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

REPLY BRIEF ON THE MERITS

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ARGUMENT

Aledamat contends that the heightened harmlessness standard of *People v. Green* (1980) 27 Cal.3d 1, 69, rather than the usual standard of *Chapman v. California* (1967) 386 U.S. 18, 22-23, should apply to alternative-legal-theory error. His answer brief, however, does not attempt to reconcile that position with modern harmless-error jurisprudence, which is inconsistent with the use of *Green* as the exclusive rule in these circumstances.

Under *Chapman*, the error in this case was harmless beyond a reasonable doubt. There was no dispute about the proper "deadly weapon" definition at trial. Counsel did not focus on the incorrect "inherently deadly" definition or even squarely contest the deadly-weapon question. Closing arguments focused instead on the "probable force" element of assault. The jury rejected, under proper instructions, defense counsel's argument that the application of force was not probable. In light of that, the further finding that Aledamat used the box cutter in a manner likely to produce great bodily injury was supported by overwhelming evidence. The incorrect deadly-weapon definition did not contribute to the verdict.

I. THE ORDINARY *CHAPMAN* STANDARD APPLIES TO ALTERNATIVE-LEGAL-THEORY ERROR

The ordinary *Chapman* harmlessness standard applies to alternative-legal-theory error. Exclusive use of the *Green* rule in this context cannot be squared with this Court's and the United States Supreme Court's modern harmlessness precedent, would lead to anomalous results, and would disserve the interests of harmless-error review on appeal. (See OBM 21-27.) Aledamat nevertheless argues that the *Green* rule should control. But he offers no persuasive reason why that should be so, and he neglects to grapple with contrary authority.

1. Aledamat insists that this Court has "clearly, and repeatedly" reaffirmed *Green* as the controlling harmlessness standard for alternative-legal-theory error. (ABM 4, 17-20.) To the contrary, the Court has conspicuously avoided adopting a particular standard.[1] And the Court's recent decisions in *People v. Chiu* (2014) 59 Cal.4th 155, 167-168, and *In re Martinez* (2017) 3 Cal.5th 1216, 1226-1227, though they did not directly address the open question, strongly suggest that a standard broader than *Green* applies, as those decisions looked to the evidence and the arguments of counsel in determining whether it appeared beyond a reasonable doubt that the jury relied on the proper theory. (See OBM 14-15.) At the very least, conflicting results in the lower courts demonstrate a need for guidance on the question. (See, e.g., *People v. Stutelberg* (2018) 29 Cal.App.4th 214, 240 Cal.Rptr.3d 156, 160-162 & fn. 2 [disagreeing with the court below and holding that *Chapman* applies, while noting the open question and the grant of review in this case].) Aledamat is therefore mistaken to the extent he suggests that the issue does not need specific attention.

2. Far from settling the issue in favor of the *Green* rule, this Court's precedents, and those of the United States Supreme Court, foreclose the use of that rule as the exclusive harmlessness standard in the context of alternative-legal-theory error. In *Hedgpeth v. Pulido* (2008) 555 U.S. 57,

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[1] See *People v. Chun* (2009) 45 Cal.4th 1172, 1205 [applying rule similar to *Green* "[w]ithout holding that this is the only way to find error harmless"]; *People v. Cross* (2008) 45 Cal.4th 58, 70 (conc. opn. of Baxter, J.) [observing that Court had previously applied *Green* in determining harmlessness of alternative-legal-theory error but had "never intimated that this was the only way to do so"]; *People v. Guiton* (1993) 4 Cal.4th 1116, 1131 ["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"].

the United States Supreme Court held that alternative-legal-theory error is not structural. (*Id.* at pp. 61-62.) The Court surveyed its cases applying *Chapman* to similar instructional errors and observed that "nothing in [those cases] suggests that a different standard should apply in this context." (*Id.* at p. 61.) And the Court there criticized the lower court's use of a standard similar to *Green* that required "absolute certainty" that the jury relied on the valid theory before affirming in the face of alternative-legal-theory error. (*Id.* at pp. 59-60.) Lower federal courts now use the *Chapman* standard to assess such error on appeal. (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 made clear in cases decided since *Green* that "the state Constitution affords no greater protection than the federal Constitution" in assessing instructional errors for harmlessness. (*People v. Mil* (2012) 53 Cal.4th 400, 415.) The Court has thus rejected outdated "heightened standard[s] of reversible error" like *Green* in other instructional contexts because such standards are incompatible with California law. (See *People v. Breverman* (1998) 19 Cal.4th 142, 176; *People v. Flood* (1998) 18 Cal.4th 470, 487.) The same result must follow here. *Green* is a rule of "near automatic reversal." (Cf. *Breverman, supra*, 19 Cal.4th at p. 175; *Flood, supra*, 18 Cal.4th at p. 490.) Exclusive use of that rule to assess the harmlessness of alternative-legal-theory error would be "fundamentally inconsistent" with the state Constitution. (See *Flood, supra*, 8 Cal.4th at p. 490.) Since the federal Constitution requires no standard more stringent than *Chapman*, *Green* cannot apply in this context.

