# IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

YAZAN ALEDAMAT,

Defendant and Appellant.

No. S248105



## BRIEF OF AMICUS CURIAE

On Review of a Decision of the Court of Appeal
Second Appellate District

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**BRIEF OF AMICUS CURIAE**

## I. THIS COURT SHOULD RETAIN ITS EXISTING PREJUDICE STANDARD FOR ALTERNATIVE-LEGAL-THEORY ERROR

For at least 39 years, and consistent with its duty under the California Constitution, this Court has adhered to the rule that alternative-legal-theory error is presumptively prejudicial. The Court's prejudice standard – which consistently focuses on what theory the jury relied on (or must have relied on) – neither leads to near-automatic reversal nor lacks a basis in logic. Moreover, it is consistent with the concerns prompting the adoption of Article VI, section 13 of the California Constitution and with United States Supreme Court precedent. As demonstrated below, respondent offers no sound reason to reject the Court's current prejudice standard. The formulations in the Court's review questions 1 and 2 are consistent with the current, well-tailored standard in continuing to look at what the jury in the case at hand *actually did*.

### A. Under the California Constitution, Alternative-Legal-Theory Error Requires Reversal Unless it Can Be Shown That the Jury Actually, or Must Have, Relied on a Legally Correct Theory

Decades of precedent make clear that instructing a jury on a legally incorrect theory is state law error. (See *People v. Chun* (2009) 45 Cal.4th 1172, 1201 (*Chun*); *People v. Sanders* (1990) 51 Cal.3d 471, 509-510 (*Sanders*); *People v. Green* (1980) 27 Cal.3d 1, 74 (*Green*).) When a trial court commits state law error, Article VI, section 13 of the California Constitution dictates that an appellate court cannot reverse the judgment unless there has been a "miscarriage of justice."

This Court has held alternative-legal-theory error a miscarriage of justice when the record does not show that the jury based its verdict on a legally correct theory. For example, in *Green*, this Court "simply [could] not tell" from the record whether the jury relied on a legally correct or incorrect theory of kidnaping. (*Green, supra*, 27 Cal.3d at p. 71.) Thus, the Court was "compelled to conclude that a miscarriage of justice ha[d] occurred." (*Id.* at p. 74.) By contrast, the Court has not hesitated to hold that there was no miscarriage of justice where other findings compelled the conclusion that the jury based its verdict on a legally correct theory. (See *Sanders, supra*, 51 Cal.3d at pp. 509-510; cf. *People v. Cantrell* (1973) 8 Cal.3d 672, 686 ["if there is no such doubt – i.e., if on the record it appears beyond a reasonable doubt that the jury based its verdict on the theory supported by 'admissible evidence submitted under correct instructions' – there is no miscarriage of justice"], disapproved on another ground in *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12.)

In these and other cases, the Court has confirmed that its role under Article VI, section 13 is to decide "whether the error in instructing on [a legally invalid theory] prejudiced defendant," i.e., whether it was a miscarriage of justice. (*Chun, supra*, 45 Cal.4th at p. 1201; see also *F.P. v. Monier* (2017) 3

Cal.5th 1099, 1108.) While the Court still holds to "the presumption . . . that the error affected the judgment" (*In re Martinez* (2017) 3 Cal.5th 1216, 1224), the Court – as required by the state constitutional provision – does "examin[e] . . . the entire cause, including the evidence" (Cal. Const., art. VI, § 13).

Specifically, "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." (*Chun, supra*, 45 Cal.4th at p. 1203.) Sometimes, "other aspects of the verdict . . . leave no reasonable doubt that the jury made the findings necessary" under the legally valid theory. (*Id.* at p. 1205.) Other times, even if the verdict itself does not establish that the jury made the necessary findings, the *evidence* will leave no reasonable doubt that the jury did so. Thus, the error may be harmless "'if it is impossible, upon the evidence, to have found what the verdict *did* find'" without also making the findings necessary under a legally correct theory. (*Id.* at p. 1204, quoting *California v. Roy* (1996) 519 U.S. 2, 7 (per curiam) (conc. opn. of Scalia, J.) (*Roy*).)

### B. The Current Alternative-Legal-Theory Error Prejudice Test Works Well in Practice and Has Logical Support

In addition to conforming to the requirements of Article VI, section 13, this Court's decades-old alternative-legal-theory error prejudice standard finds support in at least three respects: consistency of application, frequency of reversal, and underlying logic. These considerations run counter to the assumptions underlying, and reasoning within, Respondent's brief.

#### 1. This Court has consistently held that the prejudice inquiry must focus on what the jury actually decided

This Court has consistently applied the current alternative-legal-theory error prejudice test. Respondent traces this Court's alternative-legal-theory error caselaw, distinguishes various articulations of the prejudice standard, and argues that "[t]his Court's more recent decisions . . . suggest that a harmlessness standard broader than the *Green* rule may apply to alternative-

legal-theory error." (Opening Brief on the Merits at pp. 12-14 ["OBM"]; see also Reply Brief on the Merits at p. 6 ["RBM"].) While respondent is correct that over time, the Court has used different articulations, this Court's prejudice inquiry has never deviated from a simple inquiry: what theory did the jury *actually* rely on?[1]

Indeed, that will continue to be the focus of the prejudice inquiry, whether the Court chooses standards articulated in review questions 1 or 2. The first formulation in question one ("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," italics added) is based on the language used in *Chun*, *Chiu*, and *In re Martinez*. The second formulation in question one ("if the record affirmatively demonstrates that *the jury actually rested its verdict* on the legally correct theory," italics added) is based on the language used in *Guiton* and *In re Martinez*. Question 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

