No.

IN THE SUPREME COURT OF THE UNITED STATES

LETICIA MONTOYA,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA,
SECOND APPELLATE DISTRICT, DIVISION FOUR

PETITION FOR WRIT OF CERTIORARI

Sara H. Ruddy
Counsel of Record
2020 Milvia Street, Ste. 300
Berkeley, CA 94704
Tel: (510) 548-4248
Fax: (510) 548-4248
sara.ruddy@gmail.com

QUESTION PRESENTED

When a reviewing court is assessing whether an instructional error that permitted the jury to find the defendant guilty on an erroneous legal theory requires reversal of a criminal convicton, do the Sixth Amendment and *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) permit the court to resolve disputed facts in favor of the verdict and ignore evidence in the record that demonstrated there was a reasonable possibility that the jury relied on the erroneous legal theory to find the defendant guilty?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The Court of Appeal entered its judgment on January 7, 2015. A copy of the decision is attached as Appendix A.

Petitioner timely filed a petition for rehearing in the Court of Appeal, which was summarily denied on January 28, 2015. A copy of the order denying rehearing is attached as Appendix B.

Petitioner filed a petition for review and a request for judicial notice in

the California Supreme Court. The California Supreme Court granted the request for judicial notice but denied review on April 15, 2015. A copy of the order appears as Appendix C.

The instant Petition for Writ of Certiorari is filed within 90 days of that order.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to to a speedy and public trial, by an impartial jury. . . .

Former California Penal Code section 12034, subdivision (c) provided[1]:

> Any person who willfully and maliciously discharges a firearm from a motor vehicle at another person other than an occupant of a motor vehicle is guilty of a felony punishable by imprisonment in state prison for three, five, or seven years.

Californa Penal Code section 187, subdivision (a), provides:

> Murder is the unlawful killing of a human being, or a fetus, with

[1] This provision was repealed, effective January 1, 2012. Cal. Stats. 2010 ch. 711, §4. Penal Code section 26100, subdivision (c), added by Cal. Stats. 2010, ch. 711, §6, is identical.

malice aforethought.

California Penal Code section 188 provides:

Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

When it is shown that the killing resulted from the intentional doing of an act with express or implied malice as defined above, no other mental state need be shown to establish the mental state of malice aforethought. Neither an awareness of the obligation to act within the general body of laws regulating society nor acting despite such awareness is included within the definition of malice.

California Penal Code section 189 provides, in pertinent part:

. . . . [A]ny murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree. All other kinds of murders are of the second degree.

. . . .

California Penal Code section 31 provides in pertinent part:

All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission . . . are principals in its commission.

STATEMENT OF THE CASE

A. Proceedings in the Trial Court

Petitioner Leticia Montoya was convicted of discharging a firearm from a motor vehicle at an individual outside the vehicle and first degree murder, committed by shooting from a motor vehicle. Former Cal. Pen. Code 12034, subd. (c)[2]; Cal. Pen. 187 & 189. 1CT 178, 179. Undisputed evidence established that Ms. Montoya was the driver of the car, not the shooter.

Evidence. At about 2 o'clock on the morning of December 28, 2008, Abraham Guerrero, Nick Perez, and Kevin Montenegro were talking together, in front of Guerrero's mother's house on Correnti Street in the Pacoima district of Los Angeles, when a white car drove slowly by. 3RT 227, 230, 4RT 326, 327. Guerrero was wearing a black and white baseball cap with the letter "A" on it. 4RT 393-394.

As the car approached, the lights went out and the barrel of a rifle poked out from the passenger window. 3RT 231. The car stopped a few feet away. The front passenger asked where they were from, a question Perez and Montenegro understood as a gang challenge. 3RT 233, 235; 4RT 330, 331. Perez tried to grab the rifle. 4RT 337-338. During the struggle he heard it go off. He just let go and the car took off. 4RT 337.

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[2] This provision was renumbered, effective January 1, 2012. It is now codified as California Penal Code section 26100, subdivision (c). Cal. Stats 2010, ch. 711. § 6.

Guerrero died from a single gunshot wound, which went through his left arm into his chest and penetrated the aorta. 5RT 498, 500-501.

Both Montenegro and Perez identified codefendant Sergio Flores as the shooter. 3RT 245; 4RT 345.

Jose Andalon, who had been charged with 11 counts of residential burglary and was facing a life sentence as a third striker, had agreed to testify for the prosecution in exchange for a twelve-year determinate term and dismissal of 10 of the 11 counts 6RT 608, 6RT 659. Andalon testified that he was one of the founders of a gang known as Little Pacoima and of a subset of the gang called the Pacoima Southside Locos (PSSL). 5RT 434-435. He also claimed he was a "shot caller" of the gang at the time of the Guerrero homicide. 5RT 578.

According to Andalon, Montoya and Flores were also members of PSSL. 7RT 808-814, 851, 872. Among the group's major rivals were the Van Nuys Boys. 7RT 824-825. The Van Nuys Boys would sometimes wear an Oakland A's hat or an Atlanta Braves hat with an "A" on it. 5RT 575-576.

