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April 30, 2015

Hon. Frank McGuire, Clerk
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

re: *People v. Riley*, S225382: Amicus Curiae Letter of California Appellate Defense Counsel in Support of Appellant Riley's Petition for Review (Rule 8.500(g))

Dear Mr. McGuire:

Pursuant to rule 8.500(g)(1) of the California Rules of Court, California Appellate Defense Counsel (CADC) respectfully submits this letter in support of appellant Riley's petition for review.

Interest of *Amicus Curiae*

California Appellate Defense Counsel (CADC) is a statewide organization of approximately four hundred appellate lawyers who regularly represent California criminal defendants in the state's appellate courts and in federal habeas corpus proceedings. CADC's members frequently confront the issue of whether constitutional trial error requires reversal, and resolution of that issue often controls whether our clients will or won't be able to obtain relief. CADC's members thus have an ongoing interest in ensuring that the Courts of Appeal of this State apply the proper standard of prejudice to constitutional trial errors.[1]

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution to the preparation or submission of the brief.

Amicus Curiae's Argument for Granting Review: Where the Court of Appeal Is Far From Alone in Mistakenly Relying on What Amounts to Substantial Evidence Review to Find Even Federal Constitutional Errors Harmless, This Court Should Intervene.

An appellate justice can probably recite it while sleeping: where a criminal trial is marred by federal constitutional error, under *Chapman v. California* (1967) 386 U.S. 18, 24, the government can avoid reversal only by proving harmlessness beyond a reasonable doubt. But rote recitation doesn't ensure faithful application. "The proof lies not in closely parsing what the Court of Appeal *said* about the standard of review, but in what the Court of Appeal *actually did*." (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 712, fn. 6, italics added.)

CADC urges this Court to figuratively reawaken the Courts of Appeal by granting review in *Riley* — then seriously and critically exploring what proper *Chapman* analysis requires and what it prohibits. To a very limited extent, that's what happened three years ago: this Court held that where elemental instructional error occurred, the required standard was the "*opposite*" of the "less demanding" substantial-evidence review apparently employed by the Court of Appeal. (*People v. Mil* (2012) 53 Cal.4th 400, 417-418, original italics.) But that court had not said it was relying on a lenient standard; on the contrary, it claimed to be "[a]pplying the *Chapman* test[.]" (*People v. Mil* (5th Dist. Ct. of App. no F056605, Jun. 17, 2010) 2010 WL 2407152 *12.) Recitation — but not application.

As we'll show in this letter, the materially erroneous *Chapman* analysis in the Court of Appeal's *Mil* decision was far from an inexplicable, isolated mistake this Court happened to catch. On the contrary, it was just one case among many — an epidemic whose casualties are serving prison terms instead of facing new, fair trials. This Court's *Mil* opinion could have sent a more comprehensive message to the Courts of Appeal about how *Chapman* review is — and isn't —

done. Then again, *Chapman* itself should have sent that message long ago, as should a host of subsequent decisions carrying the heavy weight of the Supremacy Clause. But as Justice Liu recently warned, "it is reasonable to worry that *Chapman* will continue to mean something different in the courts of California than what the high court has repeatedly said it means." (*People v. Jackson* (2014) 58 Cal.4th 724, 808 (conc. & dis. opn. of Liu, J.).)

Justice Liu is right to worry: for whatever reasons, the constitutional message hasn't sunk in. True, the essential elements of *Chapman* review may be long "settle[d]," but you wouldn't know it from a survey of California cases — as far from the "uniform[]" teachings of the Supreme Court as they can be. (Cal. Rules of Court, rule 8.500(b)(1).)

