IN THE CALIFORNIA SUPREME COURT

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. LETICIA MONTOYA, Defendant and Appellant.	No. COURT OF APPEAL NO. B243042

PETITION FOR REVIEW

On Appeal from the Judgment of the
Superior Court of the State of California
in and for the County of Los Angeles
Superior Court No. PA066801

HONORABLE BEVERLY REID O'CONNELL, JUDGE

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PETITION FOR REVIEW

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

LETICIA MONTOYA, defendant in the above entitled case and petitioner herein, petitions this court to review the unpublished decision of the court of appeal of the State of California, Second Appellate District, Division Four, filed on January 7, 2015, in case number C072195. The Court of appeal affirmed the judgment of the trial court. Appellant filed a petition for rehearing on January 21, 2015. The Court of appeal denied the petition on January 28, 2015. A copy of the decision of the Court of appeal, showing the date of its filing, is set forth as Appendix A. A copy of the order denying rehearing is attached as Appendix B.

Review is sought pursuant to California Rules of Court rule 8.500 (b), to secure uniformity of decision and settle important questions of law.

QUESTIONS PRESENTED

1. In *People v. Chiu* (2014) 59 Cal.4th 155, this court set forth a standard for determining when reversal is required when the jury receives alternative instructions on the elements of the offense, one of which is legally correct and one of which is legally incorrect. Does the court of appeal misapply the standard set forth in *Chiu* when it affirms a judgment on the basis of its own resolution of disputed facts and ignores parts of the record from which it could be inferred that the jury relied on the erroneous legal theory in reaching its verdict?

2. Do not the Sixth Amendment and *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705] preclude the court of appeal from holding harmless an instructional error that permitted the jury to find the defendant guilty on an erroneous legal theory by resolving disputed facts in favor of the verdict and ignoring evidence in the record from which a reasonable juror could have had a reasonable doubt about whether the evidence supporting the legally correct theory established the defendant's guilt?

NECESSITY FOR REVIEW

Review is necessary in this case to clarify the standard a reviewing court should use to determine when an instructional error that permits a jury to find a defendant guilty on a legal theory that does not require it to find every element of the crime charged requires reversal. Two recent decisions of this court, *People v. Chiu*, *supra*, 59 Cal.4th 155, and *People v. Chun* (2011) 45 Cal.4th 1172, have adopted seemingly inconsistent standards for making this determination when the instructions permit the defendant to be convicted on either a legally incorrect theory or a legally correct theory.

In *Chiu*, this court adopted the demanding standard set forth in *People*

v. Guiton (1993) 4 Cal.4th 1116 to determine whether the erroneous instruction requires reversal. (*Chiu, supra,* 59 Cal.4th at p. 167.) When the trial court's instructions permit the jury to convict the defendant on alternative theories, some of which are legally correct and some of which are legally incorrect, the conviction cannot stand unless the court is able to "conclude beyond a reasonable doubt that the jury based its verdict on the legally valid theory." (*Ibid.*)

In *Chun*, however, this court did not rely on *Guiton* or adopt its standard of review. Noting that *Guiton* had expressly left open the standard of review for harmlessness in that situation, this court adopted a standard that was derived from Justice Scalia's concurrence in *California v. Roy* (1996) 519 U.S. 2 [136 L.Ed.2d 266, 117 S.Ct. 337] (*Roy*). (*Chun, supra,* 45 Cal.4th at p. 1203, citing *Guiton*, *supra,* 4 Cal.4th at pp. 1130, 1131.)

There, Justice Scalia explained that when jury instructions permit the jury to find the defendant guilty without finding every element of the offense charged, "[t]he error . . . can be harmless only if the jury verdict on other points effectively embraces this one or if it is impossible, upon the evidence, to have found what the verdict *did* find without finding this point as well." (*Roy, supra,* 519 U.S. at p. *7*.)

The analysis this court employed in *Chun* aptly illustrated the way to review a record using this method of harmless error analysis. There the jury instructions on felony murder required the jury to find that the defendant had the specific intent to commit the underlying felony of shooting at an occupied motor vehicle and that the shooting had to be "willful and malicious." (*Chun, supra,* 45 Cal.4th at p. 1205.) Further, undisputed evidence showed that there were three individuals in the vehicle and they were shot at close range with three different firearms.

(*Ibid.*) Thus, the court was able to conclude that the error was harmless because "no juror could find felony murder without also finding conscious-disregard-for-life malice." (*Ibid.*)

However, although this court used Justice Scalia's test from *Roy* to analyze the instructional error in *Chun*, it created ambiguity about just what the appropriate test is by stating that it might not be "the only way to find error harmless." (*Id.* at p. 1204.) The problem with this dictum is that it fails to provide any guidance as to what other ways may be appropriate methods for finding an error harmless, and consequently invites reviewing courts to invent their own form of harmless error analysis, as the court of appeal did in this situation.

