No.

IN THE SUPREME COURT OF THE UNITED STATES

VINCE E. LEWIS, *Petitioner,*

v.

STATE OF CALIFORNIA, *Respondent*.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When federal constitutional error occurs at a criminal trial and a California appellate court turns to the question whether the judgment must be reversed as a result of the error, does not the test set forth in *Chapman v. California*, 386 U.S. 18, 23-24 (1967), require that the appellate court examine the *entire* record and ask whether there is evidence which could rationally lead to a finding in favor of the defendant and that the court not look solely at the evidence most favorable to the prosecution and draw only prosecution-favorable inferences?

* * * * *

PARTIES TO THE CASE

The appellants in the court below were Vince E. Lewis, the present petitioner, and his co-defendants Mirian [*sic*] Herrera and Ariana Coronel. The People of the State of California were the respondent.

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Petitioner Vince E. Lewis respectfully prays that a writ of certiorari issue to review the decision of the Court of Appeal of the State of California, Second Appellate District, Division One, affirming his conviction for first-degree murder.

OPINIONS BELOW

The opinion of the California Court of Appeal is unpublished and is available at 2014 WL 3405846 and 2014 Cal. App. Unpub. LEXIS 4923. A copy is attached as Appendix A. It is cited herein as "Op." The California Supreme Court order denying Mr. Lewis' petition for review is attached as Appendix B.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a). The California Court of Appeal filed its opinion on July 14, 2014. Mr. Lewis' timely petition for review was denied by the California Supreme Court on October 15, 2014. This petition is filed within ninety days thereafter.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

The Fourteenth Amendment of the United States Constitution provides in relevant part:

> "[N]or shall any State deprive any person of life, liberty or property, without due process of law . . . ."

* * * * *

STATEMENT OF THE CASE

A young female gang member in Los Angeles, Darsy "Mickey" Noriega, was to be disciplined for consorting with a member of a rival gang. The evidence showed that other female gang members intended to beat the victim, although more ambiguous and more hypothetical evidence would support a conclusion that she was at risk of being killed. Petitioner Vince Lewis drove the intended perpetrators and the intended victim on a beer run. Two of the young women were pregnant, and they stopped so that one of them could urinate in a dark alley. While Mr. Lewis waited in the car, co-defendant Mirian "Mimi" Herrera shot and killed Darsy Noriega.

The case against Mr. Lewis for murder went to the jury on alternative theories of direct aiding and abetting (which would have required proof of his specific intent to aid in a killing) and natural and probable consequences liability (which could be established by an intent to aid in an assault).[1/] 2 CT 505-06.[2/] The jury found him guilty of first-degree murder, in a general verdict not

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1. Under California law:

> A person who knowingly aids and abets criminal conduct is guilty of not only the intended crime [target offense] but also of any other crime the perpetrator actually commits [nontarget offense] that is a natural and probable consequence of the intended crime. [Citations.] Thus, for example, if a person aids and abets only an intended assault, but a murder results, that person may be guilty of that murder, even if unintended, if it is a natural and probable consequence of the intended assault.
>
> A nontarget offense is a 'natural and probable consequence' of the target offense if, judged objectively, the additional offense was reasonably foreseeable. [Citation.] The inquiry does not depend on whether the aider and abettor actually foresaw the nontarget offense. Rather, liability is measured by whether a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted. Reasonable foreseeability is a factual issue to be resolved by the jury. [Citation.]

People v. Chiu, 59 Cal.4th 155, 161-62, 172 Cal.Rptr.3d 438, 325 P.3d 972 (2014) (internal (continued...)

specifying the theory of liability. 2 CT 552. On appeal, Mr. Lewis argued that the instructions to the jury improperly permitted a conviction for first-degree murder based on natural and probable consequences liability, and that the error was prejudicial.