Does that mean review must be granted in every such proceeding? No, but one case — and *Riley*, presenting only this problem, is ideal — should be the vehicle for this Court to clearly:

(a) acknowledge the systemic problem;

(b) identify, explain, and apply harmless error review's key elements — distinguishing what is and isn't proper; and

(c) announce to the Courts of Appeal that a failure to adhere to these standards risks, if not full review, an order transferring the matter back for *Chapman* 2.0 — i.e., citing *Riley* and directing the Court of Appeal to follow settled principles in reevaluating the impact of constitutional error. (Cal. Rules of Court, rule 8.500(b)(4).)

A. The State Bears a Heavy Burden to Establish That a Constitutional Error Did Not Contribute to the Verdict, and a Reviewing Court Has an Obligation to Conduct Appropriate Whole-Record Review

When there has been federal constitutional error, the normal test for prejudice is the one set forth in *Chapman v. California*, *supra*, 386 U.S. 18:

"whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." (*Id*. at p. 23, internal quotation marks omitted.) Or, put another way, the Constitution "requir[es] the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Id*. at p. 24. *See also, e.g.*, *Deck v. Missouri* (2005) 544 U. S. 622, 635; *Arizona v. Fulminante* (1991) 499 U. S. 279, 295-296.)

In appellant Riley's case, as in most criminal cases, it was the prosecution that was "the beneficiary of a constitutional error," and therefore it was the prosecution that bore the burden of establishing "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." And the U.S. Supreme Court's decisions have made unmistakably clear that, in making this inquiry, "the general rule of the post-*Chapman* cases [is] that the whole record be reviewed in assessing the significance of the errors." (*Yates v. Evatt*, 500 U.S. at p. 409. *Accord, e.g.*, *Rose v. Clark* (1986) 478 U.S. 570, 583 ["The question is whether, on the whole record . . . the error . . . [is] harmless beyond a reasonable doubt."], internal quotation marks omitted; *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681 ["Since *Chapman*, we have repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt."]; *United States v. Hasting* (1983) 461 U.S. 499, 509 ["Since *Chapman*, the Court has consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole . . . ."].)

As appellant Riley points out, whole-record review necessarily requires consideration not merely of the evidence and inferences most favorable to the prosecution but also of those matters that favor the defense or undercut the prosecution's case. "[T]he true strength of the prosecution's proof cannot be

assessed without considering challenges to the reliability of the prosecution's evidence." (*Holmes v. South Carolina* (2006) 547 U.S. 319, 330-331.) Moreover, whole-record review encompasses matters beyond the evidence itself, such as whether the prosecutor exploited the error when arguing to the jury, whether the length of the jury's deliberations or its requests for read-back indicate that the jury had difficulty reaching a decision, or whether — as in Mr. Riley's case — the jury was unable to reach a verdict on related counts or in a prior trial with substantially the same evidence. (*See, e.g., Arizona v. Fulminante*, *supra*, 499 U.S. at pp. 297-298, 300; *Satterwhite v. Texas* (1988) 486 U.S. 249, 260; *Chapman v. California*, *supra*, 386 U.S. at p. 25; *Fahy v. Connecticut* (1963) 375 U.S. 85, 88-89; *Krulewitch v. United States* (1949) 336 U.S. 440, 444-445.)

B. Sixth Amendment Strictures on *Chapman* Prejudice Inquiry

The *Chapman* prejudice analysis is affected in crucial ways by the Sixth Amendment. Most significantly, in undertaking *Chapman* inquiry, an appellate court is not permitted to engage in fact-finding, assess credibility, or weigh competing inferences. A defendant has a "Sixth Amendment right to have essential facts found by a jury beyond a reasonable doubt" (*Dillon v. United States* (2010) 560 U.S. 817, 828), and thus "it is the responsibility of the jury — not the court — to decide what conclusions should be drawn from evidence admitted at trial" (*Cavazos v. Smith* (2011) 565 U.S. 1, 132 S.Ct. 2, 4, 181 L.Ed.2d 311).[2]

