

OPPORTUNAL

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2 COURT OF APPEAL No. F082878

3 SUPERIOR COURT No. BF176040

4
5 IN THE
6 SUPREME COURT OF THE UNITED STATES
7

8 JULIO ANGEL TORREZ JR-
9 PETITIONER

VS.

10 THE PEOPLE,
11 PLAINTIFF AND RESPONDENT

12 ON PETITION FOR A WRIT OF CERTIORARI TO
13

14 IN THE SUPREME COURT OF CALIFORNIA
15

16 PETITION FOR WRIT OF CERTIORARI
17 AND COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIFTH APPELLATE
18 DISTRICT

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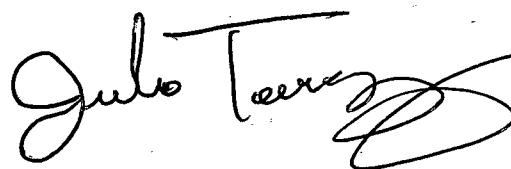


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Petition for Review

Appellant Julio Angel Torrez, Jr. respectfully petitions this Court for review under California Rules of Court, rule 8.500.

On January 17, 2023, the Court of Appeal issued a decision affirming the judgment of conviction and remanding for a full resentencing. No petition for rehearing was filed. The Court of Appeal's unpublished decision is attached as an appendix.

Issues Presented for Review

The following issues are presented for this Court's review under rule 8.500(b) of the California Rules of Court:

- I.** Is a defendant's silence in a recorded jail call admissible as an adoptive admission where he had been informed of his right to remain silent, his counsel advised him to remain silent if confronted by accusations of guilt, he received a warning that the call was monitored, and he said (during the call) that he did not want to talk about the charged crime because his statements could be used against him?
- II.** Does using a defendant's silence violate due process under *Doyle v. Ohio* (1976) 426 U.S. 610 (*Doyle*) where the defendant remains silent selectively in a private conversation after being informed of his right to remain silent, advised by counsel to remain silent if accused of guilt, and warned his conversation is being recorded?

III. Does using a defendant's silence in a recorded jail call violate the due process right to a fair trial where he had been informed of his right to remain silent, his counsel advised him to remain silent if confronted by accusations of guilt, he received a warning that the call was monitored, and he said (during the call) that he did not want to talk about the charged crime because his statements could be used against him?

IV. Did the Court of Appeal misapply the harmless error test of *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*) by determining that the error lacked prejudice not by analyzing the errors' effect on the verdicts, but the effect of other evidence on the verdicts?

V. Is it error to deny a request to modify CALCRIM No. 357's instruction on adoptive admissions to inform the jury that, when deciding whether the defendant's silence adopted a statement's truth, it may consider evidence the defendant relied on a right to remain silent?

VI. Did the above errors' cumulative prejudicial effect deny the defendant his Fourteenth Amendment right to due process?

Statement of the Case

An information charged Torrez with attempted murder (Pen. Code, §§ 187, subd. (a), 664,^{1/} Count 1); assault with a deadly weapon (§ 245, subd. (a)(1), Count 2); inflicting corporal injury resulting in a traumatic condition (§ 273.5, subd. (a), Count 3); and felony child endangerment (§ 273a, subd. (a), Count 4). (1CT 75–87.) It also alleged various conduct and criminal history enhancements. (1CT 76–86.)

A jury found Torrez guilty as charged in Counts 2 and 3. (2CT 576; 3CT 638, 640.) The jury acquitted Torrez of Count 1's attempted-murder charge, but it found him guilty of the lesser-included offense of attempted voluntary manslaughter (§§ 192, subd. (a), 664). (2CT 576, 3CT 632, 635.) The jury also acquitted Torrez of Count 4's felony child-endangerment charge but convicted him of the lesser-included offense of misdemeanor child abuse (§ 273a, subd. (b)). (2CT 577; 3CT 643, 645.) The jury found numerous conduct enhancements true. (2CT 576–577; 3CT 636–641.) At a bifurcated bench trial, the court found the criminal history allegations true. (10RT 1771–1772.)