While his appeal under advisement, the California Supreme Court held in *People v. Chiu*, 59 Cal.4th 155, 172 Cal.Rptr.3d 438, 325 P.3d 972 (2014), that the natural and probable consequences theory would not support a first-degree murder conviction. A defendant guilty of murder only on a natural and probable consequences theory is guilty of *second*-degree murder. The parties submitted supplemental briefs to the Court of Appeal concerning *Chiu*. Rather than reversing the first-degree conviction as the California Supreme Court did in *Chiu*, the Court of Appeal found the instructional error harmless beyond a reasonable doubt, citing only the evidence favorable to the prosecution and concluding that every reasonable juror would have found that Mr. Lewis specifically intended to aid in a killing, and would have found him guilty of first-degree murder on a theory of direct aiding and abetting. Op. 19.

HOW THE FEDERAL QUESTION WAS PRESENTED BELOW

The invalidity of the first-degree murder conviction, on account of an erroneous instruction on natural and probable consequences, was presented to the Court of Appeal on pages 21-24 of Mr. Lewis' opening brief on appeal.[3/] After the California Supreme Court decided *Chiu*, Mr. Lewis'

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1. (...continued)
quotation marks omitted).

2. The jury was also instructed on a conspiracy theory, but that theory does not figure in the issue presented here.

3. Instructional errors of this type need not be raised in the first instance in the trial court. Cal. Penal Code, § 1259. The instruction on natural and probable consequences was in fact objected
(continued...)

counsel submitted a supplemental brief, filed June 12, 2014, explaining the applicability of *Chiu* and explaining that the instructional error was prejudicial. The Court of Appeal found the instructional error to be harmless beyond a reasonable doubt. Op. 19. The issue was presented to the California Supreme Court on pages 6-15 of Mr. Lewis' petition for review. Review was summarily denied. App. B.

* * * * *

3. (...continued)
to at trial, albeit on different grounds. 5 RT 3613-16.

REASONS FOR GRANTING THE WRIT

A. *The Chapman Test for Prejudice Is, Or Should Be, Well-Settled*

The question presented by this case is one of immense importance to the criminal justice system in California: whether, when there have been substantial federal constitutional errors at trial and harmless-error review is called for, a reviewing court looks only to the evidence and inferences favorable to the prosecution in determining whether a new trial is warranted, or whether it must look to the whole case, including evidence and inferences that undercut the prosecution's case or that support the defense.

The test for prejudice is the familiar one set forth in *Chapman v. California*, *supra*, 386 U.S. 18. "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Id*. at 23 (internal quotation marks omitted). Or, put another way, the Constitution "requir[es] the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id*. at 24. Of particular importance for present purposes, "[t]he question is whether, *on the whole record* . . . the error . . . [is] harmless beyond a reasonable doubt." *Rose v. Clark*, 478 U.S. 570, 583 (1986) (internal quotation marks omitted, emphasis added); *accord, Satterwhite v. Texas*, 486 U.S. 249, 258-59 (1988) ("The question, however, is not whether the legally admitted evidence was sufficient to support the [verdict], which we assume it was, but rather, whether the State has proved beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."; internal quotation marks omitted).

Two decisions from this Court are particularly illustrative of how the constitutional test works: *Neder v. United States*, 527 U.S. 1 (1999), and *Delaware v. Van Arsdall*, 475 U.S. 673 (1986).

Van Arsdall involved a "constitutionally improper denial of a defendant's opportunity to impeach a witness for bias." 475 U.S. at 684. On the question of prejudice, the Court held that "[t]he correct inquiry is whether, *assuming that the damaging potential of the cross-examination were fully realized*, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." *Ibid*. (emphasis added).

Similarly, in *Neder*, which involved constitutional error arising from the failure to instruct on an element of an offense, this Court held that the error could be found harmless under *Chapman* if the issue to which the error pertained was "uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error." *Neder*, 527 U.S. at 17; *see also id.* at 19 (asking "whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element").