In his first statement to the police, Andalon did not mention Montoya. He said that in November of 2008, Flores was jumped by some Van Nuys Boys. 5RT 551. Subsequently, on Thanksgiving day, Andalon gave Flores a .22 caliber Ruger rifle. 5RT 540, 553. At about 8 o'clock on the morning of December 28, 2008, Flores called Andalon and told him, "I smoked the fools." 5RT 564-565. Andalon took this to mean that Flores had killed a rival gang

member. 5RT 565. Flores told Andalon that the man he had shot was wearing a hat with an "A" on it. 5RT 575-576. He also told Andalon he was surprised when he pulled the trigger because the whole clip went off. 5RT 565-566. Flores said the car they had used belonged to Eduardo Gomez, known in the gang as Vital. 5RT 567.

The police were apparently not satisfied with this information—or, as Andalon put it, "his case wasn't really going too good"—and so he told them that Montoya had also participated in the shooting. 6 RT 595. He said that after he talked with Flores, he called Montoya at work. 5RT 568-569. She said she could not talk on her work phone, so they hung up and spoke again on her cell phone for 20 to 30 minutes. 5RT 570.

Montoya told Andalon that she and Flores were at Flores's house getting high on PCP, talking about a drive-by that had taken place in early December and about the incident in which Flores had gotten jumped. She told Andalon she was pissed off that rival gang members were coming into their neighborhood and doing anything they wanted and she felt that she had to do something about it; so they got the gun and walked from Flores's house to her house with the gun between them, as if they were a couple hugging. 5RT 571-572.

A "kickback," or party, was taking place at Montoya's house for someone who had just gotten out of jail. 5RT 572-573. Not on the guest list, Andalon did not know anything about it at the time. 6RT 652. During the kickback,

someone came in and told the group that "they" were hanging out outside on Correnti. 5RT 572-573.

Montoya told Andalon they took Gomez's car keys without telling him. 5RT 572-573. Montoya was driving; Flores was riding shotgun; Gordo, another PSSL member, was in the backseat. 5RT 573. They saw three people standing in front of a house. Flores got out and asked them where they were from. Before they even answered, Flores pulled the trigger and shot them. Startled, Montoya panicked, jumping the curb, and messing up Gomez's car. 5RT 573.

Andalon claimed that he called Montoya at work; but there was evidence that no telephone calls were made between (818) 890-1228, the number from which Andalon called Montoya, and Montoya's work number between December 28, 2008, and January 2, 2009. 6RT 675-676; 9RT 1161-1163, 1176-1177. In addition, there was evidence that Montoya had bi-monthly drug tests between February, 2008, and February 2009. All were negative. 8RT 1003-1005.

In a statement Montoya made to the police after her arrest, she said that several people were at her house that night because Gordo, one of the main heads of the gang, had just gotten out of jail a couple of days before. 2CT 243, 280-281. Originally, Gomez and Gordo and a couple of girls were there. Gordo wanted Gomez's car keys but he would not give them to him. Gomez was "all messed up." She was sober. 2CT 243.

Flores showed up later. 2CT 243. He wanted to go to his house to get some money. She accompanied him. 2CT 243. When they got back to her house, Gordo told her to ask Gomez for his car keys. She and Gomez had been friends for a long time, so he gave them to her. 2CT 243-244. She was driving; Flores was in the front seat; Gordo in the back. 2CT 244.

They were supposed to be going to the AM/PM, but after they were in the car, Flores said he was looking for "Ducky." Flores is part of a "new generation of kids coming up" so she did not know him the way she knew Gordo or Gomez. She assumed Ducky was some other new guy that he hung around with. 2CT 263. She did not realize there was a gun in the car until later. 2CT 246.

They turned onto Correnti, and Gordo or Flores said, "Oh, there he is." 2CT 245. There were probably six or seven people there. 2CT 251. One of them walked up to the car. 2CT 266. There were words, but she did not remember what they were; she was fidgeting with the radio. 2CT 265-266. Suddenly she heard "pop, pop, pop." She froze. Then she heard Gordo and Flores tell her, "go, go, go" and she took off. 2CT 245. There were probably six or seven shots altogether. 2CT 253. She messed up Gomez's car because she hit a curb when she turned onto Wingo. 2CT 246.

She did not know who had fired the shots until they got back to her house. She saw Flores holding the gun and Gordo said, "You let him have it." Flores said the gun got stuck. 2CT 247. When they got back to her house, she

told everybody to leave. 2CT 245.

After the shooting, Gordo, an important figure in the gang, gathered everyone together and told them to stop talking about the shooting. 2CT 269-270, 280.

Jury Instructions. The jury was instructed on two theories of aiding and abetting, direct aiding and abetting, as defined by the California Supreme Court in *People v. Beeman,* 35 Cal.3d 547 (1984), and aiding and abetting under the natural and probable consequences theory of derivative liability. The jury was instructed that to convict appellant of murder under the direct aiding and abetting theory, it had to find that she knew the full intent of the perpetrator and acted with the intention of aiding or encouraging its fulfillment. 2CT 331-332, 11RT 1516-1517, CALCRIM 401. The court also instructed on the natural and probable consequences theory of aiding and abetting as follows:

> The people are relying upon the natural and probable consequences theory. Under the natural and probable consequences theory of murder, before you may decide whether the defendant is guilty of murder, you must decide whether she is guilty of assault with a deadly weapon.
>
> To prove that the defendant is it guilty of murder, the people must prove that:
>
> 1. The defendant is guilty of assault with a deadly weapon;
>
> 2. During the commission of assault with a deadly weapon a co-participant in that assault with a deadly weapon committed the crime of murder;
>
> 3. Under all of the circumstances, a reasonable person in the defendant's position would have known that the commission of the

> murder was a natural and probable consequence of the commission of the assault with a deadly weapon.
>
> A co-participant in a crime is the perpetrator or anyone who aided and abetted the perpetrator. It does not include a victim or innocent bystander.
>
> A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence. If the murder was committed for a reason independent of the common plan to commit the assault with a deadly weapon, then the commission of murder was not a natural and probable consequence of assault with a deadly weapon.
>
> To decide whether the crime of murder was committed, please refer to the separate instructions that I will give you on that crime.