The trial court sentenced Torrez to an aggregate prison term of 22 years. (3CT 831–832; 4CT 886; 15RT 2326.) Torrez filed a timely notice of appeal. (3CT 869.)

On appeal, Torrez raised seven claims for relief: the judgment should be reversed because the trial court's admission of Torrez's silence as tacit adoptive admissions under Evidence Code sec-

^{1/} Undesignated statutory references are to the Penal Code.

tion 1221 was an abuse of discretion (AOB Part I); the judgment should be reversed because the trial court's order admitting the purported tacit admissions violated federal due process (AOB Part II); the judgment should be reversed because the trial court erred by refusing to modify CALCRIM No. 357 to inform the jury that, when deciding the meaning of Torrez's silence, it could consider evidence that Torrez relied on his right to remain silent (AOB Part III); the judgment should be reversed because the above errors' cumulative prejudicial effect denied Torrez a fair trial (AOB Part IV); the matter should be remanded for resentencing under Assembly Bill No. 518 (AOB Part V); the matter should be remanded for resentencing under Senate Bill No. 567 (AOB Part VI); and the multiple prior serious felony enhancements should be stricken (AOB Part VII).

In an unpublished opinion, the Court of Appeal rejected Torrez's first four claims. It affirmed the convictions and remanded for resentencing. (Slip opn., at p. 25.)

Statement of the Facts

A. The prosecution's case

Uncontested evidence showed that Torrez stabbed Natalie in the chest inside her apartment. (5RT 762–767, 773–775; SCT 11.) She survived.

Torrez was arrested the next day. (7RT 1129–1137.) At that time, Torrez had three cuts on his right palm. (7RT 1158–1159; 9RT 1548–1549; People's Exhibit 103-C [Photos 86 and 88].)

While in jail, Torrez made numerous phone calls to Arias. In many calls, Arias accused Torrez of trying to kill her. (2CT 544–545, 33, 63, 67.) Mostly, Torrez did not directly respond to those accusations. (2CT 544–545; SCT 33, 68.)

In several calls, Torrez claimed he did what he did because he was scared and feared for his life. (SCT 28, 35, 40, 45.) In one call, he told Arias: “You know, uh, Like I said, you know, I was - I was scared. I was - that’s my life, you know? That’s - that’s what I wanna tell you.” (SCT 28.)

In a second call, Torrez explained: “Look, you know what I mean, to be honest, I fear [sic] for my life. You know, I mean, I - I was scared, you know what I mean? That’s why I reacted the way I reacted, you know?” (SCT 35.) Shortly after, Torrez told Arias that he forgave her. (SCT 35.) In response, Arias asserted, “I didn’t do anything to you, Julio. . . . I didn’t do nothing to you. I was nothing . . . but good to you.” (SCT 35–36.) Torrez did not directly reply to that assertion. (SCT 35–36.)

In a third call, Torrez continued to claim he feared for his life. (SCT 40, 45.) “I felt like my life was in jeopardy,” he told Arias. (SCT 40.) Arias asked, “Like how can you say your life was in danger when you were cheating on me with Brandy” (SCT 40.) Torrez later explained, “The only reason I did it, I felt like my life was in jeopardy, that’s why I did it, you know.” (SCT 45.)

B. The defense case

The defense played a jail call for the jury. (9RT 1527; 1CT 167–178.) During the call, Arias twice told Torrez that he is “not

guilty." (1CT 174.) Torrez explained, "All I gotta say is I defended myself. You know what I mean?" (1CT 174.) Arias responded, "Okay then. Then that - that - that's - you defended yourself." (1CT 175.) Torrez continued, "And - and - and - you know what I mean? You have your brother there." (1CT 175.) "Okay. You defended yourself," Arias replied. (1CT 175.)

Argument — Necessity for Review

I. The trial court abused its discretion under Evidence Code section 1221 by admitting the purported tacit admissions that Torrez made in recorded jail calls.

