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

DEFNDANT/APPELLANT'S ANSWER BRIEF ON THE MERITS

Andrea S. Bitar, Esq., SBN 199284
Bird Rock Law Group, A.P.C.
5580 La Jolla Blvd., #456
La Jolla, CA 92037
andreabitar@birdrocklaw.com
619-356-1624 (phone)/484-698-5302 (fax)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ISSUES PRESENTED

1. Is 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

This Court has clearly, and repeatedly, set out the appropriate test to use when evaluating prejudice from alternative legal theory error. Most recently in *In re Martinez* (2017) 3 Cal.5th 1216, this Court has directed that, using the harmless error standard articulated in *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705], "once [the defendant] has shown that the jury was instructed on correct and incorrect theories of liability, the presumption is that the error affected the judgment...." (*Martinez, supra,* 3 Cal.5th at p. 1224.) In order to overcome the presumption that defendant was harmed by such an error, the government must show "beyond a reasonable doubt that the jury based its verdict on the legally valid theory." (*Id.*, quoting *People v. Chiu* (2014) 59 Cal.4th 155, 167.)

This Court has recognized that the burden of the government in such a case is a heavy one, given that "an erroneous instruction deprives a

defendant of the right to a jury trial under the Sixth Amendment to the United States Constitution...." (*Martinez, supra*, 3 Cal.5th at p. 1224.) This Court has further reaffirmed the principle that the presumption of error is necessary to overcome the challenges juries face in applying the law to the facts correctly when erroneously instructed, given that "[j]urors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law...." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1125, quoting *Griffin v. United States* (1991) 502 U.S. 46, 59 [112 S.Ct. 466, 116 L.Ed.2d 371].)

Respondent has conceded that, applying this Court's harmless error standard as it is currently articulated, the lower court here acted properly in reversing defendant's conviction for assault with a deadly weapon and the accompanying enhancement. (Respondent's opening brief, p. 32.) Nevertheless, in seeking review in this case, respondent has advocated a different, less stringent error standard in the instance of alternative legal theory error. Respondent asks that error be deemed harmless not only when the record indicates that the jury actually relied upon the correct legal theory, but (drawing from language in *Neder v. United States* (1999) 527 U.S. 1 [144 L. Ed. 2d 35, 119 S. Ct. 1827]) also when a reviewing court theorizes that a hypothetical jury would have affirmed, as well.

But there is no legal basis, when reviewing alternative legal theory error, to substitute the judgment of a theoretical "reasonable" jury for a determination of what a particular jury actually decided in a specific case. The *Neder* "hypothetical jury" standard has by and large been reserved for situations (such as a failure to instruct on an element of a crime at issue) in which a jury was completely deprived of the opportunity to reach a decision using the correct legal standard; because there was no jury decision at all,

courts instead must turn to the "hypothetical jury" standard. In alternative legal theory cases, however, there is no need to turn to the hypothetical. The reviewing court can and should scrutinize the record, and determine, beyond a reasonable doubt, if the jury's decision actually relied upon the invalid legal theory. This is the harmless error standard that this Court has repeatedly articulated, and comports with the *Chapman* standard.

Looking to this Court's second question, in this particular case, and based upon the evidence in the record, it would have been entirely possible for the jury to have erroneously determined that defendant possessed an inherently deadly weapon without also concluding that defendant used a weapon in a manner that presents a risk of death or great bodily injury. Defendant pulled out a box cutter and pointed it at the victim, but remained between three and a half or four feet away. There is no evidence that defendant took a step towards the victim, and when defendant saw a police officer arrive, he put the box cutter away. Combined with the district attorney's argument to the jury that the box cutter was an inherently deadly weapon, there is simply not enough evidence in the record to support an argument that the jury actually found defendant used the box cutter in a manner that presented a risk of death or great bodily injury. Under this Court's application of the *Chapman* standard in alternative legal theory error cases such as *Green* and *Guiton*, the conviction below was properly reversed.

STATEMENT OF THE CASE AND FACTS

Defendant/appellant Yazan Aledamat was charged and tried on one count of assault with a deadly weapon (section 245, subdivision (a)(1)) and one count of criminal threat (section 422, subdivision (a)).[1] These charges stemmed from an encounter between defendant and a married couple (Yurida Gonzalez and Francisco Bautista) working at lunch truck in Los Angeles. (RT, pp. 326-327, 332, 334.)

Gonzalez and Bautista had noticed defendant stopping by the lunch truck several times. (RT, pp. 328, 336.) Defendant had previously made advances toward Gonzalez, telling her she was attractive and asking Gonzalez for her phone number; she refused. (RT, pp. 328-329.)

