SUPREME COURT NO. _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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PETITION FOR REVIEW AFTER THE UNPUBLISHED DECISION OF THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE, AFFIRMING THE JUDGMENT OF CONVICTION

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APPEAL FROM THE SUPERIOR COURT
OF SAN DIEGO COUNTY

Honorable Laura W. Halgren, Judge

PETITION FOR REVIEW AFTER THE UNPUBLISHED DECISION OF THE COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION ONE, AFFIRMING THE JUDGMENT OF CONVICTION

Question Presented for Review

1. Whether the Court of Appeal improperly applied the harmless error standard described in *Chapman v. California* (1967) 386 U.S. 18, by finding the admission of evidence illegally taken during a warrantless search of petitioner's cell phone was not prejudicial.

Necessity for Review

Review should be granted in this case to determine an important

question of law.

This case was returned to the Court of Appeal on remand from the United States Supreme Court after it ruled in a landmark decision, that the police had conducted an illegal warrantless search of petitioner's cell phone following his arrest for weapon possession. (See *Riley v. California* (2014) ___ U.S. ___, 134 S. Ct. 2473.)

On remand, petitioner argued that the illegal searches of his smart phone conducted at the scene of the arrest, and later at the police station, produced evidence that prejudiced petitioner at trial and required a reversal of the judgment of conviction.

Petitioner argued that this was a close case as the eyewitnesses to the shooting excluded him as being present, the first trial resulted in a hung jury with more votes for acquittal than conviction, and the photos taken from the phone, which depicted petitioner as a dangerous gang member likely contributed to his conviction. Rather than conducting the harmless error analysis described in *Chapman*, which requires an examination of the entire record, the Court of Appeal reviewed the evidence as if it were conducting a review for substantial evidence to support a conviction. The court ignored significant defense-favorable evidence, and viewed all of the evidence in the light most

favorable to the prosecution's case.

This is the precise error Justice Liu described in his concurring and dissenting opinion in *People v. Jackson* (2014) 58 Cal.4th 791-797. Petitioner respectfully requests that the court grant review in this case to determine whether the Court of Appeal erred by failing to review the entire record, including defense favorable evidence, in determining whether the illegal search of petitioner's cell phone was a prejudicial under the *Chapman* standard.

Statement of the Facts

The relevant facts are presented in the "Background" section of the argument set forth below.

Argument

I

A proper review of the record under the *Chapman* standard shows the illegal warrantless search of petitioner's cell phone was prejudicial error and requires reversal of the judgment.

Background

Petitioner was stopped on August 22nd, 2009, for a traffic infraction near his home. (3 RT 584.) It was thereafter determined that he was driving with an expired license, which led to an inventory search of the car that produced two handguns. (1 RT Augment (RTA)

111.) Petitioner was placed under arrest and the arresting officer, (Officer Dunnigan), then seized and searched his cell phone, where he read text messages leading him to believe petitioner was connected to a local gang. (1 RTA 114-115.) Officer Dunnigan thereafter contacted Detective Malinowski from the gang unit who was investigating a shooting incident that took place on August 2nd, 2009. (1 RTA 180.)

While petitioner was being booked at the jail, Detective Malinowski performed a more thorough search of the phone, acknowledging that he was searching for any evidence of a crime. (1 RTA 176.) With the assistance of forensic technicians, he discovered videos showing informal boxing matches involving three men including Gerald Haynes and Donte Haddock who were later found to have participated in the August 2nd, shooting. (1 RTA 178.) Malinowski believed he heard petitioner in the background of the videos shouting encouraging words to the others. (1 RTA 178.) Detective Malinowski also found various photographs on the cell phone including three photos that were later introduced at trial. (4 RT 858-860.) The first was a photo of petitioner standing in front of his red Oldsmobile flashing a suspected gang sign (Exh. 39); the second was a photo of petitioner with Gerald Haynes flashing a gang sign in front of the red car (Exh.

40); and the third was a photograph of petitioner with his arm around Gerald Haynes flashing gang signs. (Exh. 41.) (4 RT 860.) The detective also used the phone number he obtained while searching the phone to get petitioner's cell phone records, which were later used as a significant part of the prosecutor's case. (3 PHT 421, 500; 6 RT 1169-1172.)