In contrast, *Chiu* simply says that the verdict cannot stand unless the reviewing court is able to find a basis in the record from which it can determine the jury based its verdict on the valid theory. (*Chiu, supra,* 59 Cal.4th at p. 167.) Thus, unlike *Chun*, *Chiu* offers the reviewing court no escape route from the need to determine whether the jury in the case before the court actually based its verdict on a valid theory. Review is necessary to resolve this apparent conflict between two recent decisions of this court.

In this case, the court of appeal found the trial court's error in instructing on the legally invalid natural and probable consequences theory harmless because in its view the jury's guilty verdict on the charge 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." (Appendix A, p. 21.) This approach to the question of prejudice, which is far less demanding than that required by *Chiu*, demonstrates the

need for this court to clarify the ambiguity created by the invitation to experiment held out in *Chun*.

Unfortunately, as the decision of the court of appeal in this case illustrates, permitting reviewing courts to experiment with their own formulation of the standard of review for harmlessness in such situations risks infringing the defendant's Sixth Amendment right to have the jury determine guilt.

As this court explained in *Chun*, when the trial court instructs on a both a legally valid theory and a legally invalid theory, it commits federal constitutional error (*Hedgpeth v. Pulido* (2008) 555 U.S. 57, 59-60 [172 L. Ed. 2d 388, 129 S.Ct. 530] (*Pulido*)), which is subject to review under *Chapman v. California, supra,* 386 U.S. 18. Under this rigorous standard, reversal is required unless the state can show that the error was harmless beyond a reasonable doubt. (*Id.* at p. 24.)

In this case, the court of appeal found the trial court's instructional error harmless because in its view the jury's guilty verdict on the charge 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." (Appendix A, p. 21.) This approach ignored evidence favorable to appellant. In addition, it constitutes improper fact-finding by the court of appeal, which affirmed appellant's first degree murder conviction on the basis of its own opinion of how the jury was likely to have resolved conflicts in the evidence.

Indeed, the manner in which the court of appeal approached the question of prejudice is not just at odds with the dictates of *Chiu*, it is plainly wrong under settled Supreme Court law. Consequently, it violated

appellant's Sixth Amendment right to a jury trial and infringed her Fourteenth Amendment right to due process of law.

The court of appeal's improper approach to the question of prejudice under federal constitutional standards is symptomatic of a widespread problem with how the courts of appeal in general are misapplying those standards. To show this, appellant has submitted with this petition a motion for judicial notice of twelve petitions for review, in which the appellant asked this court to review a decision by the court of appeal in which federal constitutional error had been found to be non-prejudicial by taking an improper prosecution-favorable view of the record: *People v. Mercado*, S221241; *People v. Estrada*, S211538 *People v. Lewis*, S220153; *People v. Iuvale*, S218265; *People v. Robles*, S216892; *People v. Yanez*, S212391; *People v. Madrigal*, S212023; *People v. Aguilar*, S209226; *People v. Huezo*, S204962; *People v. Lewis*, S204103; *People v. Miller*, S186011; *People v. Beckley*, S184480. All of these petitions were denied.

While finding further decisions of this type is difficult — because it is evidence not considered in the court of appeal's decision that is the primary deficiency — appellant would point out that this improper approach to *Chapman* analysis also appears in *People v. Gonzalez* (2012) 210 Cal.App.4th 875, 885 (admission of confession made in violation of *Miranda* harmless because there was "sufficient admissible evidence" to support conviction) and *People v. Katzenberger* (2010) 178 Cal.App.4th 1260, 1269 (discounting defense testimony because it "does not compel a conclusion" that defendant did not inflict charged assault), as well as in many unpublished decisions. (See, *e.g., People v. Flores* (Sep. 13, 2013, B241530) Cal.App.Unpub.Lexis 6524 *28: "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"; *People v. Royal* (July 18, 2013, B241841) 2013 Cal.App.Unpub.Lexis 5048 *8 (instructional error harmless under Chapman because there was "ample substantial evidence to support the 'fear' element of robbery"); *People v. Ernest* (Oct. 10, 2012, B232792) 2012 Cal.App.Unpub.Lexis 7369 *35 ("even if defendant's recorded statement was not admitted into evidence, the evidence of his guilt of the charged crimes was substantial"); *People v. Brown* (July 12, 2011, B224439) 2011 Cal.App.Unpub.Lexis 5185 *25 (error harmless under either *Chapman* or *Watson* because there was substantial evidence of intent); *People v. Ennis* (Jan. 18, 2011, no. B212811) Cal.App.Unpub.Lexis 304 *28 (defendant cannot establish prejudice because evidence of guilt substantial).