On October 22, 2016, Bautista was working at the truck when defendant approached him. (RT, p. 336.) Defendant said he was looking for Gonzalez because he wanted to have sex with her. (RT, p. 337.) Bautista was surprised, and took off his apron and turned toward defendant. (RT, pp. 352-353.)

Defendant then took a step back, pulled out a box cutter, and pointed it at Bautista. (RT, pp. 340, 353-354, 371, 380.) Defendant thrust his hand (holding the box cutter) forward at approximately waist level; Bautista moved back. (RT, pp. 341-342.) Defendant was between three and a half and four feet away from Bautista when he thrust the box-cutter at Bautista. (RT, p. 342.) Bautista testified that defendant said, "I'll kill you." (RT, pp. 343-344.) Bautista was afraid that defendant might actually kill him. (RT, p. 344.)

When the police arrived, they saw defendant standing on the sidewalk, holding a box cutter at approximately waist level and facing

---

[1] All statutory references are to the Penal Code unless otherwise indicated.

Bautista at a distance of approximately five feet. (RT, pp. 367, 376.) When he saw the police, defendant retracted the box cutter and put it into his pants pocket. (RT, p. 368.)

Defendant was tried before a jury. (CT, pp. 47-50, 66-69.) When instructing the jury on the assault with the deadly weapon count, the trial court gave a form of CALCRIM number 875, which describes the elements of the offense and also provides a definition of a "deadly weapon." The jury was instructed as follows:

> 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.

(CT, p. 58; CALCRIM No. 875.)

In his closing argument, the prosecutor referenced the definition of a deadly weapon twice. First, he discussed the box cutter, describing it as a deadly weapon:

> 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.

(RT, pp. 640-641.) In his rebuttal closing argument, the prosecutor again referred to the box cutter, this time asserting it was an inherently deadly weapon:

> 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.

(RT, p. 662.)

On appeal, defendant argued that CALCRIM 875 was erroneously given, because it instructed the jury with both a valid and an invalid legal theory. Defendant pointed to this Court's decision *People v. Aguilar* (1997)

16 Cal.4th 1023, which indicated that two types of "deadly weapons" exist within the context of section 245, subdivision (a)(i): objects such as dirks and daggers, which are designed for use as a lethal weapon; and other objects, that are not deadly as a matter of law, but have been used in a manner likely to produce death or great bodily injury. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1029.) California case law has typically described weapons in the first category as "inherently deadly" or "deadly per se." (*Ibid.*) In contrast, "a knife is not an inherently dangerous or deadly instrument as a matter of law...." (*People v. McCoy* (1944) 25 Cal.2d 177, 188.) Because the box cutter held by defendant in the underlying events was not an "inherently deadly" weapon, defendant argued that it was erroneous for the trial court to instruct the jury using CALCRIM 875, which directed the jury to find defendant guilty using a legally valid theory (the box cutter was used in a deadly way) or a legally invalid theory (the box cutter was inherently deadly).

Before the Court of Appeal, the respondent conceded that the trial court erred by giving CALCRIM 875, because the box cutter was not an inherently deadly weapon, but argued that the instruction was not prejudicial because the error was factual, rather than legal. (RB, p. 8.) The respondent argued that because CALCRIM 875 was technically correct in setting out two types of deadly weapons (inherently deadly or used in a deadly way), but the box cutter in this particular case did not fit into the inherently deadly category, the distinction was a factual one and a valid ground for the conviction remained. (RB, p. 9.)

The Court of Appeal held that the error was a presentation of alternative legal theories, one valid and one invalid. The Court of Appeal agreed with defendant that CALCRIM 875 directed the jury it could find

him guilty based on his use of the box cutter under two theories, one of which was legally correct (that the box cutter was used in a manner likely to produce death or great bodily injury) and one of which was legally incorrect (that the box cutter was inherently deadly). The Court of Appeal held that it must thus vacate defendant's conviction because there was "no basis in the record for concluding that the jury relied on the alternative definition of 'deadly weapon' (that is, the definition looking to how a non-inherently dangerous weapon was actually used)." (Opinion, p. 6.) The Court of Appeal indicated that it believed, under *People v. Smith* (1998) 62 Cal.App.4th 1233, that reversal was required where an appellate court "cannot discern from the record which theory provided the basis for the jury's determination of guilt...." (Opinion, p. 6, quoting *Smith, supra*, 62 Cal.App.4th at p. 1239.)

The Court of Appeal also indicated that it believed the *Smith* and *People v. Guiton* (1993) 4 Cal.4th 1116 opinions of this Court were

> arguably in tension with more recent cases, such as *People v. Merritt* (2017) 2 Cal.5th 819, which directed that the failure to instruct on the elements of a crime does not require reversal if those omitted elements are "uncontested" and supported by "overwhelming evidence." (*Id.* at pp. 821-822, 830-832; *Neder v. United States* (1999) 527 U.S. 1, 17-18.

