FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff - Appellee*, v. EDUARDO VALENCIA, *Defendant - Appellant*.	No. 24-3820 D.C. No. 1:22-cr-02073-SAB-1 OPINION

Appeal from the United States District Court
for the Eastern District of Washington
Stanley Allen Bastian, District Judge, Presiding

Argued and Submitted February 27, 2026
Richland, Washington

Filed September 3, 2026

Before: Jennifer Sung, Salvador Mendoza, Jr., and Roopali H. Desai, Circuit Judges.

Opinion by Judge Mendoza, Jr.

SUMMARY*

Criminal Law

The panel reversed Eduardo Valencia's convictions for Hobbs Act robbery and brandishing a firearm during an armed robbery, and remanded for a new trial.

Valencia, who has tattoos covering the backs of his hands, contended that the district court committed reversible error by compelling him to take the stand as a prerequisite for showing his hand tattoos to the jury. Surveillance footage, although blurry, did not appear to show tattoos on the left hand of the robber who lost his glove. The defense maintained that the display of Valencia's hands is not testimonial evidence and would not make him subject to cross-examination. The district court rejected this argument.

Following *United States v. Bay*, 762 F.2d 1314 (9th Cir. 1984), the panel held that by forcing Valencia to take the stand in order to display an identifying physical characteristic to the jury, the district court violated Valencia's Fifth Amendment right not to testify, and the error was not harmless.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

COUNSEL

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W. Miles Pope (argued), Goddard Pope PLLC, Boise, Idaho, for Defendant-Appellant.

OPINION

MENDOZA, JR., Circuit Judge:

The constitutional rights of criminal defendants cannot be determined with a roll of the dice. The right not to testify is one of the "many unassailable rights" constitutionally guaranteed to criminal defendants during trial. *Villarreal v. Texas*, 607 U.S. 465, 467 (2026). These rights are more than mere formalities—they form the backbone of a criminal justice system designed to provide all defendants with fair trials. This privilege against self-incrimination stands as a pillar of our Constitution and was deliberately safeguarded by the Framers as crucial to the preservation of liberty against the overreach of government power.

A jury convicted Eduardo Valencia of Hobbs Act robbery and brandishing a firearm during an armed robbery of La Milpa Market in Yakima, Washington. Valencia appeals his convictions and 162-month custodial sentence on several grounds. Our analysis starts and ends with

Valencia's first contention: that the district court committed reversible error by compelling Valencia to take the stand as a prerequisite for showing his hand tattoos to the jury. We have jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). In *United States v. Bay*, we clearly held that a district court commits constitutional error by allowing a defendant to "present the clearly relevant evidence of his tattoos only at the price of forgoing his Fifth Amendment right not to testify." 762 F.2d 1314, 1316 (9th Cir. 1984). Thus, we reverse and remand for a new trial.

I.

A.

On the evening of November 18, 2020, store manager Ramon Valdez-Ramos stood at the counter of La Milpa Market as a black car drove slowly past. Two masked men entered the market. One of the men approached the counter with an envelope in his hand, telling Valdez-Ramos that he wanted to cash a check. The man then pulled out a gun and threatened to shoot Valdez-Ramos if he did not hand over the money in the cash register. The second masked man approached, also brandishing a gun. When Valdez-Ramos resisted, the men pistol-whipped him and struck him with their hands before making off with about $16,000 in cash.

In the skirmish between the three men, one robber dropped the envelope and the other lost his left glove. The abandoned glove was recovered from the scene and sent to a Washington State Patrol crime laboratory for DNA testing, which revealed that DNA on the glove matched the genetic profile of a man named Eduardo Valencia. The envelope was addressed to Valencia's parents' home, and it had been sent by his child's school district. The responding officer

also reviewed the market's security footage and identified the black car filmed shortly before the robbery as a Chrysler 300 sedan. Valencia was arrested while driving a black Chrysler 300 on July 26, 2022.

B.

Valencia was charged with one count of Hobbs Act robbery under 18 U.S.C. § 1951(a) and one count of "brandish[ing], carry[ing], and us[ing] a firearm" while committing that robbery. Valencia has tattoos covering the backs of his hands. So, at trial, Valencia's attorney attempted to capitalize on surveillance footage from La Milpa Market that, although blurry, did not appear to show tattoos on the left hand of the robber who lost his glove. Reminiscent of the famous Johnnie Cochran line,[1] the defense argued that "if it's not his hand, then he's not the man." To support their theory, they sought to show Valencia's hands to the jury without him taking the stand. The defense maintained that "the display of his hands is not testimonial evidence and would not put him subject to cross-examination."

