IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,	)	Court of Appeal No. D059840
v.	)	Superior Court No. SCD 226240
DAVID LEON RILEY, Defendant and Petitioner.	)	

APPEAL FROM THE SUPERIOR COURT
OF SAN DIEGO COUNTY

Honorable Laura W. Halgren, Judge

PETITION FOR REHEARING

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Topical Index

Table of Authorities

Cases

Statutes

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Introduction

The present rehearing petition is necessary to address mistakes or omissions from the opinion as it is in all such petitions. But this petition is somewhat unique in that it also allows the court the opportunity to address an issue that's been the topic of considerable recent discussion — whether appellate courts have been properly applying the harmless error test described in *Chapman v. California* (1967) 386 U.S. 18.

Justice Liu most recently addressed the question of whether the California appellate courts have been misapplying the *Chapman* standard. (*People v. Jackson* (2014) 58 Cal.4th 724, 792, dis. and conc. opn.) He contends the appellate courts have been mistakenly taking an approach similar to a review for substantial evidence where the court removes the illegally seized evidence and asks whether the remaining portion of the record is sufficient to support the judgment. Justice Liu emphasizes that this approach is wrong, and the correct analysis, according to all relevant U.S. Supreme Court authority, is to review the entire record, including defense friendly evidence and challenges to the evidence favoring the state in determining whether the prosecution has proved beyond a reasonable doubt that the errors had no impact on the verdict. (*Ibid.*) (See *United States v. Hasting* (1983) 461 U.S. 499, 509, where the court stressed "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"; see also *Yates v. Evatt* (1991) 500 U.S. 391, 409; and *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681.)

The present case provides a good example of the problem Justice Liu highlights. Petitioner argues that rehearing on the harmless error must be granted so that the court can correct the mistakes noted and

review the issue using the entire record. But rehearing is necessary even under the analysis the court used as it overlooks important evidence produced by the illegal search, including evidence of petitioner's cell phone records that originated from the cell phone search and became a significant part of the state's case at trial.

Background

The United States Supreme Court determined the detectives' warrantless search of petitioner's smart phone violated the Fourth Amendment. (*Riley v. California* (2014) 134 S.Ct. 2473.) The court remanded the matter back to this court to determine whether the illegal search constituted prejudicial error requiring a new trial.

On February 19th, 2015, after briefing and argument, this court filed the unpublished opinion finding the evidence that was illegally seized from petitioner's cell phone following his arrest was harmless beyond a reasonable doubt. (Opinion p. 12.) The opinion relied on evidence favoring the state's case to show petitioner was connected to the car used in the shootings and the gang, and that he was concerned that he might be a suspect in the shooting. But the relevant issue at trial was not whether he had ties to the gang, or whether he later had knowledge of the shooting but rather is whether petitioner was the

third shooter in the incident, and the evidence of this was weak. And the relevant issue here is whether the state showed to a near certainty that the evidence illegally taken from petitioner's smart phone did not contribute to the verdict.

Petitioner now asks that this court grant a rehearing based on errors made in the opinion.

The errors include 1) a misapplication of the harmless error analysis under *Chapman v. California* (1967) 386 U.S. 18; 2) the omission of defense-favorable facts that are key to the analysis and 3) a view of the relevant facts that supported all inferences to favor the prosecution's case.

Argument

I

The proper *Chapman* analysis requires a review of the entire record including defense favorable evidence, and does not include inferences in support of the judgment

The opinion first properly states the basic premise that after finding a federal constitutional error, the beneficiary of the error (the prosecution) "must prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman v. California, supra*, 386 U.S. at p. 24.) The focus is "what the jury

actually decided and whether the error might have tainted its decision. That is to say, the issue is whether the ... verdict actually rendered in this trial was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279; *People v. Neal* (2003) 31 Cal.4th 63, 86.)

However, the harmless error analysis in the present case is flawed in two significant respects. First, it fails to review the record "as a whole" in assessing the significance of the errors. (*Yates v. Evatt, supra,* 500 U.S. at p. 409; *Delaware v. Van Arsdall, supra,* 475 U.S. at p. 681); *United States v. Hasting, supra,* 461 U.S. a p. 509.) Next, the court conducts a form of a substantial evidence review, ignoring or minimizing defense-favorable and prosecution-unfavorable evidence and inferences, and other matters demonstrating how the error "might have contributed to the verdict." (*Chapman v. California, supra,* 386 U.S. at p. 23.)