Torrez's first claim on appeal demonstrates that the trial court abused its discretion under Evidence Code section 1221 by admitting evidence of his silence as tacit adoptive admissions. (See AOB Part I.) The Court of Appeal failed to adjudicate this claim's merits. Instead, it assumed the claim was meritorious. (Slip opn., at p. 15.) For the reasons below, this Court should grant review to address this claim.

A. This Court has held that a defendant's silence can be admitted as a tacit adoptive admission if the trial court determines that the circumstances (1) afforded the defendant a fair opportunity to respond and (2) did not lend themselves to an inference the defendant was relying on his constitutional right to silence.

Evidence code section 1221 provides: "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with

knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth.”

Where the party responds to the accusation with silence, evasion, or equivocation, it is admissible under limited circumstance as a *tacit* adoptive admission. (*People v. McDaniel* (2019) 38 Cal.App.5th 986, 998 (*McDaniel*)).

To gain admission of a party’s silence as a tacit admission, the proponent of the evidence “must establish the statement was made under circumstances that would normally call for a response if the statement were untrue.” (*McDaniel, supra*, 38 Cal.App.5th at p. 998.) Thus, before admitting a purported tacit admissions, the trial court must find that the accusatory statement was made “‘under circumstances which fairly afford [the defendant] an opportunity to hear, understand, and to reply, and which do not lend themselves to an inference that he was relying on the right of silence guaranteed by the Fifth Amendment to the United States Constitution.’ [Citation.]” (*People v. Riel* (2000) 22 Cal.4th 1153, 1189 (*Riel*)).

B. Here, the evidence showed that Torrez had been made aware of his right to remain silent, his attorney advised him to remain silent if confronted by accusations of guilt, and he knew the jail calls were recorded. The trial court abused its discretion by admitting Torrez’s silence as tacit admissions.

The record as a whole shows that Torrez lacked a fair opportunity to respond. First, Torrez knew that law enforcement was

Jail calls are a common source of evidence in criminal prosecutions. Such calls are recorded by jail phone systems, like the Securus system used here. (7RT 1174.) And when they are recorded, inmates are informed that the calls are recorded, as Torrez was here. (7RT 1184.)

Thus, the evidentiary issue that arose here — a dispute over the admission of a defendant's silence during a recorded jail call — is likely to recur with frequency. Review is warranted to provide incarcerated individuals clarity concerning the risks they may take by remaining silent.

Further, the unusual fact pattern presented here — where the defendant not only was aware the jail calls were being recorded, but also had received *Miranda* warnings and been advised by defense counsel to remain silent — gives this Court a unique opportunity to address the limits of the admissibility of a defendant's silence under Evidence Code section 1221.

Accordingly, this case presents an important legal question of statewide importance. This Court should grant review to settle this important question of law under rule 8.500(b)(1) of the California Rules of Court.

II. The admission of the purported tacit admissions violated Torrez's Fourteenth Amendment due process right to a fair trial under the rule of *Doyle v. Ohio*.

Torrez's second claim in the Court of Appeal presented two related federal due process arguments. (See AOB Part II.C.1-2.) The first argument was that the admission of Torrez's silence

violated the rule of *Doyle*, *supra*, 426 U.S. 610. The Court of Appeal failed to adjudicate this argument's merits. Instead, it assumed the argument was meritorious. (Slip opn., at p. 15.) For the reasons below, this Court should grant review on this federal due process issue.

A. Under the rule of *Doyle v. Ohio*, it is unfair to use a defendant's silence against him after he has been advised that he has a right to remain silent.

In 1976, in *Doyle*, the high court held that impeaching a defendant's trial testimony with evidence of his post-*Miranda* silence was fundamentally unfair and a violation of due process. (*Doyle*, *supra*, 426 U.S. at pp. 617-619; U.S. Const., 14th Amend.) The *Doyle* court explained that "every post-arrest silence is insolubly ambiguous" when it follows the mandated warnings that anything the arrestee says may be used against him and that he has a right to remain silent. (*Id.* at p. 617.) Those warnings imply "that silence will carry no penalty." (*Id.* at p. 618.) "In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." (*Ibid.*)

This Court has extended the *Doyle* rule to bar the prosecution from using a defendant's post-*Miranda* silence as evidence of guilt in its case-in-chief. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 118 (*Coffman*)).