By crediting only the evidence and inferences most favorable to the prosecution, the Court of Appeal in the present case was, in essence, engaging in factfinding, assessing credibility, and weighing competing inferences. Under the Sixth Amendment right to a jury trial, however, these functions are given exclusively to the jury. A defendant has a "Sixth Amendment right to have essential facts found by a jury beyond a reasonable doubt," *Dillon v. United States,* 560 U.S. 817, 828 (2010), 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,* 132 S.Ct. 2, 4 (2011).[4/] Thus,

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4. *See also, e.g.*, *Blakely v. Washington*, 542 U.S. 296, 308 (2004) ("the Sixth Amendment . . . limits judicial power . . . to the extent that the claimed judicial power infringes on the province of the jury"); *Apprendi v. New Jersey*, 530 U.S. 466, 483-84 (2000) (discussing "the [constitutional] requirements of trying to a jury all facts necessary to constitute a statutory offense, and proving those facts beyond reasonable doubt"]; *United States v. United States Gypsum Co.*, 438 U.S. 422, 446 (1978) ("ultimately the decision on the issue of intent must be left to the trier of fact alone"); *Davis v. Alaska*, 415 U.S. 308, 317 (1974) (describing jury as "sole judge of the credibility of a witness"); *Weiler v. United States*, 323 U.S. 606, 611 (1945) ("We are not authorized to look (continued...)

the Court of Appeal's approach to the record when reaching its conclusion of no prejudice was fundamentally wrong. The Court of Appeal reached conclusions that were not required to be made by Mr. Lewis's actual jury, and did not do so by reference to any jury considering the entirety of the evidence under proper instructions. The Court of Appeal disregarded the evidence favorable to Mr. Lewis that an actual, properly-instructed jury would have been required to take into account.

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*, 547 U.S. 319, 330-31 (2006). Since the prejudice inquiry requires examination of "the whole record" and an assessment of whether the prosecution's case on an element was "overwhelming" and "uncontested" and whether there was "evidence that could rationally lead to a contrary finding" to the one sought by the prosecution, an appellate court cannot look solely to prosecution-favorable evidence in the record or draw only prosecution-favorable inferences from the record. Yet that is what the Court of Appeal did in this case.

The settled principles of *Chapman* and its progeny were not acknowledged by the Court of Appeal in Mr. Lewis' case, let alone applied there. Instead, by cherry-picking the facts and viewing the record in the light most favorable to the prosecution, the Court of Appeal's approach effectively assumed the answer to the prejudice question. The Court of Appeal did not mention the evidence that Mr. Lewis was *not* a direct aider and abetter of murder. It is certainly possible that a properly-instructed jury would have come to view the case as the Court of Appeal did, but no rational jury could properly come to that conclusion without considering all of the evidence and inferences that

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4. (...continued)
at the printed record, resolve conflicting evidence, and reach the conclusion that the error was harmless because we think the defendant was guilty. That would be to substitute our judgment for that of the jury and, under our system of justice, juries alone have been entrusted with that responsibility.").

were before the jury, those favorable to the prosecution and those unfavorable. The Court of Appeal's invalid approach to this case is discussed in detail in section C, *infra*. Similar federal constitutional error in numerous other California cases is discussed next, in section B.

B. *The California Courts of Appeal Repeatedly Render Decisions Inconsistent with Chapman*

Whereas "the whole record" must be tested for "the significance of the errors[,]" *Yates v. Evatt*, 500 U.S. 391, 409 (1991), a California appellate court is often satisfied – as it was in Mr. Lewis's case – simply by a form of substantial evidence review, whereby the court ignores defense-favorable and prosecution-unfavorable evidence and inferences and/or disregards other matters in the record that indicate the error "might have contributed to the conviction," *Chapman*, 386 U.S. at 23.

This case is not an aberration. While identifying similar cases is extraordinarily difficult – because it is evidence *not* considered in the Court of Appeal's opinion that is the primary deficiency – examples are sadly numerous. In each of the cases in the following undoubtedly incomplete list, as in the present case, the Court of Appeal found federal constitutional error to be non-prejudicial by ignoring defense-favorable evidence and inferences, looking to "substantial evidence" of guilt, and otherwise viewing the evidence from an exclusively prosecution-favorable perspective. The Court of Appeal's improper approach to the question of prejudice under federal constitutional standards in Mr. Lewis's case is symptomatic of a widespread problem with how the Courts of Appeal in general are misapplying those standards.