The prosecution used the evidence it gained from the cell phone searches to try and convict petitioner of the charged offenses of attempted murder, shooting at an occupied vehicle, and assault with a semi-automatic weapon, along with a gang enhancement under Penal Code section 186.22, subd.(b), and two firearm use enhancements. However, the trial resulted in a hung jury. (4 Original RT 1343-1344.) The prosecution then tried the case again, with the same evidence, and convictions were returned on all counts along with true findings on the enhancement allegations. (2 CT 527-529.)

Before both trials, defense counsel argued the warrantless search of petitioner's cell phone violated the Fourth Amendment. In between the two trials, the California Supreme Court published *People v. Diaz* (2011) 51 Cal.4th 54, where it held the police may search the contents of the cell phone carried by an arrestee under the search incident to

arrest exception to the warrant requirement of the Fourth Amendment.

But *Diaz* was overruled by the United States Supreme Court in the present case. The only issue relevant here is whether the illegal searches conducted by the police resulted in prejudicial error requiring reversal of the judgment.

Petitioner argues reversal is required given the fact that the evidence of guilt was weak as shown by the hung jury who heard the same case, and the fact that none of the four eyewitnesses to the shooting could identify petitioner. Moreover, the photographs and videos taken from the phone connected petitioner to the gang thought to be responsible for the shooting, specific gang members who actually participated in the shooting, and the car that was used by the shooters to drive away from the scene. The phone search also led to petitioner's phone records the prosecution used to show he was in the area at the time of the shooting. Even though the prosecutor acknowledged there were holes in his case, he was eventually able to obtain convictions on all counts and allegations, thanks in part to the photos and videos taken during the illegal searches.

The evidence implicating petitioner

The prosecution's case against David Riley was based entirely on

circumstantial evidence. It used the same evidence at the retrial that it had presented at the original trial, which resulted in a hung jury with one count split 8-4 in favor of guilty, two others at 9-3 for guilty, and two counts 11-1 in favor of an acquittal. (4 ORT 1343-1344.)

The prosecutor emphasized in closing argument at the retrial that he was presenting "pieces of a puzzle" to show that petitioner was involved in the shooting. (6 RT 1164.) However, he acknowledged that some of the pieces were missing. "Based on all of the pieces to this puzzle - - like I told you at the beginning we don't have every single piece, but the pieces we do have, it is abundantly clear Mr. Riley was there the day of the shooting and he was involved in the shooting." (6 RT 1173.) "Even though we are missing a piece here or there, the picture is clear." (6 RT 1175.)

The pieces the prosecution presented

1. Petitioner's red Cutlas Oldsmobile was the car driven by the shooters.

2. The guns found two weeks later in petitioner's other car were the guns used in the shooting, and DNA evidence showed he had touched one of the guns.

3. Cell phone records showed that petitioner was in the area at the time of the shooting.

4. Petitioner's phone calls from the jail to Jazmin McKinnie that were recorded by police showed that he was

concerned with being charged in the murder.

5. Jazmin McKinnie gave conflicting statements when explaining that petitioner was not present during the shooting.

6. Petitioner fit the description provided by eyewitnesses Haide and Ginno Urias. (6 RT 1164-1172.)

The prosecution's missing pieces

The lack of identification from the eyewitnesses

There were four eyewitness to the shooting and none of the witnesses identified petitioner. The witnesses were Julia Montoya, who lived across the street from Jazmin McKinnie and had known her for several years, and three members of the Urias family — Javier, Ginno and Haide who were also neighbors of McKinnie. (3 RT 547-548; 4 RT 681.)

The testimony of Haide and Ginno Urias was especially important to the issue of identification because they spent a good deal of time looking at the three men. Haide was about 20 feet away from the red Oldsmobile before the shooting and observed the three black males (two near the car and the other talking with McKinnie across the street) for 10 to 15 minutes. (4 RT 701, 703.) She told an investigating officer that she believed she could identify the three men if she saw them again, and she did in fact identify Donte Haddock in a photo

lineup a few months later. (4 RT 703, 704-705; 5 RT 909.) However, when she saw petitioner at the preliminary hearing, she testified he was not one of the men present at the shooting. (4 RT 706-707.)