[2] *See also, e.g.*, *Apprendi v. New Jersey* (2000) 530 U.S. 466, 483-484 (discussing "the [constitutional] requirements of trying to a jury all facts necessary to constitute a statutory offense, and proving those facts beyond reasonable doubt"); *U.S. v. U.S. Gypsum Co.* (1978) 438 U.S. 422, 446 ("ultimately the decision on the issue of intent must be left to the trier of fact alone"); *Davis v. Alaska*, (1974) 415 U.S. 308, 317 (describing jury as "sole judge of the credibility of a witness"); *Weiler v. United States* (1945) 323 U.S. 606, 611 ("We are not authorized to look at the printed record, resolve conflicting evidence, and reach the

The nature of these Sixth Amendment limits is made clear in the Supreme Court's decisions. For example, in *Delaware v. Van Arsdall*, *supra*, 475 U.S. 673, where a defendant had been precluded from fully cross-examining a prosecution witness, the High Court instructed that the "correct inquiry" required the reviewing court to "*assum[e] that the damaging potential of the cross-examination were fully realized*." (*Id*. at p. 684, italics added.) Similarly, in *Yates v. Evatt*, *supra*, 500 U.S. 391, the Court held that a constitutionally improper mandatory-presumption instruction required reversal of a murder conviction because prosecution-favorable inferences were "not *compelled as a rational necessity*" and "the jury *could have taken petitioner's behavior as confirming his claim*" and "we *cannot rule out the possibility beyond a reasonable doubt*" that the decedent had been killed inadvertently. (*Id.* at pp. 410-411, italics added.) And in *Neder v. United States* (1999) 527 U.S. 1, which involved constitutional error arising from the failure to instruct on an element of a charged offense, the Court held that in making the *Chapman* assessment, "a court, in typical appellate-court fashion, asks whether the record *contains evidence that could rationally lead to a contrary finding* with respect to the omitted element." (*Id.* at p. 19, italics added.) The Court answered the question in the negative because the factual matter to which the instructional error was relevant was both "uncontested and supported by overwhelming evidence." (*Id.* at p. 17.)

Thus, as these decisions make clear, proper harmless error review is conducted with due regard for the "Sixth Amendment right to have essential facts found by a jury beyond a reasonable doubt" and the constitutional principle that "it is the responsibility of the jury — not the court — to decide what conclusions

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conclusion that the error was harmless because we think the defendant was guilty. That would be to substitute our judgment for that of the jury and, under our system of justice, juries alone have been entrusted with that responsibility.").

should be drawn from evidence admitted at trial." (*Cavazos v. Smith*, *supra*, 132 S.Ct. at p. 4.)

C. There Is Widespread Disregard for Whole-Record Review in California's Courts of Appeal

As the foregoing makes clear, whole-record review entails consideration, through a Sixth Amendment lens, of (1) evidence and inferences that are favorable to a criminal defendant (i.e., that affirmatively point to the defendant's innocence); (2) evidence and inferences that are unfavorable to the prosecution (i.e., that impeach or cast doubt upon the prosecution's witnesses or evidence, and thus lessen the likelihood that a jury would find guilt to be proven beyond a reasonable doubt); and (3) matters beyond the evidence (such as a jury's difficulties in reaching a verdict or a prosecutor's exploitation of the error when arguing to the jury). As appellant Riley argues in seeking review, the Court of Appeal's failure to conduct proper whole-record review in his case involved all of these factors, but that court's failure is symptomatic of widespread failures to conduct such review in the Courts of Appeal of this State generally.

All too commonly, the courts assess a constitutional error by considering only the most prosecution-favorable evidence and inferences, while ignoring evidence and inferences that tend to favor the defense or undercut the prosecution. Such an approach may be appropriate when a defendant raises a challenge to the sufficiency of the evidence to sustain a conviction (*see Jackson v. Virginia* (1979) 443 U.S. 307), but it is quite clearly *not* appropriate when assessing whether a constitutional violation is harmless. (*Satterwhite v. Texas*, 486 U.S. at pp. 258-259 [the test for determining prejudice "is not whether the legally admitted evidence was sufficient to support the [verdict], which we assume it was, but rather, whether the State has proved beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."], internal quotation marks omitted.)