An appellate court analyzing the issue errs by simply removing the illegally obtained evidence and essentially asking whether the remaining evidence supports the judgment. (*Satterwhite v. Texas* (1988) 486 U.S. 249, 258-259.) Rather, the proper question is whether the state has actually proved beyond a reasonable doubt that the error

did not contribute to the verdict. (*Ibid.*)

II
A review of the whole record shows this was a close case on the question of guilt as shown by the hung jury at the original trial.

The first significant fact omitted from the opinion is that this was a very close case, as demonstrated by the fact that the first trial (where the prosecution presented the same evidence) resulted in a hung jury. And it was not a case where there was an outlier holdout juror — the votes were 9-3 for guilty on shooting at a vehicle (count one), 8-4 for guilty in the attempted murder of Ajon Webster (count two), 11-1 for not guilty as to the attempted murder of the passenger in Webster's car (count three), 9-3 for guilty on the assault with a semiautomatic weapon count involving Webster (count four), and 11-1 for not guilty on the assault with a semiautomatic weapon count involving the passenger (count five). (4 RT Augment 1343-1344.)

So in the first trial, based on the same evidence, the jury cast 60 votes for the five counts and voted to convict in less than half of the votes (28 out of 60). Even as to the three counts involving Ajon Webster that were charged at the present retrial, there were 10 votes for not guilty.

The fact that the first trial resulted in a deadlocked jury is proof

that the first trial "was a close one." (*Dow v. Virga* (9th Cir. 2013) 729 F.3d 1041, 1049; And see *Krulewitch v. U.S.* (1949) 336 U.S. 440, 445; *People v. Ganier* (1977) 19 Cal.3d 835, 854-856.)

That the case was close is highly significant when arguing prejudicial error, as all evidence presented by the prosecution must be considered important where the evidence was not exceedingly strong. Here, the state actively argued before both trials that the court should admit the photos and other evidence taken from the phone (which shows petitioner in a bad light). It's unfair after a court determines that the evidence was illegally obtained, to conclude that it made no difference. The court's failure to note that this was a close case shows it did not engage in the required whole-record review.

III

A proper whole-record review would emphasize that none of the four eyewitnesses to the shooting identified petitioner.

A key fact in support of the defense argument was that four people witnessed the shooting and none identified petitioner as being present or involved. Most significant was the fact that two of the witnesses, Haide and Ginno Urias were outside and close to the shooters, and each observed the three men near petitioner's car for 10-

15 minutes before the shooting. (4 RT 703-705; 5 RT 909.) Both told the investigating detective they would be able to identify the three men if given the chance, but neither identified petitioner when shown photo lineups, and when Haide looked at petitioner at the preliminary hearing, she said he was not one of the shooters. (4 RT 706-707, 855, 861; 5 RT 905.) And it wasn't like she was afraid to make an identification, as she identified Donte Haddock. (5 RT 909.)

This court makes no reference to the powerful exonerating evidence in the "Analysis" portion of the opinion, again showing it failed to consider the whole record in reaching the conclusion.

The identification issue was briefly raised in the factual statement referred to as "Trial Evidence." (Opinion p. 4.) The court simply notes in that section that "The three eyewitnesses to the shooting *declined* to give a positive identification of Riley as one of the shooters, although one of those witnesses said Riley *could have been* one of the shooters." (Opinion p.5, emphasis added.)

This brief statement of the issue was taken from the original opinion which likely reviewed the case in the light most favorable to the initial judgment. Regardless of the standard used, it is wrong to say Haide and Ginno "declined" to give a positive identification as the

record shows instead, they were "unable" to identify petitioner as one of the shooters even though they got a good look at the three men, said they could identify them, and then both concluded petitioner was not involved. Haide's later reply to the prosecutor's question that petitioner "could" have been one of the shooters followed her similar response to defense counsel's question of whether Stephen Redford could have been involved. (4 RT 709.)

