In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

YAZAN ALEDAMAT,

Defendant and Appellant.

Case No. S248105

Second Appellate District, Division Two, Case No. B282911
Los Angeles County Superior Court, Case No. BA451225
The Honorable Stephen A. Marcus, Judge

OPENING BRIEF ON THE MERITS

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ISSUES PRESENTED

1. Is an error in instructing the jury on both a legally correct theory of guilt and a legally incorrect one harmless if an examination of the record permits a reviewing court to conclude beyond a reasonable doubt that the jury based its verdict on the valid theory, or is the error harmless only if the record affirmatively demonstrates that the jury actually rested its verdict on the legally correct theory?

2. Could the jury, in this case, have concluded that defendant used an inherently deadly weapon in committing the assault without also concluding that defendant used a weapon in a manner that presents a risk of death or great bodily injury?

INTRODUCTION

The Court of Appeal below held that where there is error in offering the jury both a valid and an invalid theory of conviction—so-called "alternative-legal-theory error"—the judgment must be reversed unless the record shows that the jury necessarily relied on the valid theory. It concluded that this rule of near-automatic reversal, derived from *People v. Green* (1980) 27 Cal.3d 1, controls even though the error would "certainly" not be reversible under ordinary harmlessness review. But the *Green* rule is only one way a court may determine that alternative-legal-theory error is harmless. Using *Green* as the exclusive test is incompatible with more recent decisions of this Court and the United States Supreme Court.

To forestall further decisions like the one below, this Court should now clarify that the ordinary harmlessness standard of *Chapman v. California* (1967) 386 U.S. 18, 22-23, governs alternative-legal-theory error. Under that standard, a court may affirm if it concludes beyond a reasonable doubt that the error did not contribute to the verdict. There is no persuasive reason why any higher standard should apply in these

circumstances. Nothing about the nature of the error calls for a different or more demanding standard than *Chapman*, which applies to a variety of similar instructional errors. Nor does our state Constitution independently require any more stringent standard of reversibility. The use of *Chapman* in this context would also advance the proper role of appellate review by preserving judgments where, as here, the error could not have affected the outcome of the trial.

STATEMENT OF THE CASE AND FACTS

Defendant Yazan Aledamat was tried in the Los Angeles County Superior Court for assault with a deadly weapon (Pen. Code, § 245, subd. (a)) and making a criminal threat (Pen. Code, § 422, subd. (a)), with an enhancement allegation as to the threat charge that he had used a deadly and dangerous weapon (Pen. Code, § 12022, subd. (b)(1)). (CT 20-24, 47-48.) The evidence showed that Aledamat frequented a food truck where Yuridia Gonzalez and her husband, Francisco Bautista, worked. (RT 326-329, 331-332, 334, 336.) Aledamat sometimes commented on Gonzalez's attractiveness, and had asked for her phone number, but Gonzalez had rebuffed him. (RT 327-329.) On a day when Gonzalez was absent but Bautista was working, Aledamat made provocative comments about Gonzalez. (RT 334, 336-339, 346-347, 350-352, 383.) Bautista took off his apron and turned around to face Aledamat. (RT 352-353.) In response, Aledamat pulled out a box cutter with its blade exposed, thrust it toward Bautista, and said "I'm going to kill you." (RT 339-344, 353-354, 360, 381-382, 384.) Police officers arrived and saw Aledamat holding the box-cutter out toward Bautista. (RT 343-344, 354, 359, 366-368, 371, 373-377, 380.) Aledamat put the box cutter in his pocket; the officers arrested him and recovered the weapon. (RT 368, 371-372.)

After the close of evidence, the court read the jury the standard CALCRIM instructions on, among other things, the elements of the assault charge:

> To prove that the defendant is guilty of this crime, the People must prove that:
>
> The defendant did an act with a deadly weapon other than a firearm, that by its nature would directly and probably result in the application of force to sa[id] person;
>
> The defendant did that act willfully;
>
> When the defendant acted, he was aware of the facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to someone, and
>
> When the defendant acted, he had the present ability to apply force with a deadly weapon other than a firearm to a person.

(RT 632-633; see CT 58; CALCRIM No. 875.)

The court then read several elaborating instructions, including instructions defining the term "deadly weapon":

> A deadly weapon other than a firearm is any object, instrument, or weapon that is inherently deadly or one that is used in such a way that it is capable of causing and likely to cause death or ... great bodily injury.
>
> ...
>
> Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.

(RT 634-635; see CT 58; CALCRIM No. 875.)

The court also read the jury the standard instruction on the weapon enhancement allegation:

> If you find the defendant guilty of the crimes charged in counts 1 and 2, you must then decide whether for each crime the People have proved the additional allegation that the defendant

personally used a deadly or dangerous weapon during the commission of that crime.

...

A deadly or dangerous weapon is any object, instrument, or weapon that is inherently dangerous ... or one that is used in such a way that it is capable of causing or likely to cause death or great bod[il]y injury.

In deciding whether an object is a deadly weapon, consider all of the surrounding circumstances including when and where the object was possessed and any other evidence that indicates whether the object would be used for a dangerous rather than a harmless purpose.

"Great bodily injury" means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.

Someone personally uses a deadly or dangerous weapon if he or she intentionally ... displays the weapon in a menacing manner.

(RT 637-638; see CT 59-60; CALCRIM No. 3145.)

Aledamat's counsel defended against the assault charge by arguing that there was at least reasonable doubt that his act of wielding the box cutter probably would have resulted in the application of force; counsel did not contest that the box cutter itself qualified as a deadly weapon. (RT 643-649.) As to the threats charge, defense counsel argued that reasonable doubt existed about whether Aledamat actually made the threat and whether Bautista was in sustained fear as the result of any threat. (RT 649-659.)

The jury convicted Aledamat of both charges and found the enhancement allegation true. (RT 682-683; CT 64-69.) Aledamat admitted that he had previously been convicted of robbery (see Pen. Code, §§ 667, subd. (a)(1), 667 subds. (b)-(f)), and the court sentenced him to 11 years in state prison (RT 672-676, 904; CT 67, 75-79).