B. Here, the evidence shows that Torrez had been advised that he had a right to remain silent before the jail calls in which he remained silent when confronted by accusations of guilt. The admission of Torrez's silence violated due process under *Doyle v. Ohio*.

Here, Torrez was given *Miranda* warnings when arrested (People's Exhibit 101 [Transcript of Julio Torrez Interview, at pp. 7-8, 10]), and his defense counsel advised him to remain silent if confronted by accusations of guilt (2CT 465-466), and he knew the jail calls were recorded and monitored (2CT 543; 4RT 516; 7RT 1184). Further, his statements in the jail calls reveal that he believed remaining silent would protect him because he understood his statements could be used against him. (1CT 169, 175, 177; 2CT 545, 547; SCT 31-32, 43, 61.)

Thus, the record shows that Torrez subjectively believed that his silence was protected, and that his statements could be used against him.

The *Doyle* rule was not premised on an overly technical application of the Fifth Amendment's privilege against self-incrimination. Rather, it is a due process case that turns on fundamental fairness. (See *Doyle, supra*, 426 U.S. at p. 618.) Under the circumstances here, Torrez faced a challenging dilemma. On the one hand, he could follow the advice of defense counsel and remain silent, comforted by the *Miranda* warnings' implicit assurance that the Constitution protected his silence. On the other, he could speak and let the prosecution use his words against him.

As in *Doyle*, the use of Torrez's silence in the prosecution's case-in-chief was "fundamentally unfair and a deprivation of due process." (*Doyle, supra*, 426 U.S. at p. 618.) As demonstrated below, the error was prejudicial and requires reversal of the judgment. (See Part IV, *post*.)

C. This case presents the Court an opportunity to resolve two important legal questions related to the rule of *Doyle v. Ohio*.

This Court's prior cases have left unresolved two legal questions that might limit the *Doyle* rule's application. This Case presents both questions.

1. This Court should grant review to hold that the rule of *Doyle v. Ohio* applies — at least under certain circumstances — in private conversations.

Doyle involved a defendant's silence in a police interrogation. (*Doyle, supra*, 426 U.S. at pp. 612–616.) One District Court of Appeal has extended the *Doyle* rule to private conversations between a defendant and a private citizen. (*People v. Eshelman* (1990) 225 Cal.App.3d 1513, 1518–1520 (*Eshelman*).) Under *Eshelman*, the *Doyle* rule applies "when the evidence demonstrates that defendant's silence in front of a private party results primarily from the conscious exercise of his constitutional rights." (*Id.* at p. 1520.)

This Court has not approved of *Eshelman*'s extension of the *Doyle* rule. In one decision, this Court has suggested that *Eshelman* is good law. (See *People v. Hajek and Vo* (2014) 58

Cal.4th 1144, 1212 [“‘*Doyle* does not apply where, as here, the conversation in which the defendant was silent involved a private party ‘absent a showing that such conduct was an assertion of [the defendant’s] rights to silence and counsel.’ (*People v. Eshelman* (1990) 225 Cal. App. 3d 1513, 1520 . . .).] But this Court has not expressly endorsed *Eshelman*.

As a result, the Attorney General argued in the Court of Appeal that Torrez’s *Doyle* claim fails, in part, because he did not invoke silence while being interrogated by a law enforcement officer. (RB 29–30.) The Attorney General’s argument demonstrates that *Eshelman*’s validity is unclear.

Moreover, this Court should grant review to clarify this point of law, not for the benefit of attorneys, but for the benefit of ordinary citizens. What silence does the Constitution protect? If a private citizen accuses me of a crime, does the Constitution give me the right to remain silent? Or can the government use my silence used against me in a criminal prosecution?

Ordinary citizens and arrestees, like Torrez, should not be left to guess at the bounds of the constitutional protection surrounding silence. Accordingly, this is an important question of law, and this Court should grant review to answer it.

2. This Court should grant review to hold that the rule of *Doyle v. Ohio* applies even where the defendant remains silent selectively.