In the rest of this letter, *amicus curiae* brings to this Court's attention the widespread nature of deficient whole-record review in the Courts of Appeal, of which *Riley* is an example. What follows are recent examples of this deficiency. The listing is necessarily underinclusive because defective whole-record review can seldom be detected from the face of a court's written opinion. It is only on rare occasions that an appellate court will explicitly indicate that it is finding an error harmless under *Chapman* on the basis that there is "substantial evidence" or "sufficient evidence" in the prosecution's case to support the verdict apart from the error. More often, though, it is what is *not* mentioned in the opinion that constitutes the departure from whole-record review. Such decisions simply omit reference to evidence that is defense-favorable or prosecution-unfavorable and ignore other facts in the record that tend to indicate that the error "might have contributed to" the verdict. (*Chapman*, *supra*, 386 U.S. at p. 23.) This latter type of decision is, by its very character, much harder to discover, but amicus has found several from throughout the courts and includes them in the compilations below.

1. Examples of California Courts of Appeal Ignoring Defense-Favorable Evidence and Inferences, Looking to "Substantial Evidence" of Guilt, and Otherwise Viewing the Evidence from an Exclusively Prosecution-Favorable Perspective

- *People v. Sedillo* (2015) ___ Cal.App.4th ___ (2015 WL 1569710): "We therefore must 'determine whether the instructional ambiguity is harmless beyond a reasonable doubt under the *Chapman [v. California*, *supra*, 386 U.S. 18] standard.' . . . Thus, even with the omission in the given the instruction, under the facts of this case — defendant waiting in the getaway car while Moreno approaches the Huizar home with a rifle — it is not reasonably likely the jury concluded that defendant only formed the intent to aid Moreno *after* he had shot the victims." (*Id*. at *17, original italics.)

- *People v. Quezada, Sierra, & Garcia* (Jan. 12, 2015, no. B244800) 2015 WL 140044; see Pet. for Review filed by appellant Sierra (S224372, filed

Feb. 24, 2015, denied Apr. 15, 2015) at pp. 3-4, 7, 9-10, 17-19, 25-28 (Court of Appeal ignored facts unfavorable to the prosecution).

- *People v. White* (Jan. 9, 2015, E059488) 2015 WL 128787 *8: "we find the error [in failing to define theft in connection with a charge of receiving stolen property] was harmless. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Watson* (1956) 46 Cal.2d 818, 836.) . . . . [T]he record contains ample evidence that Rivera intentionally kept the rental car beyond the consent given to him by Jennifer, and for such a long time that it deprived the Hummels of the remaining value of the rental agreement. Therefore, we conclude there is no reasonable probability that the error contributed to the verdict."

- *People v. Montoya* (Jan. 7, 2015, no. B243042) 2015 WL 112792 *12; see Pet. for Review (S224457, filed Feb. 20, 2014, denied Apr. 15, 2015) at pp. 13, 15-16, 22 (Court of Appeal ignored defense-favorable facts).

- *People v. Barrientos* (Nov. 19, 2103, no A134147) 2013 WL 6072250; see Pet. for Review (no. S215657, filed Dec. 31, 2013, denied Mar. 12, 2014) at pp. 26-29 (challenging Court of Appeal's failure to conduct whole record review).

- *People v. Flores* (Sept. 13, 2013, no. B241530) 2013 WL 4963223 *8: "given the nature and quality of the other evidence showing that defendant was the shooter, a reasonable juror could have found defendant guilty of the charged crimes beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)"

- *People v. Royal* (July 18, 2013, no. B241841) 2013 WL 3777147 *3: "As discussed in the preceding part of this opinion, there is ample substantial evidence to support the 'fear' element of robbery. Even if, as appellant contends, the special instruction 'implicated [his] federal constitutional right to be tried by an impartial jury,' any error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)"

- *People v. Mercado* (2013) 216 Cal.App.4th 67. See Pet. for Review (no. S211241, filed May 22, 2103) at p. 40 (defense favorable facts ignored).