The district court rejected that argument, concluding that the act of Valencia showing his hands was "testimony" that "subject[ed] him to cross-examination." Notably, before the jury returned to the courtroom, the government brought to the court's attention a Ninth Circuit case, *United States v. Bay*, which holds that a defendant's display of his tattoos is non-testimonial. The government explained that *Bay* reversed a district court's ruling that "the defendant

[1] "If it doesn't fit, you must acquit." Court TV, *CA v. OJ Simpson: Week 36*, at 50:30, https://www.courttv.com/title/6-w36-defense-closing-argument/.

could not display [his] tattoos without giving up his Fifth Amendment rights." When the district court asked what that meant for the trial, the government stated, "he can just show them," and "I can't question him." But the district court responded that it was "willing to roll the dice" because it believed that the government *should* be allowed to question Valencia about the tattoos. It reasoned that if Valencia was going to suggest that his hands were different from those shown in the security footage, the government should have the opportunity to question him "within that limited parameter of his presentation."

Valencia took the stand, testifying that the tattoos on his left hand had been there for "[c]lose to nine . . . years." The government then briefly cross-examined Valencia, establishing that Valencia had acquired multiple tattoos at different times. Both sides rested.

Before the trial concluded, the government moved to reopen its case to introduce "newly discovered evidence." The new evidence was a picture posted to Facebook showing Valencia without tattoos on his fingers. The district court granted the motion to reopen. The government recalled the investigating agent, who testified that she had found the picture on Facebook the previous day "[a]fter court." The agent reminded the jury that Valencia had testified the previous day that his hands had been tattooed for nine years, but that the picture was posted on June 11, 2020, less than four years before the trial. The government's closing statement stressed the apparent inconsistency between Valencia's testimony and the Facebook post:

> [T]he defendant took the stand yesterday, and he showed you his left hand with very

> distinctive tattoos on his fingers, and he told you that he got those tattoos nine years ago . . . And I would submit to you, ladies and gentlemen, when you review the exhibit, he does not have those distinctive tattoos on his fingers, and that photo was from June of 2020. So why would the defendant tell you that he did if he didn't? I think the answer is obvious. You determine the credibility of witnesses.

The jury requested to see current pictures of Valencia's hands while deliberating, and the district court responded by permitting Valencia to show his hands to the jury again, in person. The jury ultimately found Valencia guilty on both counts.

II.

A.

Valencia maintains that the district court ignored binding Ninth Circuit law by forcing him to take the stand as a condition of showing his tattoos to the jury and, by doing so, committed reversible constitutional error. The government insists that there was no error and, in the alternative, that any error was harmless. The district court's decision to "roll the dice" left Valencia with the impossible choice to forgo presenting exculpatory evidence or forgo his Fifth Amendment right to refuse to give testimony. We hold that this was constitutional error and that the error was not harmless.

Our error analysis is governed by *United States v. Bay*. In that case, our court faced a strikingly similar question: whether a criminal defendant could display his hand tattoos

to the jury while refusing to take the stand. 762 F.2d at 1315. We held that the defendant could display this identifying physical characteristic while declining to testify. *Id.* at 1315–16. That is because "[a] criminal defendant has an absolute right not to testify" arising from the Fifth Amendment. *Salinas v. Texas*, 570 U.S. 178, 184 (2013) (citation modified) (plurality opinion). The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The Self-Incrimination Clause "permits a person to refuse to testify against himself at a criminal trial in which he is a defendant." *Vega v. Tekoh*, 597 U.S. 134, 141 (2022) (quoting *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984)).

Bay concerned a bank-robbery trial in which a defendant sought to display his distinctive hand tattoos after a bank teller's testimony describing the robber's hands made no mention of tattoos. 762 F.2d at 1315–16. The defendant requested to show his hands without taking the witness stand. *Id.* at 1315. But the district court found that such a display would be testimonial, "and therefore that [the defendant] would have to take the witness stand and subject himself to cross-examination" if he showed his hand tattoos to the jury. *Id.* The defendant chose not to take the stand and consequently was not permitted to display his hand tattoos. *Id.*

On appeal, we disagreed. Noting that the government could compel the defendant to show identifying physical characteristics to the jury, we reasoned that if showing these characteristics is considered non-testimonial "when it is to the government's advantage, surely the defendant can make the same showing without taking the stand, when such a showing is to his advantage." *Id.* We held that

showing identifying physical characteristics, like tattoos, is non-testimonial. *Id.* In other words, showing physical characteristics to the jury "does not infringe the Fifth Amendment privilege against self-incrimination." *Id.* Ultimately, we remanded so that the district court could "hear testimony as to the foundation for display of the tattoos." *Id.* at 1317.

Here, though the government brought *Bay* to the district court's attention in the first instance and explained that Valencia must be permitted to show his hands to the jury without being subject to cross-examination, the government now attempts to distinguish *Bay* from the facts of this case. Its arguments are unpersuasive. Indeed, the government concedes that the district court "incorrectly concluded that displaying [Valencia's] hands alone was testimonial," yet contends that Valencia "was not presented with the same choice that Bay was" because the jury could see Valencia's hands when he was sitting at counsel table. That the jury could see Valencia's hands in open court misses the point. The fundamental error is that the district court forced Valencia to take the stand in order to display an identifying physical characteristic—hand tattoos—to the jury. That was precisely the error in *Bay*, and it is the error here.[2]

B.