2CT 334-335; 11RT 1522-1524; CALCRIM 403.

Montoya objected to this instruction. The trial court overruled the objection, finding that it was supported by substantial evidence. 10RT 1386.

The prosecutor relied on natural and probable consequences as a theory for finding Montoya guilty of first degree murder, telling the jury:

> Now, when you have a rifle out the window, there are three people standing there and you pull the trigger, that's an assault with a deadly weapon. But then, as you see under the circumstances, any reasonable person would know that if you have a loaded firearm pointing at a person and you pull that trigger; oh, yes, a natural probable consequence might be that person might get shot and killed.

11RT 1426.

B. The Court of Appeal Decision

While petitioner's appeal was pending, the California Supreme Court decided *People v. Chiu,* 59 Cal.4th 155 (2014), adopting as a matter of public policy a new rule that precludes the use of the natural and probable

consequences theory to establish guilt of first degree murder except when the separate felony murder doctrine is at issue.

Following *Chiu*, the court of appeal found that the instructions permitting the jury to find petitioner guilty of first degree murder under the natural and probable consequences theory were erroneous. However, in the court's view the error was harmless beyond a reasonable doubt because the guilty verdict on the count of discharging a firearm from a motor vehicle "indicates the jury rejected Montoya's exculpatory account of the shooting (provided during her custodial interview) in favor of her inculpatory statements to her friend Andalon." Opn., App. A, p. 21.

REASONS FOR GRANTING THE PETITION

The Court of Appeal correctly found Constitutional error in the instruction on natural and probable consequences that permitted the jury to find petitioner guilty of first degree murder without finding that she intended to aid and abet a murder or even that she had a subjective appreciation of the risk her actions entailed. However, as petitioner will show in Section B, *infra*, in holding the error harmless beyond a reasonable doubt, the court failed to follow controlling decisions of this Court on the proper method of analyzing Constitutional error, instead ignoring evidence from which the jury could have had a reasonable doubt about petitioner's guilt, resolving disputed inferences and questions of credibility in favor of the verdict, and paying no

heed to the prosecutor's explicit invitation to the jury to rely on the natural and probable consequences doctrine.

Moreover, as petitioner will show in Section C, *infra,* this is far from an isolated error. The appellate courts of this state routinely ignore settled law emanating from this Court to find Constitutional errors harmless beyond a reasonable doubt. The California Supreme Court, which grants review in only two percent of the criminal appeals in which review is sought,[3] has denied numerous petitions for review raising this issue. The vast majority of the decisions misconstruing the *Chapman* standard are unpublished, making the likelihood of review by the California Supreme Court even more remote. California is the most populous state in the United States, home to 12 percent of this nation's people.[4] Thus, a systemic error in the courts of this state affects a large number of cases. In short, this case is worthy of a grant of certiorari because it is illustrative of a widespread and systemic problem.

A. This Court's *Chapman* Cases Require the Reviewing Court to Review the Whole Record, Including Facts Favorable to the Defendant, and Do Not Permit the Court to Act as a Second Jury.

In *Chapman v. California* (1967) 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d

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[3] Judicial Council of California, 2014 Court Statistics Report, "Summary of Actions on Petitions for Review, Fiscal Year 2012-2013," p. 8. http://www.courts.ca.gov/documents/2014-Court-Statistics-Report.pdf. Accessed June 30, 2015.

[4] https://en.wikipedia.org/wiki/Demographics_of_California. Site visited June 30. 2015.

705, this Court held for the first time that constitutional errors in criminal trials are subject to harmless error analysis. *Id.* at pp. 23-24. *Chapman* placed stringent limits on the circumstances permitting affirmance, placing the burden on 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. The court also cautioned against overemphasis on overwhelming evidence as a ground for affirmance. *Id.* at 23.

In the almost 50 years since *Chapman*, two strains of harmless error analysis have emerged in the decisions of this Court. One strain emphasizes the strength of the evidence; the other emphasizes the error's impact on the verdict. Compare *Harrington v. California*, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969) (*Bruton* violation harmless when inadmissible evidence was cumulative and conviction supported by overwhelming evidence) with *Yates v. Evatt,* 500 U.S. 391, 111 S.Ct. 1884, 114 L.Ed.2d 432 (1991) (To say an error did not contribute to verdict is "to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record").

In *Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999), this Court attempted to reconcile the two strains of harmless error analysis. Under *Neder*, whether the reviewing court is dealing with instructions that omit or misdescribe an element of an offense or analyzing constitutional errors in the admission and exclusion of evidence, the court

should ask, "Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?" *Id.* at 18. To answer this question, the reviewing court must "conduct a thorough review of the record." *Id.* at 19.