On appeal, Aledamat claimed that the standard instructions as to the assault charge and the weapon-use allegation gave rise to alternative-legal-theory error. The Court of Appeal agreed. (Opn. 4-5.) A "deadly weapon" for purposes of Penal Code section 245 is "'any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury.'" (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028-1029.) And an "inherently deadly weapon" is simply an object—such as a gun, dirk, or blackjack—that is deadly to others in the "ordinary use" for which it is designed. (*Id.* at p. 1029.) A box cutter, as a matter of law, is not inherently deadly. (*People v. McCoy* (1944) 25 Cal.2d 177, 188.) Because the instructions permitted the jury to conclude that the box cutter was a deadly weapon if it was "inherently deadly," and no other definition of that term was provided (RT 634-635; see CT 58; CALCRIM No. 875; see also RT 637-638; CT 59-60; CALCRIM No. 3145), the Court of Appeal concluded that the jury was permitted to reach its verdict on the basis of either a legally valid theory or a legally invalid theory (see opn. 4-5; see also *People v. Nelson* (2016) 1 Cal.5th 513, 546-547 [instructional language is erroneous if it is reasonably likely to have misled the jury]).

Relying on *People v. Guiton* (1993) 4 Cal.4th 1116, 1129, the Court of Appeal held that reversal was required because alternative-legal-theory error can be deemed harmless only if the record shows that the jury actually and necessarily relied on the legally valid theory, a showing not supported by the record here. (Opn. 5-6.) The Court of Appeal observed, however, that "the rules regarding prejudice that we apply in this case are arguably in tension with more recent cases, such as *People v. Merritt* (2017) 2 Cal. 5th 819." (Opn. 6.) And it concluded that an ordinary harmless-beyond-a-reasonable-doubt standard "would certainly be satisfied here" since it was uncontested and shown by overwhelming evidence that the box cutter

qualified as a deadly weapon. (Opn. 6-7.) But it determined that any reconsideration of the proper standard "is for our Supreme Court, not us." (Opn. 7.)

ARGUMENT

I. ALTERNATIVE-LEGAL-THEORY ERROR IS SUBJECT TO THE ORDINARY *CHAPMAN* STANDARD OF HARMLESS-ERROR REVIEW

The Court of Appeal below properly concluded that there was alternative-legal-theory error here, since the jury was given both a valid and an invalid path to conviction. (Opn. 4-5; *ante*, p. 8; see *People v. Brown* (2012) 210 Cal.App.4th 1, 11 [CALCRIM No. 875 presents jury with alternative-legal-theory error].) The rule of near-automatic reversal that the court followed, however, should not apply in these circumstances. Had the trial court erroneously instructed the jury only that the box-cutter was an inherently deadly weapon, it is beyond dispute that the error would have been reviewable for harmlessness under the ordinary *Chapman* standard. (*People v. Brooks* (2017) 3 Cal.5th 1, 69-70 [misdescription of an element of the offense subject to harmless-error review under *Chapman*].) But because the trial court also instructed the jury with the correct definition of "deadly weapon," the Court of Appeal used a more stringent harmless-error test. As the Court of Appeal observed, this approach is "arguably in tension with more recent cases." (Opn. 6.) In fact, the harmlessness standard applied by the Court of Appeal is incompatible with modern harmless-error decisions, which compel application of the ordinary *Chapman* standard.

A. The Origins of the *Green* Rule and Its Application to Alternative-Legal-Theory Error

The standard of reversal used by the Court of Appeal originates with *People v. Green* (1980) 27 Cal.3d 1. In *Green*, this Court held 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. 69.)

Several years later, in *People v. Guiton* (1993) 4 Cal.4th 1116, the Court re-evaluated that rule in light of the United States Supreme Court's intervening decision in *Griffin v. United States* (1991) 502 U.S. 46. *Griffin* held that, where alternative theories of conviction have been presented to the jury, a general verdict will not be set aside on grounds of factual insufficiency if there is at least one factual theory supported by the record. (*Griffin*, *supra*, 502 U.S. at pp. 56-57.) While acknowledging that the *Griffin* rule did not bind the States, this Court in *Guiton* concluded that the rule "makes good sense." (*Guiton*, *supra*, 4 Cal.4th at p. 1129.) It held that, for purposes of California law, when an alternative theory of guilt is factually deficient, as opposed to legally invalid, reversal is not required unless the record affirmatively shows that the jury relied on the factually unsupported theory. (*Ibid.*) The Court went on to observe that it was not called upon to "decide the exact standard of review of cases governed by *Green*," i.e., cases in which the alternative theory is legally invalid. (*Id.* at p. 1130.) But it noted that "one way" of assessing harmlessness in that situation is to "determine from other portions of the verdict that the jury necessarily found the defendant guilty on a proper theory." (*Ibid.*) The Court concluded that there "may be additional ways by which a court can determine that error in the *Green* situation is harmless. We leave the question to future cases." (*Id.* at p. 1131.)

Subsequent decisions of this Court have not squarely addressed or settled the open question recognized in *Guiton*. Some 15 years after that case was decided, Justice Baxter emphasized that *Guiton*'s approach was only one way to determine harmlessness in cases of alternative-legal-theory

error and that the Court had "never intimated that this was the only way to do so." (*People v. Cross* (2008) 45 Cal.4th 58, 70 (conc. opn. of Baxter, J.).) He posited that the ordinary harmless-error standard of *Chapman v. California* (1967) 386 U.S. 18, should apply. (*Cross, supra*, 45 Cal.4th at pp. 70-71 (conc. opn. of Baxter, J.).) That standard differs markedly from the one described in *Green* and *Guiton*. Under the *Chapman* standard, which applies to most federal constitutional errors, including most instructional errors, a reviewing court must undertake "a thorough examination of the record" to determine whether it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." (*Neder v. United States* (1999) 527 U.S. 1, 18, 19.) For example, *Chapman* permits affirmance where an element of the offense has been omitted from the instructions if "the omitted element was uncontested and supported by overwhelming evidence." (*Id.* at p. 17; accord, *People v. Mil* (2012) 53 Cal.4th 400, 410.)

