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

ANSWER TO STATE PUBLIC DEFENDER'S AMICUS CURIAE BRIEF

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INTRODUCTION

The Office of the State Public Defender contends that it is appropriate and consistent with the state and federal Constitutions to assess alternative-legal-theory error for prejudice exclusively under the test of *People v. Green* (1980) 27 Cal.3d 1, 69. The *Green* test may be one way to show that such error was harmless. But this Court's precedents, and those of the United States Supreme Court, establish that it is not the exclusive harmless-error standard in these circumstances. Instead, like similar instructional errors, alternative-legal-theory error is governed by the ordinary prejudice inquiry of *Chapman v. California* (1967) 386 U.S. 18, 22-23.

ARGUMENT

THE ORDINARY *CHAPMAN* STANDARD GOVERNS ALTERNATIVE-LEGAL-THEORY ERROR; THE *GREEN* TEST IS ONLY ONE WAY TO SATISFY *CHAPMAN*

1. Much of the Public Defender's argument is based on the same misconception driving Aledamat's answer brief: that this Court has already settled on the *Green* test as the applicable harmlessness standard for alternative-legal-theory error. (See OSPD Brief 11-18 [discussing the "current standard"].) In the Public Defender's formulation, alternative-legal-theory error may be deemed harmless only if: (1) portions of the verdict disclose that the jury necessarily relied on the valid theory; (2) the verdict shows that the jury made findings amounting to the functional equivalent of the valid theory; or (3) the defendant admitted or conceded the valid theory. (OSPD Brief 14-15.) The Public Defender disputes that the ordinary *Chapman* inquiry for instructional errors—whether it appears beyond a reasonable doubt that the verdict would have been the same absent the error (see *Neder v. United States* (1999) 527 U.S. 1, 19)—can apply in this context. (OSPD Brief 13.)

The Public Defender is correct that, in assessing alternative-legal-theory error for prejudice, this Court has often focused on whether the record affirmatively showed that the jury based its verdict on the correct legal theory. (See OSPD Brief 11-13.) But in doing so, the Court has consistently observed that this is not the only way to find such error harmless. (See *People v. Chun* (2009) 45 Cal.4th 1172, 1205; *People v. Guiton* (1993) 4 Cal.4th 1116, 1131.) And Justice Baxter, in a concurring opinion, has expressed his view that the ordinary *Chapman* standard should apply. (*People v. Cross* (2008) 45 Cal.4th 58, 70 (conc. opn. of Baxter, J.).) The Court has neither rejected nor explicitly embraced that view.

According to the Public Defender, this Court has reversed in a number of cases after applying the *Green* test. (OSPD Brief 14, fn. 3.) But most of those decisions are less clear about the applicable standard than the Public Defender suggests, and their results are consistent with *Chapman*. (See OBM 14-15; PR 11-13; *In re Martinez* (2017) 3 Cal.5th 1216, 1225-1227 [citing *Chun* and assessing record, including evidence, concluding it did not show beyond a reasonable doubt that jury relied on valid theory]; *People v. Chiu* (2014) 59 Cal.4th 155, 167-168 [citing *Green* as well as "beyond a reasonable doubt" standard, and assessing evidence in concluding record did not show jury based its verdict on valid theory]; *People v. Nunez* (2013) 57 Cal.4th 1, 42 [citing *Green* as well as "beyond a reasonable doubt" standard]; *People v. Perez* (2005) 12 Cal.4th 593, 607 [invoking *Green* and *Guiton* but reversing on alternative ground that error was prejudicial even under reasonable probability standard].) Others were decided before *Guiton* identified the open question (*People v. Edwards* (1985) 39 Cal.3d 107, 117; *People v. Smith* (1984) 35 Cal.3d 798, 808), or did not involve the relevant question at all (*People v. Swain* (1996) 12 Cal.4th 593, 607). Those few decisions that appear to have reversed solely on the basis of the *Green* test did not acknowledge or address the unresolved standard-of-

prejudice issue. (See *People v. Johnson* (2015) 61 Cal.4th 734, 772-774; *People v. Morgan* (2007) 42 Cal.4th 593, 612-613.)

As the State has acknowledged, the *Green* test may certainly serve as "one way" to satisfy *Chapman*. (See OBM 25) The question to be answered now is the one the Court previously left "to future cases": whether *Green* is the *exclusive* harmlessness test in cases of alternative-legal-theory error. (*Guiton, supra*, 4 Cal.4th at p. 1131.) It is not.