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[1] See *Green*, *supra*, 27 Cal.3d at p. 69 [reversal required when "the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested"]; *People v. Smith* (1984) 35 Cal.3d 798, 808 (*Smith*) [error prejudicial where "[t]he People cannot show that no juror relied on the erroneous instruction as the sole basis for finding defendant guilty"]; *People v. Guiton* (1993) 4 Cal.4th 1116, 1129-1130 (*Guiton*) ["the *Green* rule requiring reversal applies, absent a basis in the record to find that the verdict was actually based on a valid ground," e.g., where it is "possible to determine from other portions of the verdict that the jury necessarily found the defendant guilty on a proper theory"]; *Chun*, *supra*, 45 Cal.4th at pp. 1203-1205; *People v. Chiu* (2014) 59 Cal.4th 155, 167 (*Chiu*) [reversal required unless "there is a basis in the record to find that the verdict was based on a valid ground" or "we conclude beyond a reasonable doubt that the jury based its verdict on the legally valid theory"]; *In re Martinez*, *supra*, 3 Cal.5th at p. 1218 [reversal required "unless the reviewing court concludes beyond a reasonable doubt that the jury actually relied on a legally valid theory in convicting the defendant"].

presents a risk of death or great bodily injury?"), is based on the test Justice Scalia proposed, which the Court adapted in *Chun* (see *Roy, supra*, 519 U.S. at p. 7 (conc. opn. of Scalia, J.) [error can be harmless "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 pp. 1204-1205 ["we think this test works well here, and we will use it"]).

Crucially, all these alternative or supplementary formulations – unlike respondent's proposed rule (see OBM at pp. 14, 16 ["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," i.e. if a rational jury would have found the defendant guilty absent the error] – look to what the jury in the case at hand *actually did*. That is what the Court has done for decades and what it should continue to do.

### 2. The current test does not result in near-automatic reversal

Respondent repeatedly characterizes this Court's current alternative-legal-theory prejudice test as one that requires "near-automatic reversal." (OBM at pp. 7, 12, 21, 25; RBM at pp. 7, 9.) Respondent similarly argues that the current test "in effect, requires reversal per se subject to a narrow exception" (OBM at p. 25), and sets a barrier that the Attorney General could only surmount on a "rare" or "seldom" basis (*id.* at p. 26; RBM at p. 8). Indeed, in respondent's view, the current test "would invalidate *almost all judgments* resulting from trials at which alternative-legal-theory error occurred." (RBM at p. 9, italics added.)

The decisions from this Court since *Green* refute these contentions. By amicus's count, since *Green* this Court has addressed alternative-legal-theory error 24 times. It has concluded the error was harmless 15 times.[2] It has

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[2]*People v. Hardy* (2018) 5 Cal.5th 56, 94 (*Hardy*); *People v. Covarrubias* (2016) 1 Cal.5th 838, 882-883 & 902, fn. 26; *People v.*

concluded the error not harmless nine times.[3] Thus, the current test in practice has more often led to *affirmance.*

The cases in which this Court has affirmed – along with cases in related areas – demonstrate that courts have had no difficulty applying the current harmlessness test, selecting the most apposite formulation of that test, and affirming where the test demonstrates the error harmless. First, other portions of the verdict, such as specific findings, may show that the jury necessarily found a defendant guilty on a legally correct theory. Put another way, "[t]he error . . . can be harmless . . . if the jury verdict on other points effectively embraces this one." (*Roy, supra,* 519 U.S. at p. 7 (conc. opn. of Scalia, J.).) This Court has relied on this reasoning. (See, e.g., *Hardy, supra,* 5 Cal.5th at p. 94 [to the extent instruction erroneously permitted first degree murder conviction based on the natural and probable consequences doctrine, error harmless where jury – who found four felony-based special circumstance allegations true – necessarily relied on valid theory of felony murder].)

Second, the verdict may show that the jury must have found the functional equivalent of facts necessary to convict on a valid theory. Thus, an

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*Pearson* (2012) 53 Cal.4th 306, 320; *People v. Farley* (2009) 46 Cal.4th 1053, 1116, fn. 22; *Chun, supra,* 45 Cal.4th at pp. 1203-1205; *People v. Richardson* (2008) 43 Cal.4th 959, 1018; *People v. Lewis* (2008) 43 Cal.4th 415, 464, 466, rejected on another ground in *People v. Black* (2014) 58 Cal.4th 912, 919-920; *People v. Hinton* (2006) 37 Cal.4th 839, 881-882; *People v. Haley* (2004) 34 Cal.4th 283, 315-316; *People v. Hillhouse* (2002) 27 Cal.4th 469, 499; *People v. Hughes* (2002) 27 Cal.4th 287, 368; *People v. Pulido* (1997) 15 Cal.4th 713, 716, 726-727; *People v. Marshall* (1997) 15 Cal.4th 1, 37-38; *People v. Kelly* (1992) 1 Cal.4th 495, 531; *Sanders, supra,* 51 Cal.3d at pp. 509-510.