Shortly after Justice Baxter made those observations, the Court acknowledged the still-open question in *People v. Chun* (2009) 45 Cal.4th 1172, but again declined to resolve it. It instead concluded that the alternative-legal-theory error in that case could be deemed harmless by asking whether "other aspects of the verdict or evidence leave no reasonable doubt that the jury made the findings necessary" to support the valid theory. (*Id.* at pp. 1204-1205.) The Court noted that it used that test "without holding that this is the only way to find error harmless." (*Ibid.*)

This Court's more recent decisions, while not directly taking on the unresolved issue, suggest that a harmlessness standard broader than the *Green* rule may apply to alternative-legal-theory error. In *People v. Chiu* (2014) 59 Cal.4th 155, the Court said that a conviction "must be reversed unless we conclude beyond a reasonable doubt that the jury based its verdict on the legally valid theory." (*Id.* at p. 167, citing *Chun, supra*, 45

Cal.4th at pp. 1201, 1203-1205.) In applying that standard, the Court did not limit its inquiry to "portions of the verdict" alone but determined that, in light of the jury's questions during deliberations, "we cannot conclude beyond a reasonable doubt that the jury ultimately based its first degree murder verdict on ... the legally valid theory ...." (*Chiu*, *supra*, 59 Cal.4th at pp. 167-168.) Similarly, in *In re Martinez* (2017) 3 Cal.5th 1216, the Court recited "the *Chiu* prejudice standard" that governs alternative-legal-theory error but did not expressly grapple with the scope of the harmlessness inquiry. (*Id.* at pp. 1225, 1226.) In applying the standard, the Court reviewed the record in the case, including the evidence presented to the jury and the jury's questions during deliberations, before concluding that that review did not "show beyond a reasonable doubt that the jury relied on a legally valid theory." (*Id.* at pp. 1226-1227.)[1]

Lower courts have taken different approaches to harmless-error review in this situation. The Court of Appeal below, for example, believed that it was not permitted to affirm unless the record established that the jury necessarily relied on the valid theory. The court therefore reversed, even though it would have concluded that the error was harmless under an ordinary *Chapman* test, since the evidence in support of the valid theory was uncontested and overwhelming. (Opn. 6-7.) Likewise, in *People v. Sanchez* (2001) 86 Cal.App.4th 970, the court reversed for alternative-

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[1] The central issue in *Martinez* was whether a more relaxed harmlessness standard should apply to alternative-legal-theory error on collateral review. (See *Martinez*, *supra*, 3 Cal.5th at p. 1221.) The Court rejected that proposition and instead applied the standard articulated in *Chiu*. (*Id.* at 1225.) In the briefs, the People had argued, among other things, that it would be appropriate to review the entire record in determining prejudice, but that argument did not draw comment other than the observation that "[t]he Attorney General's position, like the Court of Appeal's, is based on its review of the evidence." (*Id.* at p. 1226.)

legal-theory error, despite "overwhelming evidence" in support of the legally valid theory. (*Id.* at p. 981.) It did so because "there simply is no legitimate basis in the record" to conclude that the verdict was necessarily based on the legally correct theory and it was "conceivable" that the jury might have relied on the incorrect theory. (*Ibid.*) On the other hand, the Court of Appeal in *Brown*, *supra*, 210 Cal.App.4th 1, affirmed despite alternative-legal-theory error, reasoning that the "ample evidence" produced at trial in favor of the valid theory, along with the arguments of counsel, left no reasonable doubt that the jury found the defendant guilty on the valid theory. (*Id.* at p. 13.)

This Court should now clarify whatever lingering ambiguity produced these disparate results. The ultimate inquiry in this context should be no different from the *Chapman* harmless-error standard customarily applied to instructional error affecting the elements of an offense. Under that standard, a reviewing court may affirm if it appears beyond a reasonable doubt that the error did not affect the verdict, even if the record does not show that the jury necessarily relied on the valid theory.

B. This Court and the United States Supreme Court Have Retreated from Rigid Harmlessness Standards Such as the *Green* Rule

The *Green* rule is a conspicuous outlier when it comes to assessing the harmlessness of an instructional error. Since *Green* and *Guiton* were decided, this Court and the United States Supreme Court have addressed the proper harmlessness standard to be applied in various instructional contexts and have consistently rejected such rules of automatic or near-automatic reversal.

In *People v. Harris* (1994) 9 Cal.4th 407, for example, this Court decided that instructional error in misdescribing the "immediate presence" aspect of robbery is not subject to the standard of reversibility set forth in

Green. (*Id.* at pp. 416-419.) Instead, the Court concluded, it is governed by "the harmless error test traditionally applied to misinstruction on the elements of an offense, namely, whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" (*Id.* at pp. 425, quoting *Chapman*, *supra*, 386 U.S. at p. 24.) The Court noted that, when it decided *Green*, it did not have the benefit of subsequent United States Supreme Court authority applying *Chapman* to similar instructional error. (*Ibid.*, discussing *Yates v. Evatt* (1991) 500 U.S. 391.)

