No. 14-5760

In The
Supreme Court of the United States

JONATHAN KEITH JACKSON,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of California

BRIEF OF *AMICUS CURIAE* CALIFORNIA APPELLATE DEFENSE COUNSEL IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

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 reviewing courts of this State apply the proper standard of prejudice to constitutional trial errors.[1]

SUMMARY OF THE ARGUMENT

In the nation's most populous State, constitutional errors at trial are all too routinely forgiven when reviewing courts cite the requisite harmless error standard but apply its virtual opposite. So where the Constitution places squarely on the prosecution, as "the beneficiary of the error," the burden to prove harmlessness, *Chapman v. California*, 386 U.S. 18, 24 (1967), many a California decision expressly or

[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. *Cf.* Rule 37.6. Counsel of record received timely notice of the intent to file this brief and granted consent for its filing. *Cf.* Rule 37.2(a).

implicitly demands from the defendant a showing of actual prejudice. And where "the whole record" must be tested for "the significance of the errors[,]" *Yates v. Evatt*, 500 U.S. 391, 409 (1991), a California appellate court is often satisfied simply by a form of substantial evidence review, whereby the court ignores defense-favorable and prosecution-unfavorable evidence and inferences and/or disregards other matters in the record that indicate the error "might have contributed to the conviction," *Chapman*, 386 U.S. at 23.

It has been several years since four Justices' eyebrows were sufficiently raised to issue a warning that "in future cases the California courts should take care to ensure that their burden allocation conforms to the commands of *Chapman*." *Gamache v. California*, 562 U.S. ___, 131 S.Ct. 591, 593 (2010) (statement of Sotomayor, J., joined by Ginsburg, Breyer, and Kagan, JJ.). Here in petitioner Jackson's case, dissenting Justice Goodwin Liu forcefully argued that the California Supreme Court has failed to heed that warning. *People v. Jackson*, 58 Cal.4th 724, 789-808, 319 P.2d 925 (2014) (conc. & dis. opn.). However, *amicus curiae* will show that the basic problem is both deeper and wider than would appear from a review of the *Jackson* decision. The deficiencies in *Chapman* analyses are commonplace throughout the appellate courts of the State, including the intermediate appellate courts, and go well beyond the question of burden allocation.

Justice Liu has expressed understandable alarm: "Given the precedential force of these decisions [in

which the California Supreme Court has deviated from *Chapman*'s mandate], 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*, 58 Cal.4th at 808. The goal of this *amicus curiae* brief is to offer this Court evidence that Justice Liu's concern is well founded empirically.

AMICUS CURIAE'S ARGUMENT FOR GRANTING CERTIORARI

In rejecting petitioner's claim that the constitutional error at his penalty retrial warranted a reversal of the death judgment, the California Supreme Court purported to find that "the People have satisfied their burden under *Chapman [v. California*, 386 U.S. 18] to show that any federal errors are harmless beyond a reasonable doubt." *People v. Jackson,* 58 Cal.4th 724, 748 (2014). In fact, however, the state court failed to accurately apply principles laid down by this Court in *Chapman* and its progeny.

The state court's approach was deficient in two basic respects. First, the court failed to consider the whole record of the case. Most prominently, the court failed to take into account a powerful indicator of prejudice: at a prior penalty trial, jurors who had heard the same evidence as at the retrial had been unable to reach a verdict, thus showing that the case for death was a close one. *See Jackson*, 58 Cal.4th at

794 (conc. & dis. opn. of Liu, J.); *see also Dow v. Virga,* 729 F.3d 1041, 1049 (9th Cir. 2013) ("Dow's first trial resulted in a deadlocked jury, proof that his case was a close one.").

Second, while the state supreme court purported to recognize that *Chapman* places the burden on the State to show the error was harmless beyond a reasonable doubt, *see Jackson*, 58 Cal.4th at 748 (maj. opn.), the court's analysis shows that it actually placed the burden upon the petitioner to establish the error was prejudicial. *See id*. at 789-807 (conc. & dis. opn. of Liu, J.).