The reviewing court is not to function as a second jury. *Id.* at 19. "Rather 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." *Ibid.* Only if there is no such evidence can the court declare the error harmless beyond a reasonable doubt. *Ibid.* Applying these principles, *Neder* held,

> where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless.

Id. at 17. Under these circumstances, "We think it beyond cavil here that the error 'did not contribute to the verdict obtained.' *Chapman, supra,* at 24." *Ibid.*

After *Neder*, certain things can be said:

First, in ascertaining whether the error contributed to the verdict, the reviewing court must consider the record as a whole. *Neder v. United States, supra,* 527 U.S. at 15-16. Accord, *e.g.*, *Yates v. Evatt*, *supra,* 500 U.S. at 409 (1991); *Rose v. Clark,* 478 U.S. 570, 583, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986); *Delaware v. Van Arsdall,* 475 U.S. 673, 681, 106 S.Ct. 1431, 89 L.Ed.

2d 674; *United States v. Hasting,* 461 U.S. 499, 509, 103 S.Ct. 1974; 76 L.Ed. 2d 96 (1983).

Second, 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, 330-331, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006) .

Third, 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. 279, 297-98, 300, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991); *Satterwhite v. Texas*, 486 U.S. 249, 260, 108 S.Ct. 1792, 100 L.Ed. 2d 284 (1988); *Chapman v. California*, *supra,* 386 U.S. at 25; *Fahy v. Connecticut,* 375 U.S. 85, 88-89, 84 S.Ct. 229, 11 L.Ed.2d 171 (1963); *Krulewitch v. United States,* 336 U.S. 440, 444-445, 69 S.Ct. 716, 93 L.Ed. 790 (1949).

Finally, the *Chapman* prejudice analysis is affected in crucial ways by the Sixth Amendment. As this court warned in *Neder,* in undertaking the

Chapman inquiry, the reviewing court does not act as a "second jury." *Neder*, *supra,* 527 U.S. at 19. An appellate court may not ascertain the facts, 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. 1, ___, 132 S.Ct. 2, 4, 181 L.Ed.2d 311 (2011); *Dillon v. United States,* 560 U.S. 817, 828, 130 S.Ct. 2683; 177 L.Ed.2d 271 (2010) (defendant has "Sixth Amendment right to have essential facts found by a jury beyond a reasonable doubt").

The nature of these Sixth Amendment limits is made clear in decisions of this Court. For example, in *Delaware v. Van Arsdall, supra,* 475 U.S. at 681, where a 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. Similarly, in *Yates v. Evatt*, *supra,* 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"; "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 410-411.

Thus, as these decisions make clear, proper harmless error review must be conducted with due regard for the "Sixth Amendment right to have essential facts found by a jury beyond a reasonable doubt," see *Dillon v. United States, supra,* 560 U.S. at p. 828, 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*, *supra,* 132 S.Ct. at p. 4, 181 L.Ed.2d. at 313.

B. The Finding of the Court of Appeal in this Case that the Constitutional Instructional Error was Harmless Failed to Comport with Clear Directives of this Court on the Conduct of Harmless Error Review.

Under *Chapman, supra,* 386 U.S. at 24, the Court of Appeal was required to reverse petitioner's first degree murder conviction unless it was able to determine beyond a reasonable doubt that the error—permitting the jury to find petitioner guilty of first degree murder on the theory that the murder was a natural and probable consequence of a crime petitioner set out to aide and abet—did not contribute to the verdict. The court of appeal based its finding of harmlessness on the assumption that "[t]he guilty verdict on count 3, shooting from a motor vehicle, indicates the jury rejected Montoya's exculpatory account of the shooting (provided during her custodial interview) in favor of her inculpatory statements to her friend Andalon." (Appendix A, p. 20.)

This truncated analysis of the effect of the error that occurred here fails to consider the whole record before the jury, ignoring evidence and inferences that could have led a rational juror to have a reasonable doubt about the intent with which petitioner acted. See *Holmes v. South Carolina, supra,* 547 U.S. at 330-331. In addition, this statement shows the court of appeal acting as a second jury, resolving disputed facts and drawing inferences that are in the exclusive province of the jury contrary to this court's decision in *Neder*, *supra,* 527 U.S. at 19.

The guilty verdict of discharging a firearm from a motor vehicle does suggest that the jury disbelieved at least part of Montoya's exculpatory statement, but it provides no compelling reason for the court's conclusion that the jury believed Andalon: there was nothing stopping the jury from disbelieving both of them. A rational juror could have disbelieved everything Andalon said and still have found Montoya guilty of shooting from a motor vehicle if it concluded that at any time before Flores fired the gun, she had the intention of aiding and abetting an assault with a firearm. In other words, the Court of Appeal's conclusion that the jury must have believed Andalon's version of events was "not compelled as a rational necessity." *Yates, supra,* 500 U.S. at 410.

Furthermore, even if the jury had believed everything Andalon said, his testimony merely indicated that Montoya intended to aid and abet Flores in his plan to shoot at rival gang members. Although a rational juror could have

inferred from Andalon's testimony that Montoya intended to aid and abet a killing, such a juror could also have inferred that she was merely indifferent to the outcome, or even that she did not subjectively realize that death was likely to result from Flores' discharge of a firearm from the car window. Neither of the second two possible resolutions would result in a first degree murder conviction without the aid of the natural and probable consequences instruction.