[3] *In re Martinez, supra,* 3 Cal.5th at pp. 1225-1227; *People v. Johnson* (2015) 61 Cal.4th 734, 772-774; *Chiu, supra,* 59 Cal.4th at pp. 167-168; *People v. Nunez* (2013) 57 Cal.4th 1, 42 (*Nunez*); *People v. Morgan* (2007) 42 Cal.4th 593, 612-613; *People v. Perez* (2005) 35 Cal.4th 1219, 1233 (*Perez*); *People v. Swain* (1996) 12 Cal.4th 593, 607; *People v. Edwards* (1985) 39 Cal.3d 107, 117; *Smith, supra,* 35 Cal.3d at p. 808.

appellate court may affirm "if it is impossible, upon the evidence, to have found what the verdict *did* find without finding this point as well." (*Roy*, *supra*, 519 U.S. at p. 7 (conc. opn. of Scalia, J.).) As with the rationale discussed above, this Court has affirmed on this basis. In *Chun*, *supra*, 45 Cal.4th at p. 1205, the Court held harmless an erroneous instruction that permitted a second degree murder conviction based on felony murder, because any juror who relied on felony murder necessarily found that the defendant willfully shot at an occupied vehicle, committed an act dangerous to life, and did so knowing of the danger and with conscious disregard for life. In other words, "no juror could find felony murder without also finding [the valid theory of] conscious-disregard-for-life malice." (*Ibid.*)

Finally, it is possible to hold alternative-legal-theory error harmless where a defendant admitted or affirmatively conceded the legally proper theory. (See *People v. Cross* (2008) 45 Cal.4th 58, 72 (conc. opn. of Baxter, J.) [any alternative-legal-theory error would be harmless where, among other things, defendant conceded that he engaged in the conduct underlying the legally proper theory]; cf. *Connecticut v. Johnson* (1983) 460 U.S. 73, 87 (plurality) (*Johnson*) [improperly instructing with conclusive or burden-shifting presumption on intent may be harmless if defendant conceded issue of intent]; *People v. Flood* (1998) 18 Cal.4th 470, 504 (*Flood*) [same, as to instruction omitting element].)

As indicated by this Court's treatment of alternative-legal-theory error cases and the various ways courts have found the error harmless, appellate courts are well equipped under present law to distinguish alternative-legal-theory error which is harmless from that which is not. Thus, even assuming arguendo that requiring "reversal per se subject to a narrow exception" would be "'fundamentally inconsistent' with Article VI, section 13, of the California Constitution" (OBM at p. 25, quoting *Flood*, *supra*, 18 Cal.4th at p. 490), the

longstanding alternative-legal-theory error prejudice test is far from such a standard.

### 3. The current test makes good sense

There are at least three reasons why – apart from considerations of the precedent discussed above – the current alternative-legal-theory error prejudice standard "makes good sense." (*Griffin v. United States* (1991) 502 U.S. 46, 59 (*Griffin*).) First,

> 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.

(*Ibid.*; see also *In re Martinez*, *supra*, 3 Cal.5th at p. 1224.) Indeed, "[t]he jury may render a verdict on the basis of the legally invalid theory without realizing that, as a matter of law, its factual findings are insufficient to constitute the charged crime." (*Perez*, *supra*, 35 Cal.4th at p. 1233.)

Second, it is not just that jurors are not equipped to spot a legally inadequate theory; they are, if anything, *likely* to rely on it. If a theory "proves invalid, there is a substantial risk that the jury may have based its verdict on an improper theory," which "follows from the necessarily limited number of theories presented to the jury, and from the fact that the jury's decision-making is carefully routed along paths specifically set out in the instructions." (*Zant v. Stephens* (1983) 462 U.S. 862, 901 (conc. opn. of Rehnquist, C.J.) (*Zant*).) More concerning, a jury may have "substantial incentives to take the easier path urged by" the prosecutor's argument and the court's instructions, and thus, relying on a legally incorrect theory may "spare[] the jury from grappling with" a more difficult question. (*Green*, *supra*, 27 Cal.3d at p. 73.) In such a situation, where one theory is easier to find than the other, "there is no reason to

believe the jury would have deliberately undertaken the more difficult task" (*Sandstrom v. Montana* (1979) 442 U.S. 510, 526, fn. 13; accord, *Johnson, supra*, 460 U.S. at pp. 84-85), and it is fair to assume that the invalid theory contributed to the verdict (see, e.g., *Nunez, supra*, 57 Cal.4th at p. 42). Such a concern is not at issue when a trial court omits an element, because there, no instruction affirmatively misleads the jury.

Third, respondent is misguided in its focus on the notion that "drawing a distinction between alternative-legal-theory error and other instructional errors subject to *Chapman* [*v. California* (1967) 386 U.S. 18] would . . . imply, counterintuitively, that the addition of a correct charge to an incorrect one is more egregious error than the incorrect charge standing alone." (OBM at p. 24; see also RBM at p. 9.) Amicus is not contending that alternative-legal-theory error is *worse* than other types of instructional error. Rather, it is *different* because applying the same prejudice standard to it presents a greater risk of courts engaging in impermissible judicial factfinding.

"[W]hen a reviewing court considers the strength of the evidence in order to fill a gap in the jury's findings, the court is wading into the factfinding role reserved for the jury." (*People v. Merritt* (2017) 2 Cal.5th 819, 834 (conc. opn. of Liu, J.) (*Merritt*).) *Neder v. United States* (1999) 527 U.S. 1, 18 (*Neder*), likewise stands for the principle that – in light of the immense respect our system has for the jury, and appellate courts' mandate not to usurp their function – when reviewing instructional error an appellate court should intrude no further than is absolutely necessary to determine if the verdict was just. In the omission and misdescription contexts, the jury has never been asked to render a decision on a true element of the offense. Thus, in order to find the error harmless, the appellate court can look to whether "the omitted [or misstated] element was uncontested and supported by overwhelming evidence," and in the process, determine what the jury would have done and whether it would have been just. (*Id.* at p. 17.) The high court has sanctioned

this intrusion on the jury's factfinding function because, for example, it is unavoidable in the omitted element context.