- *People v. Estrada* (May 9, 2013, B235543) 2013 WL 1910314: any error in admitting testimony of purported eyewitness was harmless because (1) "the jury could reasonably have concluded" that the defendant

committed first-degree murder (*id.* at *7); (2) the prosecution's evidence, viewed from a pro-prosecution perspective, provided "overwhelming evidence" of guilt (*id.* at *6, *8 [twice], *10); and (3) defendant's references to deficiencies and inconsistencies in the prosecution's case did "not demonstrate any error was not harmless beyond a reasonable doubt" (*id.* at *8 [twice], *9).

- *People v. Aguilar* (Jan. 29, 2013, no. F061462) 2013 WL 325263; see Pet. for Review (S209226, filed Mar. 12, 2013, denied May 15, 2013) at pp. 1-2, 4-8, 11-16 (Court of Appeal found "any possible" Confrontation Clause error harmless; analysis limited to recital of evidence supporting the judgment).

- *People v. Martinez* (Nov. 30, 2012, no. A134355) 2012 WL 5985629 *4: "We nonetheless conclude that any error in admitting appellant's statements was harmless beyond a reasonable doubt. [Citing *Arizona v. Fulminante* and *Chapman v. California*, *supra*.] There was more than enough evidence, without appellant's statements, to support his conviction."

- *People v. Gonzalez* (2012) 210 Cal.App.4th 875, 995: "we conclude the admission of Christopher's confession was harmless because even excluding the unlawful confession we conclude there is sufficient admissible evidence in the record from a variety of 'disinterested reliable' witnesses to support his conviction."

- *People v. Ernest* (Oct. 10, 2012, no. B232792) 2012 WL 4815408 *12: appellant claimed his statement to police was involuntary or coerced; held: "even if defendant's recorded statement was not admitted into evidence, the evidence of his guilt of the charged crimes was substantial. . . . [T]here was other evidence establishing defendant's guilty state of mind, including his leaving the hospital and not returning, and his behavior in the parking lot outside the hospital. Green's testimony alone provided sufficient evidence of his guilt, and was accompanied by ample circumstantial evidence."

- *People v. Huezo* (July 16, 2012, no. B233864) 2012 WL 2879019 *6; see Pet. for Review (no. S204962, filed Aug. 27l 2012, denied Oct. 17, 2012) at pp. 5-7, 9 (challenging Court of Appeal's approach of considering only prosecution-favorable facts and inferences in assessing prejudice).

- *People v. White* (June 27, 2012, no G044741) 2012 WL 2412073 *3: "Further, while defendant argues that Dana was a 'critical witness' for the prosecution, without whose testimony he could not have been convicted on count three, he is simply incorrect. . . . Indeed, had Dana not testified at all, substantial evidence of defendant's guilt, in the form of police testimony, would still exist. Thus, even if we had concluded that excluding the 1994 conviction was erroneous, it was not prejudicial under even the most stringent standard. (See *Chapman v. California* (1967) 386 U.S. 18.)"

- *People v. Lewis* (June 7, 2012, no. C056876) 2012 WL 2053543; see Pet. for Review (S204103, filed July 20, 2012, denied Sept. 12, 2012) at pp. 1-2, 5-8, 14-22 (in declaring confrontation error harmless, Court of Appeal ignored or discounted key evidence supporting defense theories, viewed conflicting evidence as to support the judgment, and found no "prejudice" from the erroneously admitted evidence);

- *People v. Bojorquez* (Aug. 4, 2011, no. B226372) 2011 WL 338689 *4: "any error was harmless under both *People v. Watson* (1956) 46 Cal.2d 818, 836 and *People v. Chapman* (1967) 386 U.S. 18, 24. There was substantial evidence, including eyewitness identification and items found in defendant's Chevy truck, connecting defendant with the crimes." Court ignored that defendant presented alibi defense that would have supported a defense verdict, see 2011 WL 338689 *3.