(Opinion, pp. 6-7.) In its opinion, the Court of Appeal seemed to indicate that *Merritt* and *Neder* would support affirmance even if a reviewing court could only hypothesize what a jury might have done, given "uncontested" or "overwhelming evidence." (Opinion, p. 7.)

ARGUMENT

In the petition for review, respondent presented the issue here as a choice between two harmless error standards: whether the standard should require "a reviewing court to conclude beyond a reasonable doubt that the jury based its verdict on the valid theory," or if the error is harmless "only if the record affirmatively demonstrates that the jury actually rested its verdict on the legally correct theory...." (PTR, p. 5.) Respondent advocates for a particular incarnation of the *Chapman* harmless error standard in its opening brief, arguing that

> [u]nder that [*Chapman*] 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.

(Opening brief, p. 16.)

This Court, however, has not applied Respondent's version of the *Chapman* standard in alternative legal theory cases. A common, uniting thread in this Court's alternative legal theory jurisprudence is the focus on a determination, by examining the record, of what legal theory a jury actually relied upon, rather than merely evaluating whether a hypothetical, rational jury could have relied upon the valid legal theory in question. Although this Court's cases may have varied somewhat in language, all (or almost all) have required evidence from the record to ascertain the jury's actual decision in a particular case. This Court has turned to the hypothetical "reasonable juror" to resolve instructional error prejudice only in cases where it is impossible for a reviewing court to turn to the record and determine a jury's decision. But the decisions of this Court indicate that in cases of alternative legal theory error, it is critical to determine if the jury actually convicted a defendant on a valid legal theory.

Respondent's opening brief answers this Court's first question by presenting the issue as a choice between the harmless error standard articulated in *People v. Guiton* (1993) 4 Cal.4th 1116 and *People v. Green* (1980) 27 Cal.3d 1, on the one hand, and the harmless error standard set out in *Chapman v. California* (1967) 386 U.S. 18, on the other. But a reviewing court applying the *Chapman* error standard in cases of alternative legal theory error does not act in the hypothetical or the abstract, judging whether a reasonable jury could have convicted on the evidence in the record. Rather,

> [t]he question [*Chapman*] instructs the reviewing court to consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. [Citation.] Harmless-error review looks, we have said, to the basis on which "the jury actually rested its verdict." [Citation.] The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error.

(*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 [113 S.Ct. 2078, 124 L.Ed.2d 182].)

The answer to this Court's first question is that both alternatives must be true: in cases of alternative legal theory error, a reviewing court may find the presumption of prejudice is overcome only if it can determine, beyond a reasonable doubt, that the jury actually based its verdict on a valid legal theory. The choice is not between the two theories; a proper application of *Chapman* encompasses both. What a reviewing court may not do, however, is to follow the respondent's suggested standard, which would allow "a reviewing court [to] 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...." (Respondent's opening brief, p. 16.)

The answer to this Court's second question requires an examination of the record here. As the Court of Appeal properly determined, the limited evidence available does not enable a reviewing court to conclude that the jury affirmatively determined the defendant used the box cutter "in a manner that presents a risk of death or great bodily injury." The box cutter had a small blade; the defendant was never closer than a yard away from the victim; when the defendant saw the police, he put the knife away. From this evidence, the jury very plausibly could have found the defendant guilty because it believed he used an inherently deadly weapon, not because he used the box cutter in a deadly manner. Accordingly, the reversal of the Court of Appeal was appropriate and this Court should affirm.

1. THE HISTORY AND PROGRESSION OF EVALUATING ALTERNATIVE LEGAL THEORY ERROR CASES IN CALIFORNIA.

1.1. *People v. Green*

Most discussions of the modern alternative legal theory harmless error standard begin with this Court's opinion in *People v. Green* (1980) 27 Cal.3d 1. In *Green,* the defendant was convicted of murder, robbery, and kidnapping. (*Id.* at p. 12.) The kidnapping charge was divided factually into three segments. (*Id.* at pp. 62-63.) This Court found that two of the three segments were legally insufficient to qualify as kidnapping. (*Id.* at p. 67.)

Because the *Green* prosecutor had argued alternative legal theories, one of which was insufficient to establish a kidnapping, the Court reversed. "[W]hen 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." (*Green, supra,* 27 Cal.3d at p. 69.) The legal principle that emerged from *Green* was that it was critical for a reviewing court to determine the jury's actual decision from the evidence in the record, and to avoid hypothesizing regarding upon what legal theory the jury might have relied. Without such evidence, an alternative legal theory error must be deemed presumptively prejudicial.