- *People v. Morell*, 2014 WL 527223 (Feb. 11, 2014, No. A134567), *cert. denied sub nom. Sciutto v. California*, 135 S.Ct. 300 (2014) (No. 14-5865); *see* certiorari petition at 13-14 (appellate court's *Chapman* analysis failed to consider defense-favorable

evidence and inferences, or the prosecutor's exploitation of the erroneous instruction in her argument to the jury).

• *People v. Flores*, 2013 WL 4963223 *8 (Sep. 13, 2013, No. B241530) ("given the nature and quality of the other evidence showing that defendant was the shooter, a reasonable juror could have found defendant guilty of the charged crimes beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)").

• *People v. Royal*, 2013 WL 3777147 *3 (July 18, 2013, No. B241841) ("As discussed in the preceding part of this opinion, there is ample substantial evidence to support the 'fear' element of robbery. Even if, as appellant contends, the special instruction 'implicated [his] federal constitutional right to be tried by an impartial jury,' any error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)").

• *People v. Estrada*, 2013 WL 1910314 (May 9, 2013, No. B235543), *cert. denied,* 134 S.Ct. 936 (2014) (No. 13-7218): any error in admitting testimony of purported eyewitness was harmless because (1) "the jury could reasonably have concluded" that the defendant committed first-degree murder (*id*. at *7); (2) the prosecution's evidence, viewed from a pro-prosecution perspective, provided "overwhelming evidence" of guilt (*id*. at *6, *8 [twice], *10); and (3) defendant's references to deficiencies and inconsistencies in the prosecution's case did "not demonstrate any error was not harmless beyond a reasonable doubt" (*id*. at *8 [twice], *9). *See* certiorari petition at 7, 16-19.

• *People v. Mercado*, 216 Cal.App.4th 67, 93, 156 Cal.Rptr.3d 804 (May 7, 2013, No. B223451), *cert. denied,* 134 S.Ct. 798 (2013) (No. 13-6990). *See* certiorari petition filed Oct. 17, 2013.

• *People v. Martinez*, 2012 WL 5985629 *4 (Nov. 30, 2012, No. A134355): "We nonetheless conclude that any error in admitting appellant's statements was harmless beyond

a reasonable doubt. [Citing *Arizona v. Fulminante*, 499 U.S. 279 (1991) and *Chapman*.] There was more than enough evidence, without appellant's statements, to support his conviction."

• *People v. Gonzalez*, 210 Cal.App.4th 875, 885, 148 Cal.Rptr.3d 720 (Oct. 29, 2012) ("we conclude the admission of Christopher's confession was harmless because even excluding the unlawful confession we conclude there is sufficient admissible evidence in the record from a variety of 'disinterested reliable' witnesses to support his conviction.").

• *People v. Ernest*, 2012 WL 4815408 *12 (Oct. 10, 2012, No. B232792) (appellant claimed his statement to police was involuntary or coerced; held: "even if defendant's recorded statement was not admitted into evidence, the evidence of his guilt of the charged crimes was substantial. . . . [T]here was other evidence establishing defendant's guilty state of mind, including his leaving the hospital and not returning, and his behavior in the parking lot outside the hospital. Green's testimony alone provided sufficient evidence of his guilt, and was accompanied by ample circumstantial evidence.").

• *People v. Huezo*, 2012 WL 2879019 *6 (July 16, 2012, No. B233864), *cert. denied,* 133 S.Ct. 1602 (2013) (No. 12-8295): See certiorari petition at 10-13 (appellate court drew conclusion as to what prosecution-favorable facts and inferences "[t]he evidence establishes" and "[i]t is reasonable to infer").

• *People v. White*, 2012 WL 2412073 *3 (June 27, 2012, No. G044741) ("Further, while defendant argues that Dana was a 'critical witness' for the prosecution, without whose testimony he could not have been convicted on count three, he is simply incorrect. . . . Indeed, had Dana not testified at all, substantial evidence of defendant's guilt, in the form of police testimony, would still exist. Thus, even if we had concluded that excluding the 1994 conviction was erroneous, it was not prejudicial

under even the most stringent standard. (*See Chapman v. California* (1967) 386 U.S. 18.)").