- *People v. Brown* (July 12, 2011, no. B224439) 2011 WL 2811525 *9: "The error, however, was harmless. There is substantial evidence from which a reasonable juror could infer that there was intent to kill. . . . In view of the evidence, whether under the standard set forth in *People v. Watson*, *supra*, 46 Cal.2d 818, 836, or *Chapman v. California, supra*, 386 U.S. 18, 836, the error was harmless."

- *People v. Ennis* (Jan. 18, 2011, no. B212811) 2011 WL 137199, *9: "Even if the confrontation clause objection had been preserved, any error in admitting the evidence was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18.) Because the evidence in this case was substantial, defendant cannot establish prejudice."

- In *People v. Katzenberger* (2010) 178 Cal.App.4th 1260, 1269: court finds no *Chapman* prejudice in an assault case by (1) relying on a purportedly "plausible claim" by the alleged victim as to why police found no bruises or

marks and (2) discounting defense-favorable testimony because, *inter alia*, it "does not compel a conclusion" that no blow was inflicted.

- *In re Julius A.*(Sep. 21, 2010, no. B214341) 2010 WL 3636217: alibi defense was presented, but "even assuming [a defense witness's] statement was erroneously excluded, any such error was harmless. . . . Given the substantial evidence of Julius' presence at the scene of the crime, . . . any alleged constitutional error in excluding the evidence was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)"

- *People v. Miller* (July 27, 2010, no. A121646) 2010 WL 2913613 *13-*15: See Pet. for Review (no. S186011, filed Sep. 2, 2010, denied Oct. 13, 2010) at pp. 17-21 (challenging Court of Appeal's prejudice analysis on the basis that it depended upon ignoring defense-favorable evidence or inferences).

- *People v. Vang* (June 7, 2010, no. D504343) 185 Cal.App.4th 309, 322, 110 Cal.Rptr.3d 282 (2010): Court of Appeal analyzed prejudice by asking "whether the error was harmless, that is, whether there is enough evidence . . . from which a reasonable jury could infer defendants committed the assault [for a certain purpose]."'[3]

- *People v. Brown* (Jan. 19, 2010, no. B212584) 2010 WL 161497 *3: failure to instruct on aider-and-abettor liability was error, but "we find the error harmless beyond a reasonable doubt because there was substantial evidence that defendant aided and abetted the crime. (*Chapman v. California* (1967) 386 U.S. 18, 24.)"

2. Examples of California Appellate Courts Failing to Consider Factors Beyond the Evidence Itself

- *People v. Montoya*, *supra*, 2015 WL 112792 *12; see Pet. for Review (S224457, filed Feb. 20, 2014, denied Apr. 15, 2015) at pp. 16, 23-24 (Court of Appeal ignored prosecutor's argument).

- *People v. Quezada, Sierra, & Garcia*, *supra*, 2015 WL 140044; see Pet. for Review filed by appellant Sierra (S224372, filed Feb. 24, 2015, denied Apr.

[3] Review in *Vang* was subsequently granted by this Court, and the case was disposed of by rejecting the defendant's claim of error, never reaching the issue of prejudice. (See *People v. Vang* (2011) 54 Cal.4th 1038, 1052.)

15, 2015) at pp. 7, 26-27 (Court of Appeal ignored prosecutor's jury argument and mid-deliberation questions by codefendant's jury).

- *People v. Strain* (June 26, 2013, no. C062509) 2013 WL 3233242 *27: "We reject defense arguments that prejudice is shown by the length of deliberations (eight days) and the jurors' requests for a rereading of testimony, a legal definition of intent, etc. Those circumstances establish nothing."