In *People v. Flood* (1998) 18 Cal.4th 470, this Court re-examined the proper harmlessness standard to be applied to the erroneous omission of an element of the offense from the jury instructions. The Court observed that state and federal jurisprudence on the subject had been evolving for some decades. (*Id.* at pp. 480, 492.) In light of that evolution, it rejected the existing state-law rule, which required automatic reversal subject to various exceptions, such as one that, like the *Green* standard, permitted affirmance where the jury necessarily resolved the omitted question under other, proper instructions. (*Id.* at pp. 479-490.) The Court declined to perpetuate "an ostensible reversible-per-se rule that is riddled with exceptions meant to delineate circumstances in which such instructional error categorically may be deemed harmless." (*Id.* at p. 490.) It observed that such a rule "is fundamentally inconsistent with the language and purpose of the specific California constitutional harmless error provision." (*Ibid.*) And the Court held that "the prejudicial effect of such error is to be determined, *for purposes of California law*, under the generally applicable prejudicial error test embodied in article VI, section 13." (*Ibid.*)

Having determined that such error is not automatically reversible under California law, the *Flood* Court went on to hold that, for purposes of federal law, the *Chapman* standard controls. (*Flood*, *supra*, 18 Cal.4th at

pp. 502-503.) It reasoned that recent United States Supreme Court precedent showed "that instructional errors—whether misdescriptions, omissions, or presumptions—as a general matter fall within the broad category of trial errors subject to *Chapman* review on direct appeal." (*Id.* at p. 499.) The Court rejected the argument that such an error could be deemed harmless only if "the jury necessarily found the omitted element in connection with other findings required by the instructions." (*Id.* at p. 506.) It noted that none of the authority offered in support of that rule "involved a misinstruction on a peripheral issue that was never actually in dispute at trial and on which the evidence was totally uncontradicted." (*Id.* at pp. 506-507.) And the Court concluded that federal authority indicated, to the contrary, "that such an error may be found harmless in circumstances, such as those presented in the case at bar, in which there is no possibility that the error affected the result." (*Id.* at p. 507.)

In *People v. Breverman* (1998) 19 Cal.4th 142, this Court similarly re-examined the proper harmlessness standard to be applied to the erroneous omission of lesser-included-offense instructions. Like the error in *Flood*, such error had been deemed reversible per se under state law unless the jury necessarily resolved the omitted issue pursuant to other, proper instructions—a rule the Court characterized as a "standard of near-automatic reversal." (*Id.* at p. 175.) That standard traced back to *People v. Sedeno* (1974) 10 Cal.3d 703—decided just a few years before *Green* would announce a parallel rule—in which the Court had slightly relaxed the governing reversal-per-se standard. (*Id.* at pp. 720-722, modifying *People v. Modesto* (1963) 59 Cal.2d 722, 731.) Building on *Flood* and other decisions, the Court in *Breverman* concluded that *Sedeno*'s "rigid" standard was incompatible with California's constitutional harmless-error provision. (*Breverman, supra*, 19 Cal.4th at p. 176, citing Cal. Const., art. VI, § 13.) Since the error "can readily be assessed by an individualized, concrete

examination of the record," it "must therefore be evaluated under the generally applicable California test for harmless error." (*Ibid.*) And because the Court determined that the error did not violate federal law, the harmlessness standard mandated by our State Constitution in that context was the reasonable-probability test of *People v. Watson* (1956) 46 Cal.2d 818, 836. (*Breverman, supra*, 19 Cal.4th at pp. 172, 176.)

The United States Supreme Court in *Neder* later confirmed *Flood*'s conclusion that instructional error in omitting an element of the offense is not reversible per se but is subject to harmless-error review under *Chapman*. (*Neder, supra*, 527 U.S. at pp. 8-15.) The Court reasoned that such an error does not affect the framework within which the trial proceeds, so as to amount to a structural defect that would defy harmlessness analysis. (*Id.* at pp. 8-9.) Instead, it is akin to errors like the misdescription of an element or an impermissible conclusive presumption, both of which the Court had previously determined were subject to harmless-error review. (*Id.* at pp 12-13, discussing, among other cases, *California v. Roy* (1996) 519 U.S. 2 (*per curiam*), *Carella v. California* (1989) 491 U.S. 263, and *Pope v. Illinois* (1987) 481 U.S. 497.) Like this Court in *Flood*, the *Neder* Court rejected the proposition that the omission of an element should be deemed harmless only if it can be determined that the jury necessarily "rested its verdict on evidence that its instructions allowed it to consider." (*Id.* at p. 17.) The Court determined that such an approach would conflict with the test applied in other, similar situations, and concluded that "the harmless-error inquiry must be essentially the same: Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?" (*Id.* at p. 17-18.)

Several years later, in *Hedgpeth v. Pulido* (2008) 555 U.S. 57 (*per curiam*), the high court examined the same type of error at issue in this case, where the jury was given an alternative but legally invalid path to

conviction, and decided that such error is not structural but is instead subject to review for harmlessness. (*Id.* at pp. 61-62.) Because that case arose on collateral review, the Court held that the harmlessness test of *Brecht v. Abrahamson* (1993) 507 U.S. 619, 623, applied, and it had no occasion to expressly say what harmlessness standard would govern on direct review. (*Ibid.*) In deciding that the error was not reversible per se, however, the Court relied heavily on its post-*Chapman* jurisprudence, which had found various instructional errors subject to the beyond-a-reasonable-doubt harmlessness standard. (*Id.* at pp. 60-61.) It concluded that "nothing ... suggests that a different standard should apply in this context." (*Id.* at p. 61.) The Court also criticized the standard used by the federal court of appeals in that case, which required reversal unless the reviewing court could say with "absolute certainty" that the defendant had been convicted on the basis of the legally valid theory. (*Id.* at pp. 59-60, 62.) Application of a more stringent standard would be "patently illogical," the Court observed, as it "reduces to the strange claim that, because the jury received both a 'good' charge and a 'bad' charge on the issue, the error was somehow more pernicious than where the *only* charge on the critical issue was a mistaken one." (*Id.* at p. 61, citation and internal quotation marks and alterations omitted.)