• *People v. Bojorquez*, 2011 WL 338689 *4 (Aug. 4, 2011, No. B226372) ("any error was harmless under both *People v. Watson* (1956) 46 Cal.2d 818, 836 [299 P.2d 243] and *People v. Chapman* [*sic*] (1967) 386 U.S. 18, 24. There was substantial evidence, including eyewitness identification and items found in defendant's Chevy truck, connecting defendant with the crimes." Court ignores that defendant presented alibi defense that would have supported a defense verdict, *see* 2011 WL 338689 *3.)

• *People v. Brown*, 2011 WL 2811525 *9 (July 12, 2011, No. B224439) ("The error, however, was harmless. There is substantial evidence from which a reasonable juror could infer that there was intent to kill. . . . In view of the evidence, whether under the standard set forth in *People v. Watson, supra*, 46 Cal.2d 818, 836 [299 P.2d 243], or *Chapman v. California, supra*, 386 U.S. 18, the error was harmless.").

• *People v. Ennis*, 2011 WL 137199, *9 (Jan. 18, 2011, No. B212811) ("Even if the confrontation clause objection had been preserved, any error in admitting the evidence was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18.) Because the evidence in this case was substantial, defendant cannot establish prejudice.").

•*People v. Katzenberger*, 178 Cal.App.4th 1260, 1269, 101 Cal.Rptr.2d 122 (2010) (court finds no *Chapman* prejudice in an assault case by (1) relying on a purportedly "plausible claim" by the alleged victim as to why police found no bruises or marks and (2) discounting defense-favorable testimony because, *inter alia*, it "does not compel a conclusion" that no blow was inflicted.).

• *In re Julius A.*, 2010 WL 3636217 (Sep. 21, 2010, No. B214341) (alibi defense was presented, but "even assuming [a defense witness's] statement was erroneously excluded, any such error was harmless. . . . Given the substantial evidence of Julius'

presence at the scene of the crime, . . . any alleged constitutional error in excluding the evidence was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)").

• *People v. Miller*, 2010 WL 2913613 *13- *15 (July 27, 2010, No. A121646), *cert. denied*, 131 S.Ct. 1572 (2011) (No. 10-8124): See certiorari petition at 11-16 (challenging appellate court's prejudice analysis on the basis that it "depended upon ignoring defense-favorable evidence or inferences and adopting debatable interpretations most favorable to the prosecution.").

• *People v. Vang*, 185 Cal.App.4th 309, 322, 110 Cal.Rptr.3d 282 (June 7, 2010, No. D504343) (Court of Appeal analyzes prejudice by asking "whether the error was harmless, that is, whether there is enough evidence . . . from which a reasonable jury could infer defendants committed the assault [for a certain purpose].' ").[5/]

• *People v. Brown*, 2010 WL 161497 *3 (Jan. 19, 2010, No. B212584) (failure to instruct on aider-and-abettor liability was error, but "we find the error harmless beyond a reasonable doubt because there was substantial evidence that defendant aided and abetted the crime. (*Chapman v. California* (1967) 386 U.S. 18, 24.)").

California's failure to adhere to *Chapman* is not confined to the state Courts of Appeal. In *People v. Gamache*, 48 Cal.4th 347, 397, 106 Cal.Rptr.3d 771, 227 P.3d 342 (2010), the state Supreme Court erroneously placed the burden on the defendant to demonstrate prejudice. *See Gamache v. California*, 131 S.Ct. 591 (2010) (statement of Sotomayor, J., joined by Ginsburg, Breyer, and Kagan, JJ.). It did so again in *People v. Jackson*, 58 Cal.4th 724, 744-48, 168 Cal.Rptr.3d 635, 319 P.3d 925 (2014), *cert. denied,* ___ S.Ct. ___ (Nov. 17, 2014) (No. 14-5760);

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5. The California Supreme Court granted review in *Vang* and rejected the defendant's claim of error, never reaching the issue of prejudice. *People v. Vang*, 52 Cal.4th 1038, 1052, 132 Cal.Rptr.3d 373, 262 P.3d 581 (2011).

see id. at 789-808 (Liu, J., dissenting). Although not precisely the same issue as in this case, these examples help to demonstrate how far and how often the California courts have departed from *Chapman*. *See Chapman*, 386 U.S. at 24; *Deck v. Missouri*, 544 U.S. 622, 635 (2005); *Arizona v. Fulminante*, 499 U.S. 279, 295-96 (1991); *cf. O'Neal v. McAninch*, 513 U.S. 432, 438-39 (1995).