The opinion repeats on the following page that Haide "at trial *explained* Riley could have been the man she saw." (Opinion p. 6.) But Haide didn't "explain" anything, and simply answered that way in response to the prosecutor's question of whether it was within the realm of possibility. She had previously unequivocally excluded petitioner under oath. That she later acknowledged some possibility that he was involved, did little to strengthen the state's case. The court's review of the testimony suggesting Haide explained petitioner could have been a shooter shows it was again analyzing the evidence in the light most favorable to the prosecution's case.

IV

The opinion omitted any reference to the videos taken from petitioner's phone.

The opinion incorrectly confines its analysis of the items illegally

taken from petitioner's cell phone to the three photographs of petitioner that were presented at trial.

The court makes no reference to the boxing videos that were also taken from the phone and discussed at trial by Detectives Malinowski and Barnes to support their conclusions. (4 RT 857-858; 5 RT 1050-1051.) Detective Barnes emphasized that the illegal video played a role in his opinion regarding petitioner's gang membership. (5 RT 1050.) And the prosecutor referred to the videos during closing argument. (6 RT 1161.) Omitting this fact from the opinion further demonstrates that analysis did not include a review of the whole record.

V

The opinion fails to acknowledge the third party culpability evidence showing Stephen Redford may have been the third shooter.

Although mentioned briefly in the factual statement under "Defense Evidence" (Opinion p.8), the opinion ignores the fact that there was another Lincoln Park gang member, Stephen Redford, who fit the description of the third shooter, lived in the area where the Oldsmobile was parked after the shooting, and had handled one of the guns used in the shooting (according to DNA tests). (5 RT 913-915.) And while the police curiously decided not to investigate Redford's

involvement, Haide Urias testified at trial that "maybe" he was the third shooter. (4 RT 709.)

The fact that there was no direct evidence of petitioner's involvement in the case, and there was another legitimate suspect who was never investigated, is further evidence that this was a weak or a close case against petitioner, and this should have been included in the court's harmless error analysis.

VI

The opinion uses an improperly drawn inference about the existence of other photographs.

The opinion notes in footnote 2, in the "Trial Evidence" section (Opinion p. 2), that the three photographs taken from petitioner's phone and admitted at trial may not have been the only photos showing petitioner throwing up gang signs with other Lincoln Park members. Then, in the "Analysis" section the court repeats the photos were "duplicative of other photographs the expert had seen depicting the same behavior." (Opinion p. 11.) However, the record belies the claim that there were additional photos.

When asked for the basis of his opinion that petitioner was a Lincoln Park gang member, Detective Barnes listed a few facts including:

1) He's been contacted 12 times with 13 different Lincoln Park

gang members.[1]
2) He's seen "several photos" with other known Lincoln Park gang members tossing up signs, Lincoln Park signs.
3) He's read reports that have said petitioner wore gang clothes or a green bandana.
4) He had a gang moniker "Dave Bo." (5 RT 1044.)

But when the prosecutor followed up in his attempt to verify the basis for the expert's opinion, he focused largely on the three photos and emphasized the fact that petitioner was flashing Lincoln Park gang signs with Gerald Haynes in the photos. (5 RT 1041-1050.) This was the primary area of inquiry. He later added that the illegally taken videos also helped form his opinion. (5 RT 1051.)

There was no evidence showing the expert had viewed any photos that were not taken from petitioner's phone. While he testified that he might have seen "several" photos, it could be that he was using that term to describe the three photos admitted into evidence, or it could refer to other photos taken from the phone but not admitted. Detective Malinowski testified at the suppression hearing that the police downloaded "a bunch of photos" from the phone. (1 RTA 179.)

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[1] Respondent notes in her Supplemental Respondent's Brief at p. 25 that the gang expert said he had 12 prior contacts with petitioner, but the expert testified that even though he had been working full time (for three years) as a gang detective in Lincoln Park, he had never met petitioner. (5 RT 1057.)

The court's suggestion that the illegally seized photos were cumulative of other photos that were not illegally taken has no support in the record and is another inference in support of the convictions that petitioner contends is improper.

VII

Illegal evidence of the phone calls petitioner made shortly after the shooting.

In support of the harmless error finding, the court refers to the fact that "Riley's cell phone usage records showed his cell phone was also near the place of the shooting around the time of the shooting, and was further used about 30 minutes later near the location where police found Riley's Oldsmobile." (Opinion p. 9.)

The prosecution stressed at trial that petitioner called Jazmin McKinnie shortly after the shooting, and his cell phone records were a significant part of the state's case. (6 RT 1169-1172.)