In *Skilling v. United States* (2010) 561 U.S. 358, the Court later recognized that alternative-legal-theory error is reviewed for harmlessness on direct appeal, but it did not specifically articulate the applicable standard. (*Id.* at p. 414 & fn. 46.) Lower federal courts after *Pulido* and *Skilling* have applied *Chapman* to alternative-legal-theory error. (See *United States v. Garrido* (9th Cir. 2013) 713 F.3d 985, 994; *Bereano v. United States* (4th Cir. 2013) 706 F.3d 568, 578; *United States v. Skilling* (5th Cir. 2011) 638 F.3d 480, 481-482; *United States v. Black* (7th Cir. 2010) 625 F.3d 386, 388.)

This Court has also more recently concluded that instructional error involving the omission of multiple elements of a charged offense—even all elements of the offense—is not structural but is amenable to harmlessness review under *Chapman*. In *People v. Mil*, *supra*, 53 Cal.4th 400, the Court held that the erroneous omission of two elements of an offense from the jury instructions was subject to *Chapman* review. (*Id.* at p. 417.) Drawing from *Neder* and *Pulido*, the Court reasoned that "harmless-error analysis applies to instructional errors so long as the error at issue does not categorically vitiate *all* the jury's findings." (*Id.* at p. 412, quoting *Pulido*, *supra*, 555 U.S. at p. 61, internal quotation marks omitted.) And extending that decision a few years later, the Court held in *People v. Merritt* (2017) 2 Cal.5th 819, that instructional error in omitting all the elements of the charged offense of robbery in that case was subject to harmlessness review under *Chapman*. (*Id.* at p. 830.) There, identity was the only contested issue, the jury was correctly instructed as to identity, counsel accurately argued the elements of robbery to the jury, the jury found on other proper instructions that the defendant possessed the requisite mental state for robbery, and the jury found true a firearm-use allegation. (*Ibid.*) In light of the arguments of counsel and the jury's findings, and because the evidence of robbery "was overwhelming and uncontroverted," the Court held that the instructional error was harmless under *Chapman*. (*Id.* at pp. 831-832.)

C. Application of *Green* as the Exclusive Test in Cases of Alternative-Legal-Theory Error Is Incompatible with Modern Harmless-Error Precedent

The foregoing authority compels application of *Chapman*, not *Green*, as the governing harmlessness standard in cases of alternative-legal-theory error. The *Green* standard, if used as the exclusive test, is one that requires near-automatic reversal—it prohibits affirmance except in cases where it

can be ascertained that the jury necessarily relied on the valid theory.[2] That standard cannot be reconciled with the reasoning or results of decisions since *Green* and *Guiton*.

Although the *Pulido* Court did not directly address what harmlessness standard governs alternative-legal-theory error on direct review as a matter of federal law, its decision strongly indicates that the test would be no more stringent than the ordinary *Chapman* inquiry. (*Pulido*, *supra*, 555 U.S. at p. 61 [nothing in Court's prior cases suggests a standard other than *Chapman* would apply to alternative-legal-theory error]; see also *Skilling*, *supra*, 561 U.S. at p. 414 & fn. 46 [principles discussed in *Pulido* apply "equally" to cases on direct review].) That is especially true in light of the Court's criticism of the rule that the lower court had used in that case, requiring "certainty" that the jury actually relied on the valid theory. (*Pulido*, *supra*, 555 U.S. at pp. 59-60, 62; see also *Neder*, *supra*, 527 U.S. at p. 17 [rejecting similar proposed rule].) And *Chapman* is the usual standard applicable to federal constitutional error on direct review. (*Brecht*, *supra*, 507 U.S. at p. 630.) Following *Neder* and *Pulido*, federal appellate courts may affirm despite alternative-legal-theory error if, after a thorough examination of the record, it appears beyond a reasonable doubt that the

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[2] See *Pulido*, *supra*, 555 U.S. at p. 62 [rule requiring certainty that jury relied on valid theory would appear to entail "a finding that no violation had occurred at all, rather than that any error was harmless"]; *Neder*, *supra*, 527 U.S. at p. 17 [rule allowing affirmance only upon determination that jury actually rested its verdict on evidence the instructions properly allowed it to consider "is simply another form of the argument that a failure to instruct on any element of the crime is not subject to harmless-error analysis"]; *Breverman*, *supra*, 19 Cal.4th at p. 175 [overruling "the stringent *Sedeno* test of near-automatic reversal"]; *Flood*, *supra*, 18 Cal.4th at pp. 483-484 [*Sedeno* represents narrow exception to general rule of automatic reversal]; *People v. Pulido* (1997) 15 Cal.4th 713, 716 [equating *Sedeno* and *Green* rules]; *Guiton*, *supra*, 4 Cal.4th at p. 1130 [same].

jury verdict would have been the same absent the error. (*Skilling*, *supra*, 638 F.3d at p. 482; see also *Garrido*, *supra*, 713 F.3d at p. 994 [acknowledging applicability of *Chapman* to alternative-legal-theory error]; *Bereano*, *supra*, 706 F.3d at p. 578 [same]; *Black*, *supra*, 625 F.3d at p. 388 [same].)

As the *Pulido* Court correctly suggested, there is nothing in the nature of alternative-legal-theory error that calls for a different and more rigorous harmlessness standard from the one that governs a variety of similar instructional errors, such as omission or misdescription of an element of the offense, or an improper mandatory presumption. (See, e.g., *Pulido*, *supra*, 555 U.S. at pp. 60-61; *Neder*, *supra*, 527 U.S. at pp. 9-12; *Merritt*, *supra*, 2 Cal.5th at pp. 825-829; cf. *Roy*, *supra*, 519 U.S. at p. 5 [error in failing to properly instruct on intent required for aiding and abetting may be "as easily characterized as a 'misdescription of an element' of the crime, as it is characterized as an error of 'omission'"].) Application of the *Chapman* standard to alternative-legal-theory error poses no unique practical difficulty as compared to those errors. Under *Chapman*, it may readily be determined beyond a reasonable doubt that alternative-legal-theory error did not affect the verdict. That may be true, for example, when the evidence in support of the valid theory was uncontested and overwhelming, or when the parties at trial focused on the valid theory rather than the invalid one. (See *Neder*, *supra*, 527 U.S. at pp. 18-19; *Merritt*, *supra*, 2 Cal.5th at pp. 831-832; *Flood*, *supra*, 18 Cal.4th at pp. 506-507.) Nor is there any concern implicated by alternative-legal-theory error beyond fair trial procedures—such as the deterrence of official misconduct—that might

counsel in favor of a standard higher than *Chapman*. (See *Breverman*, *supra*, 19 Cal.4th at p. 176, fn. 24.)[3]