But, in the context of alternative-legal-theory error, courts have an effective, less intrusive prejudice test, that avoids judicial factfinding and speculation as to what a rational jury would have done. The existing prejudice test for alternative-legal-theory error *can* answer the question of what the jury did and whether the verdict was just – either because the jury *did* rely on a legally proper theory or because it must have found the predicate facts supporting it – without unnecessarily usurping the jury's factfinding role.

### C. The Legislative History of Article VI, Section 13 of the California Constitution and This Court's Subsequent Caselaw Further Compel the Conclusion That Alternative-Legal-Theory Error is Presumptively a Miscarriage of Justice

As explained above, to answer the questions presented in this case, this Court need only reaffirm the alterative-legal-theory prejudice standard it has consistently applied for decades: a test which focuses on what theory the jury actually relied on and does not result in near-automatic reversal. But the standard's support goes further. Alternative-legal-theory error is not the type of trivial error that motivated the enactment of Article VI, section 13, and the current prejudice standard is consistent with caselaw showing the *Watson*[4] test to be only "generally applicable."

#### 1. Article VI, section 13 was targeted at trivial errors, not serious constitutional errors like alternative-legal-theory error

The legislative history of Article VI, section 13 supports this Court's caselaw treating alternative-legal-theory error as a miscarriage of justice unless the jury actually, or must have, relied on a correct theory. It is black letter law that "[a] constitutional amendment should be construed in accordance with the

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[4] *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*).

natural and ordinary meaning of its words." (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 245.) "When, however, [a court] cannot find the meaning of the provision in its words alone, it applies the rule that the object sought to be attained and the evil sought to be avoided are of prime consideration in the task of interpretation." (*People v. Brown* (1988) 46 Cal.3d 432, 466 (conc. opn. of Mosk, J.) (*Brown*).)

Article VI, section 13 reads as follows:

> No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.

Because the phrase "miscarriage of justice" neither is defined within Article VI, section 13, nor has natural and ordinary meaning, the circumstances underlying the adoption of the constitutional provision hold the key to discerning its meaning.

Recently, a majority of this Court signed Justice Liu's concurring opinion in *People v. Blackburn* (2015) 61 Cal.4th 1113 (*Blackburn*), which reviewed "the text, history, and purpose of section 13." (61 Cal.4th at p. 1138 (conc. opn. of Liu, J., joined by Werdegar, Cuéllar, and Kruger, JJ.).) "Section 13 was adopted in 1966 as part of a general reorganization of the California Constitution. It derives from former article VI, section 4 1/2 (former section 4 1/2), which was added to the California Constitution in 1911 when the voters approved Senate Constitutional Amendment No. 26." (*Blackburn, supra*, 61 Cal.4th at p. 1138 (conc. opn. of Liu, J.).)

Before the addition of former section 4 1/2, "most trial errors were reviewed under the functional equivalent of an automatic reversal rule. (*Blackburn, supra*, 61 Cal.4th at p. 1138 (conc. opn. of Liu, J.).) Indeed, "the old rule [was] that prejudice is presumed from *any* error of law." (*People v.*

*O'Bryan* (1913) 165 Cal. 55, 65, italics added.) The old rule "incorporated a virtually irrebuttable presumption and thereby led almost automatically to reversals based on what were perceived to be the most technical and trivial of errors." (*Brown, supra*, 46 Cal.3d at p. 467 (conc. opn. of Mosk, J.).)

As a majority of this Court recently agreed, "[t]he addition of former section 4 1/2 to the California Constitution changed the role of appellate courts by requiring review of 'the entire cause including the evidence' and permitting reversal only after finding a 'miscarriage of justice.'" (*Blackburn, supra*, 61 Cal.4th at p. 1138 (conc. opn. of Liu, J.); accord, *People v. Cahill* (1993) 5 Cal.4th 478, 501 (*Cahill*) [the provision was added "for the specific purpose of abrogating the preexisting rule that had treated any substantial error as reversible per se"], italics omitted.) Moreover, the legislative history suggests that "former section 4 1/2 was directed at trivial errors and was not meant or understood to provide that only an error affecting the outcome of a trial would qualify as a miscarriage of justice." (*Blackburn, supra*, 61 Cal.4th at p. 1139 (conc. opn. of Liu, J.).)

Specifically, in the 1911 Voter Information Guide, the proposed amendment's sponsor said that "'[t]he object of this amendment . . . is to render it unnecessary for the higher courts to grant the defendant in a criminal case a new trial for unimportant errors. It is designed to meet the ground of common complaint that criminals escape justice through technicalities." (*Blackburn, supra*, 61 Cal.4th at pp. 1138-1139 (conc. opn. of Liu, J.), quoting Voter Information Guide, Special Elec. (Oct. 10, 1911) argument in favor of Sen. Const. Amend. No. 26, p. 11 (1911 Voter Information Guide); accord, *Cahill*, supra, 5 Cal.4th at p. 532 (dis. opn. of Mosk, J.) ["the 'general purpose' of former section 4 ½ was simply to constitutionally preclude reversals in criminal cases by appellate courts, and the attendant loss of public confidence in the

criminal justice system, when the errors committed at trial were 'unimportant' or 'purely technical'"].)[5]

Alternative-legal-theory error – as compared to the errors motivating the adoption of Article VI, section 13 – is anything but trivial or unimportant. It is a "serious constitutional error." (*In re Martinez*, *supra*, 3 Cal.5th at p. 1225.) Indeed, it deprives a defendant of at least one (and up to four) rights under the California Constitution. First, and most importantly for present purposes, under the California Constitution, every defendant has a right to a jury trial. (Cal. Const., art. I, § 16). Because instruction with a legally incorrect theory "deprives a defendant of the right to a jury trial under the Sixth Amendment to the United States Constitution" (*In re Martinez*, *supra*, 3 Cal.5th at p. 1224), it follows that such an instruction also violates the parallel state constitutional right (see *People v. Longwill* (1975) 14 Cal.3d 943, 951, fn. 4, disapproved on another ground in *People v. Laiwa* (1983) 34 Cal.3d 711, 728).