Since there was no "rational necessity" for the jury to chose between believing Andalon or believing Montoya, the Court of Appeal could only have come to the conclusion that the jury must have accepted Andalon's testimony and rejected Montoya's by deciding for itself "what conclusions should be drawn from evidence admitted at trial." See *Cavazos v. Smith, supra,* 132 S.Ct. at 4, 181 L.Ed.2d 311. In other words, the Court of Appeal was acting as a second jury, contrary to this Court's directive in *Neder, supra,* 527 U.S. at 19. Such judicial factfinding infringes a defendant's "Sixth Amendment right to have essential facts found by a jury beyond a reasonable doubt." *Dillon v. United States, supra,* 560 U.S. at p. 828.

Furthermore, had the Court of Appeal heeded this Court's directive in *Neder* by asking "in typical appellate court fashion, . . . whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element," *Neder, supra,* 527 U.S. at 19, it would have found a number of factors that could have led a rational juror to have a reasonable

doubt about Andalon's veracity.

Andalon testified that he called Montoya at work. Opn., App. A at 4. Yet there was no corroboration that such a call was ever made, a flaw in the prosecution's proof that could have raised a reasonable doubt about whether this aspect of his statement was true. Opn., App. A at 7. Andalon testified that Montoya told him she and Flores were getting high on PCP before they went to get the rifle. Opn., App. A at 4-5. Yet Montoya presented evidence that she had tested negative for drugs, including PCP, on 24 occasions between February 2008 and February 2009. Opn., App. A at 7.) The evidence of her 12-month record of clean tests, which started ten months before December of 2008 and continued for two months afterward, could have raised a reasonable doubt about the truth of Andalon's testimony about her PCP use. In addition to the defense evidence casting doubt on Andalon's veracity, by his own admission, he was a gang member, testifying in exchange for leniency. Without considering this evidence, which cast doubt on the reliability of the prosecution's evidence, the Court of Appeal was in no position to assess the true strength of the prosecution's case. See *Holmes v. South Carolina, supra,* 547 U.S. at 330-331.

Finally, there is no indication in the Court of Appeal's opinion that it gave any weight to additional factors that could have caused a rational jury to rely on the natural and probable consequences theory. See, *e.g., Arizona v. Fulminante*, *supra,* 499 U.S. at 297-98, 300; *Satterwhite v. Texas*, *supra*, 486

U.S. at p. 260; *Chapman v. California*, *supra,* 386 U.S. at 25; *Fahy v. Connecticut*, *supra*, 375 U.S. at 88-89; *Krulewitch v. United States*, *supra,* 336 U.S. at 444-445. One such factor is the prosecutor's explicit reliance on the theory, 11RT 1425, not mentioned by the court in its decision. The prosecutor had two theories for finding Montoya guilty of first degree murder—the jury could rely on Andalon's testimony or on the natural and probable consequences theory of liability. Using the natural and probable consequences doctrine as the basis for conviction made it possible for the jury to reach a verdict without delving into the thorny question of what part—if any—of Andalon's testimony to believe. When, as here, an erroneous instruction "eases the jury's task, 'there is no reason to believe the jury would have deliberately undertaken the more difficult task' of evaluating the evidence of intent" *Connecticut v. Johnson,* 460 U.S. 73, 85, 74 L.Ed.2d 823, 103 S. Ct. 969 (1983).

Neder, supra, 527 U.S. 1, teaches that when instructional error permits the jury to convict without finding an element of the charged offense, the reviewing court should ask whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element." *Id.* at p. 19. Only if the answer is "no" is affirmance appropriate. *Ibid.* Affirmance was appropriate in *Neder* because "the omitted element was uncontested *and* supported by overwhelming evidence." *Neder, supra,* 527 U.S. at p. 17 (emphasis added). It was not appropriate here because the

evidence supporting the inference that Montoya intended to aid and abet a killing was far from overwhelming and it was hotly contested.

In short, to reach the conclusion that the instructional error here was harmless beyond a reasonable doubt, the Court of Appeal was required to do almost the reverse of what this Court has directed reviewing courts to do when conducting *Chapman* analysis. Instead of looking at the evidence in the record that would support the conclusion that the jury relied on the natural and probable consequences theory of liability, it appears that the court looked only at evidence that would support the conclusion that the jury found the requisite intent. Instead of looking at evidence in the record that could have caused the jury to question the prosecution's theory of the case, it appears that the court looked only at evidence that supported the prosecution's theory of the case. And instead of looking at the record dispassionately to determine what reasonable inferences a rational jury could have drawn from the evidence, the court acted as a second jury, making credibility assessments and weighing competing inferences.

C. This Case is Worthy of a Grant of Certiorari because it is Illustrative of a Widespread Problem in California's Courts of Appeal.

What makes this case worthy of a grant of certiorari is that the perfunctory nature of the *Chapman* review performed by the Court of Appeal in this case is symptomatic of a widespread problem in the way California

appellate courts conduct *Chapman* analysis, problems that the state supreme court has failed to correct.