Ginno Urias was also outside at the time of the shooting and had been doing repairs on his mother's exercise bike. (4 RT 815-816.) The red car was parked right next to his house. (4 RT 815-816.) He recognized the car because it had been parked there a few nights earlier playing loud music and causing an annoyance. (4 RT 817.) He saw two men emerge from the car — the driver and the passenger, and the third across the street. (4 RT 827, 829.) He observed the three men for about 10-15 minutes before the shooting, and later told an officer that he would be able to identify the men if he saw them again. (4 RT 828, 830.) When he was later shown a photo lineup that included petitioner's picture, he was not able to identify petitioner. (4 RT 830; 5RT 905.)

Another missing piece

Failure to investigate the third party who handled one of the guns

In addition to the eyewitnesses who excluded or couldn't identify petitioner as a participant in the shooting, there was another Lincoln Park gang member, Stephen Redford, who the police never interviewed

even though his fingerprints were on one of the guns found in petitioner's car (DNA evidence connecting Redford to the gun was much stronger than the evidence connecting petitioner to the other gun), the red Oldsmobile was found parked near Redford's house, and Detective Malinowski who led the investigation, conceded that petitioner and Redford looked a lot alike. (5 RT 913-915.) In fact, while the detective agreed the two looked very similar, he never showed Redford's photo to any of the witnesses. (5 RT 914.) This supported the defense claim that the police were more interested in building a case to convict petitioner than they were in searching for the real third shooter. (5 RT 917-919.)

Challenges to the state's evidence

In addition to the lack of an identification from the percipient witnesses, and the strong possibility of Stephen Redford's involvement, the defense challenged some of the state's strongest evidence — pieces of the puzzle they did present.

For instance, regarding petitioner's ownership of the red Oldsmobile, the defense showed that petitioner regularly loaned the car to other people. (6 RT 1098.) And the person the prosecution thought was petitioner, the one speaking with Jazmin McKinnie on the corner,

was not the person driving the red car— and one would think the owner of the car would also be the driver. (4 RT 819-820.)

Next, while petitioner's DNA was found on one of the guns in the Lexus, there was no evidence showing that he touched any of the cartridges or the clip. (6 RT 1183.) And Stephen Redford, who looked like petitioner but was not investigated had also handled one of the guns.

Regarding the recorded phone calls from the jail, the defense emphasized that petitioner's comments simply displayed his belief that the state would attempt to charge him with the shootings, which is exactly what they were trying to do, in light of the fact that they knew his car was involved and the guns used in the shooting were found in his car. (6 RT 1185.)

Evidence produced during the cell phone searches

The first search

The first warrantless search of petitioner's smart phone was conducted at the scene of the traffic stop and arrest on August 22nd, 2009. (1 RTA 110, 114.)

Patrol officer Dunnigan, who stopped petitioner, believed he was a gang member because he had a green bandana in his pocket, and a

key chain with one black and one green miniature sneaker. (1 RTA 114, 122.) He searched the cell phone and he noticed text messages where every word that normally began with the letter "K" was preceded by a "C", and this is a slang for "Crip Killer" often used among blood gangs. (1 RTA 113-115.)

After the discovering the guns in the car, and the above described evidence suggesting petitioner was a gang member, Dunnigan called Detective Malinowski who was a gang detective working that area. (1 RTA 113-114.)

The second search of the phone

When Detective Malinowski received the call from Officer Dunnigan, he went to the station (it was his day off) to speak with petitioner. (1 RTA 176.)

Once in the station, Malinowski took possession of the cell phone and "went through" it. (1 RTA 176.) He looked through "a lot of stuff" on the phone "looking for evidence" but some short street boxing videos "caught my eye." (1 RTA 176-179, 193.) Donte Haddock and Gerald Haynes were the guys boxing in the videos, but Malinowski thought he could hear petitioner in the background encouraging the others with comments like "Get him blood" and "Come on Lincoln." (1 RTA 178-

179.)

The cell phone was then impounded into evidence and the videos and other things (including photos) were downloaded by the police department's "computer technician people." (1 RTA 179.)

Three of the photos were introduced at trial, and they included a photo of petitioner standing in front of the red Oldsmobile flashing a gang sign (Exhibit 39), a photo of petitioner with Gerald Haynes flashing gang signs in front of the red Oldsmobile (Exhibit 40), and another picture of petitioner with his arm around Gerald Hayes flashing gang signs. (Exhibit 41.) (4 RT 860.)

The detective also got the cell phone records used to place petitioner in the area near the time of the shooting from a phone number he retrieved during his search of the phone. (3 PHT 421, 500.)