In *People v. Fudge*, 7 Cal.4th 1075, 1118, 31 Cal.Rptr.2d 321, 875 P.2d 36 (1994), a retired prison warden who had interviewed the defendant was erroneously prevented from testifying at penalty phase that it was likely that defendant would adjust well as a life-term prisoner; the court found the error harmless because "the facts of defendant's crime provided powerful aggravating evidence." *Chapman* itself was an appeal in a capital case in which the California Supreme Court applied a state-law test of prejudice excessively tolerant of federal constitutional error. *People v. Teale*, 63 Cal.2d 178, 197, 45 Cal.Rptr. 729, 404 P.2d 209 (1965). Justices O'Connor and Kennedy faulted the California Supreme Court's "cursory" harmless error analysis in *Pensinger v. California*, 502 U.S. 930, 931 (1991) (dissent from denial of certiorari).

The plainly improper approach used to affirm Mr. Lewis' conviction and deny him the benefit of *People v. Chiu*, *supra,* 59 Cal.4th 155, and deny him his right to jury trial manifests a recurring problem. Settled law is being ignored on a widespread basis. "It is reasonable to worry that *Chapman* will continue to mean something different in the courts of California than what the high court has repeatedly said it means." *Jackson*, 58 Cal.4th at 808 (Liu, J., dissenting). There is a strong need for this Court to intervene and put a halt to the regular misapplication of the *Chapman* principles by the California appellate courts.

C. *The California Court of Appeal's Decision in the Present Case Cannot be Reconciled With Chapman*

This is an appropriate case in which to grant certiorari to reaffirm the standards for assessing the prejudice from evidentiary error, because the state appellate court's legal error made a difference. The instructions set forth three potential theories of liability for Mr. Lewis: direct aiding and abetting; natural and probable consequences; and conspiracy. 2 CT 505-09. Given *Chiu*, the natural and probable consequences doctrine is a legally insufficient theory on which to base a conviction of first-degree murder. When the jury is instructed on a legally insufficient theory, reversal is required "absent a basis in the record to find that the verdict was actually based on a valid ground." *People v. Guiton*, 4 Cal.4th 1116, 1129, 17 Cal.Rptr.2d 365, 847 P.2d 45 (1993), referring to *People v. Green*, 27 Cal.3d 1, 69-70, 164 Cal.Rptr. 1, 609 P.2d 468 (1980); *accord*, *Yates v. United States*, 354 U.S. 298, 312 (1957).[6/] That finding must be made beyond a reasonable doubt. *Neder v. United States, supra*, 527 U.S. at 15-16; *Chiu*, 59 Cal.4th at 167. It is not sufficient that the verdict *could have been* based on a valid ground; principles related to assessing the sufficiency of the evidence cannot be imported into this inquiry. There is no basis on which a reviewing court can confidently conclude beyond a reasonable doubt that the first-degree verdict against Mr. Lewis was actually based on a ground other than natural and probable consequences.

To convict Mr. Lewis of first-degree murder on a direct aiding and abetting theory, the prosecution would have been required to prove that Mr. Lewis knew that Mirian Herrera intended to commit a murder, that he intended to facilitate, promote or encourage her to commit a murder, and that his own mental state with respect to the intended murder manifested wilfulness,

6. Overruled on an unrelated point in *Burks v. United States*, 437 U.S. 1 (1978).

deliberation, and premeditation. 2 CT 505; *Chiu*, 59 Cal.4th at 166-67, referring to *People v. McCoy*, 25 Cal.4th 1111, 1117-18, 108 Cal.Rptr.2d 188, 24 P.3d 1210 (2001).