As the cases listed below demonstrate, the California courts of appeal have diluted the "beyond a reasonable doubt" standard in a number of ways, including the following:

- Failing to engage in whole record review;
- Substituting the state law standard of *People v. Watson*, 46 Cal.2d 818, 836 (1956), which requires the dedendant to demonstrate a "reasonable probability" of prejudice, for the more rigorous *Chapman* standard;
- Placing the burden on the defendant to demonstrate prejudice;
- Resolving disputed factual inferences in favor of the prosecution;
- Affirming because substantial evidence supports the judgment.

This is not an exhaustive list, in part because the cases frequently are not explicit about the way they are analyzing error. The cases are listed in reverse chronological order.

1. People v. Mixon, 2015 Cal.App.Unpub.Lexis 3834, *22-*23 (B256389, 2nd App. Dist., Div. 8, June 2, 1015): error in refusing to bifurcate gang enhancement harmless under Chapman because there was "no reasonable probability the jury was influenced to find defendants guilty of robbery based on the gang evidence admitted at trial."

2. In re Martinez, 2015 Cal.App.Unpub.Lexis 3370, *11-*12 (D066705, 4th

App. Dist., Div. 1, May 15, 2015): Chiu error harmless because "sufficient evidence supports Martinez's first degree murder conviction" under straight aiding and abetting principles.

3. People v. Reed, 2015 Cal.App.Unpub.Lexis 2356, *18 (A135971, 1st App. Dist., Div. 3, Apr. 2, 2015): Admission of evidence of prior sex acts harmless beyond a reasonable doubt because, inter alia, "there is no reasonable probability the jury would have reached a result more favorable to Reed" and the prior convictions "would not likely have inflamed the jury."

4. People v. Praxedis, 2015 Cal.App.Unpub.Lexis 2018, *17 (G049546, 4th App. Dist., Div. 3, March 20, 2015): Confrontation Clause violation harmless beyond a reasonable doubt "because there was sufficient evidence, apart from Ortega's statement, this was a gang attack."

5. People v. Soyinthisane, 2015 Cal.App.Unpub.Lexis 1874, *25 (F066308, 5th App. Dist., Mar. 17, 2015): Holding denial of interpreter is reviewed under Chapman, but stating, "If no interpreter is provided, the defendant must show that he was prejudiced by the omission."

6. People v. Moore, 2014 Cal.App.Unpub.Lexis 9314, *18 (E058742, 4th App. Dist., Div. 2, Jan. 30, 2014): "[E]ven if the trial court erred by admitting evidence of defendant's statements, any such error was harmless beyond a reasonable doubt in this case because other evidence amply supported a finding of defendant's guilt."

7. People v. Moreno, 2014 Cal.App.Unpub.Lexis 8579, *17-*18 (C072902, 3rd App. Dist., Dec. 3, 2014): Error in failing to submit discretionary imposition of lifetime sex offender registration requirement to jury was harmless beyond a reasonable doubt because "[t]he evidence is overwhelming that defendant's crimes were due to sexual compulsion," even though this element of the registration requirement was contested.

8. People v. Harloff, 2014 Cal.App.Unpub.Lexis 6900, *5 (B244649, 2nd App. Dist., Div. 1, Sept. 29, 2014): "We disagree that Harloff has demonstrated prejudice, whether the error is judged under the federal standard for constitutional error . . . or the state standard for statutory error."

9. People v. Daley, 2014 Cal.App.Unpub.Lexis 5955, *30-*31 (B248219, 2nd App. Dist., Div. 7, Aug. 20, 2014): Error in natural and probable consequences instruction that permitted jury to find defendant guilty of murder even it concluded that "she aided and abetted only a simple assault and that murder was not a natural and probable consequence" of that assault was harmless under Chapman because in view of the instructions as a whole, "it is not reasonably likely that the jury misapplied the instruction in this manner."

10. People v. Eshaya, 2014 Cal.App.Unpub.Lexis 5826, *12-*15 (F066694, 5th App. Dist., Aug. 19, 2014): Court found error in failure to instruct on aiding and abetting harmless beyond a reasonable doubt by resolving credibility issues in disputed evidence in favor of prosecution.

11. People v. Leonard, 228 Cal. App. 4th 465, 496 (July 18, 2014): Defendants "have not established prejudicial error" under either Chapman or Watson from exclusion of evidence of prosecution witness's prior conviction.

12. People v. Dowdell, 227 Cal. App. 4th 1388, 1405 (July 17, 2014): Even if defendant's statement to police should have been excluded as involuntary, reversal not required under Chapman because prosecution presented "an abundance of evidence" establishing defendant's guilt and "the jury was not likely to credit [his] self-serving testimony."

13. People v. Sanez, 2014 Cal.App.Unpub.Lexis 3309, *14 (D064020, 4th App. Dist., Div. 1, May 9, 2014): Court would affirm judgment even if it applied *Chapman* standard because "the record provides substantial direct and corroborative evidence to support Sanez's conviction."

14. People v. Carter, 2014 Cal.App.Unpub.Lexis 3075, *23 (A138720, 1st App. Dist., Div. 2, Apr. 30, 2014): Any error was harmless under Chapman because prosecution evidence was "more than sufficient for the jury to conclude that Carter was guilty."