The purpose of the present *amicus* brief is to show the larger context against which the California Supreme Court's deficient *Chapman* analysis took place. As *amicus* will demonstrate, the deficiencies in that court's approach in petitioner's case are emblematic of the widespread misapplication of *Chapman* principles throughout the appellate courts of this State. Nor has the state supreme court taken any of the numerous opportunities presented to it on discretionary review to correct the error when committed by the intermediate court of appeal. Thus, until this Court intervenes, that misapplication is going to continue. It is for that reason that *amicus* respectfully requests that this Court grant certiorari.

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 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 24. *See also, e.g., Deck v. Missouri*, 544 U.S. 622, 635 (2005); *Arizona v. Fulminante*, 499 U.S. 279, 295-96 (1991).

In petitioner'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." Moreover, this 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 409. *Accord, e.g., Rose v. Clark*, 478 U.S. 570, 583 (1986) ("The question is whether, on the whole record . . . the error . . . [is] harmless beyond a reasonable doubt.") (internal quotation marks omitted);

Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986) ("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*, 461 U.S. 499, 509 (1983) ("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. . . .").

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. As this Court has noted in another context, "the 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*, 547 U.S. 319, 330-31 (2006). 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 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*, 499 U.S. at 297-98, 300; *Satterwhite v. Texas*, 486 U.S. 249, 260 (1988); *Chapman v. California*, 386 U.S. at 25; *Fahy v. Connecticut*, 375 U.S. 85, 88-89 (1963); *Krulewitch v. United States*, 336 U.S. 440, 444-45 (1949).

Moreover, 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," 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*, 565 U.S. 2, 132 S.Ct. 2, 4, 181 L.Ed.2d 311 (2011); *Dillon v. United States*, 560 U.S. 817, 828 (2010) [a defendant has a "Sixth Amendment right to have essential facts found by a jury beyond a reasonable doubt").[2]

The nature of these Sixth Amendment limits is made clear in this Court's decisions. For example, in *Delaware v. Van Arsdall*, 475 U.S. 673, where a

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

defendant had been precluded from fully cross-examining a prosecution witness, this 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 684 (emphasis added). Similarly, in *Yates v. Evatt*, 500 U.S. 391, this 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 410-11 (emphasis added). And in *Neder v. United States*, 527 U.S. 1 (1999), which involved constitutional error arising from the failure to instruct on an element of a charged offense, this 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 19 (emphasis added). This 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 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 should be drawn from evidence admitted at trial." *Cavazos v. Smith*, 132 S.Ct. at 4.

B. There Is Widespread Disregard for Whole-Record Review in California's Appellate Courts

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). The California Supreme Court's failure to conduct proper whole-record review in petitioner's case involved primarily the third of these factors, but it is symptomatic of a widespread failure to conduct such review in the appellate courts of the State generally, and it explains why the state supreme court has repeatedly declined to grant review in any of the numerous cases where a *Chapman* deficiency has been presented to the court on discretionary review.

Most 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*, 443 U.S. 307 (1979), but it is quite clearly *not* appropriate when assessing whether a constitutional violation is harmless. *Satterwhite v. Texas*, 486 U.S. at 258-59 (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 present brief, *amicus curiae* brings to this Court's attention the widespread nature of deficient whole-record review in California, of which *Jackson* 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, or they ignore other facts in the record that tend to indicate that the error "might have contributed to" the verdict. *Chapman*, 386 U.S. at 23. This latter type of decision is, by its very character, much harder to discover, but *amicus* has found several from throughout the State's appellate courts and includes them in the compilations below.

1. Examples of California Appellate Courts 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. Morell*, 2014 WL 527223 (Feb. 11, 2014, no. A134567), *cert. pending sub nom. Sciutto v. California* (no. 14-5865, filed Aug. 11, 2014): *see* petition for writ of certiorari at 13-14 (appellate court's *Chapman* analysis failed to consider defense-favorable evidence and inferences).