A special circumstance finding by a jury, for example, might provide a very high level of confidence that the jury did not actually rely upon an erroneous legal theory, and thus allow the presumption of prejudice to be overcome. In *People v. Boyd* (1985) 38 Cal.3d 762, this Court found that the presumption of prejudice could be overcome because the jury both found defendant guilty of attempted robbery and made a special circumstance finding that defendant committed murder during the commission of an attempted robbery; this Court was thus confident the jury did not rely upon an erroneous premeditation instruction. (*Boyd, supra,* 38 Cal.3d at p. 770.) And in *People v. Kelly* (1992) 1 Cal.4th 495, an alternative legal theory error was deemed harmless where the defendant was convicted of murder, and while the jury was erroneously given a robbery-felony murder jury instruction, the jury also found a rape-murder special circumstance to be true. (*Kelly,* 1 Cal.4th at p. 531.) Contrast these decisions with the case of *People v. Guerra* (1985) 40 Cal.3d 377, where a jury was instructed on both premeditated murder and felony murder, but because there was no evidence in the record indicating which theory the jury followed, the Court held that "[t]here is no principled way for us to determine which theory the jury adopted ... therefore, we cannot conclude

that the jury *necessarily* found intent to kill under the instructions...."
(*Guerra, supra,* 40 Cal.3d at pp. 387-388.)

Thus, when applying *Green,* this Court implemented the same application of the *Chapman* harmless error test that is in place today: it determined that an error was presumptively prejudicial, unless the evidence in the record affirmatively demonstrated that the jury did not rely upon an invalid legal theory in convicting the defendant.

1.2. *People v. Guiton*

In *People v. Guiton* (1993) 4 Cal.4th 1116, this Court addressed a perceived conflict between the *Green* standard and the standard articulated in the United States Supreme Court case of *Griffin v. United States* (1991) 502 U.S. 46 [112 S.Ct. 466, 116 L.Ed.2d 371]. In *Griffin,* Justice Scalia differentiated between cases where a jury verdict could be based on one correct and one incorrect legal theory, and where a jury verdict could be sustained based on correct or incorrect facts:

> Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law -- whether, for example, the action in question is protected by the Constitution, is time barred, or fails to come within the statutory definition of the crime. When, therefore, jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error. Quite the opposite is true, however, when they have been left the option of relying upon a factually inadequate theory, since jurors *are* well equipped to analyze the evidence....

(*Id.* at p. 59.)

This Court concluded in *Guiton* that the *Green* and *Griffin* standards could be harmonized. "The *Green* rule" could be "readily construed as

coming within the ... category of a 'legally inadequate theory' generally requiring reversal." (*Guiton, supra,* 4 Cal.4th at p. 1128.)

The *Guiton* court explained, as an illustration, how the *Griffin* standard would have worked under the facts in *Green,* which (as a reminder) involved the issue of whether forcibly moving a person 90 feet could legally qualify as kidnapping:

> [A] jury would be well equipped to analyze the evidence and determine whether the victim had been asported, and to determine the distance of the asportation. The jury would, however, not be equipped to determine whether, as a matter of *law,* 90 feet is insufficient.

(*Guiton, supra,* 4 Cal.4th at p. 1128.) After applying Justice Scalia's theory for legal versus factual alternative legal theory error, the *Guiton* court articulated the error standard, once such an error was found:

> But if the inadequacy is legal, not merely factual, that is, when the facts do not state a crime under the applicable statute, as in *Green,* the *Green* rule requiring reversal applies, absent a basis in the record to find that the verdict was actually based on a valid ground.

(*Guiton,* 4 Cal.4th at p. 1129.) Here, again, this Court focused on (1) the inability of a jury to choose between valid and invalid legal theories, (2) as assumption that the defendant was prejudiced, and (3) the necessity for the reviewing court to examine the actual decision of the jury when determining if reversal was appropriate.

1.3. Further Decisions By This Court Since *Guiton*, Especially *People v. Martinez*, Reaffirm A Harmless Error Standard That Assumes Prejudice From Alternative Legal Theory Error, And Only Finds Such An Error Harmless If The Evidentiary Record Supports A Finding That The Jury Actually Relied Upon A Legally Correct Theory, Rather Than The Hypothetical "Reasonable Jury" Standard Advocated By The Respondent.

In the years since *Guiton*, this Court has continued to uphold an application of the *Green/Guiton* doctrine that assumes prejudice, and focuses on looking to the specific facts each jury found in a particular case when evaluating whether an alternative legal theory error can be deemed harmless. Beginning with *People v. Chun* (2009) 45 Cal.4th 1172, followed by *People v. Chiu* (2014) 59 Cal.4th 155, and most recently in *People v. Martinez* (2017) 3 Cal.5th 1216, this Court has been consistent in its approach.