In finding the instructional error harmless beyond a reasonable doubt, the Court of Appeal cited only the evidence which would have supported this theory, but did not mention the contrary evidence:

> The undisputed facts of this case provide strong evidence of guilt. The evidence established that Lewis was the gang's shot-caller, that only the shot-caller could authorize the killing of a gang member, that Lewis called a gang meeting that Noriega was required to attend, that he made up the story about needing to buy beer and that he drove Herrera, armed with a gun, to a dark alley where she shot Noriega.

Op. 19. Initially, the issue here is not "guilt," but the level of culpability – guilt of what? "[S]trong evidence of guilt" begs the question.

There was substantial evidence that the target crime was an assault, not murder. If the jury credited this evidence, the first-degree verdict against Mr. Lewis rests on the now-forbidden natural and probable consequences theory, and not on a permissible theory of direct aiding and abetting. The Court of Appeal erred by not taking this evidence into account or even referring to it in the course of finding the instructional error harmless:

Amy Aleman was present with the perpetrators in the hours leading up to the shooting. Without her, the prosecution would have had no case against Mr. Lewis. She testified that she believed that the eventual victim, Darsy "Mickey" Noriega, "was going to get violated." 3 RT 2457. The prosecutor elicited from her that "violated" means being beaten for a predetermined number of seconds. 3 RT 2458. She confirmed this understanding on cross-examination. 3 RT 2515, 2529-30.

She testified that "people always walk away from violations." 3 RT 2529. Aleman testified that she did not see a gun before the shots were fired. 3 RT 2466, 2522.[7]

Gilbert Mendoza, another member of the gang, told the police that Mickey was going to get a violation. 2 CT 391, 394. In the statement of the facts elsewhere in its opinion, the Court of Appeal itself recognized that "Mendoza gave varying descriptions of a 'violation.'" Op. 5. "At one point he agreed with the interviewer that 'a violation is essentially a physical beating'; that they are 'common'; and that 'people get violated all the time' and 'walk away.' [3 RT 2174; see also 2 CT 391.] Later, however, Mendoza said that a violation could involve a shooting or a stabbing. [2 CT 394.]" Op. 5. Mendoza also testified that you can walk away from a violation, but if you get "taken out of the hood," you don't walk away from that. 3 RT 2181. Mendoza described what was going to happen to Mickey as a violation, not as being "taken out of the hood."

Text messages from co-defendant Ariana Coronel prior to the offense referred to "Mickey getting the boot" or being taken "outta the hood." P.Ex. 4 at 17-18; ACT 81-82. Particularly in light of Aleman's testimony, jurors could reasonably conclude that these messages manifested an intent to expel Mickey from the gang and not to kill her.

The prosecution's gang expert, Winston Lee, opined that gang members who associated with rival gang members could be either beaten or killed. 5 RT 3363-64. In response to a hypothetical question, he said that the murder would not have happened if Mr. Lewis had not authorized it. 5 RT 3402. There is no basis in the record on which the Court of Appeal could have properly concluded

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7. A short time after the shooting, Mirian Herrera told Aleman that the shooting had to be done, because Ms. Noriega had been spending time with members of other gangs. 3 RT 2483-2484; 2 CT 433. Aleman testified both that Mr. Lewis was and was not present when she was told this. 3 RT 2483-2484, 2525-2528, 2544; see 5 RT 3328-3329. Given that this occurred after the shooting, and that it is unclear whether or not Mr. Lewis was present when this was said, this evidence does not rule out the possibility that the jury relied on the natural and probable consequences theory rather than direct aiding and abetting of murder.

that all the jurors necessarily credited the latter hypothetical testimony over the testimony from witnesses with first-hand knowledge of what was actually being planned, so that all the jurors necessarily relied on a theory of direct aiding and abetting.[8/]