15. People v. Maldonado, 2014 Cal.App.Unpub.Lexis 2414 (A132029, 1st App. Dist., Div. 3, Apr. 4, 3014): Court of Appeal relied on "substantial evidence" that defendant was not provoked and did not act in defense of himself or others and discounted defense evidence contradicting prosecution version of events, id. at *8-*9, as well as prosecutor's

exploitation of error in closing argument, id. at *20, fn 10, to conclude that erroneous admission of other crimes evidence was harmless beyond a reasonable doubt. Id. at *21-*22, fn. 12.

16. In re T.H., 2014 Cal.App.Unpub.Lexis 1674, *26-*27 (A137656, 1st App. Dist., Div. 5, Mar. 7, 2014): Even if minor's statements were obtained in violation of Miranda, admission harmless beyond a reasonable doubt because "the evidence, even without T.H.'s admissions that he knew the car was stolen, established his guilt beyond a reasonable doubt."

17. People v. Davis, 2014 Cal.App.Unpub.Lexis 45, *15-*16 (E056171, 4th App. Dist., Div. 2, Jan. 7, 2014): Failure to instruct on specific intent harmless beyond a reasonable doubt because statement defendant made to police "could reasonably be interpreted as his acknowledgment" of wrong-doing and constituted "strong circumstantial evidence" of specific intent.

18. *People v. Guzman,* 2013 Cal.App.Unpub.Lexis 9323, *12-*13 (B245583, 2nd App. Dist., Div. 2, Dec. 23, 2013): Failure to instruct on voluntary intoxication harmless beyond a reasonable doubt because "jury could reasonably infer [from evidence before it] that appellant was not so intoxicated that he was unable to premeditate and deliberate killing Hernandez."

19. *People v. Jennings,* 2013 Cal.App.Unpub.Lexis 8904, *48 (E056095 4th App. Dist., Div. 2, Dec. 10, 2013): "Based on the substantial evidence of

defendant's guilt, any misconduct was harmless beyond a reasonable doubt."

20. *People v. Jackson*, 221 Cal. App. 4th 1222, 1241 (Nov. 7, 2013): Assuming expert's testimony was inadmissible as profile evidence, "Defendant has not established prejudicial error." (Citing *Chapman* and *Watson*.)

21. *People v. Alvisar,* 2013 Cal.App.Unpub.Lexis 7112, *23-*25 (F064413, 5th App. Dist., Oct. 2, 2013): finding conflicting instructions on intent element of offense harmless beyond a reasonable doubt because it was "reasonably likely" the jury resolved the conflict by choosing legally correct alternative.

22. People v. Rezac, 2013 Cal.App.Unpub.Lexis 6832, *26-*27 (F064139, 5th App. Dist., Sept. 25, 2013): 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."

23. *People v. Flores,* 2013 Cal.App.Unpub.Lexis 6524, *28 (B241530, 2nd App. Dist, Div. 5, Sep. 13, 2013): "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.)"

24. People v. Holeman, 2013 Cal.App.Unpub.Lexis 5089, *57 (E053332, 4th App. Dist., Div. 2, July 19, 2013): Under either standard (Chapman or state test for prejudice), "defendants cannot demonstrate prejudice."

25. People v. Royal, 2013 Cal.App.Unpub.Lexis 5048, *8 (B241841, 2nd App. Dist., Div. 6, July 18, 2013): Instructional error harmless under Chapman because there was "ample substantial evidence to support the 'fear' element of robbery."

26. People v. Flores, 2013 Cal.App.Unpub.Lexis 4953, *26 (B237696, 2nd App. Dist, Div. 4, July 15, 2013): Error in admission of evidence harmless under either Chapman or Watson (state test for prejudice) because defendant cannot "establish he was prejudiced by the admission of the four statements to which defense counsel objected."

27. People v. White, 2013 Cal.App.Unpub.Lexis 4648, *19-*20 (B236536, 2nd App. Dist., Div. 3, June 27, 2013): "The jury, however, may not have found the issue to be compelling, in light of the strong evidence that defendant was the carjacker; namely, defendant had Taylor's cell phone in his pocket, a fact he did not dispute at trial. That fact alone was sufficient to tie defendant to the carjacking, and therefore any error in allowing evidence that the carjacker had a red mohawk was harmless, even when measured by the federal constitutional standard of Chapman v. California (1967) 386 U.S. 18, 24."

28. People v. Rubbock, 2013 Cal.App.Unpub.Lexis 1351, *36 (B236478, 2nd App. Dist., Div. 5, Feb. 25, 2013): "Even if the trial court erred in denying one or more of defendant's Marsden motions, defendant failed to establish that he was prejudiced under the Chapman standard. "

29. People v. Ernest, 2012 Cal.App.Unpub.Lexis 7369, *35 (B232792, 2nd App. Dist., Div. 4, Oct. 10, 2012): "Here, even if defendant's recorded statement was not admitted into evidence, the evidence of his guilt of the charged crimes was substantial. Although his denial during the interrogation of any involvement with DJ's death demonstrated a consciousness of guilt, there 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."

30. People v. Ochoa, 2012 Cal.App.Unpub.Lexis 6451, *18 (A129751, 1st App. Dist., Div. 1, Aug. 31, 2012): "Given the defendant's frankly implausible testimony, even if exclusion of the evidence were error, it was harmless beyond a reasonable doubt."