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[5] In the context of explaining just what those "unimportant errors" were, the sponsoring senator "provided the following examples of the 'absurd lengths' to which courts had gone in reversing 'immaterial errors': 'In Missouri a case was reversed and the prisoner escaped conviction because the indictment alleged the deceased "instantly died" instead of charging according to the ancient formula that he "did then and there die." In a Texas case the elimination of the letter "r" from the word "first" saved a murderer from the gallows, when his guilt was absolutely determined. In our own state a conviction for murder was set aside because the indictment failed to state that the man killed was a human being.'" (*Blackburn*, *supra*, 61 Cal.4th at p. 1139 (conc. opn. of Liu, J.), quoting 1911 Voter Information Guide, *supra*, argument in favor of Sen. Const. Amend. No. 26, p. 12; see also *Brown*, *supra*, 46 Cal.3d at p. 466 (conc. opn. of Mosk, J.) [recounting further reversals for trivial errors, i.e., of robbery conviction on ground that indictment was fatally defective in failing to specify that property taken did not belong to defendant, and of larceny conviction on ground that indictment misspelled the word "larceny" as "larcey" and thereby failed to describe an offense].)

Three additional fundamental state constitutional rights are at stake when a trial court commits alternative-legal-theory error. Criminal defendants have a right to have the jury determine "every material issue presented by the evidence." (*Flood, supra*, 18 Cal.4th at p. 481.) Failing to instruct correctly on the essential elements of an offense, e.g., an alternative-legal-theory error, is a denial of this right. (See *People v. Birreuta* (1984) 162 Cal.App.3d 454, 462, disapproved on another ground in *People v. Bland* (2002) 28 Cal.4th 313, 326.) Every defendant also has a right to a 12-person jury, who may only convict upon a unanimous verdict. (Cal. Const., art. I, § 16; *People v. Collins* (1976) 17 Cal.3d 687, 693.)[6] Because – as explained above, section B.3, *supra* – it is likely that at least some members of a jury given a legally correct and incorrect theory will rely on the latter, a conviction in those circumstances would violate this right. (Cf. *Green, supra*, 27 Cal.3d at pp. 71, 73 [reasoning that "we cannot even be sure that all the jurors agreed on the same theory," and that some jurors may have "follow[ed] the district attorney's advice," which provided an "easier path" and "spared the jury from grappling with [a] much closer question"].) Finally, every defendant has a right to due process. (Cal. Const., art. I, § 15). "An instruction that relieves the prosecution of the

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[6] The framers of the California Constitution were particularly concerned with this right. When Article I was considered at the 1879 Constitutional Convention, a proposal "that would have allowed conviction by less than a unanimous jury" was "strongly denounced." (*Mitchell v. Superior Court* (1989) 49 Cal.3d 1230, 1243.) Moreover, the framers believed that the unanimity requirement and the beyond-a-reasonable-doubt burden were inextricably intertwined. (See 3 Willis & Stockton, Debates and Proceedings, Cal. Const. Convention 1878-1879, p. 1175 (statement of Mr. Reddy) [proposal to limit unanimity requirement to felony cases would upset the "fundamental principle of criminal jurisprudence" that defendants are "entitled to the benefit of all reasonable doubts" and would therefore require not only change in juror unanimity but also a shift to a "preponderance of the evidence" standard].)

obligation to establish a necessary element," i.e., alternative-legal-theory error, violates this right. (See *People v. Brown* (2016) 247 Cal.App.4th 211, 225.)

In sum, alternative-legal-theory error is simply not the type of trivial error that prompted the adoption of Article VI, section 13 of the California Constitution.

### 2. The *Watson* test is only a "generally applicable" test for state law errors

Caselaw since the adoption of Article VI, section 13 likewise demonstrates that the Court's longstanding rule that alternative-legal-theory error is presumptively a miscarriage of justice is merely one of several areas in which the Court – concerned about deprivations of fundamental rights – has provided close appellate scrutiny and a presumption of prejudice.

Amicus wishes to clarify that it is not arguing that alternative-legal-theory error can never be harmless or is always a miscarriage of justice regardless of the evidence. Nor does amicus contend that appellate courts should not determine whether the error was prejudicial. Instead, the issue is what *type* of scrutiny appellate courts in this state may apply. Notably, "[t]he text [of Article VI, section 13] does not say an appellate court may reverse a judgment only when an error affected the outcome. Instead, the text says a judgment may not be reversed unless an error resulted in a 'miscarriage of justice.' (§ 13.)" (*Blackburn, supra*, 61 Cal.4th at p. 1138 (conc. opn of Liu, J.).)