The detective testified at the preliminary hearing that police obtained a warrant to search for the records from petitioner's cell phone — 619-634-4159. (3 PHT 421.) But when asked where police originally obtained his number in order to get the warrant, Detective Barnes testified that Malinowski got it off petitioner's phone following his arrest. (3 PHT 500.) The prosecutor would later emphasize in

argument to the court "Those phone calls are extremely relevant and important." (3 PHT 544.)

So in addition to the three photos introduced at trial, the videos described by both detectives (and the prosecutor during closing argument (6 RT 1161)), possibly other photos that were not introduced, the state also obtained petitioner's cell phone records based upon the illegal search after the arrest. And the latter was a key point stressed by the prosecutor at trial, and in this court's analysis — although the additional disclosure of this significant illegally obtained evidence has not been previously addressed, it is important to the present harmless error analysis.

Conclusion

The court concludes the illegal search of petitioner's smart phone was harmless largely because, aside from the three photographs introduced at trial, there was other evidence showing that he owned the Red Oldsmobile (but the defense presented evidence showing he often loaned his car to friends), his DNA was later found on one of the guns (but the expert testified the guns were often passed around the gang after a shooting, and petitioner's DNA was not found on the spent cartridges), the gang expert referred to other factors to support his

conclusion that petitioner was a member of the Lincoln Park gang (but the primary focus when questioning the detective was the photographs and the gang signs being displayed by petitioner and Gerald Haynes), the detective viewed other photos of petitioner (which is not in the record), and petitioner used gang slang and had a moniker. The court also emphasizes that petitioner called McKinnie shortly after the shootings (but this was fruit of the illegal cell phone search) and in recorded jailhouse conversations he expressed concern that police might charge him with crimes arising from the shooting (but he never admitted any involvement in these discussions and anyone in his situation would have been concerned about being charged in the shooting).

Absent from the court's analysis was the fact that this was a close case as demonstrated by the fact that the first jury did not convict him with the same evidence; the eyewitnesses who got a close look at the shooter essentially exonerated him, the court's analysis omits the fact that Stephen Redford fit the description of the shooter, handled one of the guns and lived near the location where the car was parked after the shooting; in addition to the three photos, the search of the phone produced boxing videos described at trial by Detectives Malinowski and

Barnes and mentioned during the prosecution's closing argument, and perhaps most significant, the search also gave Detective Malinowski petitioner's cell phone number which he then used to produce a warrant for petitioner's cell phone records and this led to the "extremely relevant and important" evidence of phone calls petitioner made to McKinnie just after the shooting.

The court concludes the three photos had "de minimus incremental inflammatory impact" when compared to everything else the jury considered. But the court does not ask the necessary question of whether the state proved beyond a reasonable doubt that the evidence seized during the illegal search had no impact on the guilty verdict. When reviewing the whole record, including the defense favorable evidence, the weaknesses in the state's evidence and not making inferences supporting the verdict, the court must include the illegal search of petitioner's cell phone after his arrest was not harmless under the *Chapman* standard.

Petitioner respectfully requests that this court grant a rehearing.

Date: 2/27/15

Respectfully submitted,

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Certificate of Compliance

I, Patrick Morgan Ford, certify that the within brief consists of 3,886 words, as determined by the word count feature of the program used to produce the brief.

Dated: 2/27/15

Patrick Morgan Ford
PATRICK MORGAN FORD

DECLARATION OF SERVICE BY U.S. MAIL AND ELECTRONIC SERVICE

I, Esther F. Rowe, say: I am a citizen of the United States, over 18 years of age, and employed in the County of San Diego, California, in which county the within-mentioned delivery occurred, and not a party to the subject case. My business address is 1901 First Avenue, Suite 400, San Diego, CA 92101. I served a *Request for Rehearing*, of which a true and correct copy of the document filed in the case is affixed, by placing a copy thereof in a separate envelope for each addressee respectively as follows:

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Additionally, I electronically served a copy of the above document as follows: 1) Court of Appeal electronic notification address, 4d2nbrief@jud.ca.gov., and 2) Attorney General's electronic notification address, ADIEService@doj.ca.gov., I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed on March 2, 2015, at San Diego, California.

Esther F. Rowe