31. People v. White, 2012 Cal.App.Unpub.Lexis 4803, *7 (4th App. Dist., Div. 3, G044741, June 27, 2012): Limitation on impeachment harmless beyond a reasonable doubt, because "had Dana not testified at all, substantial evidence of defendant's guilt, in the form of police testimony,

would still exist."

32. People v. Rodriguez, 2012 Cal.App.Unpub.Lexis 3896, *19 (A131096, 1st App. Dist., Div. 4, May 23, 2012): "Nor can appellant establish prejudice under the constitutional standard articulated in Chapman v. California (1967) 386 U.S. 18, 24."

33. People v. Angeli, 2012 Cal. App. Unpub. LEXIS 267, *20 (A131704, 1st App. Dist., Div. 2, Jan. 12, 2012): "[D]efendant cannot demonstrate any prejudicial error, whether assessed under Watson, supra, 46 Cal.2d at page 836 or Chapman, supra, 386 U.S. at page 24."

34. People v. Ennis, 2011 Cal.App.Unpub.Lexis 304 *28 (B212811, 2nd App. Dist., Div. 8, Jan. 18, 2011): "Even if the confrontation clause objection had been preserved, any error in admitting the evidence was harmless beyond a reasonable doubt. Because the evidence in this case was substantial, defendant cannot establish prejudice."

35. People v. Katzenberger, 178 Cal.App.4th 1260, 1269 (2010) (3rd App. Dist.): Court found no Chapman prejudice in an assault case by (1) relying on a supposedly "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.

36. People v. Brown, 2010 Cal.App.Unpub.Lexis 343, *8 (B212584, 2nd App. Dist., Div. 7, Jan. 19, 2010): Error in failing to instruct on aider-and-

abettor liability error harmless beyond a reasonable doubt "because there was substantial evidence that defendant aided and abetted the crime."

The cases listed above represent a selection of cases in which it was possible to discern on the face of the opinion without extensive analysis of the facts that the reviewing court had failed to follow settled law when engaging in *Chapman* analysis. However, decisions finding Constitutional error harmless beyond a reasonable doubt are often perfunctory, and they do not always draw attention to evidence in the record that could contradict or cast doubt on the prosecution-favorable inferences on which the finding of harmlessness is based. Thus, it is not always possible to ascertain that a court has departed from established *Chapman* analysis from the face of the opinion. As some evidence of the existence of such cases, Petitioner filed a request for judicial notice in connection with the petition for review to the California Supreme Court in this case, listing a number of cases in which defendants had filed petitions for review challenging the refusal of several courts of appeal to engage in the whole record review required by *Chapman v. California*. The California Supreme Court had denied review in all of these cases. The request for judicial notice was granted, although the court denied the petition for review in this case, as well.

The cases for which judicial notice was taken are *People v. Lewis,* S220153 (rev. den. 10/15/2014) (case arising out of 2nd App. Dist., Div. 1, B241236);

People v. Iuvale, S218265 (rev. den. 7/9/2104) (case arising out of 4th App. Dist. Div. 1, D062725); *People v. Roble*s, S216892 (rev. den. 6/11/2014) (case arising out of 2nd App. Dist. Div. 3, B232828); *People v. Yanez,* S212391 (9/11/2013) (case arising out of 2nd App. Dist., Div. 3 B244668); *People v. Madrigal,* S212023 (rev. den. 8/21/2014) (case arising out of 5th App. Dist., F062969); *People v. Estrada,* S211538 (rev. den. 6/20/2013) (case arising out of 2nd App. Dist. Div. 3, B235543); *People v. Mercado*, S211241 (rev. den. 6/14/2013) (case arising out of 2nd App. Dist. Div. 3, B223451); *People v. Aguilar*, S209226 (rev. den. 5/15/2013) (case arising out of 5th App. Dist., F061462); *People v. Huezo*, S204962 (rev. den. 10/17/2012) (case arising out of 2nd. App. Dist. Div. 5, B233864); *People v. Lewis*, No. S204103 (rev. den. 9/12/12) (case arising out of 3rd App. Dist., C056876); *People v. Miller*, S186011 (rev. den. 9/2/10) (case arising out of 1st App. Dist., Div. 4, A121646); *People v. Beckley*, S184480 (rev. den. 9/22/2010) (case arising out of 2nd App. Dist., Div. 1, B212529).

CONCLUSION

Petitioner's case and the other examples cited above show that California's appellate courts, instead of applying *Chapman*'s test to ascertain whether the State can show beyond a reasonable doubt that the error did not contribute to the verdict, are routinely applying a variety of less stringent tests, affirming convictions because substantial evidence supports the verdict, placing the burden on the defendant to show prejudice, failing to give

appropriate weight to evidence and inferences that could raise a reasonable doubt of the defendant's guilt in the mind of a rational juror, and engaging in assessments of the weight of the evidence and the credibility of witnesses that are within the sole purview of the jury. The result is that countless criminal convictions obtained in violation of the Constitution, including petitioner's, are being affirmed because the California courts are refusing to follow the law of the land as established by this Court. Certiorari should be granted.

Respectfully submitted,

DATED: _____

Sara H. Ruddy
Counsel of Record
2020 Milvia Street, Ste. 300
Berkeley, CA 94704
Tel and fax: (510) 548-4348
sara.ruddy@gmail.com