2. The state and federal Constitutions compel application of the ordinary *Chapman* standard as the general test for prejudice in the context of alternative-legal-theory error. The state-law prejudice rule for an instructional error of this sort is the "reasonable probability" standard of *People v. Watson* (1956) 46 Cal.2d 818, 836 (see *People v. Mil* (2012) 53 Cal.4th 400, 415; *People v. Breverman* (1998) 19 Cal.4th 142, 176; *People v. Flood* (1998) 18 Cal.4th 470, 487), and the federal rule is the "harmless beyond a reasonable doubt" standard of *Chapman* (see *Hedgpeth v. Pulido* (2008) 555 U.S. 57, 59-62). (See OBM 21-25; RBM 6-8.) Since alternative-legal-theory error violates both state and federal law, the *Chapman* standard controls.

In resisting that conclusion, the Public Defender argues that the legislative history of our state constitutional harmless-error provision found in article VI, section 13 establishes that its "miscarriage of justice" standard applies only to "trivial errors." (OSPD Brief 20-21.) And it observes that alternative-legal-theory error is "serious," rather than trivial. (*Ibid.*) This Court has not recognized "trivial" error as a separate category to which article VI, section 13's application is limited. To the contrary, the Court recently reaffirmed that *Watson* is the generally applicable prejudice standard for state-law error under our Constitution. (*People v. Blackburn* (2015) 61 Cal.4th 1113, 1132.) It is true, as the Public Defender points out, that the concurring opinion in *Blackburn* described the electorate's

adoption of our state harmless-error provision as motivated by a desire to prevent appellate reversals on the basis of trivial errors. (*Id.* at pp. 1138-1140 (conc. opn. of Liu, J.).) And the argument in the 1911 voter information guide in favor of that provision gave some extreme examples of such reversals. (*Ibid.*) But there is no suggestion in *Blackburn*, or any other decision of this Court, that the *Watson* standard applies only to some discrete set of errors that are classified as "trivial."

Instead, *Blackburn* recognized that certain fundamental errors that deprive a defendant of orderly legal procedure and defy normal prejudice assessment may call for reversal without an inquiry into whether the error affected the outcome of the trial. (*Blackburn*, *supra*, 61 Cal.4th at pp. 1132-1136.) The State does not dispute that some fundamental procedural errors may, consistent with our Constitution, require a different or more strict prejudice standard than the one laid out in *Watson*. In *Blackburn*, the Court held that the failure to obtain a personal jury trial waiver from a defendant in a mentally disordered offender proceeding qualified as such an error, requiring automatic reversal. (*Id.* at p. 1134.) The Court distinguished that type of procedural defect from ordinary trial errors—such as those involving "the erroneous denial of a jury determination of certain limited matters in a criminal jury trial"—which remain subject to the *Watson* standard. (*Id.* at p. 1136.) Alternative-legal theory-error is an ordinary trial error. It does not deny a defendant orderly legal procedure (*id.* at p. 1133), affect the framework within which the trial proceeds (*id.* at p. 1136), or defy harmless-error analysis (*id.* at p. 1134). Rather, it fits squarely into the category of instructional errors that are assessed for harmlessness under the usual standards. (See *Breverman*, *supra*, 19 Cal.4th at p. 176 [failure to instruct on lesser-included offense]; *Flood*, *supra*, 18 Cal.4th at p. 487 [omission of element].)

Though this Court in the past has applied heightened standards of prejudice to some trial errors, it has more recently rejected such standards as inconsistent with article VI, section 13's command that a court must review the entire record, including the evidence, before reversing on the basis of a miscarriage of justice. (*Breverman*, *supra*, 19 Cal.4th at p. 176; *Flood*, *supra*, 18 Cal.4th at p. 487.) The Public Defender argues that *Green* is not properly categorized as a heightened standard because this Court has affirmed in a number of cases after applying the *Green* test. (OSPD Brief 13-14, fns. 2 & 3.) But the test of *People v. Sedeno* (1974) 10 Cal.3d 703 that was rejected in *Breverman* and *Flood* requires essentially "the same" analysis as the *Green* test. (*Guiton*, *supra*, 4 Cal.4th at p. 1130; see also *People v. Pulido* (1997) 15 Cal.4th 713, 716.) And *Sedeno* was accurately described as a "heightened standard of reversible error" and one of "near-automatic reversal." (*Breverman*, *supra*, 19 Cal.4th at p. 175; *Flood*, *supra*, 18 Cal.4th at p. 487.) That description was based not necessarily on its empirical results but on its rigidity relative to other standards.

The Public Defender also points to several of this Court's cases which, it claims, demonstrate that a more stringent harmlessness standard may be appropriate in certain instances. (OSPD Brief 25.) Most of those cases simply fall under the rubric discussed in *Blackburn*, which does not apply here. The others pre-date more recent harmless-error authority such as *Breverman* and *Flood*, and are therefore of limited import. (See, e.g. *People v. Stewart* (1976) 16 Cal.3d 133, 141 [citing *Sedeno* and holding that omission of affirmative defense instruction was in itself a miscarriage of justice]; contra, *People v. Salas* (2006) 37 Cal.4th 967, 983-984 [assuming *Chapman*'s beyond-a-reasonable-doubt standard applies to omission of affirmative-defense instruction and concluding the error was harmless because "no reasonable jury" would believe evidence supporting the instruction].)