This Court's caselaw has demonstrated that a single prejudice standard is not appropriate for determining which errors of state law result in a "miscarriage of justice." "[A] defendant who has established state-law error must *typically* demonstrate that 'it is reasonably probable that a result more favorable to [the defendant] would have been reached in the absence of the error.'" (*Blackburn, supra*, 61 Cal.4th at p. 1132, quoting *Watson, supra*, 46 Cal.2d at p. 836, first brackets and italics added.) Yet, while "both the wording

and history of article VI, section 13, require the reviewing court to undertake meaningful harmless-error analysis," "neither expressly or impliedly mandates any specific standard of prejudice for any kind of error in any kind of proceeding." (*Brown*, *supra*, 46 Cal.3d at p. 467 (conc. opn. of Mosk, J.).)

*Watson* "did not hold that former section 4 ½ mandated the . . . 'reasonable probability' standard as the only 'test' that could be employed when harmless-error analysis is appropriate, but simply defined that standard as the 'test' that was '*generally* applicable.'" (*Cahill*, *supra*, 5 Cal.4th at p. 536 (dis. opn. of Mosk, J.), quoting *Watson*, *supra*, 46 Cal.2d at p. 836, italics added by *Cahill*.) The Court as a whole has echoed Justice Mosk's point. (See *Cahill*, *supra*, 5 Cal.4th at p. 492 [the *Watson* test is "the harmless-error test *generally* applicable under current California law"], italics added.) Indeed, the Court has specifically rejected the argument that "*Watson* is the definitive articulation" of the phrase miscarriage of justice "for all types of error." (*Brown*, *supra*, 46 Cal.3d at p. 447.) Moreover, as a majority of this Court recently agreed, "[t]o the extent that the conception of justice embodied in our state Constitution encompasses concerns beyond the outcomes of cases, section 13 contemplates that some errors are reversible on grounds other than their likely effect on the outcome of a particular case." (*Blackburn*, *supra*, 61 Cal.4th at p. 1138 (conc. opn of Liu, J.).)

In addition to conforming to the requirements of Article VI, section 13, this Court's alternative-legal-theory error prejudice test is not an outlier in modifying the *Watson* test and applying a more exacting standard.[7] Indeed, the

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[7] Nor has the Court required that for federal constitutional error, it always apply the same *Chapman* test. (See, e.g., *People v. Aranda* (2012) 55 Cal.4th 342, 367-368 [the *Neder* formulation of the *Chapman* test – which accounts for the reviewing court's view of the overwhelming weight of the evidence supporting the verdict – "is not appropriate" in assessing the effect of the erroneous omission of the standard reasonable doubt instruction]; accord, *Merritt*, *supra*, 2 Cal.5th at p. 833 (conc. opn. of Liu,

Court has held or reaffirmed that the following additional state law errors are *not* subject to the *Watson* test: erroneously accepting a jury trial waiver from a mentally disordered offender's ("MDO") counsel without an explicit finding of substantial evidence that the offender lacked the capacity to make a knowing and voluntary waiver, or failing to advise an MDO of the right to a jury trial on extension of commitment[8]; same, as to a person originally committed after pleading not guilty by reason of insanity to a criminal offense[9]; error at the penalty phase of a capital trial[10]; failing to instruct on an affirmative defense[11]; and failing to instruct sua sponte on a lesser included offense[12]. In all instances, as with alternative-legal-theory error, the Court has articulated a presumption that the error was a miscarriage of justice, absent some affirmative indication to the contrary.[13]

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J.) ["Although I agree that some form of harmless error review is appropriate, I believe such review is more circumscribed in this context than today's opinion suggests"]; *id.* at pp. 841-842 (dis. opn. of Cuéllar, J.) [proposing limited variant of harmless error analysis].)

[8] *Blackburn, supra,* 61 Cal.4th at p. 1136.

[9] *People v. Tran* (2015) 61 Cal.4th 1160, 1170 (*Tran*).

[10] *Brown, supra,* 46 Cal.3d at p. 448.

[11] *People v. Stewart* (1976) 16 Cal.3d 133, 141 (*Stewart*). Respondent argues that "[t]he *Green* rule is a conspicuous outlier when it comes to assessing the harmlessness of an instructional error" (OBM at p. 16) and that it would contravene state law to "requir[e] the *Green* test exclusively in the context of alternative-legal-theory error" (*id.* at p. 25), but respondent does not address *Stewart.*

[12] *People v. Sedeno* (1974) 10 Cal.3d 703, 721 (*Sedeno*), overruled in part by *People v. Breverman* (1998) 19 Cal.4th 142, 165 (*Breverman*).

[13] See *Blackburn, supra,* 61 Cal.4th at p. 1136 [error may be harmless if the record affirmatively shows "substantial evidence that the defendant lacked . . . capacity at the time of counsel's waiver" or, "based on the totality of the circumstances, that the defendant's waiver was knowing and voluntary"]; *Tran, supra,* 61 Cal.4th at p. 1170 [same]; *People v. Jackson* (2014) 58 Cal.4th 724, 748 [the *Brown* test is the same in substance and

