses who testified at the fourth trial who did not also testify at the third: Ruben Perez and Branden Matulich. 4-ER-374–84; RJN, Ex. B 31–39. Perez testified that he saw someone park Brown's Cadillac on his street and walk away a few weeks before it was towed to the yard where Brown later picked it up, but it was too dark for him to see any identifying details. 6-ER-961–66. Matulich was a highway patrol officer who testified that Brown reported his Land Rover as stolen on July 21, 2010. 7-ER-1100–11.

3. The defense case.

Latriva Douglas testified that she was sure Brown was not the person she saw kill Claudio Johnson. 7-ER-1316. The person she saw was between 17 and 20 years old—much younger than Brown. 7-ER-1332. She thought he looked like somebody in the neighborhood, but was not sure. 7-ER-1319. On cross, she said she told detectives it might have been "the guy that banged on Claudio the day before he got killed." 7-ER-1335. When, on redirect, she again brought up that she told detectives "what happened the day before Claudio got killed," the court interjected, and Brown's attorney could only clarify that she talked to police about "certain things that led up to [the shooting] in your mind" before excusing his witness. 7-ER-1336.

At closing, Brown's attorney argued that it made no sense for him to have killed Claudio Johnson. Brown lived in West Los Angeles, had a child,

owned two cars, and attended UCLA. 8-ER-1428–29. That he would be in South Los Angeles at seven on a Sunday morning killing someone over their perceived gang affiliation did not "pass the smell test." 8-ER-1429. The killer was "[p]robably a gangbanger. Probably because the family had just moved in a few weeks ago." 8-ER-1429.

The prosecution argued it was "painfully obvious" that Brown was the shooter. 8-ER-1378. "If there was evidence that indicated that anyone else in the entire world—in fact, in 50 billion earths—was involved in this, [Brown] would have brought it forward." 8-ER-1448. "All of the evidence, all of the names, all of the testimony have only ever been about this defendant and his choices." 8-ER-1455.

The jury found Brown guilty of first degree murder, with an additional enhancement for use of a firearm. 8-ER-1468–76. He was sentenced to 50 years to life. (Pet. App. E-42.)

G. Appellate and Post-conviction proceedings.

On direct appeal, the California Court of Appeal assumed the trial court abused its discretion by excluding Brown's third-party culpability evidence, but concluded any error was harmless under a state law standard. (Pet. App. D-35-36.) The California Supreme Court denied review. (Pet. App. C.) Brown filed multiple *pro se* petitions for writ of habeas corpus in state and federal courts before filing the instant petition in the district court, alleging

the violation of his Sixth Amendment right to present a defense as its sole claim. (Pet. App. B-13.) The district court denied the petition as untimely and alternately found that any error was not prejudicial on May 17, 2023. (Pet. App. B).

Brown appealed, and on February 19, 2026, the Ninth Circuit affirmed the district court's denial of his petition solely on prejudice grounds. The court noted the evidence the prosecution presented against Brown, including eyewitness testimony, physical evidence, and DNA evidence. Compared to this evidence, the court found the third-party culpability evidence was not sufficiently powerful. Thus, the court held any error that may have occurred was harmless and declined to address the question of timeliness. (Pet. App. A.)

REASONS FOR GRANTING THE WRIT

A writ of certiorari should be granted because the Ninth Circuit "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). In *Brecht v. Abrahamson*, 507 U.S. 619 (1993), the Court held that a habeas petitioner seeking relief must show that constitutional error had a "substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 637. The Court elaborated in *O'Neal v. McAninch*, 513 U.S. 432 (1995) that this standard requires courts to

independently assess the effect of the excluded evidence *on the jury*. *Id.* at 436-37.

The Ninth Circuit found that Brown could not meet the *Brecht* standard, but it did so by conducting its own independent evaluation of what it perceived to be the strength of the evidence against him, rather than evaluating the excluded third-party culpability evidence's effect on the jury, as this Court's case law requires. The third-party culpability evidence in this case was presented at Brown's third trial, leading to a hung jury. When it was not presented at his fourth trial, the jury unanimously voted to convict. This clear evidence of a substantial and injurious effect did not enter into the Ninth Circuit's analysis. This Court should grant certiorari or reverse to reinforce that the effect of an error on the jury is the ultimate target of the *Brecht* analysis.

A. The focus of *Brecht*'s prejudice test is the jury.

The "substantial and injurious effect" test announced in *Brecht* was lifted from *Kotteakos v. United States*, 328 U.S. 750 (1946). In *Kotteakos*, a group of thirty-two defendants were charged with conspiracy in connection with fraudulent insurance applications, with the alleged conspiracy revolving around a single defendant. *Id.* at 753. Seven were ultimately convicted. *Id.* There was apparently no connection between many of the thirty-one other defendants except that they had all engaged in similar transactions with the

central defendant. *Id.* at 754. On appeal, the Second Circuit found that the evidence showed at least eight separate conspiracies, rather than the single one charged in the indictment, and the indictment therefore should have been dismissed. *Id.* at 754-55. But the court concluded the error was harmless because the evidence of the defendants' guilt was so strong. *Id.* at 755.