- *People v. Mercado*, *supra*, 216 Cal.App.4th 67. See Pet. for Review (no. S211241, filed May 22, 2103) at pp. 43-45 (instructions and prosecutor's argument ignored).

- *People v. Aguilar*, *supra*, 2013 WL 325263; see Pet. for Review (S209226, filed Mar. 12, 2013, denied May 15, 2013) at pp. 1-2, 8-10 ("any possible" Confrontation Clause error harmless, but missing entirely from the opinion: any acknowledgment that (a) the jury followed five court days of evidence with four such days in deliberation; (b) during the latter period jurors requested seven testimony readbacks; (c) after six hours of deliberation, the jury announced it was deadlocked; and (d) in finding defendant guilty of second-degree murder, the jury rejected the prosecution's premeditation theory).

- *People v. Lewis, supra,* 2012 WL 2053543; see Pet. for Review (S204103, filed July 20, 2012, denied Sept. 12, 2012) at pp. 18-20 (Court of Appeal ignored prosecutor's closing argument, extensively relying on the witness interview admitted in violation of the Confrontation Clause);

- *See People v. Katzenberger*, *supra*, 178 Cal.App.4th at p. 1269 (summarized above).

3. Examples of California Appellate Courts Invading the Province of the Jury by Engaging in Appellate Fact-Finding

- *People v. Quezada, Sierra, & Garcia*, *supra*, 2015 WL 140044; see Pet. for Review filed by appellant Sierra (S224372, filed Feb. 24, 2015, denied Apr. 15, 2015) at pp. 3, 7, 17-19 (Court of Appeal resolved factual ambiguities and disputed facts, made credibility determinations).

- *People v. Montoya*, *supra*, 2015 WL 112792 *12; see Pet. for Review (S224457, filed Feb. 20, 2014, denied Apr. 15, 2015) at pp. 15-16, 21-22 (Court of Appeal resolved disputed facts).

- *People v. Iniguez* (July 24, 2014, no. H038896) 2014 WL 3670002 *9: "Defendant's statement to the police, in which he described Monica as being curious about sexual intercourse and initiating intercourse with him at age 11, while they slept in a bedroom with other family members, was not credible."

- *People v. Rezac* (Sept. 25, 2013, no. F064139) 2013 WL 5348390 *8-*9: any error was harmless under *Chapman* because victim's testimony was "credible, consistent, and plausible" while defendant "evidently impeached himself in the minds of the jury by telling a story at trial that was inconsistent with his prior statements and, to put it kindly, less plausible than [the victim's] version of the events."

- *People v. Mercado*, *supra*, 216 Cal.App.4th 67. See Pet. for Review (no. S211241, filed May 22, 2103) at pp. 40-41 (making credibility determinations).

- *People v. Aguilar, supra,* 2013 WL 325263; see Pet. for Review (S209226, filed Mar. 12, 2013, denied May 15, 2013) at pp. 1-5, 11-12 ("any possible" Confrontation Clause error harmless; Court of Appeal criticized defendant's trial testimony as "riddled with inconsistencies").

- *People v. Ochoa* (Aug. 31, 2012, no. A129751) 2012 WL 3765914 *6: trial court improperly excluded evidence that complaining witness had made false reports of rape in the past, though the defense was consent; held: error was harmless under *Chapman*, "[g]iven the defendant's frankly implausible testimony."

- *People v. Ackles* (Sept. 10, 2012, no. D060772) 2012 WL 3900676: "we are satisfied that any error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) There was abundant expert testimony demonstrating the burns on [victim's] hand were intentionally inflicted. Ackles's explanations were implausible, and her expert was thoroughly impeached and lacked the credentials to cast any doubt on the mountain of expert evidence that these burns were the result of deliberate child abuse."