Amicus acknowledges this Court's decisions in *Flood* and *Breverman*, which held, respectively, that the *Watson* test applies to instructions removing an element of a crime from a jury's consideration and a trial court's failure to instruct sua sponte on a lesser included offense in a noncapital case. (*Flood, supra,* 18 Cal.4th at p. 490; *Breverman, supra,* 19 Cal.4th at p. 165.) These cases do not control the result here because they operated on two premises not applicable here. First, *Flood* and *Breverman* repeatedly referred to the existing standards as mandating automatic, near-automatic, or per-se reversal. (*Flood, supra*, 18 Cal.4th at pp. 483-485, 487-490; *Breverman, supra*, 19 Cal.4th at pp. 149, 175-176.) Indeed, they focused their reasoning on why such a standard was incompatible with California law. (See *Flood, supra*, 18 Cal.4th at pp. 487-490 [reasoning that "the reversal-per-se rule . . . rests, in our view, upon an improper interpretation and application of [article VI, section 13]," explaining why caselaw did not support a reversal per se standard, and further deeming "an ostensible reversible-per-se rule that is riddled with exceptions" as "fundamentally inconsistent with the language and purpose of . . . article VI, section 13"]; *Breverman, supra*, 19 Cal.4th at pp. 175-176 [concluding that "[t]he stringent *Sedeno* test of near-automatic reversal" is a violation of article VI, section 13, whose dictates "cannot be avoided by . . . asserting, as an ipse dixit, that a particular form of error is itself a miscarriage of justice, regardless of the evidence"].) Yet, as demonstrated above, section B.2, *supra*, far from mandating reversal, the current alternative-legal-theory error prejudice standard more often than not leads to *affirmance*. Thus, the impetus for, and the bulk of

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effect as the *Chapman* test]; *People v. Whitt* (1990) 51 Cal.3d 620, 649 [under *Chapman*, "there is a strong presumption that the defendant was prejudiced"]; *Stewart, supra*, 16 Cal.3d at p. 141 [failure to instruct can be cured "if it is shown that 'the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions'"], quoting *Sedeno, supra*, 10 Cal.3d at p. 721; *Sedeno, supra*, 10 Cal.3d at p. 721 [same].

the content of, the criticism in *Flood* and *Breverman* is not present in the alternative-legal-theory error context.

Second, *Flood* and *Breverman* conceived of automatic reversal and *Watson* as the *only* legitimate prejudice tests under state law. (See *Flood*, *supra*, 18 Cal.4th at p. 490; *Breverman*, *supra*, 19 Cal.4th at pp. 149, 165, 176-178.) For example, *Flood* criticized the "various exceptions to the reversible-per-se rule for instructional error affecting an element of a crime" for "engaging in a type of harmless error analysis that is entirely inconsistent with a rule of automatic reversal." (18 Cal.4th at pp. 489-490.) However, as demonstrated above, in assessing prejudice, this Court has more options than automatic reversal or *Watson*.

In light of this Court's longstanding rule that alternative-legal-theory error is a miscarriage of justice, the concern with trivial errors that animated the adoption of section 13, and this Court's numerous exceptions to the *Watson* rule, this Court should reaffirm that alternative-legal-theory error presumptively requires reversal under the California Constitution.

### D. This Court's Longstanding Alternative-Legal-Theory Error Prejudice Standard is Consistent With United States Supreme Court Precedent

This Court need rely only on California law to reject respondent's proposed standard.[14] Moreover, the result should be the same under Supreme

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[14] As shown above, this Court has recognized that the California Constitution potentially affords greater protection than the federal Constitution in the context of instructional error affecting an element of the offense. Respondent argues to the contrary. (OBM at pp. 24-25, quoting *People v. Mil* (2012) 53 Cal.4th 400, 415 (*Mil*); RBM at p. 7 [same].) Amicus notes that the context surrounding this quote from *Mil* shows the Court's statement to be limited to omission of multiple elements from a jury instruction, and not encompassing alternative-legal-theory error. (*See* 53 Cal.4th at p. 415 ["Finally, we conclude that the state Constitution affords no greater protection than the federal Constitution *in these circumstances*"], italics added.)

Court precedent. After reviewing various cases from the United States Supreme Court and this Court (OBM at pp. 12-21), respondent argues that "the foregoing authority compels application of *Chapman*, not *Green*, as the governing harmlessness standard in cases of alternative-legal-theory error" (*id.* at p. 21). It does not. Respondent's argument relies heavily on the reasoning – but not the holding – of *Hedgpeth v. Pulido* (2008) 555 U.S. 57 (per curiam) (*Pulido*). (OBM at pp. 22-24.) The holdings and binding precedent of the high court, however, support this Court's current alternative-legal-theory error prejudice standard.

It is axiomatic that it is the Supreme Court's prerogative alone to overrule one of its precedents. (*Bosse v. Oklahoma* (2016) 137 S. Ct. 1, 2 (per curiam).) As the high court has repeatedly made clear, "'[o]ur decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality.'" (*Ibid.*, quoting *Hohn v. United States* (1998) 524 U.S. 236, 252-253.) This language is particularly applicable to the high court's precedent on alternative-legal-theory error.

In *Stromberg v. California* (1931) 283 U.S. 359, 369-370 (*Stromberg*), the Court held unconstitutional one of the three alternate statutory means on which the jury could convict the defendant. The Court reversed the conviction because "[t]he verdict against the appellant was a general one" and "it [wa]s impossible to say under which clause of the statute the conviction was obtained." (*Id.* at pp. 367-368.) In *Yates v. United States* (1957) 354 U.S. 298, 311-312 (*Yates*), the Court extended this reasoning to a conviction resting on multiple theories of guilt when one theory is not unconstitutional, but is otherwise legally flawed.[15] The Court explained that "the proper rule to be

[15] In *Skilling v. United States* (2010) 561 U.S. 358, 414 (*Skilling*), the high court in fact cited *Yates* for the proposition that "constitutional error occurs when a jury is instructed on alternative theories of guilt and returns a

applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected." (*Id.* at p. 312.) The Court has long adhered to this rule. (See, e.g. *Zant*, *supra*, 462 U.S. at p. 881.)