In *Chun*, this Court evaluated the effect of the trial court's error instructing the jury properly on second-degree murder, but erroneously on felony murder. (*Chun, supra,* 45 Cal.4th at p. 1201.) *Chun* confirmed that the *Guiton* test was appropriate: "In this situation, to find the error harmless, a reviewing court must conclude, beyond a reasonable doubt, that the jury based its verdict on a legally valid theory...." (*Id.* at p. 1203.) *Chun* also approvingly pointed to a standard articulated in a concurring opinion by Justice Scalia in *California v. Roy* (1996) 519 U.S. 2 [136 L. Ed. 2d 266, 117 S. Ct. 337], which emphasized evaluating error by looking to the specific decision of the jury, based on evidence in the record in a particular case: "The error in the present case can be harmless only if the jury verdict on other points effectively embraces this one or if it is impossible, upon the evidence, to have found what the verdict *did* find without finding this point

as well." (*Chun, supra,* 45 Cal.4th at p. 1204, quoting *Roy, supra,* 519 U.S. at p. 7, Scalia, J., concurring.)

Similarly, in *Chiu,* this Court reviewed a case in which a jury found the defendant guilty of premeditated murder. (*Chiu, supra,* 59 Cal.4th at p. 158.) Two alternative legal theories were provided to the jury: either direct aiding and abetting liability, or vicarious aiding and abetting liability under the "natural and probable consequences" doctrine. (*Id.*) *Chiu* held that a defendant could not be liable for premeditated murder under the natural and probable consequences theory. (*Id.* at p. 167.) As a result, the *Chiu* jury had been instructed on one valid legal theory and one invalid legal theory. (*Id.*)

Chiu reaffirmed the principles of *Green* and *Guiton,* especially the focus both cases had on reversal unless the record demonstrated the jury actually relied on a valid legal theory. *Chiu* specifically held that "[w]hen a trial court instructs a jury on two theories of guilt, one of which was legally correct and one legally incorrect, reversal is required unless there is a basis in the record to find that the verdict was based on a valid ground." (*Chiu, supra,* 59 Cal.4th at p. 167.) *Chiu* did attach a specific evidentiary measure of certainty to the harmless error determination, mandating that the "[d]efendant's first degree murder conviction must be reversed unless we conclude beyond a reasonable doubt that the jury based its verdict on the legally valid theory that defendant directly aided and abetted the premeditated murder." (*Chiu, supra,* 59 Cal.4th at p. 167.) *Chiu,* however, still explicitly relied upon a determination of what the particular jury actually decided in its harmless error assessment.

Finally, and most recently, in *Martinez,* this Court again affirmed its commitment to analyzing the evidence in the record to determine what legal theory the jury relied upon. In *Martinez,* the Court addressed whether

alternative legal theory error should be evaluated differently in the habeas context. (*Martinez, supra,* 3 Cal.5th at p. 1218.) The *Martinez* court directly affirmed the *Green/Guiton* standard as applied in *Chiu,* and explained why the presumption of prejudice was critical, unless the evidentiary record demonstrated beyond a reasonable doubt that the jury had relied upon the correct legal theory:

> [Martinez] contends the jury was improperly instructed on what constitutes aiding and abetting a first degree murder. Such an erroneous instruction deprives a defendant of the right to a jury trial under the Sixth Amendment to the United States Constitution; that right implies a right to a jury properly instructed in the relevant law. (*See Neder v. United States* (1999) 527 U.S. 1, 12 [144 L. Ed. 2d 35, 119 S. Ct. 1827].) .... A petitioner in these circumstances does not carry the burden of demonstrating that his conviction was based on insufficient evidence. Rather, once he has shown that the jury was instructed on correct and incorrect theories of liability, the presumption is that the error affected the judgment.... Of course, the presumption of error can be rebutted by a showing "beyond a reasonable doubt that the jury based its verdict on the legally valid theory." (*Chiu, supra,* 59 Cal.4th at p. 167.)

(*Martinez, supra,* 3 Cal.5th at p. 1224.)

This Court's standard has remained consistent, and was clearly articulated just last year in *Martinez*: in determining whether an alternative legal theory error was harmless, a reviewing court must assume prejudice unless it can ascertain, beyond a reasonable doubt, that the jury actually relied upon a valid legal theory. This means that the reviewing court is not positing what a jury might have relied upon, or what evidence in the record the jury could have found convincing. This Court's standard – from *Green* and *Guiton* up through *Chiu* and *Martinez* -- requires the reviewing court to look for evidence in the record supporting the decision the jury actually made. It is not a prediction of what the jury might have done, were it

properly instructed. It is an evidence-based conclusion of what the jury actually did. Without such evidence, prejudice is presumed.