- *People v. Huezo* (July 16, 2012, no. B233864) 2012 WL 2879019 *6; see Pet. for Review (no. S204962, filed Aug. 27l 2012, denied Oct. 17, 2012) at pp. 5-7, 9 (challenging Court of Appeal's approach of considering only prosecution-favorable facts and inferences in assessing prejudice).

- *People v. Huezo*, *supra*, 2012 WL 2879019 *6; see Pet. for Review (no. S204962, filed Aug. 27l 2012, denied Oct. 17, 2012) at pp. 6-7, 12-15 (Court of Appeal drew conclusions as to what prosecution-favorable facts and inferences "[t]he evidence establishes" and "[i]t is reasonable to infer").

- *People v. Miller*, *supra*, 2010 WL 2913613 *13-*14; see Pet. for Review (no. S186011, filed Sep. 2, 2010, denied Oct. 13, 2010) at pp. 17-21 (challenging Court of Appeal's prejudice analysis on the basis that it depended upon adopting debatable interpretations most favorable to the prosecution, as if the appellate court were itself the trier of fact).

4. <u>Additional Cases</u>

In addition, amicus is aware of a number of petitions for review that have challenged the failure of the Courts of Appeal to conduct proper whole-record review in one or more of the ways we have outlined. See:

- *People v. Records* (Aug. 29, 2012, no. E053628) 2012 WL 3726751; see Pet. Review filed Oct. 1, 2012, denied Nov. 28, 2012 (no. S205495);

- *People v. Madrigal* (June 5, 2013, no F062969) 2013 WL 2450922; see Pet. Review filed July 15, 2013, denied Aug. 21, 2103 (no. S212023);

- *People v. Yanez* (June 26, 2013, no. B244668) 2013 WL 3224596; see Pet. Review filed July 29, 2013, denied Sept. 11, 2013 (S212391);

- *People v. Robles* (Feb. 25, 2014, no. B232828) 2014 WL 715818, see Pet. Review filed Mar. 28, 2014 (S216892) denied June 11, 2014) at pp. 5-10;

- *People v. Iuvale* (Mar. 27, 2014, no. D062725) 2014 WL 1254860; see Pet. Review filed May 5, 2014, denied July 9, 2014 (S218265);

Conclusion

Appellant Riley's case and the other examples cited above show that there is a widespread practice in the Courts of Appeal of misapplying *Chapman*'s test for harmless error. The result is that countless criminal convictions obtained in violation of the Constitution, including Mr. Riley's, are being affirmed because the courts are failing to follow the law of the land as established by the United States Supreme Court. Review should be granted.

Respectfully submitted this 30th day of April, 2015,

Richard C. Neuhoff
Stephen Greenberg
Counsel for
California Appellate Defense Counsel

CERTIFICATE OF COMPLIANCE

I certify that the above Amicus Curiae letter uses a 13 point Times New Roman font and contains 4,838 words.

Dated: April 30, 2015

Richard C. Neuhoff

PROOF OF SERVICE BY MAIL

I, the undersigned, declare:

I am employed in the City of New Britain, Hartford County, State of Connecticut. I am an active member of the State Bar of California and not a party to the within action; my business address is 11 Franklin Square, New Britain, CT 06051-2604. On today's date, I served the following:

CADC AMICUS CURIAE LETTER

on the parties in *People v. Riley* (S225382), by

(1) placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at New Britain, CT, addressed as follows:

Deputy District Attorney
330 W. Broadway
Eleventh Floor
San Diego, CA 92101

Hon. Laura W. Halgren
San Diego County Courthouse
Dept. 38
220 West Broadway
San Diego, CA 92101

Patrick Morgan Ford
1901 First Avenue, Suite 400
San Diego, CA 92101

(2) transmitting a .pdf version of this document by electronic mail to the Court of Appeal and to counsel for respondent using the following email addresses:

4d2nbrief@jud.ca.gov ADIEService@doj.ca.gov

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on May 1, 2015, at New Britain, CT 06051.

/s/
RICHARD C. NEUHOFF