Given this context, there is a considerable need for this court to intervene and to put a halt to the wholesale misapplication of the *Chapman* principles by the courts of appeal of this state.

Statement of the Case and Facts

For purposes of this petition for review only, appellant adopts the statement of the case and facts contained in the opinion of the court of appeal at pages 1-7.

ARGUMENT

I. THE COURT OF APPEAL MISAPPLIED THE STANDARD OF REVERSIBILITY SET FORTH IN *PEOPLE V. CHIU* BY AFFIRMING THE JUDGMENT BELOW ON THE BASIS OF ITS OWN RESOLUTION OF DISPUTED FACTS AND IGNORING PARTS OF THE RECORD FROM WHICH IT COULD BE INFERRED THAT THE JURY RELIED ON THE ERRONEOUS LEGAL THEORY IN REACHING ITS VERDICT.

Appellant Montoya was convicted of first degree murder, committed by shooting from an occupied motor vehicle. Undisputed evidence established that she was the driver of the car, not the shooter. The jury was

instructed on direct aiding and abetting and on aiding and abetting under the natural and probable consequences theory of derivative liability. In *People v. Chiu, supra,* 59 Cal.4th 155, this Court adopted a new rule, precluding the use of the natural and probable consequences doctrine to establish guilt of first degree murder, except when the separate felony murder doctrine is at issue. The court of appeal found that it was error to instruct that appellant could be convicted of first degree murder if murder was a natural and probable consequence of a crime she intentionally aided and abetted but concluded that the error was harmless.

On determining in *People v. Chiu, supra,* 59 Cal.4th 155, that the natural and probable consequences theory of derivative liability should not be used to impose liability for first degree murder on an aider and abettor, this court determined that the appropriate standard for determining whether reversal is required when instructions permit the jury to find the defendant guilty on this theory derives from *People v. Guiton, supra,* 4 Cal.4th 1116. (*Chiu, supra*, 59 Cal.4th at p. 167.)

In *Guiton*, this court considered and reaffirmed the long-standing rule that "'when the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand.'" (*Id.* at p. 1122, quoting *People v. Green* (1980) 27 Cal.3d 1, 69.) As *Green* and *Guiton* make clear, an error in instructing on a legally incorrect theory is not reversible *per se*, but affirmance does require the reviewing court to find affirmative evidence in the record that the jury actually rested its verdict on a valid theory. (*Guiton, supra,* 4 Cal.4th at p. 1129.) This demanding standard is due to the fact that juries are generally not

equipped to determine whether a particular theory of conviction is contrary to law. (*Guiton, supra,* 4 Cal.4th at pp. 1125-1127.)[1]

Guiton noted that judgments had been affirmed in spite of such errors when "it is possible to determine from other portions of the verdict that the jury necessarily found the defendant guilty on a proper theory." (*Id.* at p. 1130.) *Guiton* also noted that "there may be additional ways by which a court can determine that error in the *Green* situation is harmless." (*Ibid.*)

Chiu explained the appropriate standard as follows:

> Defendant's first degree murder conviction must be reversed unless we conclude beyond a reasonable doubt that the jury based its verdict on the legally valid theory that defendant directly aided and abetted the premeditated murder.

(*Chiu, supra,* 59 Cal.4th at p. 167.)

Chiu seems quite straightforward and simple to apply. In terms of this case, it requires reversal here if there is a reasonable possibility that the jury based its conclusion that Montoya was guilty of first degree murder on the erroneous natural and probable consequences theory of liability. (See *Chiu*, *supra*, 59 Cal.4th 155 at pp. 167-168.) Stated in the more usual beyond-a-reasonable-doubt language, *Chiu* requires reversal unless the

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[1] Following the lead of the United States Supreme Court in *Griffin v. United States* (1991) 502 U.S. [116 L.Ed.2d 371, 112 S.Ct. 466] (*Griffin*). *Guiton* drew a distinction between such errors and errors that permit the jury to find a defendant guilty on a factually insufficient ground. (*Guiton*, *supra,* 4 Cal.4th at p. 1128.) Under *Guiton* errors such as the erroneous natural and probable consequences instruction given here, that permitted Montoya to be convicted of first degree murder without the requisite intent, are still ordinarily reversible. But, because juries are "well equipped" to analyze the evidence and determine whether the facts are sufficient to support a legal theory, when the instructions offer the jury more than one theory of liability, at least one of which is supported by substantial evidence, the error does not provide an independent basis for reversal.

reviewing court can conclude beyond a reasonable doubt that the jury found that Montoya directly aided and abetted the intentional murder; in other words, the conviction may be upheld only if the court is able to state beyond a reasonable doubt that the that the jury that decided the case actually concluded that Montoya acted with the intent to cause death.