In *People v. Bowman* (2011) 202 Cal.App.4th 353, 364 (*Bowman*), the court held that the *Doyle* rule does not apply to a defendant’s selective silence. However, as this Court has noted,

several federal appellate courts have reached the opposite conclusion. (*Coffman, supra*, 34 Cal.4th at pp. 118–119 [collecting cases].) Despite the disagreement on the question of law, this Court has declined to weigh in. (*Ibid.*)

Again, this Court should grant review to clarify this point of law for the benefit of ordinary citizens who may find themselves in the difficult position of answering a barrage of accusatory questions. They should not be left to guess whether they may remain silent without the risk of having their silence be used against them in a criminal prosecution. Therefore, this Court should grant review and resolve this important question of law.

III. The admission of the purported tacit admissions violated Torrez's Fourteenth Amendment due process right to a fair trial under *Estelle v. McGuire* and *People v. Medina*.

The second federal due process argument raised in the Court of Appeal presents another question of law that this Court has left open—that is, is it fundamentally unfair to use a defendant's silence against him when the defendant remained silent in a recorded jail call, was previously *Mirandized*, and was aware that the call was being monitored? (See AOB Part II.C.2, citing *People v. Medina* (1990) 51 Cal.3d 870 (*Medina*).) The Court of Appeal failed to adjudicate this argument's merits. Instead, it assumed it was meritorious. (Slip opn., at p. 15.) This Court should grant review to resolve this important legal question.

A. Under *Estelle v. McGuire*, the admission of evidence violates federal due process if it results in a trial that is fundamentally unfair.

Admitting evidence violates the Fourteenth Amendment's due process clause if it makes the trial fundamentally unfair. (*Estelle v. McGuire* (1991) 502 U.S. 62, 70 (*McGuire*); *Spencer v. Texas* (1967) 385 U.S. 554, 563–564.)

B. In *People v. Medina*, this Court suggested — but did not decide — that the admission of a defendant's silence would violate due process if the evidence showed he knew his conversation was being recorded by law enforcement.

In *Medina*, the defendant challenged the admission of a silent adoptive admission under federal due process principles. (*Medina, supra*, 51 Cal.3d at p. 890; U.S. Const., 5th & 14th Amends.) He argued “the premise underlying the adoptive admissions rule (namely, that silence in the face of an accusatory statement may constitute an admission of guilt) is invalid and irrational,” at least in criminal cases where the purported adoptive admission is made after the defendant has been *Mirandized*. (*Medina*, at p. 890.)

The *Medina* court noted that “once *Miranda* [citation] warnings have been given, it may be constitutionally improper to introduce evidence of an accused's postarrest silence.” (*Medina, supra*, 51 Cal.3d at p. 890.) But the high court rejected the defendant's constitutional challenge because the record did not show he had been *Mirandized* or believed his conversation was being monitored. (*Ibid.*)

This Court expressly declined to decide whether "application of the adoptive admissions rule would be unfair" where "an in-custody, *Mirandized*, suspect is confronted with an accusatory statement in circumstances where he may be presumed to suspect the monitoring of his conversation." (*Medina, supra*, 51 Cal.3d at p. 891.) "We do not decide whether, in such circumstances, application of the adoptive admissions rule would be unfair, essentially requiring the defendant to respond to avoid an adverse inference of guilt if he remains silent." (*Ibid.*)

C. Here, the record shows that Torrez was aware of his right to remain silent, his attorney advised him to remain silent if confronted by accusations of guilt, and he knew the jail calls were being recorded. Admitting the tacit admissions under these circumstances was fundamentally unfair and a denial of due process.

This case offers this Court an opportunity to resolve that unanswered question. The facts present a somewhat narrower variation because the record shows that — in addition to being *Mirandized* and knowing the jail calls were being recorded — Torrez was advised by defense counsel to remain silent if accused of guilt.