Under California law, then, *Watson* governs ordinary instructional errors like the one in this case. Only when particular reasons such as those discussed in *Blackburn* compel application of a more stringent standard will *Watson* give way. Alternative-legal-theory error does not implicate those reasons. (See *Blackburn*, *supra*, 61 Cal.4th at pp. 1133-1136.)

The Public Defender also maintains that federal law cannot undercut exclusive use of the *Green* test in this context. (OSPD Brief 27 & fn. 14.) But ordinary instructional errors do not merit under state law "greater protection than the federal Constitution" affords. (*People v. Mil*, *supra*, 53 Cal.4th at p. 415.) The Public Defender argues that this principle is limited to the context of an instructional error that omits an element of the charged offense. (OSPD Brief 27, fn. 14.) While it is true as a factual matter that *Mil* involved that particular type of error, nothing in its reasoning or holding suggests that the statement was so limited. Much like *Blackburn*, *Mil* drew a distinction between errors that are amenable to ordinary harmlessness review and those that are not. It concluded that, under the federal Constitution, instructional errors are reversible per se only when they "vitiate all the jury's findings." (*Mil*, *supra*, 53 Cal.4th at p. 412, quotation marks and alteration omitted.) The import of *Mil* is that, at least as to instructional errors, there is no independent state-law basis for departing from normal harmlessness standards.

And as a federal constitutional matter, *Chapman* applies. In *Pulido*, the United States Supreme Court held that alternative-legal-theory error is not an extraordinary instructional defect that vitiates all of the jury's findings, and it is therefore subject to harmlessness review. (*Pulido*, *supra*, 555 U.S. at pp. 61-62.) In reaching that conclusion, the Court expressed its view that such error belongs in the same category with other ordinary instructional errors like the omission or misdescription of an element. (*Pulido*, *supra*, 555 U.S. at pp. 60-61.) Those errors are subject to

Chapman, the Court observed, and "nothing ... suggests that a different standard should apply in this context." (*Id.* at p. 61.)

The Public Defender counters that *Pulido* neither expressly held that the ordinary *Chapman* standard applies to alternative-legal-theory error, nor overruled *Yates v. United States* (1957) 354 U.S. 298 and *Stromberg v. California* (1931) 283 U.S. 359—older cases reversing for such error where it was "impossible to tell" whether the jury relied on the valid theory. (OSPD Brief 28-29.) While that is correct so far as it goes, the Public Defender's reading of *Pulido* is far too cramped. The *Pulido* Court described the type of rule employed in *Yates* and *Stromberg* as calling for "absolute certainty" that the jury relied on the valid theory. (*Pulido*, *supra*, 555 U.S. at pp. 59-60.) And it observed that the "absolute certainty" rule of those pre-*Chapman* cases was inconsistent with its more recent jurisprudence applying the harmless-beyond-a-reasonable-doubt standard to a variety of similar instructional errors. (*Id.* at pp. 60-61.) In light of that discussion, there can be little doubt that *Pulido* rejected the *Yates-Stromberg* test as the exclusive means of assessing harmlessness in the alternative-legal-theory error context, even if it did not expressly disapprove those decisions.

Indeed, the Court need not have gone out of its way to overrule *Yates* and *Stromberg*, since an "absolute certainty" test can comfortably co-exist with the general *Chapman* standard, as one way to satisfy it. In *Skilling v. United States* (2010) 561 U.S. 358, the Court remanded after concluding that alternative-legal-theory error occurred at the defendant's trial. In doing so, it made clear that the harmless-error principles discussed in *Pulido* apply "equally to cases on direct appeal." (*Id.* at p. 414, fn. 46.) On remand, the Fifth Circuit correctly observed that, consistent with *Pulido*, "there are two ways to prove the harmlessness of an alternative-theory error." (*United States v. Skilling* (5th Cir. 2011) 638 F.3d 480, 481-482.)

Such error can be harmless "if a court, after a thorough examination of the record, is able to conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error." (*Id.* at p. 482, citing *Neder*, *supra*, 527 U.S. at p. 19, quotation marks omitted.) The error can also be harmless "if the jury, in convicting on an invalid theory of guilt, necessarily found facts establishing guilt on a valid theory." (*Ibid.*) The latter test, the court observed, "is consistent with the *Neder* standard." (*Ibid.*)