In overturning the Second Circuit, this Court stressed that determining whether error had a "substantial and injurious effect" requires more than simply weighing the strength of the evidence:

> [I]t is not the appellate court's function to determine guilt or innocence. Nor is it to speculate upon probable reconviction and decide according to how the speculation comes out. Appellate judges cannot escape such impressions. But they may not make them sole criteria for reversal or affirmance. Those judgments are exclusively for the jury, given always the necessary minimum evidence legally sufficient to sustain the conviction unaffected by the error.

Id. at 763-64 (citations omitted). Ultimately, because guilt in a criminal trial is "established by the judgment of laymen," the question is "what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting." *Id.* at 764.

Furthermore, the *Brecht* Court adopted the *Kotteakos* standard in part because it believed that "because the *Kotteakos* standard is grounded in the federal harmless-error rule 28 U.S.C. § 2111, federal courts may turn to an

existing body of case law in applying it." *Brecht*, 507 U.S. at 638. The existing body of case law that the *Brecht* Court referenced shows that reviewing courts must focus their inquiry on the jury, placing special emphasis on any information in the record that speaks to the actual impact of an error on the jurors. *See Tipton v. Socony Mobil Oil Co.*, 375 U.S. 34, 37 (1963) (disagreeing with lower court's harmless error analysis because a question the jury asked the judge indicated the error affected them); Bre*v. United States*, 326 U.S. 607, 614-15 (1946) (finding error was not harmless because the jury deliberated for seven hours, then returned a guilty verdict five minutes after receiving an erroneous instruction).

B. The Ninth Circuit acted as an independent factfinder, rather than assessing the evidence's impact on the jury.

The Ninth Circuit affirmed the district court's denial of Brown's petition solely on prejudice grounds. In doing so, the court weighed the "direct evidence incriminating Brown" against the evidence implicating Hughley, which it found was not "particularly powerful." (Pet. App. A-2 (quoting *Bradford v. Paramo*, 100 F.4th 1088, 1103 (9th Cir. 2024).) The fact that Brown was not convicted in an earlier trial where the third-party culpability evidence was presented to the jury played no role in the court's analysis. (Pet. App. A.)

Because the focus of the prejudice inquiry under *Brecht* is the jury, the jury's refusal to convict Brown at his earlier trial was the most important piece of evidence in the record at that stage of the analysis. Brown's third trial was substantially similar to his fourth, except that at the third trial the jury was permitted to hear some, but not all, of the third-party culpability evidence. It is rare to have such clear evidence of an error's actual effect on the jury in the record. By ignoring this evidence and instead deciding the issue based on its own view of the strength of the prosecution's case, the Ninth Circuit placed itself in the role reserved for the jury. *See Kotteakos*, 328 U.S. at 763-64.

The placement of the jury in the role of finder of fact reflects "a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). Because the distinction between the roles of judge and jury is so important, this Court has emphasized that courts may not usurp the jury's role. *See Sandstrom v. Montana*, 442 U.S. 510, 523 (1979) (Courts may not "invade the factfinding function which in a criminal case the law assigns solely to the jury.") (cleaned up); *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) ("[T]o hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial

guarantee."). Accordingly, on review an appellate court must consider evidence that speaks to the actual effect an error had on the real jury, not assess the impact the error would have had on a hypothetical jury composed of circuit court judges. *See Sullivan*, 508 U.S. at 279. The Ninth Circuit failed to do so here.

Because the question of prejudice arises in almost every habeas case, it is vital that courts correctly apply the proper standard. This case presents a perfect vehicle for this Court to reinforce that prejudice has occurred if an error had a "substantial and injurious effect or influence *in determining the jury's verdict*," *Brecht*, 507 U.S. at 637 (emphasis added), not a substantial effect on the reviewing court's assessment of the weight of the evidence.

CONCLUSION

For the reasons stated above, Brown respectfully requests that this Court grant his petition for certiorari, or alternatively vacate the Ninth Circuit's judgment and remand.

Respectfully submitted,

CUAUHTEMOC ORTEGA
Federal Public Defender

DATED: May 18, 2026

By: _____
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**Counsel of Record*

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CERTIFICATE PURSUANT TO RULE 33

Pursuant to Rule 33.2, I hereby certify that this petition is less than 40 pages, and therefore complies with the page limit set out in Rule 33. This brief was prepared in 13-point Century Schoolbook font.

Respectfully submitted,

CUAUHTEMOC ORTEGA
Federal Public Defender

DATED: May 18, 2026

By: _____
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