

### **Chapman: *Shifting Burden***

**Where in a criminal case the court found or presumed federal constitutional error (*Chapman v. California*), did the court expressly or implicitly place the burden on the defendant to show the error was prejudicial?**

The *Chapman* standard of review – the prescribed test for evaluating the impact of federal constitutional error in a criminal trial – imposes a heavy burden on the state “to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].) The burden is assigned to “the beneficiary of the error[,]” because “[c]ertainly error, constitutional error, ... casts on someone other than the person prejudiced by it a burden to show that it was harmless.” (*Ibid.*)

So when a reviewing court finding or assuming federal constitutional error fails to hold the state to that – or any – burden, the harmless error conclusion is itself erroneous. The *Chapman* test is satisfied not only by accurately identifying it, but also by properly applying it. (Cf. *Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 712, fn. 6 [propriety of reliance on correct standard of review determined not by words used but by “what the Court of Appeal actually did” in purporting to apply it].) And four United States Supreme Court justices have warned 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* (2010) 562 U.S. 1083, 1085, [131 S.Ct. 591, 178 L.Ed.2d 514] (statement of Sotomayor, J., joined by Ginsburg, Breyer, and Kagan, JJ.)) After all, “the allocation of the burden of proving harmlessness can be outcome determinative in some cases. [Citations.]” (*Ibid.*) And to the extent the appellate court effectively places “the burden of persuasion” – i.e., of showing prejudice – on the defendant, “that would contravene *Chapman*.” (*Id.* at 1084.)