As for the district court's decision not to apply *Bay* based on the reasoning that the government "should be allowed to

[2] For purposes of our constitutional-error analysis, it is also irrelevant that in *Bay*, the defendant made the opposite (yet equally harmful) choice to not take the stand and forgo showing an identifying physical characteristic. Even though Valencia chose to show his tattoos to the jury, he was forced to do so in lieu of his Fifth Amendment right to be free from self-incrimination.

question [Valencia]," "[a] district judge may not respectfully (or disrespectfully) disagree with his learned colleagues on his own court of appeals who have ruled on a controlling legal issue." *Hart v. Massanari*, 266 F.3d 1155, 1170 (9th Cir. 2001). Published decisions from this court are binding law that *must* be followed within the circuit "unless and until overruled by a body competent to do so." *In re Zermeno-Gomez*, 868 F.3d 1048, 1052 (9th Cir. 2017) (quoting *Gonzalez v. Arizona*, 677 F.3d 383, 389 n.4 (9th Cir. 2012) (en banc)). *Bay* was and is controlling law, and the district court's decision not to apply it at the expense of Valencia's Fifth Amendment right not to testify was error, snake eyes, by any measure.

C.

So we are left with a constitutional error. But the government waves it away as "harmless." It characterizes the other evidence against Valencia—the black Chrysler 300, the envelope, and the dropped glove with Valencia's DNA on it—as so overwhelming that any error in compelling Valencia to take the stand could not have changed the outcome of the trial. It also stresses the jury's relatively brief deliberation time and the fact that the jury could see Valencia's hands from where he was sitting in the courtroom.

We apply the constitutional-error standard set forth in *Chapman v. California*, 386 U.S. 18, 24 (1967). *Bay*, 762 F.2d at 1316. Constitutional errors do not necessitate a new trial if they are harmless. *Pitts v. Mississippi*, 607 U.S. 1, 6 (2025) (per curiam). But "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman*, 386 U.S. at 24. The government bears

the burden of establishing harmless error beyond a reasonable doubt. *United States v. Velarde-Gomez*, 269 F.3d 1023, 1035 (9th Cir. 2001).

The harmless-error standard under *Chapman* is a high bar, one the government's argument does not clear. Although the government introduced other evidence tying Valencia to the robbery, it obviously put a premium on Valencia's testimony. The government moved to reopen its case after Valencia was forced to take the stand, and it deliberately emphasized the apparent inconsistency between his testimony and the Facebook post in its closing statement. It asked why Valencia would say he tattooed his hands nine years ago when a 2020 Facebook post seemed to show otherwise. The answer, the government suggested, was "obvious." Nor did the jury ask to see these other pieces of evidence that the government now marshals as the linchpin. Instead, during deliberations, the jury asked to see a current picture of Valencia's hand tattoos during deliberations. It strains credulity that the jury would affirmatively request to see Valencia's hand tattoos again, during deliberations, if they considered the tattoos irrelevant to the question of Valencia's culpability.

The government's argument that Valencia's position in the courtroom nullified any error also fails. The district court remarked that, despite the "much greater distance" when Valencia sat at counsel table, Valencia's tattoos were still "clearly" visible and there were "no complaints of blindness on the part of the jury." But as *Bay* articulated, "[c]ourtroom geography" should not determine whether a defendant is compelled "to take the stand to present potentially exculpatory physical evidence." 762 F.2d at 1316. A defendant's right not to take the stand should not be determined by yet another crapshoot: where he happens

to be seated in relation to the jury box. Plus, the crux of the error here is not the visibility of Valencia's tattoos—what damaged Valencia's defense was his forced testimony and the subsequent introduction of the 2020 Facebook post.

Finally, the jury's relatively brief deliberations do not establish beyond a reasonable doubt that the constitutional error was harmless. The deliberation clock is no better gauge of guilt than a coin flip. Though this court has held that longer deliberations can weigh against a finding of harmless error, *see Velarde-Gomez*, 269 F.3d at 1036, a short deliberation period is not enough to clear the demanding beyond-a-reasonable-doubt standard. We do not know why the jury reached its verdict with such speed, though its questions point to Valencia's hand tattoos as a focal point. Perhaps the other evidence clinched the conviction, but for all we know, the tattoo fiasco was so damaging that it carried the day on its own.

The government argues we should mirror *Bay* by declining to reverse and, at most, ordering a limited remand to determine whether Valencia can "lay a foundation for introducing his hand tattoos through additional testimony." But this is where *Bay* and this case diverge. The *Bay* defendant chose not to take the stand and not to display his hand tattoos to the jury. 762 F.2d at 1315. Valencia, by contrast, chose to take the stand to show his tattoos and the government did not raise an objection as to foundation below. "[I]f, when evidence is offered, there is no objection based on lack of a foundation, and the evidence is received, the point is not available on appeal." *Id.* at 1317. Thus, the government's argument regarding foundation lacks merit and a limited remand to the district court is not available.

Requiring Valencia to testify in order to display his tattoos was a consequential constitutional error. We reverse Valencia's convictions and remand for a new trial.

REVERSED AND REMANDED.[3]

[3] The motion to supplement the record, Dkt. No. 21, is denied as moot.