Nor does the Supreme Court's decision in *McDonnell v. United States* (2016) 136 S.Ct. 2355, suggest that a heightened prejudice standard controls some ordinary instructional errors under federal law. (OSPD Brief 29-30.) Quite the opposite: that case involved a straightforward application of *Chapman*. *McDonnell* arose from the bribery prosecution of a public officeholder for providing political favors in exchange for various loans, gifts, and other benefits. (*McDonnell*, *supra*, 136 S.Ct. at p. 2361.) The trial court erred by instructing the jury with an overbroad definition of what constituted an "official act," an essential part of one of the elements of the charged offense. (*Id.* at pp. 2366-2367, 2373-2374.) Citing *Neder*, the Court held that the error was not harmless beyond a reasonable doubt because it was unclear what evidence the jury might have credited as to that element. (*Id.* at pp. 2374-2375.) The Court's relatively brief harmlessness analysis did not articulate the applicable standard in any detail but simply noted that the evidence could have supported any of the various theories of "official act" presented to the jury. (*Ibid.*) The Court did not suggest that it would affirm only if it concluded that the jury actually decided the case on a valid theory; it simply invoked the *Neder* formulation of *Chapman* as routinely applied in ordinary instructional-error cases. (*Ibid.*) Under the circumstances of *McDonnell*, it plainly could not be determined beyond a reasonable doubt that the verdict would have been the same absent the error.

3. Finally, contrary to the Public Defender's contention, the *Green* test is not well suited to assessing alternative-legal-theory error in all circumstances. (OSPD Brief 16-18.) Throughout its brief, the Public Defender underscores that it is possible in cases of alternative-legal-theory error, unlike in other instructional-error contexts, to determine what the jury "actually did." (OSPD Brief 11-13, 17-18, 29-31; see also ABM 11-12, 20-22.) But not every appellate record will affirmatively disclose the grounds for the jury's verdict. When it does, it is of course proper to affirm or reverse on that basis. (See *Flood, supra*, 18 Cal.4th at p. 504; *Guiton, supra*, 4 Cal.4th at p. 1130.) When it does not, there is no reason to distinguish alternative-legal-theory error from other types of instructional errors that are subject to the ordinary *Chapman* standard.

It is no more possible to assess whether the jury actually rendered a proper verdict when the record does not disclose the basis for the verdict than when the jury was prevented by an error from rendering a proper verdict in the first place. Yet *Chapman* applies in the latter context. (See *Neder, supra*, 527 U.S. at p. 17.) Contrary to the Public Defender's insistence that harmless-error review must focus on what the jury "actually did" (see OSPD Brief 31, fn. 17), *Neder* holds that the Constitution permits a reviewing court to make an assessment of harmlessness even when that assessment is based on evidence the jury did not "actually consider." (*Neder, supra*, 527 U.S. at pp. 11, 17 [disavowing the "alternative reasoning" of *Sullivan v. Louisiana* (1993) 508 U.S. 275, 280, that harmless-error analysis must be predicated upon an "actual verdict"].) Where the record is silent as to the reasons for the jury's verdict, a prejudice inquiry independent of what the jury actually determined is "unavoidable," thus satisfying the Public Defender's own criterion for application of the ordinary *Chapman* standard. (See OSPD Brief 17-18

[arguing that inquiry into "what a rational jury would have done" is permissible only when unavoidable].)

Indeed, the nature of alternative-legal-theory error cuts against any heightened standard of prejudice. The Public Defender argues that such a standard is warranted in this context because a jury is not well equipped to detect the incorrect legal theory (as it might a faulty factual theory); because the jury is likely to rely on the incorrect theory; and because courts are at greater risk of invading the jury's fact-finding function when assessing this type of error. (OSPD Brief 16-18.) But a jury is no more likely to detect an omitted or misdescribed element—errors that are unquestionably subject to *Chapman*—than it is to recognize an incorrect alternative legal theory. (See *Pulido*, *supra*, 555 U.S. at pp. 60-61.) Nor is there any reason to think that a jury will generally credit a legally invalid theory over a valid one. That depends on the circumstances of a given case. And if there is even a reasonable doubt that the jury credited the valid theory, then the error would not meet the *Chapman* standard for harmlessness. Moreover, a court applying *Chapman* in this context necessarily must determine whether it appears beyond a reasonable doubt that the jury credited the valid theory that was actually presented at trial. That determination comports with the jury's factfinding function rather than intrudes upon it.

The *Pulido* Court was therefore correct in observing that it would be patently illogical to subject alternative-legal-theory error to a more stringent prejudice analysis than other, similar instructional errors. (*Pulido*, *supra*, 555 U.S. at p. 61.)

CONCLUSION

The judgment of the Court of Appeal should be reversed.

Dated: March 13, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached Answer to Amicus Curiae Brief uses a 13 point Times New Roman font and contains 3,389 words.

Dated: March 13, 2019

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DECLARATION OF SERVICE BY U.S. MAIL

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 March 13, 2019, I served the attached **ANSWER TO STATE PUBLIC DEFENDER'S AMICUS CURIAE BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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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 March 13, 2019, at Los Angeles, California.

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