There is nothing in *Chiu* that authorizes the court of appeal to resolve disputed facts in favor of the prosecution. Yet this is exactly what the court did here. The decision purports to rely on the jury's verdict on the charge of discharging a firearm from a motor vehicle as a basis for finding that the jury found the facts necessary to convict appellant of first degree murder as a direct aider and abettor, which in this case requires a finding that she intentionally aided an abetted an intentional killing (Pen. Code, §189), in other words that her mental state was the equivalent of express malice.

However, the conviction of discharging a gun from a motor vehicle does not establish or even imply that she aided and abetted an intentional killing. The jury was instructed here that to find appellant guilty of this offense, they had to find that she was the driver of a vehicle, that she knowingly permitted someone to discharge a firearm from the vehicle, and that the person in fact did discharge a firearm from the vehicle. (11RT 1528.) The conviction itself says nothing about her intent that establishes she aided and abetted an intentional killing. Indeed, even assuming that Montoya, as the driver of the car, must have been aware of the presence of three individuals on the sidewalk, the close approach of the car to their location, and Flores' hostile approach to them, what the jury found with respect to this count—that Montoya knowingly permitted Flores to discharge a firearm from the car—establishes at most that she acted with conscious disregard for life. This will not suffice for a first degree murder

conviction under section Penal Code section 189, which requires that she intentionally aided and abetted an intentional killing.

The decision of the court of appeal did not rely solely on the guilty verdict on the motor vehicle charge to conclude that the jury found Montoya directly aided an abetted an intentional killing. Instead, it asserted that the guilty verdict "indicates the jury rejected Montoya's exculpatory account of the shooting . . . in favor of her inculpatory statements to her friend Andalon." (Appendix A, p. 21.) Because in the court's view Andalon's testimony, if believed, indicated that Montoya and Flores planned the shooting as revenge for the rival gang's assault on Flores, the court concludes that the jury must have found her guilty of premeditated first degree murder. Appellant does not believe that Andalon's testimony will sustain the weight the court places on it.

Even if the jury believed every word of his statement, it could still have concluded that Montoya was simply indifferent to the possibility that Flores might kill someone. This is undoubtedly a blameworthy mental state, but it is not express malice, and it will not support a conviction of first degree murder as a direct aider an abettor, even when, as here deliberation and premeditation are not required. In other words, Andalon's testimony does not establish beyond a reasonable doubt that Montoya shared Flores' intent to kill.

However, there is a more important factual misconception here. The conclusion that the guilty verdict on the firearm discharge count indicates that the jury chose Andalon's version of the facts rather than Montoya's statement is based on a false dichotomy. There is no logical basis for concluding that the jury's only choices in this case were to believe Montoya's statement to the police in its entirety or to believe Andalon. The

jury, not the court of appeal, was the trier of fact. It was well within its purview to reject both Andalon's statement indicating that Montoya and Flores actively planned and prepared to kill rival gang members, and Montoya's statement that she did not have any idea before the shots were fired that Flores intended to commit an assault with a firearm against rival gang members. The jury could well have been skeptical of Montoya's assertion that she did not know that Flores had a rifle or that he intended to use it to shoot at rival gang members and at the same time have been disbelieved Andalon's story about going to fetch Flores' rifle. Again, under the circumstances such a resolution of the facts may arguably have indicated that she acted with conscious disregard for life, but would not have established that she intentionally to aid and abet an intentional killing.

Indeed, it is not only possible but plausible that this is exactly what the jury did. Andalon testified that after speaking with Flores, he called Montoya at work. (Appendix A, p. 4.) Yet there was no corroboration that such a call was ever made, and the absence of corroboration could have raised a reasonable doubt about whether this aspect of his statement was true. (Appendix A, p. 7.) The prosecutor established on cross-examination of the AT&T representative who testified to this fact that if Ms. Montoya's employer had more than one telephone line, the call might not have been recorded under the business's primary number, but this possibility does not corroborate Andalon's testimony. At most it indicates that the absence of a record of the call does not irrefutably establish that the call was not made.

In addition, Montoya allegedly told Andalon that the decision to go get Flores's rifle was made when she and Flores were getting high on PCP.