3. Overlooking those constitutional constraints, Aledamat argues that the *Green* rule makes sense in the context of alternative-legal-theory error,

where it is possible to examine the record for an affirmative indication that the jury used the valid theory. (ABM 11-12, 20-22.) This separates the error in this case from other kinds of instructional errors, he argues, where resort to *Chapman*'s "hypothetical" harmlessness standard is necessary because the jury has not been given correct instructions at all and therefore is unable to return a proper verdict. (*Ibid.*) An appellate record, however, will seldom affirmatively show which alternative legal theory a jury relied upon. And on the rare occasion that the record does demonstrate that the jury in fact relied on the valid theory, affirmance on that basis alone is appropriate and consonant with the California constitution's harmless-error provision. (See, e.g., *Cross*, *supra*, 45 Cal.4th at p. 70 (conc. opn. of Baxter, J.) [*Green* rule remains one way to find alternative-legal-theory error harmless].) Requiring such a showing in every case of alternative-legal-theory error, however, would be tantamount to making affirmance contingent on "a finding that no violation had occurred at all, rather than that any error was harmless." (*Pulido*, *supra*, 527 U.S. at p. 17.) So the utility of the *Green* rule on the basis offered by Aledamat is limited, at best.[2]

Aledamat also suggests that the *Green* rule is preferable to *Chapman* because jurors are not "generally equipped" to detect legal, as opposed to factual, error in jury instructions. (ABM 27.) That was one reason this Court adopted the *Green* rule for alternative-legal-theory error in *People v. Guiton*, *supra*, 4 Cal.4th at pp. 1128-1129. But that rationale is

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[2] Aledamat relies on *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279, for the proposition that a court in applying *Chapman* must examine the basis upon which "the jury actually rested its verdict" rather than speculate about what a hypothetical jury might have concluded. (ABM 12.) But as the Court later recognized, "this strand of reasoning in *Sullivan* cannot be squared with our harmless-error cases." (*Neder v. United States* (1999) 527 U.S. 1, 11.)

irreconcilable with subsequent harmless-error jurisprudence. Since *Green* and *Guiton* were decided, the *Chapman* standard has been held to apply to instructional errors such as the omission of one or more elements of a charged offense, the misdescription of an element, and 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; *People v. Merritt* (2017) 2 Cal. 5th 819, 825-829.) A jury is no better equipped to detect those legal errors than it would be to detect instruction on an incorrect alternative legal theory alongside a correct one. And, arguably, a jury in the case of alternative-legal-theory error is comparatively *better* equipped to render a proper verdict in light of the correctly defined theory.

Indeed, Aledamat fails to confront the substantial anomaly that would result from using *Green* in the way he proposes. As the *Pulido* Court recognized, it would be "patently illogical" to subject alternative-legal-theory error to harmlessness review that is more stringent than the ordinary *Chapman* standard governing other, similar instructional errors. (*Pulido*, *supra*, 555 U.S. at p. 61.) "Such a distinction 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." (*Ibid.*, quotation marks and citations omitted.) Thus, in addition to the limited practical utility of the *Green* rule, its use would be difficult to justify in light of other settled harmless-error jurisprudence.

4. Nor, more broadly, would exclusive use of the *Green* rule in this context appropriately serve the purpose and interests of harmless-error review. As a rule of near-automatic reversal, *Green* would invalidate almost all judgments resulting from trials at which alternative-legal-theory error occurred, even when it appears beyond a reasonable doubt that the error did not contribute to the verdict. But except in limited situations that

defy assessment of an error's impact on the outcome of the trial, reversal in the absence of actual prejudice is improper. (See *Merritt*, *supra*, 2 Cal.5th at pp. 825-829; *Flood*, *supra*, 8 Cal.4th at pp. 490, 502-504.) Harmlessness review should promote "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." (*Flood*, *supra*, 18 Cal.4th at p. 507.)

II. THE ERROR IN THIS CASE WAS HARMLESS BEYOND A REASONABLE DOUBT

In this case, the alternative-legal-theory error was harmless under *Chapman*. The *Chapman* standard asks whether the record shows "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.) As the Court of Appeal below correctly observed, that standard is "certainly ... satisfied here" since the appropriate deadly-weapon definition was uncontested, the jury rejected defense counsel's argument that the application of force was not probable, and the evidence amply showed that great bodily injury was likely to result from that application of force. (Opn. 6-7; cf. *Neder*, *supra*, 527 U.S. at p. 17 [affirming where element of offense was omitted from instructions because "the omitted element was uncontested and supported by overwhelming evidence"].)