The gang expert

The prosecution's gang expert was Detective Scott Barnes. (5 RT 1024.) He testified at length about how street gangs commit random acts of "violence and craziness" that scare "good people in the communities." (5 RT 1030.) He emphasized how gangs establish fear in the community in an effort to prevent people from cooperating with police, and the Lincoln Park gang is known to commit murder,

aggravated assaults and robberies among other crimes. (5 RT 1032, 1038.)

Detective Barnes testified that he believed petitioner was a gang member because petitioner had been contacted 12 times and was usually found in the presence of Lincoln Park gang members. (5 RT 1044.) He also based his conclusion on the fact that he had seen petitioner in various photos flashing gang signs with other gang members, referring to the three photos taken from the cell phone in this regard. (5 RT 1044-1050.) And he said that other than the photos, he had seen the street boxing videos where petitioner could be heard encouraging the participants who were fine-tuning their fighting skills. (5 RT 1050.)

Barnes would acknowledge during cross-examination that petitioner was a college student, with no gang tattoos and had never been the subject of a gang injunction. (5 RT 1061, 1063.)

The prosecutor used Barnes' testimony to emphasize in closing argument that petitioner was a gang member, and the gang operates to instill fear in the community. (6 RT 1174, 1176.) But Barnes' testimony was based largely on the photos and videos taken from the phone.

Applicable Law

Evidence produced in violation of the Fourth Amendment is federal constitutional error that is subject to the reversible error standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 24. (*People v. Minjares* (1979) 24 Cal.3d 410, 424.)

Under the *Chapman* standard, a constitutional error requires reversal of the judgment unless the state proves beyond a reasonable doubt that the error did not contribute to the verdict. (*Chapman v. California, supra,* 386 U.S. at p. 24.)

Justice Liu recently emphasized the importance of correctly applying the *Chapman* standard, and noted that in many ways the integrity of the appellate process requires "rigorous adherence" to the "standards established by the law to guide" harmless error review. (*People v. Jackson* (2014) 58 Cal.4th 724, 778 (conc. and dis. opn. of Liu, J.). In *Jackson,* Justice Liu agreed with the majority that the error in requiring the defendant to wear a stun belt at trial was harmless at the guilt phase, but disagreed that the error was also harmless at the penalty phase of the capital trial. (*Id*. at p. 789.)

Justice Liu and the majority opinion agreed that the *Chapman* analysis has two primary features. First, a finding of harmless error

requires a showing "beyond a reasonable doubt" that the error did not affect the verdict. (*Id*. at p. 792.) The reasonable doubt standard has long been understood to indicate a very high level of probability to deprive an individual of life or liberty. (*Ibid*, citing *Victor v. Nebraska* (1994) 511 U.S. 1, 14.) "Under *Chapman*, a reviewing court need not calibrate its certitude to some vaguely specified probability; instead, the court must be convinced the error was harmless to the maximal level of certainty within the realm of reason, a level that admits no reasonable doubt." (*Ibid*.)

Second, the burden of proving beyond a reasonable doubt that the error did not affect the jury's verdict lies with the "beneficiary of the error", namely the state. (*Id*. at p. 793, citing *Chapman, supra,* 386 U.S. at p. 24.) Because it may be difficult to determine whether a particular error contributed to the jury's verdict given the counterfactual nature of the inquiry, the allocation of the burden to the state can prove outcome determinative. (*Ibid*.)

Rigorous adherence to these standards serves to maintain the crucial role of appellate review in promoting adherence to the law, to restrain reviewing courts from invading the province of the jury, and to preserve jury verdicts that may be untainted by error based upon a

disciplined application of the law. (*Id*. at p. 792.)

Another important feature of the *Chapman* harmless error analysis, is that it is not a situation where the reviewing court examines the evidence in the light most favorable to the judgment. Instead, the court "has the power to review the record de novo to determine an error's harmlessness." (*Arizona v. Fulminante* (1991) 499 U. S. 279, 295-296, citing *Chapman,* 386 U.S. at p. 25.) And the courts have made clear that "the general rule of the post-*Chapman* cases is that *the whole record* be reviewed in assessing the significance of the error" (*Yates v. Evatt* (1991) 500 U.S. 391, 409.) "The question is whether, *on the whole record*. . .the error . . . is harmless beyond a reasonable doubt. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681.)

And the whole-record review necessarily requires consideration not merely of the evidence and inferences most favorable to the prosecution but also of those matters that undercut or contradict the prosecution-favorable view of the case. As the court 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.)