(Appendix A, p. 4-5.) Yet Montoya presented evidence that she had tested negative for drugs, including PCP, on 24 occasions between February 2008 and February 2009. (Appendix A, p. 7.) The prosecutor established on cross-examination that she did not test for drugs between December 25 and December 30, 2008. (Appendix A, p. 7.) This negative evidence does not corroborate Andalon's testimony. It simply indicates that the negative drug tests do not entirely refute his assertion that she was getting high on PCP on the night of December 27-28, 2008, a 12-month record of clean tests, which started before December, 2008 and continued for two months afterward, could have raised a reasonable doubt about the truth of Andalon's testimony about her PCP use.

Again, this evidence does not conclusively establish that appellant did not smoke PCP before the homicide, but 10 months of clean tests indicate that she was not regularly using drugs at the time of the homicide, and the evidence could have raised a reasonable doubt about this aspect of Andalon's testimony. These facts, which the jury could reasonably have viewed as undermining Andalon's assertion that he spoke with Montoya, were cited in the factual and procedural background section of the opinion, but not mentioned in the discussion of prejudice.

Finally, the likelihood that the jury relied on the natural and probable consequences doctrine to find Montoya guilty of first degree murder is enhanced by the fact the prosecutor asked them to do just this. As appellant pointed out in her opening brief (AOB Montoya 18), the prosecutor argued that the jury could find Montoya guilty without finding that she intended to aid and abet an intentional murder:

> 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.) If the jury heeded the prosecutor, it may well "have been focusing on the natural and probable consequences theory." (*Chiu, supra,* 59 Cal.4th at p. 168.)

Because the decision of the court of appeal here represents a significant departure from the method of analysis authorized by this court in *Chiu, supra,* 59 Cal.4th at p. 167, appellant believes the court may have relied on the permission given by this court in *People v. Chun, supra,* 45 Cal.4th 1172, to look for additional ways of holding errors involving erroneous legal theories harmless. In *Chun* this court declined to follow *Guiton,* and instead opted to use a standard derived from Justice Scalia's concurrence in *California v. Roy* (1996) 519 U.S. 2 [136 L.Ed.2d 266, 117 S.Ct. 337] (*Roy*). (*Chun, supra,* 45 Cal.4th at pp. 1204-1205.)

In *Roy*, the trial court had incorrectly instructed the jury that an aider and abettor could be convicted if he had knowledge of the perpetrator's unlawful intent. The Ninth Circuit had reversed. The United States Supreme Court remanded the case because the federal appeals court had used the more rigorous "beyond a reasonable doubt" standard applicable to federal constitutional errors on direct appeal instead of the more deferential "grave doubt" as to harmlessness standard applicable in a federal habeas corpus petition. (Compare *Chapman, supra,* 386 U.S. at p. 24 with *Brecht v. Abrahamson* (1993) 507 U.S. 619 [123 L.Ed.2d 353, 113 S.Ct. 1710].) Justice Scalia concurred in the remand but wrote separately to explain what in his view was the proper inquiry for determining harmlessness. He explained that when jury instructions permit the jury to find the defendant guilty without finding every element of the offense

charged, "[t]he error . . . can be harmless only if the jury verdict on other points effectively embraces this one or if it is impossible, upon the evidence, to have found what the verdict *did* find without finding this point as well." (*Roy, supra,* 519 U.S. at p. *7* [Scalia, J. concurring].) Using the "beyond a reasonable doubt" language derived from *Chapman*, *Chun* expressed the standard of reversibility in these words: "[i]f other aspects of the verdict or the evidence leave no reasonable doubt that the jury made the findings necessary for . . . [conviction on the valid theory], the erroneous . . . instruction was harmless." (*Chun, supra,* 45 Cal.4th at p. 1205.)

Despite this court's decision to use the standard from Justice Scalia's concurrence in *Roy* rather than the standard discussed in *Guiton,* his standard is not, in fact, inconsistence with *Guiton* and *Chiu*. Both standards of reversibility focus on the findings by the particular jury in the particular case, and direct the reviewing court to reverse unless it can ascertain to the requisite degree of certainty that the jury actually based its verdict on a legally valid theory. The trouble with the *Chun* decision is its suggestion that there may be other ways of holding an error harmless without specifying what these ways might be or providing any clue to the appellate courts about what these ways might be. Indeed, by focusing on ways of holding an error harmless, the opinion suggests that the reviewing court's job is to look for ways to affirm convictions even in the face of instructions that fail to provide appropriate guidance as to what conduct constitutes the crime with which the defendant is charged.