- *People v. Flores*, 2013 WL 4963223 *8 (Sep. 13, 2013, no. B241530) ("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*, 2013 WL 3777147 *3 (July 18, 2013, no. B241841) ("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. Estrada*, 2013 WL 1910314 (May 9, 2013, B235543), *cert. denied sub nom. Estrada v. California*, 134 S.Ct. 936 (2014): 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). *See* Cert. Petition (no. 13-7128) at 7, 16-19.

- *People v. Martinez*, 2012 WL 5985629 *4 (Nov. 30, 2012, no. A134355): "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*, 210 Cal.App.4th 875, 995 (Oct. 29, 2012) ("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*, 2012 WL 4815408 *12 (Oct. 10, 2012, no. B232792) (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*, 2012 WL 2879019 *6 (July 16, 2012, no. B233864), *cert. den. sub nom. Huezo v. California* (Mar. 18,

2013, no. 12-8295): *See cert. petition* at 10-13 (challenging appellate court's approach of considering only prosecution-favorable facts and inferences in assessing prejudice).

- *People v. White*, 2012 WL 2412073 *3 (June 27, 2012, no. G044741) ("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. Bojorquez*, 2011 WL 338689 *4 (Aug. 4, 2011, no. B226372) ("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 ignores that defendant presented alibi defense that would have supported a defense verdict, *see* 2011 WL 338689 *3.)

- *People v. Mercado*, 2011 WL 2936791 (July 21, 2011, no. B223451), *cert. den. sub nom. Mercado v. California* (Dec. 9, 2013, no. 13-6990). *See Cert. Pet*. filed Oct. 17, 2013.

- *People v. Brown*, 2011 WL 2811525 *9 (July 12, 2011, no. B224439) ("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*, 2011 WL 137199, *9 (Jan. 18, 2011, no. B212811) ("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*, 178 Cal.App.4th 1260, 1269 (2010) (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.*, 2010 WL 3636217 (Sep. 21, 2010, no. B214341) (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*, 2010 WL 2913613 *13-*15 (July 27, 2010, no. A121646), *cert. den. sub nom. Miller v. California* (Feb. 28, 2011, no. 10-8124): *See cert. petition* at 11-16 (challenging appellate court's prejudice analysis on the basis that it "depended upon ignoring defense-favorable evidence or inferences and adopting debatable interpretations most favorable to the prosecution.").

- *People v. Vang*, 185 Cal.App.4th 309, 322, 110 Cal.Rptr.3d 282 (2010) (June 7, 2010, no. D504343) (court of appeal analyzes 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*, 2010 WL 161497 *3 (Jan. 19, 2010, no. B212584) (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. Strain*, 2013 WL 3233242 *27 (June 26, 2013, no. C062509): "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. Morell, supra*, 2014 WL 527223 (appellate court failed to consider the prosecutor's exploitation of the erroneous instruction in her argument to the

[3] Review in *Vang* was subsequently granted by the California Supreme 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*, 54 Cal.4th 1038, 1052 (2011).

jury), *see pending cert. petition sub nom. Sciutto v. California* (no. 14-5865) at 14.

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

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

- *People v. Rezac*, 2013 WL 5348390 at *8-*9 (Sep. 25, 2013, no. F064139) (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. Ochoa*, 2012 WL 3765914 *6 (Aug. 31, 2012, no. A129751) (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*, 2012 WL 3900676 (Sep. 10, 2012, no. D060772) ("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, supra*, 2012 WL 2879019 *6: *See cert. petition* at 10-14 (no. 12-8295, filed Mar. 18, 2013) at 10-13 (court of appeal drew conclusion 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 cert. petition* at 11-16 (challenging appellate court's prejudice analysis on the basis that it "depended upon ignoring defense-favorable evidence or inferences and adopting debatable interpretations most favorable to the prosecution, as if the appellate court were itself the trier of fact.").