Where an instructional error does not "defy" harmlessness analysis but is "readily susceptible to such analysis" (*Merritt*, *supra*, 2 Cal.5th at p. 829), *Chapman* review has consistently been deemed appropriate. (See *Pulido*, *supra*, 555 U.S. at p. 61 ["Harmless-error analysis applies to instructional errors so long as the error at issue does not categorically vitiate all the jury's findings"]; *People v. Aranda* (2012) 55 Cal.4th 342, 364 [the "touchstone for determining the appropriateness of harmless error review is the ability to ascertain the effect of the constitutional violation"]; *Mil*, *supra*, 53 Cal.4th at pp. 413-414 ["critical inquiry" is whether error can be "quantitatively assessed"].) There is no reason for a different result here. Indeed, drawing a distinction between alternative-legal-theory error and other instructional errors subject to *Chapman* would produce "'patently illogical'" and arbitrary outcomes. (*Pulido*, *supra*, 555 U.S. at p. 61.) It would imply, counterintuitively, that the addition of a correct charge to an incorrect one is more egregious error than the incorrect charge standing alone. (*Ibid.*; *Cross*, *supra*, 45 Cal.4th at p. 71 (conc. opn. of Baxter, J.).)

Nor does state law by itself mandate any harmlessness test more stringent than *Chapman*. Since *Green* and *Guiton* were decided, this Court has recognized that "the state Constitution affords no greater protection

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[3] *Guiton* suggested that *Green*'s strict standard of reversal is appropriate in the alternative-legal-theory context because a jury is not "fully equipped" to detect a legal error, as opposed to a factual inadequacy. (*Guiton*, *supra*, 4 Cal.4th at pp. 1128-1129.) But a jury is no better equipped to detect the misdescription of an element, much less the complete omission of an element, than it is to recognize alternative-legal-theory error, and yet those instructional errors are subject to review under *Chapman*, not *Green*. In fact, a jury in the case of alternative-legal-theory error is comparatively better equipped to render a proper verdict because it has at least been correctly instructed on all the elements of the offense.

than the federal Constitution" in the context of instructional error affecting an element of the offense. (*Mil*, *supra*, 53 Cal.4th at p. 415.) And the Court has rejected the application of "heightened standard[s] of reversible error" in other contexts precisely because such standards would run afoul of our constitutional harmless-error provision. (*Flood*, *supra*, 18 Cal.4th at p. 487; see also *People v. Breverman*, *supra*, 19 Cal.4th at p. 176 [overruling *Sedeno*'s equivalent harmlessness standard for lesser-included-offense instructional error].) The *Green* rule of near-automatic reversal is such a standard.

Like the standards this Court rejected in *Flood* and *Breverman*, *Green*, in effect, requires reversal per se subject to a narrow exception. (See *Flood*, *supra*, 18 Cal.4th at p. 490; *Breverman*, *supra*, 19 Cal.4th at p. 175.) That kind of standard is "fundamentally inconsistent" with article VI, section 13, of the California Constitution. (*Flood*, *supra*, 18 Cal.4th at p. 490.) Unless there has been structural error that is not susceptible to harmlessness analysis at all, our Constitution requires a reviewing court to assess a faulty instruction's effect on the verdict under the reasonable-probability test of *People v. Watson*, *supra*, 46 Cal.2d at p. 836, by examining the "entire cause, including the evidence." (*Flood*, *supra*, 18 Cal.4th at pp. 487-490; *Breverman*, *supra*, 19 Cal.4th at p. 176.) *Green*'s limited exception to per-se reversal may serve as "one way" to satisfy *Chapman*. (See *Flood*, *supra*, 18 Cal.4th at p. 504; *Guiton*, *supra*, 4 Cal.4th at p. 1130; see also *Cross*, *supra*, 45 Cal.4th at p. 70 (conc. opn. of Baxter, J.); cf. *Skilling*, *supra*, 638 F.3d at p. 482.) But requiring the *Green* test exclusively in the context of alternative-legal-theory error cannot be justified as a matter of state law. (See Cal. Const., art. VI, § 13; *Mil*, *supra*, 53 Cal.4th at p. 415; *Breverman*, *supra*, 19 Cal.4th at p. 176; *Flood*, *supra*, 18 Cal.4th at p. 490.)

The *Chapman* standard also better serves the purpose and interests of harmless-error review. "'The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence." (*Flood*, *supra*, 18 Cal.4th at p. 507.) The doctrine thus seeks to preserve judgments where an error could not have affected the outcome on that central question. It thereby "promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." (*Ibid.*) The *Green* rule is inconsistent with these goals. It mandates reversal in spite of a fair trial any time the record fails to disclose the particular basis upon which the jury rendered its general verdict.

This case illustrates why that rigid rule undermines sound harmless-error principles. As the Court of Appeal acknowledged, and as will be discussed below, the harmless-error test of *Chapman* is "certainly" met here because the evidence supporting the valid theory was uncontested and overwhelming (Opn. 7) and because the parties never focused on the invalid theory at trial. In other words, there was "error that, in theory, may have altered the basis on which the jury decided the case, but in practice clearly had no effect on the outcome." (*Rose v. Clark* (1986) 478 U.S. 570, 582, fn. 11; accord, *Harris*, *supra*, 9 Cal.4th at p. 431.) "To set a barrier so high that it could never"—or, as here, would rarely—"be surmounted would justify the very criticism that spawned the harmless-error doctrine in the first place: Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." (*Neder*, *supra*, 527 U.S. at p. 18, citation and quotation marks omitted.)