1.4. *Neder v. United States* And *People v. Merritt*

The Court of Appeal in this case, below, felt that the harmless error standard in the recent case of *People v. Merritt* (2017) 2 Cal.5th 819 was at odds with this Court's opinions in *Green* and *Guiton*. (Opinion at p. 6.) The *Merritt* opinion, in turn, was strongly influenced by the United States Supreme Court decision of *Neder v. United States* (1999) 527 U.S. 112 and its application of *Chapman* harmless error review.

Neder was not a case of alternative legal theory error, with a jury forced to choose between a valid and an invalid statement of the law. Rather, in *Neder,* an element of the offense at issue was omitted; the question was whether such an error was susceptible to harmless error review at all. (*Neder, supra,* 527 U.S. at p. 4.) *Neder* held that such an error was subject to *Chapman* review, and that the appropriate test was "whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" (*Id.* at p. 15, quoting *Chapman, supra,* 386 U.S. at p. 24.) The error should not be deemed harmless if "the defendant contested the omitted element and raised evidence sufficient to support a contrary finding...." (*Id.* at p. 19.)

The application of *Chapman* error review in *Neder* or similar cases, however, differs significantly from the type of error at issue here. Here, the jury made an actual decision, based on either the valid or invalid legal theory presented to it. A reviewing court in a case of alternative legal theory error looks at the evidence in the record and attempts to determine

upon which theory the jury actually relied. The reviewing court is deducing what the jury did, but it is moving in the world of the jury's actual decision.

In a case like *Neder,* however, a reviewing court must operate in the realm of the hypothetical—what might have happened had the error not been made. The *Neder* jury made a decision based on the erroneous omission of an element of the offense. *Neder* looked to the evidence presented and hypothesized whether a reasonable jury would have made the same decision absent the error:

> In this situation, where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless.

(*Neder, supra,* 527 U.S. at p. 17.)

Merritt also did not analyze alternative legal theory error, but rather, similar to *Neder,* a failure by the trial court to instruct on the elements of the crime at issue. (*Merritt, supra,* 2 Cal.5th at p. 824.) *Merritt* framed the issue as "whether error in failing to instruct on the elements of robbery is amenable to harmless error analysis and, if so, whether the error was harmless in this case." (*Id.* at p. 825.) *Merritt* held that failing to instruct on elements of the crime at issue was not reversible per se, but subject to harmless error analysis. (*Id.* at p. 829.)

Because *Merritt* was analyzing a failure to properly instruct the jury on elements of the crime, just as *Neder* did, it makes sense that *Merritt* would use *Neder*'s application of *Chapman* harmless error review, which poses the question of prejudice in the hypothetical: "whether it is clear beyond a reasonable doubt that a rational jury would have rendered the same verdict absent the error." To reach such a conclusion, *Merritt* adopted

Neder's requirement that the supporting evidence be "overwhelming and uncontroverted." (*Merritt, supra,* 2 Cal.5th at p. 832.)

The application of the *Chapman* harmless error test in such a context is arguably more stringent than the *Green* and *Guiton* doctrine applicable in cases of alternative legal theory error, and with good reason. If a reviewing court is hypothesizing what might have happened had no error been committed, rather than discerning what a jury actually did, the standard should be quite high. But this type of *Chapman* harmless error is simply not applicable in cases of alternative legal theory error. As this Court has repeatedly recognized over many years—from *Green* to *Guiton* to *Chiu* to *Martinez*—if an actual jury decision occurred, evaluating the prejudice from an error critically depends on discerning that decision.

This Court asked the parties to answer the question of how to determine prejudice in cases of alternative legal theory error, and posed two possibilities: (1) that the evidence demonstrated the jury relied upon the valid legal theory beyond a reasonable doubt, or (2) that the evidence demonstrated that the jury's actual decision relied upon the valid legal theory. Defendant posits that this Court has consistently articulated the proper harmless error test in alternative legal theory error cases presumes prejudice, unless the evidence shows (beyond a reasonable doubt) that the jury actually relied upon the valid legal theory. The *Neder* hypothetical "rational jury" test is inapplicable and inappropriate here.

2. COULD THE JURY HAVE CONCLUDED THAT THE DEFENDANT USED AN INHERENTLY DEADLY WEAPON, WITHOUT ALSO CONCLUDING THAT HE USED IT IN A WAY THAT PRESENTED A RISK OF DEATH OR GREAT BODILY INJURY?

This Court also asks whether the jury could have erroneously concluded that the box cutter used by defendant was an inherently deadly weapon, without also concluding that he used the box cutter in a way that risked death or great bodily injury.