In concluding that the instructional error that permitted the jury to find Montoya guilty of first degree murder on the natural and probable consequences theory was harmless, the court of appeal decided disputed

facts in favor of the prosecution; ignored evidence in the record from which a rational jury could have formed a reasonable doubt about whether Montoya intended to aid and abet an intentional murder; and ignored the explicit invitation from the prosecutor to find her guilty on the basis of the natural and probable consequences theory. This approach to harmless error is utterly inconsistent with the standard approved in *Chiu* and with the approach described by Justice Scalia in *Roy.* It appears that it could only have come from the suggestion in *Chun* that other approaches to harmless error analysis might be acceptable in this situation.

Appellant urges this court to grant review and clarify the standard for determining when reversal is required for jury instructions that permit the jury to find the defendant guilty on either a legally erroneous or a legally proper theory of liability.

II. THE DETERMINATION BY THE COURT OF APPEAL IN THIS CASE THAT THE ERROR THAT PERMITTED THE JURY TO FIND APPELLANT GUILTY OF FIRST DEGREE MURDER ON THE NATURAL PROBABLE CONSEQUENCES THEORY WAS HARMLESS FAILED TO COMPORT WITH CLEARLY ESTABLISHED FEDERAL LAW ON THE REVERSIBILITY OF FEDERAL CONSTITUTIONAL ERROR.

A. When reviewing constitutional error, the court must consider the whole record, including matters that undermine the prosecution's case, and must not substitute its own view of the facts for that of the jury.

Appellant argued in the preceding section that the approach to harmlessness adopted by the court of appeal in this case was inconsistent with the test prescribed by this court in *People v. Chiu*, *supra,* 59 Cal.4th 155. Here she argues that the court of appeal's determination that the error that permitted appellant to be convicted of first degree on the natural and probable consequences theory of derivative liability failed to comport with

requirements of clearly established federal law for determining when federal constitutional errors require reversal. (*Chapman v. California, supra,* 386 U.S. 18.)

As explained above, instructions which permit the jury to find a defendant guilty on a legally incorrect theory of criminal liability constitute federal constitutional error, even when, as here, the instructions also permit conviction on a legally valid theory. (*Hedgpeth v. Pulido, supra,* 555 U.S. 57, 59-60.) In *Neder v. United States* (1999) 527 U.S. 1, 15 [119 S.Ct. 1827, 144 L.Ed.2d 35], the United States Supreme Court held that the failure to instruct on an element of an offense is subject to harmless error review under *Chapman*. In *Pulido,* the high court held that instructions on multiple theories, one of which is improper, is also subject to harmless error review under *Chapman*. (*Pulido, supra,* 555 U.S. at pp. 60-61.)

It thus appears that under the United States Constitution there may be other ways than the one authorized in *Chiu* of holding what the high court in *Pulido* described as the "alternate theory error" harmless. But these ways are circumscribed by clearly established Supreme Court law and do not permit affirmance in this case.

Beginning with basics, under *Chapman*, the burden is 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." (*Chapman, supra,* 386 U.S. at p. 24.) In ascertaining whether the error contributed to the verdict, decisions of the United States Supreme Court have repeatedly stressed that the reviewing court must consider the record as a whole. (*Neder, supra,* 527 U.S. at pp. 15-16. Accord, *e.g.*, *Yates v. Evatt* (1991) 500 U.S. 391, 409 [111 S.Ct. 1884, 114 L.Ed.2d 432] ("the general rule of the post-*Chapman* cases [is] that the whole record be reviewed in

assessing the significance of the errors"); *Rose v. Clark* (1986) 478 U.S. 570, 583 [106 S.Ct.3101, 92 L.Ed.2d 460] ("[t]he question is whether, on the whole record . . . the error . . . [is] harmless beyond a reasonable doubt") (internal quotation marks omitted); *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681 [106 S.Ct. 1431, 89 L.Ed.2d 674] ("[s]ince *Chapman*, we have repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt"); *United States v. Hasting* (1983) 461 U.S. 499, 509 [103 S.Ct. 1974; 76 L.Ed.2d 96] ("[s]ince *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 the United States Supreme 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* (2006) 547 U.S. 319, 330-331[126 S.Ct. 1727, 164 L.Ed.2d 503].) 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* (1991) 499 U.S. 279, 297-98, 300 [111 S.Ct. 1246, 113 L.Ed.2d 302; *Satterwhite v. Texas* (1988) 486 U.S. 249, 260 [108 S.Ct. 1792, 100 L.Ed. 2d

284]; *Chapman v. California*, *supra,* 386 U.S. at 25; *Fahy v. Connecticut* (1963) 375 U.S. 85, 88-89 [84 S.Ct. 229, 11 L.Ed.2d 171; *Krulewitch v. United States* (1949) 336 U.S. 440, 444-445 [69 S.Ct. 716, 93 L.Ed. 790].)