1. Aledamat argues that the question whether the box cutter qualified as a deadly weapon was in fact contested at trial. (ABM 26-27.) He states that the defense "presented evidence to the jury that defendant did not use the box cutter in a deadly manner" and that counsel spent "considerable time contesting such a characterization of defendant's actions." (*Ibid.*) But counsel's argument focused on the element of basic assault requiring that Aledamat did an act that by its nature would "directly and probably result in the application of force." (RT 643-649; see RT 632; CT 58.) As to the definition of "deadly weapon," the jury was correctly instructed to consider

whether the box cutter was used in such a way that it was "capable of causing and likely to cause death or great bodily injury." (RT 634-635; see CT 58 [CALCRIM No. 875]; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028-1029, 1033.) The incorrect definition told the jury that the box cutter was a deadly weapon if it was "inherently deadly," and did not define that term further. (RT 634; CT 58 [CALCRIM No. 875].) Aledamat's counsel did not address whether the box cutter qualified as a deadly weapon, discuss the definitions applicable to that issue, or ask the jury to reach a particular conclusion on it. (See RT 642-659.)

Even if counsel's argument implicitly called into question whether the box cutter was used in a manner that was likely to cause great bodily injury, it did not highlight any dispute about the proper deadly-weapon definition and instead implicated only the correct definition. Defense counsel never mentioned the term "deadly weapon," and nothing in his argument pointed the jury to any inquiry other than whether the box cutter was used in a way that was likely to cause great bodily injury. The prosecutor's argument was in accord. She did not suggest that the box cutter automatically qualified as a deadly weapon, but paraphrased the non-inherently deadly-weapon definition for the jury in her initial argument: "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.) Although the prosecutor used the term "inherently deadly" in passing during her brief rebuttal, she did so as part of a response to counsel's argument that Aledamat should not have been charged with assault at all. (RT 662-663.) She, like defense counsel, did not frame any dispute about the proper deadly-weapon definition that applied in this case. The jury thus had no reason to focus on the improper theory that the box cutter was inherently deadly. The case "was simply not

tried on alternate grounds that included the legally inadequate theory." (*People v. Brown* (2012) 210 Cal.App.4th 1, 13.)

2. Against that backdrop, the incorrect inherently-deadly-weapon instruction could not have contributed to the verdict in light of the evidence showing a likelihood of great bodily injury. The jury rejected defense counsel's argument that the application of force was not probable within the meaning of the basic assault definition. (See RT 642-659.) As the jury was correctly instructed, the underlying assault required a finding that Aledamat's actions "would directly and probably result in the application of force," meaning at least a slight touching in a rude or angry way. (RT 632-633; see CT 58 [CALCRIM No. 875].) Given the jury's acceptance that the application of force was probable, the only further question was whether great bodily injury was likely to result from that probable force.

As this Court has explained, the deadly-weapon inquiry looks to the "probability or capability of producing great bodily injury" by use of the instrument. (*Aguilar*, *supra*, 16 Cal.4th at p. 1033.) Thus, even in the absence of actual injury, or any touching at all, the use of "some hard, sharp, pointy thing" in threatening the victim is usually enough to establish that the object qualifies as a deadly weapon. (*In re D.T.* (2015) 237 Cal.App.4th 693, 699 [observing that courts have consistently affirmed assault-with-a-deadly-weapon convictions against sufficiency challenges in such circumstances]; see also *In re B.M.* (Dec. 27, 2108, No. S242153) 2018 WL 6802197, *4 [a sharp object applied to a vulnerable part of the body or wielded in a wild or uncontrolled manner can show a likelihood of great bodily injury].) The jury was correctly instructed that the prosecution was not required to prove that Aledamat actually touched Bautista, that Aledamat intended to use force, or that Bautista was actually injured. (RT 633; see CT 58 [CALCRIM No. 875]; *In re B.M., supra,* 2018 WL 6802197, *4; *Aguilar*, *supra*, 16 Cal.4th at p. 1028.) The jury was also

correctly instructed to consider all the circumstances in deciding whether the box cutter was used as a deadly weapon, including any evidence "that indicates whether the object would be used for a dangerous rather than a harmless purpose." (RT 638; see CT 59-60 [CALCRIM No. 3145].) And the jury was correctly told that great bodily injury" means "significant or substantial physical injury" or "an injury that is greater than minor or moderate harm." (RT 634-635; see CT 58 [CALCRIM No. 875].)