Under either the *Green/Guiton* articulation of *Chapman* prejudice (was there evidence beyond a reasonable doubt that the jury actually found defendant guilty under the valid legal theory?) or a *Neder*-style test (could a reasonable jury have convicted under the valid legal theory, assuming the evidence is overwhelming and uncontested?), the answer is yes. Respondent conceded in its opening brief that under this Court's current *Green/Guiton* standard, the Court of Appeal was correct to reverse defendant's conviction. (Respondent's opening brief, pp. 32-33.) But even if this Court determines a *Neder*-style test is appropriate, the evidence against defendant was neither overwhelming nor uncontested, and this Court should not find that a hypothetical reasonable jury would have convicted defendant.

2.1. Under Either The *Green/Guiton* Test Or The *Neder* Test, It Is Impossible To Determine That The Jury Here Relied Upon The Valid Legal Theory Presented To It.

Defendant was tried and convicted by a jury of assault with a deadly weapon, pursuant to section 245, subdivision (a)(1). (CT, pp. 20, 47-50, 64-69.) The text of the statute defines assault with a deadly weapon as the commission of "an assault upon the person of another with a deadly weapon or instrument other than a firearm...." (§245, subd. (a)(1).) The

instruction given to the jury, CALCRIM number 845, defined a deadly weapon as "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." (CT, p. 58; CALCRIM No. 845.)

Because the box cutter could not legally be considered an inherently deadly weapon, the prosecution was required to prove that defendant used it "in such a way that it is capable of causing and likely to cause death or great bodily injury." (CALCRIM No. 845.)

Here, the evidence admitted at trial established that defendant initially approached Bautista; the defendant said he was looking for Bautista's wife because he wanted to have sex with her. (RT, p. 337.) Bautista turned toward defendant. (RT, pp. 352-353.) Defendant then took a step back, pulled out the box cutter out of his right pocket, and pointed it at Bautista. (RT, pp. 340-341, 353-354, 371, 380.) The defendant thrust his hand (holding the box cutter) forward at approximately waist level; Bautista moved back. (RT, pp. 341-342.) Defendant was between three and a half and four feet away from Bautista when he thrust the box-cutter at Bautista. (RT, p. 342.) When the police arrived, they saw defendant standing on the sidewalk, holding a box cutter at approximately waist level and facing Bautista at a distance of approximately five feet. (RT, pp. 367, 376.) When he saw the police, defendant retracted the box cutter and put it into his pants pocket. (RT, p. 368.)

Prior cases where the characterization of an object as being used in a deadly manner was an issue do not support such a finding here. Ordinarily, in such circumstances, the distance between defendant and the victim is significantly closer than the distance between defendant and Bautista here. (*See, e.g., People v. Page* (2004) 123 Cal.App.4th 1446, 1472 [defendant

held pencil against victim's neck and threatened to stab him with it]; *In re D.T.* (2015) 237 Cal.App.4th 693, 699-700 [defendant held small knife against victim's back].) In cases where the distance was somewhat greater, there was other evidence in the record indicating the defendant intended to use the object in a deadly manner. (*See, e.g, People v. Simons* (1996) 32 Cal.App.4th 1100, 1104-1106 [prior to brandishing screwdriver at police officer, defendant attempted to drive away with officer hanging from car door; led officer on high speed chase; struck officer with his car; and fled on foot].)

Here, the evidence in the record reflects that defendant only threatened Bautista—never touched him with the knife, never got closer than three feet. (RT, p. 342.) The prosecutor was confusing in his reference to the box cutter, calling it a deadly weapon at one point, and an inherently deadly weapon at another. (RT, pp. 640-641, 662.)

In contrast, the defense attorney contested the conclusion that defendant used the box cutter in a deadly manner:

> So the question before you is this: is that act of pulling out a box cutter and pointing it towards someone an act that probably, not "could," not "might," not "possibly," probably resulted in physical force being applied to Mr. Bautista?

(RT, p. 645.) The defense attorney further argued that given the distance between Bautista and defendant, it was not probable that defendant could have used the box cutter in a deadly manner:

> Is that act, is that act of holding a box cutter that distance away probably, not "possibly" not "could," like the prosecutor said, because that's not the law, it's not "could," anything could happen, right? It's not "could." It's "probably," more likely than that. Well, is this more likely than not going to cause injury? Absolutely not. It is very

> unlikely that it would cause physical force to be applied to Mr. Bautista.

(RT, p. 645.) The defense attorney went on to spend significant time in his closing argument contesting whether defendant used the box cutter in a deadly manner. (RT, pp. 646-648.)

Looking at the two possible harmless error tests for prejudice, it is clear that there is no basis to determine the alternative legal theory error was harmless. With respect to the *Green/Guiton* error standard, the evidence in the record does not demonstrate beyond a reasonable doubt that defendant used the box cutter in a deadly manner. Bautista and the police officer both testified that defendant was no closer than three and a half feet from Bautista; that defendant backed away from Bautista; that he did not lunge toward Bautista; and that when the police arrived, defendant put the box cutter in his pocket. Such evidence does not live up to the *Green/Guiton* standard required in *Chiu:* "[w]hen a trial court instructs a jury on two theories of guilt, one of which was legally correct and one legally incorrect, reversal is required unless there is a basis in the record to find that the verdict was based on a valid ground." (*Chiu, supra,* 59 Cal.4th at p. 167.) Respondent agrees on this point, conceding that the Court of Appeal's decision was correct under this Court's current articulation of alternative legal theory error. (Respondent's opening brief, pp. 32-33.)