The facts presented here pose a narrower constitutional question: Is it fundamentally fair to apply the adoptive admission rule to an in-custody, *Mirandized* defendant who knows his conversation is being recorded, and who was advised by defense counsel not to respond to accusations of guilt? Since the *Medina* court left

unanswered the broader constitutional question, this narrower question is a novel legal issue of first impression.

Under these circumstances, the admission of the purported tacit admissions was fundamentally unfair. Several state high courts have considered the admission of tacit admissions against criminal defendants and concluded that doing so is — in all cases — unfair. (See, e.g., *Ex parte Marek* (Ala. 1989) 556 So.2d 375, 380–382; *Commonwealth v. Dravecz* (1967) 424 Pa. 582 [227 A.2d 904, 909].) Another found the practice troubling, and therefore imposed strict evidentiary rules for admitting such evidence. (*State v. Forbes* (2008) 157 N.H. 570 [953 A.2d 433, 435–436].) As these out-of-state decisions explain, there are many reasons why a criminal defendant might remain silent, including: inattention; fear; anger; dignity; pride; awareness that there is no obligation to respond; knowledge that a response could be used at trial; or a desire to placate or manipulate the accuser.

When, as here, the defendant has been *Mirandized*, advised by defense counsel to remain silent, and warned that his calls are being recorded, it would not be natural for the defendant to respond to each and every accusation of guilt. Instead, it would be more natural for a defendant in Torrez's position to rely on the advice of counsel (and the prior *Miranda* warnings) and remain silent when accused during a conversation that is being recorded by law enforcement.

Thus, under the narrow facts of this case, the admission of the purported tacit admissions denied Torrez his federal due process right to a fair trial. (*McGuire, supra*, 502 U.S. at p. 70;

Medina, supra, 51 Cal.3d at p. 890; U.S. Const., 14th Amend.) As demonstrated below, the error was prejudicial and requires reversal of the judgment. (See Part IV, *post*.)

D. This case presents this Court an opportunity to decide the issue it left open in *People v. Medina* and hold that it is a denial of due process to admit a defendant's silence on a recorded jail call where the defendant knew the call was being monitored, had been made aware of his right to remain silent, and had been advised by counsel to remain silent.

Again, this case gives this Court a chance to resolve an unanswered question concerning the protection afforded to ordinary citizens' silence by the federal Constitution. The fact pattern that this Court, in *Medina*, suggested might violate a defendant's federal due process right to a fair trial is presented here. To provide citizens the benefit of clarity on this important question of law, this Court should grant review.

IV. The Court of Appeal's harmless error analysis misapplies the *Chapman v. California* standard — and thereby violated Torrez's Sixth Amendment right to a jury trial — by finding the above errors harmless based on the presence of other evidence of guilt.

The Court of Appeal's opinion assumes that Torrez's three claims above have merit. It then rejects the claims by concluding that the erroneous admission of the tacit admissions was harmless under *Chapman, supra*, 386 U.S. 18. (Slip opn., at pp. 15–18.) However, the opinion misapplies the *Chapman* standard by foc-

using not on *the error's* effect on the verdicts, but on the effect of *other evidence*. This Court should grant review.

A. *Chapman v. California* requires reversal unless the state proves beyond a reasonable doubt that the error — here, the erroneously admitted evidence — did not contribute to the jury's verdict.

Federal constitutional errors require reversal unless the People prove "beyond a reasonable doubt" that the error "did not contribute to the verdict obtained," (*Chapman, supra*, 386 U.S. at p.

24.)

In *Sullivan v. Louisiana* (1993) 508 U.S. 275, 277–278 (*Sullivan*), the Court explained that harmless error review exists in tension with the Sixth Amendment's jury trial right. The *Sullivan* court resolved the tension by instructing courts to apply the *Chapman* test in a manner that is "[c]onsistent with the jury-trial guarantee." (*Id.* at p. 279.) The overall task of the reviewing court is to determine whether the verdicts *actually rendered by this jury in this trial* were not attributable to the error. (*Ibid.*)

As the *Sullivan* court explained: "[T]he question [Chapman] instructs the reviewing court to consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. [Citation.] Harmless-error review looks, we have said, to the basis on which 'the jury actually rested its verdict.' [Citation.] The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty ver-

dict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered — no matter how inescapable the findings to support that verdict might be — would violate the jury-trial guarantee. [Citations.]” (*Sullivan, supra*, 508 U.S. at p. 279.)