According to the trial testimony, 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 standing three-and-a-half or four feet away from Bautista, and Bautista reacted by moving back. (RT 341-342.) Aledamat's thrusting the box cutter toward Bautista, accompanied by a threat to kill, easily showed that the object was used "for a dangerous rather than a harmless purpose." (RT 638.) Nothing suggested that the threat was not a serious one. Even though no contact occurred, Aledamat was standing close enough to Bautista that the blade would have only just missed striking him; indeed Bautista moved back to avoid the thrust. The jury could not reasonably have drawn any other conclusion but that Aledamat wielded the box cutter as a weapon that was likely to cause great bodily injury. The thrust of an exposed box cutter blade is surely likely to result in such an injury. (See *People v. Washington* (2012) 210 Cal.App.4th 1042, 1047 ["some physical pain or damage, such as lacerations, bruises, or abrasions is sufficient for a finding of 'great bodily injury'"]; see also *In re B.M.*, *supra*, 2018 WL 6802197, *4-5 [deadly-weapon inquiry may look to harm that could have resulted from manner in which object was used, though absence of actual injury may suggest that great bodily injury was not likely].)

Aledamat counters that the record does not overwhelmingly show that he used the box cutter as a deadly weapon because he was too far away

from Bautista at the time of the assault. (ABM 24.) But the jury necessarily rejected, under proper instructions, the theory that Aledamat was too distant from Bautista to complete an assault. Given the jury's finding that the application of force was probable, the consequent likelihood of great bodily injury from the use of the box cutter with its blade exposed was supported by overwhelming evidence.

The Court of Appeal's recent decision in *People v. Stutelberg*, *supra*, 240 Cal.Rptr.3d 156, illuminates the harmlessness of the error here. In that case, the defendant was convicted of two counts of assault with a deadly weapon based on his use of a box cutter in a bar fight. (*Id.* at pp. 157-158.) After determining that the standard deadly-weapon instructions resulted in alternative-legal-theory error, the Court of Appeal assessed the error for harmlessness under *Chapman*. (*Id.* at pp. 159-162.) It concluded that the error was harmless as to one of the two victims because that victim had suffered a wound that caused nerve damage and required stitches. (*Id.* at pp. 162-162.) The court also noted that the arguments of counsel did not "invite the jury to classify the box cutter as inherently deadly." (*Id.* at p. 163.) Even though the prosecutor at one point suggested that the defendant needed only to be "armed with a razor blade," his "statements in their totality did not direct the jury to conclude that the box cutter was inherently deadly by default" but instead discussed the "ample grounds" upon which the jury could have concluded that the box cutter was used as a deadly weapon when the defendant "swiped" and "slashed" at the victims. (*Ibid.*)

As to the second victim, the court determined that the error was prejudicial, observing that "the exact manner in which Stutelberg used the box cutter" against the victim was unclear. (*Stutelberg*, *supra*, 240 Cal.Rptr.3d at p. 163.) The evidence showed that the defendant "swung" at the victim and missed, but not necessarily while holding the box cutter, and that he "flicked" the box cutter at the victim. (*Ibid.*) And the jury rejected

other testimony that the defendant "jabbed" the box cutter at the victim, because it acquitted the defendant of a different charge based on that testimony. (*Ibid.*)

In this case, the jury rejected not the prosecution's evidence but defense counsel's argument that force was not a probable result of the attack. And the evidence was unambiguous: it showed that Aledamat thrust the box cutter toward Bautista. While actual injury may be sufficient to show a likelihood of great bodily injury, it is not required. (See *B.M.*, *supra*, 2018 WL 6802197, *4; *Aguilar*, *supra*, 16 Cal.4th at p. 1028.) Given that the attack here was made with the exposed blade of the box cutter, and that counsel did not invite the jury to classify the box cutter as inherently deadly but instead focused on the correct deadly-weapon definition, the error was harmless beyond a reasonable doubt.

CONCLUSION

The judgment of the Court of Appeal should be reversed.

Dated: January 8, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached REPLY BRIEF ON THE MERITS uses a 13-point Times New Roman font and contains 3,230 words.

Dated: January 8, 2019

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DECLARATION OF SERVICE

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.

On January 8, 2019, I served the attached **Reply Brief on the Merits** by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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On January 8, 2019, I caused the original and eight (8) copies of the **Reply Brief on the Merits** in this case to be delivered to the California Supreme Court at 350 McAllister Street, First Floor, San Francisco, CA 94102-4797 by **Federal Express, Tracking # 8133 7986 6098**.

On January 9, 2019, I caused one electronic copy of the **Reply Brief on the Merits** in this case to be submitted electronically to the California Supreme Court by using the Supreme Court's Electronic Document Submission system.

On January 9, 2019, I caused one electronic copy of the **Reply Brief on the Merits** in this case to be served electronically on the California Court of Appeal by using the Court's Electronic Service Document Submission system.

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 January 8, 2019, at Los Angeles, California.

K. Amioka
Declarant

Signature

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