Recognizing the foregoing principles, this Court has, in recent years, retrenched its harmless-error precedents in other contexts where similarly

outmoded standards applied. (See, e.g., *Merritt*, *supra*, 2 Cal.5th at p. 831; *Breverman*, *supra*, 19 Cal.4th at p. 176; *Flood*, *supra*, 18 Cal.4th at pp. 486-487; *People v. Cahill* (1993) 5 Cal.4th 478, 509-510.) It should do so here as well by clarifying that alternative-legal-theory error is subject to the ordinary *Chapman* standard of harmless-error review.

II. THE ALTERNATIVE-LEGAL-THEORY ERROR IN THIS CASE WAS HARMLESS

Under *Chapman*, the alternative-legal-theory error here was harmless beyond a reasonable doubt, as the Court of Appeal correctly perceived. It would not be harmless under *Green*.

A. Factual Background

The prosecution's evidence at trial showed that Aledamat pulled out the box cutter with its blade exposed and thrust it toward Bautista, saying "I'll kill you." (RT 339-344.) He was about four feet away from Bautista. (RT 342.) Officers saw Aledamat holding the box cutter with its blade out when they arrived at the scene. (RT 371, 380.) The defense presented no evidence. (RT 616.)

The jury was instructed that the box cutter was a deadly weapon for purposes of the charged offense and the weapon-use allegation if it was "inherently deadly" (the invalid theory) or if it was "used in such a way that it [was] capable of causing and likely to cause death or great bodily injury" (the valid theory). (RT 634, 637-638; see CT 58-59.) The term "inherently deadly" was not further explained or defined. But the jury was told in connection with the weapon-use allegation that, "in considering whether an object is a deadly weapon, consider all of the surrounding circumstances including when and where the object was possessed and any other evidence that indicates whether the object would be used for a dangerous rather than a harmless purpose." (RT 638; see CT 59-60.)

In argument to the jury, the prosecutor summarized the facts, pointing out that Aledamat "pulled out a box cutter, opened it up and thrust it towards" Bautista. (RT 640.) She then addressed each charge, arguing with respect to the assault that Aledamat could have harmed Bautista:

> As far as assault with a deadly weapon goes, you don't have to actually touch the person. You don't have to actually inflict injury upon the person. What he did was sufficient; he committed a crime, a crime of assault with a deadly weapon. And the added allegation is that he used a box cutter.
>
> Ladies and gentlemen, you wouldn't want your children using a box cutter, would you? This is a deadly weapon. If used in a way to cause harm, it would cause harm. It's not whether he did cause harm; it's could he; could he have caused harm with that box cutter? The answer: absolutely.

(RT 640-641.)

Defense counsel countered by focusing on the element of assault requiring an act that by its nature would directly and probably result in the application of force:

> ... It all comes down to one word in this charge. The instruction will tell you the defendant did an act; the prosecution must prove beyond a reasonable doubt that the defendant did an act with a deadly weapon that by its nature would directly and probably result in the application of force to a person. What is the key word there? "Probably."

(RT 643-644; see RT 632; CT 58.) Counsel went on to argue that Aledamat's actions would probably not have resulted in the application of force, as he had only "pointed" the box cutter at Bautista. (RT 645.) Counsel contended that "the question before you is this: Is that act of pulling out a box cutter and pointing it toward someone an act that probably, not 'could,' not 'might,' not 'possibly,' probably resulted in physical force being applied to Mr. Bautista?" (RT 645.) He argued that Aledamat stood at a distance from Bautista and that this was a mere

"brandishing" case. (RT 645-649.) Counsel did not contest that the box cutter met the definition of a "deadly weapon," or address that question at all. (RT 642-659.)

In her relatively brief rebuttal, the prosecutor addressed the facts of the case and the arguments of the defense. Responding to defense counsel's assertion that a different crime should have been charged, she explained that the assault charge fit the facts:

> As I said before, you wouldn't want your children playing with this (indicating). It's inherently a deadly weapon. It's by definition the reason this law was created. And look, there's a copy of the 2012 Penal Code, look how thick that is (indicating). Look how many options there are. Brandishing is in there, absolutely. Stabbing is in there. Attempt murder is in there. That's not why you're here. You're here because that man assaulted another man with a deadly weapon. And, while doing so, he threatened to kill him.

(RT 662-663.) She made no other mention of the term "inherently deadly." (RT 659-664.)

B. The Error Was Harmless Under *Chapman*

Chapman requires a reviewing court to determine "beyond a reasonable doubt that the error did not contribute to the verdict obtained." (*Chapman*, *supra*, 386 U.S. at p. 24; accord, *Flood*, *supra*, 18 Cal.4th at p. 494.) "'To say that an error did not contribute to the verdict is to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.'" (*Flood*, *supra*, 18 Cal.4th at p. 494.) If, after reviewing the record, a court can "conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error," it should affirm. (*Neder*, *supra*, 527 U.S. at p. 19; accord, *Mil*, *supra*, 53 Cal.4th at p. 417.)

The record in this case establishes beyond a reasonable doubt that the alternative-legal-theory error did not contribute to the verdict. That the box

cutter qualified as a deadly weapon was not a contested issue at trial. In her opening argument, the prosecutor paraphrased the correct general definition of "deadly weapon," telling the jury that the box cutter qualified because, "if used in a way to cause harm, it could cause harm." (RT 641; see *Aguilar*, *supra*, 16 Cal.4th at pp. 1028-1029 [deadly weapon is object that is "used in such a manner as to be capable of producing and likely to produce, death or great bodily injury"]; see also RT 634-635, 637-638; CT 58-60; CALCRIM Nos. 875, 3145.) Defense counsel did not address the deadly-weapon aspect of the charges in his argument. And although the prosecutor used the term "inherently deadly" in her rebuttal, she did so only in passing, as part of her response to defense counsel's argument about the probable-application-of-force element of assault. (RT 662-663.) The jury could not have reasonably understood these arguments as framing any dispute about the nature of the box cutter as a deadly weapon.