In dicta, the Court has twice criticized *Stromberg* and *Yates*, but it has not overruled them. (See *Pulido*, *supra*, 555 U.S. at pp. 58, 61 [stating that nothing in other jury instruction cases "suggests that a different harmless-error analysis should govern" in the alternative-legal-theory error context, but simply holding that such error is amenable to harmless error analysis and on federal habeas review, governed by the standard of review articulated in *Brecht v. Abrahamson* (1993) 507 U.S. 619, 623][16]; *Griffin*, *supra*, 502 U.S. at pp. 55-56 [reasoning that *Yates* was an "unexplained extension" of *Stromberg*, but concluding that "[o]ur continued adherence to the holding of *Yates* is not at issue in this case"].) What the Court *has* done is merely clarify that on direct appeal, "errors of the *Yates* variety are subject to harmless-error analysis." (*Skilling*, *supra*, 561 U.S. at p. 414 & fn. 46.)

If *Skilling* were the Court's last word, there would be no doubt that the *Yates* rule – which it has never overruled – was binding precedent. But a case decided after *Pulido* provides yet further support that the *Yates* approach – focused on what the jury actually did – is still applicable and not inconsistent with *Neder*. In *McDonnell v. United States* (2016) 136 S. Ct. 2355, 2373-2374 (*McDonnell*), the high court reversed the defendant's bribery convictions

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general verdict that may rest on a legally invalid theory."

[16] The California test – only requiring proof "beyond a reasonable doubt" – is wholly different from the "absolute certainty" standard the high court criticized in *Pulido*. In *that* context, the high court said "[s]uch a determination would appear to be a finding that no violation had occurred at all, rather than that any error was harmless." (*Id.* at p. 62). Thus, respondent is incorrect to suggest that affirmance under the California test is tantamount to a determination of no error. (See RBM at p. 8.)

because the jury instructions defining an "official act" were "significantly overinclusive." The Court (1) recited some of the evidence and argument at trial; (2) explained how it was "possible" that the jury could have convicted the defendant "without finding that he committed or agreed to commit an 'official act,' as properly defined"; (3) stated that the jury "could have" misconceived the relevant target of the official act; and (4) reasoned that it was "possible" that the jury convicted the defendant "without finding that he agreed to make a decision or take an action on a properly defined 'question, matter, cause, suit, proceeding or controversy.'" (*Id.* at pp. 2374-2375.) In sum,

> Because the jury was not correctly instructed on the meaning of 'official act,' it may have convicted Governor McDonnell for conduct that is not unlawful. For that reason, we cannot conclude that the errors in the jury instructions were 'harmless beyond a reasonable doubt.'

(*McDonnell, supra*, 136 S.Ct. at p. 2375, quoting *Neder, supra*, 527 U.S. at p. 16; accord, *Chiarella v. United States* (1980) 445 U.S. 222, 237, fn. 21 ["We may not uphold a criminal conviction if it is impossible to ascertain whether the defendant has been punished for noncriminal conduct"].)

Notably, the Court did not look – as respondent suggests it would, if given the chance – to whether "the jury verdict would have been the same absent the error." (OBM at pp. 22-23.) Nor did the Court look to whether "the evidence in support of the valid theory was uncontested and overwhelming, or [whether] the parties at trial focused on the valid theory rather than the invalid one." (*Id.* at p. 23.) Thus – regardless of whether *McDonnell* is properly characterized as an alternative-legal-theory error or misdescription case – the case demonstrates that *Neder* did not cabin *Chapman* in the way respondent contends it does. Instead, as dictated by the circumstances and consistent with a reviewing court's constitutionally limited factfinding role, the high court in *McDonnell* applied a test fully consistent with *Yates*' "impossible to tell"

standard and looked to what the jury actually did.[17] Thus, the high court's precedent and recent application of it demonstrate that the *Yates* standard – which closely tracks this Court's alternative-legal-theory error standard – still applies.

[17] Respondent asserts that in *Neder*, the high court disavowed its prior statement in *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 (*Sullivan*), that harmless error analysis looks to the basis on which the jury actually rested its verdict. (RBM at p. 8, fn. 2.) Not so. *Neder* addressed the argument, based on *Sullivan*'s alternative reasoning, that harmless error analysis could not apply to the omission of an element because the basis for harmless-error review was simply absent. (*Neder, supra,* 527 U.S. at p. 11.) It was *this* portion of *Sullivan* – and not its description of harmless error review – that the high court stated "cannot be squared with our harmless-error cases." (*Id.* at p. 11.)

## CONCLUSION

For the foregoing reasons, the Court should retain its longstanding alternative-legal-theory error prejudice standard. The standard (and its presumption of prejudice) is consistent with the California Constitution and with United States Supreme Court precedent, does not lead to near-automatic reversal, and makes sense. Retaining this standard also pays proper deference to the jury's right to determine the facts of a case by keeping the focus rightfully on what the jury actually did.

Dated: January 31, 2019

Respectfully submitted,

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## DECLARATION OF SERVICE BY MAIL

Case Name: ***People v. Yazan Aledamat***
Case Number: **S248105**

I, Jon Nichols, the undersigned, declare as follows:

I am over the age of 18 and not a party to this cause. I am employed in the county where the mailing took place. My business address is 1111 Broadway, Suite 1000, Oakland, California 94607. I served a copy of the following document(s):

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on **February 1, 2019,** at Oakland, California.

s/Jon Nichols
JON NICHOLS