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Law regarding the impact of gang evidence

California courts have long recognized the prejudicial impact of gang evidence. "The word 'gang' connotes opprobrious implications. . . and takes on a sinister meaning when it is associated with activities." (*People v. Perez* (1981) 114 Cal.App.3d 470, 479.) Given its highly inflammatory impact, the California Supreme Court has condemned the introduction of such evidence if it is only tangentially relevant to the charged offenses. (*People v. Cox* (1991) 53 Cal.3d 618, 660.) Evidence of a defendant's gang membership, even if relevant, creates a risk that the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the charged offense. (*People v. Carter* (2003) 30 Cal.4th 1166, 1194.)

In *People v. Albarran* (2007) 149 Cal.App.4th 214, 232, the court reversed defendant's convictions of multiple violent offenses due to the improper admission of gang evidence, where the evidence of threats to police officers, Mexican Mafia references and unrelated crimes had nothing to do with the charged offenses, and created the real danger that the jury would infer defendant was dangerous and seek to punish him for past or perhaps future crimes.

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Legal Analysis

The question for the Court of Appeal, on remand from the United States Supreme Court, was whether the state established beyond a reasonable doubt that the evidence taken during the illegal search of the cell phone at the scene, and the second illegal search of the phone at the police station had no impact on the jury's verdicts.

Or put another way, did the state establish beyond a reasonable doubt that the jury's finding that petitioner was present at the shooting was not influenced by the photos showing him standing next to the car used in the shooting, flashing gang signs with one of the known shooters, the videos the prosecution argued showed him encouraging combat training involving gang members who were present at the shooting and the cell phone records produced after the search of the phone? The state has to show beyond a reasonable doubt that the photographs, videos and cell phone records had no impact on the verdict in a case the prosecutor acknowledged was flawed with gaps in the evidence.

The state did not come close to the required showing given the present record.

First, there can be little dispute that this was a close case on the

issue of petitioner's guilt — that is whether he was one of the shooters at the scene on August 2nd, 2009. The fact is demonstrated by the hung jury in the first trial on the same evidence. A deadlocked jury shows the case was close when analyzing an error for prejudice. (*Krulewitch v. U.S.* (1949) 336 U.S. 440, 445; *People v. Gainer* (1977) 19 Cal.3d 835, 854-856.)

The first trial resulted in a hung jury with the votes on certain counts being 9-3 and 8-4 in favor of guilt and two counts 11-1 for not guilty. (4 ORT 1343-1344.) The state presented the same evidence at the retrial, using the photos and videos to connect petitioner to the car that was involved in the shooting, and flashing gang signs with members of the Lincoln Park gang who were found to be involved in the shooting. It will be hard to seriously argue that this inflammatory gang evidence had no impact on the jury. And the prosecutor admitted that he had no direct evidence connecting petitioner to the shooting, relying instead on circumstantial evidence he referred to as "pieces of a puzzle." Even presenting this evidence, the prosecutor acknowledged that his case was missing puzzle pieces. The evidence taken from the cell phone records was a substantial part of the state's case.

The prosecutor's confession of weakness in the state's case was

likely a reference to the fact that four eyewitnesses saw the shooting, including the Urias siblings who studied the three shooters for several minutes and told police they would surely be able to identify all three shooters. However, neither witness identified petitioner from the photo lineup prepared by Detective Malinowski, and when Haide Urias saw petitioner in court, she concluded he was not one of the people involved in the shooting. The fact that an eyewitness who studied the perpetrator's face for several minutes in broad daylight from close range, and said she would have no trouble identifying him (as she did with Donte Haddock after several months) and later acknowledged when looking at the defendant, that he was not one of the shooters is devastating to the state's position in the present inquiry. It is far more than a "missing piece of the puzzle" in a criminal prosecution — it is exonerating evidence.

The prosecution did present two "pieces of the puzzle" that suggested petitioner was present on August 2nd. First, the state showed that one of petitioner's two automobiles, the red Oldsmobile, was present at the shooting. But the impact of this evidence was reduced by the uncontradicted testimony that petitioner frequently loaned his second car to friends, and by eyewitness testimony that the

person the police believed was petitioner (talking on the corner with Jazmin McKinnie) was not the person driving the car. Logic would suggest that if petitioner was present, he would have been driving his own car. Or conversely, the fact that someone else was driving his car supports the claim that he let others drive it.