4. Additional Cases

In addition, *amicus* is aware of a number of petitions for discretionary review filed in the California Supreme Court that have challenged the failure of the intermediate courts of appeal to conduct proper

whole-record review in one or more of the ways we have outlined. All have been denied except one that is pending. *See*:

- *People v. Lewis*, 2012 WL 2053543 (June 7, 2012, no. C056876); *see* Pet. Review filed July 20, 2013, denied Sep. 12, 2013 (no. S204103);
- *People v. Records*, 2012 WL 3726751 (Aug. 29, 2012, no. E053628); *see* Pet. Review filed Oct. 1, 2012, denied Nov. 28, 2012 (no. S205495);
- *People v. Aguilar*, 2013 WL 325263 (Jan. 29, 2013, no. F061462); *see* Pet. Review filed Mar. 12, 2013, denied May 15, 2013 (no. S209226);
- *People v. Madrigal*, 2013 WL 2450922 (June 5, 2013, no. F062969); *see* Pet. Review filed July 15, 2013, denied Aug. 21, 2013 (no. S212023);
- *People v. Yanez*, 2013 WL 3224596 (June 26, 2013, no. B244668); *see* Pet. Review filed July 29, 2013, denied Sep. 11, 2013 (S212391);
- *People v. Robles*, 2014 WL 715818 (Feb. 25, 2014, no. B232828); *see* Pet. Review filed Mar. 28, 2014 (S216892) denied June 11, 2014) at 5-10;
- *People v. Iuvale*, 2014 WL 1254860 (Mar. 27, 2014, no. D062725; *see* Pet. Review filed May 5, 2014, denied July 9, 2014 (S218265);

- *People v. Lewis*, 2014 WL 3405846 *10 (July 15, 2014, no. B241236); *see* Pet. Review filed Aug. 22, 2014 (no. S220153), still pending.

C. There Is Widespread Disregard for *Chapman*'s Requirement that the State Bear the Burden to Show that Federal Constitutional Error Is Harmless

The second fundamental flaw in the California Supreme Court's inquiry into *Chapman* harmlessness in petitioner's case is that it effectively assigned to the defendant the burden of establishing that he was prejudiced, rather than requiring the prosecution to "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman*, 386 U.S. at 24; *see People v. Jackson*, 58 Cal.4th at 789-808 (conc. & dis. opn. of Liu, J.). That this is a widespread problem in California is borne out by the fact that there is another petition for writ of certiorari currently before this Court raising this precise issue. *See* cert. pet. in *Sciutto v. California, supra*, no. 14-5865 (filed Aug. 11, 2014) § II.A at 20-24. The *Sciutto* petition contains a sampling of the lower court decisions in which the burden has been shifted to the defendant to establish *Chapman* prejudice. *Amicus* adds the below cases to the *Sciutto* listing:

- *People v. Holeman*, 2013 WL 3790901 *17 (July 19, 2013, no. E053332) ("Under either standard [*Chapman* and the state

test for prejudice], defendants cannot demonstrate prejudice.").

- *People v. Flores*, 2013 WL 3724863 *7 (July 15, 2013, no. B237696) ("Nor can defendant establish he was prejudiced by the admission of the four statements to which defense counsel objected. . . . Thus, any error associated with the admission of the objected-to statements was harmless under . . . the federal beyond a reasonable doubt test.").
- *People v. Johnson*, 2013 WL 3120692 *4 (June 21, 2013, no. A131027) ("Even assuming the trial court should not have so instructed the jury, defendant has failed to demonstrate prejudicial error requiring reversal under any standard of review. (*Chapman v. California* (1967) 386 U.S. 18, 24.)").
- *People v. Garcia*, 2012 WL 3764742 *12 (Aug. 31, 2012, no. A126353) ("even if the evidence should have been excluded, we conclude its admission was harmless under any standard of review. [Citing *Chapman*.]. . . . We therefore conclude defendant has not demonstrated that the admission of Rudkin's preliminary hearing testimony was prejudicial error requiring reversal.").

CONCLUSION

Petitioner's case and the other examples cited above show that there is a widespread practice in California's appellate courts of misapplying *Chapman*'s test for harmless error. The result is that countless criminal convictions obtained in violation of the Constitution, including petitioner's, are being affirmed because the California courts are failing to follow the law of the land as established by this Court. Certiorari should be granted.

Respectfully submitted this 12th day of September, 2014,

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