Moreover, the *Chapman* prejudice analysis is affected in crucial ways by the Sixth Amendment. Most significantly, in undertaking the *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* (2011) 565 U.S. 1, __ [132 S.Ct. 2, 4, 181 L.Ed.2d 311]; *Dillon v. United States* (2010) 560 U.S. 817, 828 [130 S.Ct. 2683, 177 L.Ed.2d 271] (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 the United States Supreme Court. For example, in *Delaware v. Van Arsdall*, *supra,* 475 U.S. 673, where a defendant had been precluded from fully cross-examining a prosecution witness, the high court instructed that the "correct inquiry" required the reviewing court to "assum[e] that the damaging potential of the cross-examination were fully realized." (*Id.* at p. 684.) Similarly, in *Yates v. Evatt*, *supra,* 500 U.S. 391, the high 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 pp. 410-411.) And in *Neder v. United States*,

supra, 527 U.S. 1, which involved constitutional error arising from the failure to instruct on an element of a charged offense, the high court held that in making the *Chapman* assessment, "a court, in typical appellate-court fashion, asks whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element." (*Id.* at p. 19.) In *Neder* the court answered the question in the negative because the factual matter to which the instructional error was relevant was both "uncontested and supported by overwhelming evidence." (*Id.* at p. 17.)

Thus, as these decisions make clear, proper harmless error review is conducted with due regard for the "Sixth Amendment right to have essential facts found by a jury beyond a reasonable doubt" (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 p. 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 the United States Supreme Court on the conduct of harmless error review.

Under Chapman, the court of appeal was required unless the court of appeal was able to determine beyond a reasonable doubt that the error—permitting the jury to find Montoya guilty of first degree murder on a natural and probable consequences theory—did not contribute to the first degree murder 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 brief statement needs to be unpacked before it can be analyzed. It apparently rests on the hypothesis that if the jury had believed Montoya's exculpatory statement to the police, it would have found her not guilty of first degree murder altogether.

The first flaw in the court's reasoning is the faulty assumption that no rational jury could have resolved the facts of the case in such a way as to find that Montoya intended to aid and abet an assault with a firearm but did not intend to aid and abet an intentional killing. But there are several ways in which the jury could have reached such a conclusion. First, even if it had believed Andalon's statement in its entirety, it could have concluded that Montoya intended to aid and abet an assault with a firearm but not an intentional killing. Second, the jury could have disbelieved Andalon's statement that Montoya went with Flores to get the gun and helped him conceal it on the way back to her house, without believing Montoya's statement that she thought they were just going to get beer. In other words, here was no impediment to the jury disbelieving Andalon's story about Montoya's confession to him, and disbelieving Montoya's statement that she did not know Flores had a gun or that he was looking for rival gang members. Either resolution of the facts would mean that the jury relied on the natural and probable consequence instruction to find Montoya guilty.

The annals of criminal law (not to mention life in general) are rife with examples of people telling partial truths to show themselves in a more favorable (or less unfavorable) light. For example, in California jury instructions on self-defense are required even when the defendant testifies that the shooting was accidental when there is substantial evidence that the defendant was acting in self-defense and that the shooting was

intentional because in this situation, the jury "could disbelieve defendant's testimony that the firing was accidental." (*People v. Villanueva* (2008) 169 Cal. App. 4th 41, 51 [quotation marks and citation omitted].) In short, there was no compelling factual for the court of appeal's conclusion that the jury necessarily found that Montoya had the requisite intent for first degree murder under principles of direct aiding and abetting.

Since there was no necessity for the jury to have chosen 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 itself "what conclusions should be drawn from evidence admitted at trial." (See *Cavazos v. Smith* (2011) 565 U.S. 1 [132 S.Ct. 2, 4, 181 L.Ed.2d 311].) Such judicial factfinding infringes a defendant's "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.)

The only evidence the decision of the court of appeal cites to support its assertion that Montoya possessed the necessary mental state to be convicted of first degree murder is her "conduct and incriminating statements to Andalon." (Appendix A, p. 21.) If by conduct, the court means the act of driving the car, her conduct is consistent with the intent to aid and abet an assault with a firearm, and does not necessarily demonstrate the intent to aid and abet an intentional killing. If the decision is referring to her alleged statement to Andalon, it fails to give appropriate weight to factors that could have led the jury to reject Andalon's testimony in its entirety.

As appellant argued in the previous section, Andalon testified that he called Montoya at work. (Appendix A, p. 4.) Yet there was no

corroboration that such a call was ever made. Although the evidence presented by the defendant did not completely rule out the possibility that the call was made, the absence of corroboration could have raised a reasonable doubt about whether this aspect of his statement was true. (Appendix A, p. 7.)