The second legitimate "piece" of inculpatory evidence presented by the prosecution was that petitioner had two of the guns likely used in the shooting stored under the hood of his Lexus. There was a strong chance that petitioner had handled one of the guns, and an even stronger chance that Stephen Redford who looked just like him (according to Detective Malinowski) had handled the other.[1]

In addition to these "pieces" of incriminating circumstantial evidence, the prosecutor presented weaker evidence attempting to implicate petitioner as a potential shooter. Included in this category was cell phone records (taken from the search) suggesting petitioner was in the vicinity shortly after the shooting, phone calls with Jazmin (recorded at the jail) where he wondered out loud if the prosecution would charge him in this incident, Jazmin's conflicting statements

[1] Petitioner pled guilty to possession of those guns in a separate case – SCD222526.

when denying petitioner's involvement, and the fact that petitioner generally fit the description provided by the eyewitnesses (Haide and Ginno Urias) who later agreed he was not present at the scene. The circumstantial case the prosecution presented was strongly bolstered by the gang expert's testimony that petitioner was a member of the gang, gangs commit heinous crimes seeking to terrorize the community, and his summary of several crimes that petitioner had nothing to do with.

The courts have long agreed that gang evidence is highly inflammatory and has the potential to create the inference in the jurors' minds that the defendant is criminally disposed and dangerous. (*People v. Carter, supra,* 30 Cal.4th at p. 1194.) Presenting this evidence may result in the jury seeking to punish the defendant in the charged case for other crimes he may have committed. (*People v. Albarran, supra,* 1469 Cal.App.4th at p. 232.)

The evidence here showed that petitioner was friends with Lincoln Park gang members including probable participants in the shooting, Gerald Haynes and Donte Haddock. But he was also a college student, with no gang tattoos, and he had never been the subject of a gang injunction.

Detective Barnes relied heavily on the three photos taken from

petitioner's smart phone during the warrantless forensic search of the phone at the police station, to support his opinion that petitioner was an active member of the gang. The photos likely made an impression given that they showed petitioner standing next to the car used in the shooting, flashing apparent gang signs with Gerald Haynes who was likely one of the shooters. This was an exceptionally powerful visual to show jurors who were asked to decide whether petitioner was present at the shooting. The detective also referred to the boxing match videos taken from the phone to support his conclusion, and added that these matches were like formal combat training for the gang, petitioner's encouraging statements in the background were the comments of a gang member supporting this combat training, and did more than show petitioner clowning around with his friends.

So the prosecutor was able to bolster his otherwise thin circumstantial case with prejudicial gang evidence that was based largely on the photos and videos taken from petitioner's smart phone.

Given this record, the state failed to prove beyond a reasonable doubt that the evidence taken from the illegal searches had no impact on the jury in an otherwise weak case.

Gang evidence is a terrific boon for prosecutors who use such

evidence as much as possible to taint a jury. But for the same reason that gang evidence helps to gain a conviction at trial, creating the distraction with inferences of criminal disposition and dangerousness, it hurts the prosecution's chances of proving the constitutional errors were harmless beyond a reasonable doubt.

The state presented a weak case here, and the record will not allow the state to meet its high burden of showing the visually powerful photos, videos and the evidence of the cell phone records, played no role in the jury's verdict.

Court of Appeal Opinion

The opinion properly cites the controlling principles under *Chapman*, but then conducts a review that fails to apply that proper standard. The court made severable significant mistakes in the process:

(a)

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." (Opinion, p. 8-9, citing *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 court's harmless error analysis 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*.)

(b)

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.

(c)

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

A major 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.)

The Court of Appeal 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.

(d)

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.

(e)

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.

(f)

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.[2]
>
> 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

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[2] 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.)

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.)

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.

(g)

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 of Appeal 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 and the DNA of another gang member who looked like petitioner was also found on one of the guns) 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 are 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 of Appeal 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 should have

concluded 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 review and clarify the appropriate analysis an appellant court must use when applying the *Chapman* standard to determine prejudicial error.

Date: Respectfully submitted,

_____
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Certificate of Compliance

I, Patrick Morgan Ford, certify that the within brief consists of 8,254 words, as determined by the word count feature of the program used to produce the brief.

Dated:

_____
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 an *Petition For Review*, 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. Executed on March 24, 2015, at San Diego, California.

Esther F. Rowe