The prosecutor's argument does not support the Court of Appeal's conclusion of harmless error. Indeed, in one important particular the prosecutor's argument cuts against the Court of Appeal's conclusion. The prosecutor told the jurors they did not have to agree on a theory of murder. Some could find direct aiding and abetting of murder, while some could find the target crime was assault but that murder was a natural and probable consequence. 5 RT 3672-73. The prosecutor argued that Mr. Lewis and Ms. Coronel were guilty of murder as direct aiders and abetters, but conceded that the jurors could find that an assault was contemplated. 6 RT 3906, 3921. He argued that under any theory the appropriate verdict would be first-degree murder, a proposition which is not true after *Chiu*. 6 RT 3929. It cannot be said with certainty that the entire jury rejected the natural and probable consequences theory. If even one juror relied on that theory, the judgment must be reversed as Mr. Lewis was not convicted unanimously under a legally permissible theory.

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8. The third theory on which the jury was instructed, conspiracy, is not a legally sufficient theory of first-degree murder in light of *Chiu*. The conspiracy instruction, like the natural and probable consequences instruction, defined the target crime as assault with force likely to produce great bodily injury. 2 CT 508. The conspiracy instruction defined "natural and probable consequence" in the same way as did the instruction on the natural and probable consequences of aiding and abetting. 2 CT 509. The law concerning "natural and probable consequences" has been applied interchangeably in conspiracy cases and aiding and abetting cases. See *People v. Prettyman*, 14 Cal.4th 248, 261, 58 Cal.Rptr.2d 827, 926 P.2d 1013 (1996) (aiding and abetting), referring to *People v. Kauffman*, 152 Cal. 331, 92 P. 861 (1907) (conspiracy). The difference between the two theories identified in *People v. Smith*, 2014 WL 6477208 (Cal. Nov. 20, 2014), has no application to the facts of this case. It follows from *Prettyman* that *Chiu* also precludes *first-degree* murder liability as a natural and probable consequence of a conspiracy to commit a non-homicide crime. Even if *Chiu* did not directly extend to conspiracy, the instruction on the conspiracy theory does not save the first-degree verdict against Mr. Lewis because, as discussed in text, the record does not rule out the possibility that the jury's verdict was based on the unquestionably forbidden natural and probable consequences theory of aiding and abetting.

Most importantly, the prosecutor argued that an aider and abetter was "equally guilty" with the perpetrator, 5 RT 3671, and displayed a PowerPoint slide which used the same phrase, Ct.Ex. 7 at p. 3. This phrase originally appeared in the pattern jury instruction on accomplice liability, CALCRIM No. 400, but was deleted because of its misleading nature. *See People v. Loza*, 207 Cal.App.4th 332, 348-56, 143 Cal.Rptr.3d 355 (2012) (counsel ineffective for failing to object to this language); *People v. Nero,* 181 Cal.App.4th 504, 517-18, 104 Cal.Rptr.3d 616 (2010). The instruction given in this case did not include the offending language, 2 CT 504, but the damage was done by the prosecutor's arguments, oral and visual. *Chiu* makes even more clear than prior precedent that it is simply not true that the accomplice to murder is "equally guilty." With no instruction on the point, and with no way for the jury to know that the prosecutor's argument was legally erroneous, it can be assumed that the jury that reached the verdicts the prosecutor asked for accepted the prosecutor's argument on this point. Argument by the prosecutor exploiting the error is a part of the "whole record" that helps to demonstrate prejudice. *Arizona v. Fulminante, supra*, 499 U.S. at 297-98; *Satterwhite v. Texas, supra*, 486 U.S. at 260; *Chapman*, 386 U.S. at 25.

In sum, reasonable jurors could see the evidence more than one way on the question whether Mr. Lewis intended a killing or a beating. An analysis of prejudice consistent with the Constitution must account for that reality. But the Court of Appeal cited only the evidence most favorable to the prosecution. Op. 19. An approach to harmless error that looks only at prosecution-favorable evidence and prosecution-favorable inferences is fundamentally wrong under the constitutional test.

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CONCLUSION

The petition for a writ of certiorari should be granted, and the judgment of the Court of Appeal of California should be reversed.

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Respectfully submitted,

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