In addition, Andalon testified that Montoya told him the decision to go get Flores's rifle was made when she and Flores were getting high on PCP. (Appendix A, p. 4-5.) Yet Montoya presented evidence that she had tested negative for drugs, including PCP, on 24 occasions between February 2008 and February 2009. (Appendix A, p. 7.) Once again, her evidence does not conclusively refute the possibility that she was using PCP on the night of December 27-28, 2008, but the evidence of her 12-month record of clean tests, which started before December, 2008 and continued for two months afterward, could have raised a reasonable doubt about the truth of Andalon's testimony about her PCP use. [2]

Finally, the court's decision here appears to have given little or no 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*, 375 U.S. at pp. 88-89; *Krulewitch v. United States*, *supra,* 336 U.S.

[2] Another disturbing aspect to the court of appeal's discussion of the evidence of intent is its reliance on cases in which the reviewing court found that the prosecution's evidence established substantial evidence of intent. Reliance on substantial evidence for affirmance represents a complete abdication of the court's responsibility to hold the prosecution to its burden of showing that the constitutional error did not contribute to the verdict. (*Chapman, supra,* 386 U.S. at p. 24.)

440, 444-445. One of these is the prosecutor's invitation to decide the case on this basis, not mentioned by the court in its decision. The prosecutor's theory that Montoya was guilty of first degree murder had two alternatives—either the jury could rely on Andalon's testimony or on the natural and probable consequences theory of liability. He candidly told the jury it could find Montoya guilty without finding that she intended to aid and abet an intentional murder:

> 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 1425.)

If the jury used the natural and probable consequences theory to find Montoya guilty, it did not have to rely on Andalon at all—and in addition to the defense evidence casting doubt on his veracity, he was a gang member, testifying in exchange for leniency. Using the natural and probable consequences doctrine as the basis for conviction enabled the jury to reach a verdict without delving into the thorny question of what part—if any—of Andalon's testimony to believe.

In *Neder v. United States, supra,* 527 U.S. 1, a case which bears a substantial resemblance to this case because it involved the omission of instructions on an element of the charged offense, the United States Supreme Court explained the task of the appellate court conducting *Chapman* review in such a situation as follows: "a court, in typical appellate-court fashion, asks whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element." (*Id.* at p. 19; see also *People v. Mil* (2012) 53 Cal.4th 400, 417.)

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].)

Here the evidence supporting the omitted element was far from overwhelming, being totally dependent on the jury's believing Andalon, a self-described gang shot caller who was testifying in exchange for leniency, and it was hotly contested, by Montoya's statement to the police, by evidence casting doubt on the veracity of two of the few aspects of his statement that could be checked, and by the circumstances of the crime, which though sufficient to support the conviction were certainly far from dispositive with respect to appellant's intention.

As demonstrated by the cases cited in the section explaining the necessity for review and in appellant's accompanying motion for judicial notice, the court of appeal's mistaken approach is a widespread problem in the courts of his state. Review should be granted here.

CONCLUSION

For the reasons stated above, petitioner urges this court to grant review.

DATED: February 14, 2015

Respectfully submitted,

_____

Sara H. Ruddy
Attorney for Petitioner
Leticia Montoya

Word-Count Certificate

I hereby certify that this petition for review contains words, not including the tables or this certificate, as ascertained by the word-count function of the computer program used to prepare the petition.

DATED: February 14, 2015

Respectfully submitted,

_____

Sara H. Ruddy
Attorney for Petitioner
Leticia Montoya

APPENDIX A

Opinion of the Court of Appeal

[not included in service copies]

APPENDIX B

Order Denying Rehearing

[not included in service copies]

DECLARATION OF SERVICE BY MAIL

I am employed in the City of Berkeley, County of Alameda, State of California.

I am over 18 years of age, and not a party to the within cause; my business address is 2020 Milvia Street, Ste. 300, Berkeley, CA 94704.

On February 14, 2015, I served a true copy of the attached **APPELLANT'S PETITION FOR REVIEW** on each of the following, by placing a true copy thereof in a sealed envelope(s) addressed as follows:

Attorney General
State of California
300 South Spring Street
Los Angeles, CA 90013

Attn: Yun K. Lee

Los Angeles County Superior Court
Foltz Criminal Justice Center
210 W Temple St.
Los Angeles, CA 90012

For delivery to: Hon. Beverly Reid O'Connell, Judge

Amy Ashvanian, DDA
Office of the District Attorney
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Chowchilla, CA 93610-1508

and with postage thereon fully prepaid, placing said envelopes for mailing on the above date.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on February 14, 2015, at Berkeley, CA.

_____

SARA H. RUDDY