If this Court determines that the appropriate harmless error standard is that used in *Neder,* reversal is required unless (1) the elements were uncontested and (2) the evidence against the defendant was overwhelming. (*Neder*, 527 U.S. at p. 17; *Merritt*, 2 Cal.5th at p. 832.) Here, the critical element was not uncontested, and the evidence against the defendant was not overwhelming. Defense counsel presented evidence to the jury that

defendant did not use the box cutter in a deadly manner, and the defense attorney spend considerable time contesting such a characterization of defendant's actions. Thus, even under the *Neder* standard (which defendant argues is not the appropriate legal framework for resolution of alternative legal theory error), reversal is required.

Given that an "inherently deadly weapon" is a legal term of art, and such information was not communicated to the jury, Justice Scalia's discussion of jurors' lack of preparation to discern legal error seems particularly relevant:

> Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law -- whether, for example, the action in question is protected by the Constitution, is time barred, or fails to come within the statutory definition of the crime. When, therefore, jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error.

(*Griffin, supra,* 502 U.S. at p. 59.)

The answer to this Court's second question (could the jury 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?) is yes. Given that the evidence regarding whether defendant used the box cutter in a deadly manner was neither uncontested nor overwhelming, "[t]here is no principled way for us to determine which theory the jury adopted...." (*Guerra, supra,* 40 Cal.3d at pp. 387-388.) Accordingly, the reversal of the Court of Appeal should stand.

CONCLUSION

In cases of alternative legal theory error, a reviewing court should presume that the defendant was prejudiced unless the evidence in the record demonstrates, beyond a reasonable doubt, that the jury actually based its verdict on a legally valid theory. With respect to the alternative legal theory error in this particular case, it is possible that the jury here convicted the defendant based solely on an invalid legal theory that the defendant possessed an inherently deadly weapon. The evidence in the record does not support the conclusion, beyond a reasonable doubt, that the jury affirmatively determined defendant used the box cutter "in a manner that presents a risk of death or great bodily injury." The decision of the Court of Appeal should be affirmed.

Dated: 11-18-18

Respectfully submitted,

Andrea Bitar

Andrea S. Bitar, Esq.
Attorney for Defendant and Appellant

CERTIFICATE OF WORD COUNT COMPUTATION

The text of this brief consists of 7,579 words as counted by the Microsoft Word program used to prepare this brief.

Dated: 11-18-18

Andrea Bitar

Andrea S. Bitar
Attorney for Appellant

PROOF OF SERVICE

The undersigned declares that I am a citizen of the United States, over eighteen years of age, not a party to this cause, an attorney authorized to practice in the State of California, and my business address is 5580 La Jolla Blvd., #456, La Jolla, CA 92037. I served by U.S. Mail the original and 13 true and correct copies of the attached document (*Defendant/Appellant Yazan Aledamat's Answer Brief on the Merits*--S248105) on the:

California Supreme Court
350 McAllister Street, First Floor
San Francisco, CA 94102-4979

I also served a true and correct copy of the attached document through the TrueFiling electronic filing system on the:

California Court of Appeal
Second Appellate District

I also served a true and correct copy of the aforementioned document by U.S. Mail as follows:

California Attorney General
Los Angeles Office
Michael R. Johnson
Deputy Solicitor General
300 S. Spring Street, Suite 1702
Los Angeles, CA 90013

California Appellate Project
Los Angeles Office
520 S. Grand Avenue, 4th Floor
Los Angeles, CA 90071

Los Angeles County District Attorney
Hall of Justice
Attn: Jeffrey Boxer
211 W. Temple Street, Ste.1200
Los Angles, CA 90012

Los Angeles County Public Defender
Attn: Raoul Hutchens
210 W. Temple Street, 19th Floor
Los Angeles, CA 90012

Yazan Aledamat, #AT9021
Wasco State Prison
701 Scofield Ave.
P.O. Box 7700
Wasco, CA 93280

Hon. Stephen A. Marcus
Clara Shortridge Foltz
Criminal Justice Center
210 West Temple Street
Los Angeles, CA 90012

I declare under penalty of perjury that the foregoing is true and correct and that each said document was properly addressed and sent by U.S. Mail or electronic filing from San Diego County, California on November 19, 2018

Andrea Bitar

Andrea S. Bitar, Esq.