The valid theory was also supported by overwhelming evidence. In determining whether an object that is not inherently deadly is used in a manner so as to qualify as a deadly weapon, "the trier of fact may consider the nature of the object, the manner in which it is used, and all other facts relevant to the issue." (*People v. Aguilar*, *supra*, 16 Cal.4th at p. 1029; see RT 637-638.) An object need not actually be used with deadly force to qualify as a deadly weapon. (*In re D.T.* (2015) 237 Cal.App.4th 693, 699.) When the object "is capable of being used in a 'dangerous or deadly' manner," and the evidence shows that the defendant "intended on a particular occasion to use it as a weapon should the circumstances require," then the object qualifies as a deadly weapon for purposes of that occasion. (*People v. Graham* (1969) 71 Cal.2d 303, 328, disapproved on other grounds by *People v. Ray* (1975) 14 Cal.3d 20, 32; cf. *D.T.*, *supra*, 237 Cal.App.4th at p. 699 [courts have consistently affirmed assault-with-a-

deadly-weapon convictions against sufficiency challenges where the defendant used "some hard, sharp, pointy thing" to threaten the victim].)

The trial testimony in this case established unambiguously that Aledamat used a sharp object to threaten Bautista. The box cutter was plainly capable of causing, and likely to cause, great bodily injury. It therefore qualified as a deadly weapon on that basis. (See, e.g., *People v. McCoy*, *supra*, 25 Cal.2d at pp. 182, 188-194 [where defendant stood over victim, holding knife a few inches from her face, offense was assault with a deadly weapon, and no instruction on simple assault was warranted]; *Page* (2004) 123 Cal.App.4th 1466, 1470-1473 [there was "ample evidence" that sharpened pencil was a deadly weapon where defendant's accomplice held it to victim's neck and threatened him]; *People v. Simons* (1996) 42 Cal.App.4th 1100, 1106-1107 [holding "without hesitation" that evidence "clearly demonstrated" screwdriver was deadly weapon where defendant flailed about with it in attempt to ward off police officers and "would bring the screwdriver forward" toward officers when they approached].)

That the jury might have had available to it an invalid route to conviction based on the standard instruction's reference to an inherently deadly weapon is "arguably possible" but "theoretical ... in most cases" (*Brown*, *supra*, 210 Cal.App.4th at pp. 11, 13), including this one. In circumstances like these, where the arguments of counsel reflect that "the case was simply not tried on alternate grounds that included the legally inadequate theory," and the evidence in support of the valid theory was overwhelming, there can be no reasonable doubt that the invalid theory did not contribute to the verdict. (*Id.* at p. 13.) The Court of Appeal below was therefore correct to conclude that the *Chapman* test is "certainly" satisfied here. (Opn. 7.) "Reversing defendant's conviction because of an instructional error concerning an uncontested, peripheral element of the offense, which effectively was conceded by defendant, was established by

overwhelming, undisputed evidence in the record, and had nothing to do with defendant's own actions or mental state, would erode the purpose and rationale of the harmless error doctrine and promote disrespect for the judicial system." (*Flood*, *supra*, 18 Cal.4th at p. 507.)

C. The Error Would Not Be Harmless Under *Green*

Under the *Green* standard, alternative-legal-theory error is harmless if the jury necessarily employed the valid theory in returning its verdict. (*People v. Green*, *supra*, 27 Cal.3d at p. 69.) Thus, as the Court has suggested in its order expanding the issue presented in this case, the error here would be harmless even under *Green* if the jury could not have concluded that Aledamat used an inherently deadly weapon in committing the assault without also concluding that he used a weapon in a manner that presents a risk of death or great bodily injury. The record does not show that the error was harmless under *Green*.

The instructions given to the jury did not provide any definition of "inherently deadly" that might have cabined its interpretation of that term in accord with its legal meaning. Nor did the elements of the assault charge require the jury to make any determination tantamount to a finding that the box cutter was used in a manner that presented a risk of death or great bodily injury. (See RT 632-633; see CT 58; CALCRIM No. 875.) Thus, it is possible that the jury could have determined that the box cutter was inherently deadly even if it did not believe that it was used in a manner capable of producing and likely to produce death or great bodily injury. Although that possibility may be only "theoretical" (*Brown*, *supra*, 210 Cal.App.4th at p. 11)—and therefore insufficient to require reversal under *Chapman*—it is enough to require reversal under *Green*, which allows

affirmance only if the jury actually and necessarily relied on the valid theory (see *Guiton, supra*, 4 Cal.4th at pp. 1129, 1130).[4]

CONCLUSION

The judgment of the Court of Appeal should be reversed.

Dated: September 21, 2018 Respectfully submitted,

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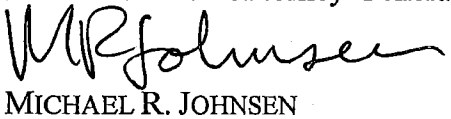

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[4] Even if the Court were to determine that the error was harmless under *Green*, it should decide the question of whether *Chapman* governs alternative-legal-theory error generally, to provide needed guidance to the lower courts.

CERTIFICATE OF COMPLIANCE

I certify that the attached OPENING BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 7,932 words.

Dated: September 21, 2018

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DECLARATION OF SERVICE BY U.S. MAIL and EMAIL

Case Name: **People v. Yazan Aledamat** Case No.: **S248105**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

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On **September 21, 2018**, I served the attached **OPENING BRIEF ON THE MERITS** by transmitting a true copy via electronic mail to:

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The one copy for the California Appellate Project was placed in the box for the daily messenger run system established between this Office and California Appellate Project (CAP) in Los Angeles for same day, personal delivery.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **September 21, 2018**, at Los Angeles, California.

K. Bobadilla
Declarant

Signature