B. Here, the Court of Appeal did not focus, as *Chapman v. California* demands, on the erroneously admitted evidence’s effect on the jury’s verdicts, and it instead focused on the effect of *other evidence* on the verdicts. The Court of Appeal’s analysis violated Torrez’s Sixth Amendment right to a jury trial.

The Court of Appeal’s opinion concludes that any error in the admission of the tacit admissions was harmless beyond a reasonable doubt under *Chapman*. (Slip opn., at pp. 15–18.) But this conclusion rests on a misapplication of *Chapman*.

Rather than focus on *the error’s effect* on the jury’s actual verdicts, the opinion instead focuses on the effect of *other evidence*. That is, while the Court of Appeal should have addressed whether Arias’s accusations that *she did nothing to Torrez* (SCT 35–36) and that *she did not endanger him* (SCT 40–41), the Court of Appeal instead focused on Torrez’s statements that other people were in the apartment (slip opn., at pp. 16–17).

Based on its review of *other evidence*, the Court of Appeal surmised that Torrez’s “claim of ‘self-defense’ was clearly based on a third party being present rather than defending an attack

issue of law to reiterate the correct application of the *Chapman* standard.

V. The trial court erred by refusing Torrez's proposed modification of CALCRIM No. 357, which would have correctly informed the jury that it may consider evidence that Torrez relied on his right to remain silent when assigning meaning to his silence under the tacit admission rule.

Torrez's fourth claim in the Court of Appeal argued that the trial court erred by refusing a request to modify CALCRIM No. 357 to inform the jury that it could consider evidence that Torrez relied a constitution right to remain silent when deciding whether he intended his silence to adopt the truth of Natalie's statements. (See AOB Part IV.) This Court should grant review.

A. This Court has held that whether a defendant's conduct actually constituted an adoptive admission is a question for the jury to decide.

This Court's decisions have clearly established that "whether [a] defendant's conduct actually constituted an adoptive admission [is] a question for the jury to decide." (See, e.g., *Riel, supra*, 22 Cal.4th at p. 1189.)

B. Here, trial evidence supported an inference that Torrez remained silent in reliance on his right of silence, not as an adoption of the accusations' truth, but the jury was not instructed that it could consider such reliance when assigning meaning to his silence.

The trial court instructed the jury concerning the evidence of the purported tacit admissions as follows:

If you conclude that someone made a statement outside of court that accused the defendant of the crime or tended to connect the defendant with the commission of the crime and the defendant did not deny it, you must decide whether each of the following is true:

1. The statement was made to the defendant or made in his presence;
2. The defendant heard and understood the statement;
3. The defendant would, under all the circumstances, naturally have denied the statement if he thought it was not true;

AND

4. The defendant could have denied it but did not.

If you decide that all of these requirements have been met, you may conclude that the defendant admitted the statement was true.

If you decide that any of these requirements has not been met, you must not consider either the statement or the defendant's response for any purpose.

(3CT 601; 10RT 1717-1718; CALCRIM No. 357.)

Torrez had requested, and the trial court refused, a modification to the instruction. The modification would have informed the jury that it could consider evidence that Torrez relied on a constitutional right of silence when deciding whether he intended his silence to admit the truth of Natalie's statements:

If you decide that all of [the four requirements included in CALCRIM No. 357] have been met, you may conclude that the defendant admitted the statement was true, *unless you believe that*

defendant failure [sic] to respond was in reliance on his right of silence guaranteed by the Fifth Amendment of the United States Constitution."

(2CT 559, italics added.)

The requested modification was a correct statement of law. The Court of Appeal did not disagree. (Slip opn., at pp. 20-21.) Rather, the Court of Appeal concluded the modification was argumentative in that it pointed out only one of several factors a jury could consider. (Slip opn., at p. 21.)

But the Court of Appeal's opinion fails to consider how the constitutional right to remain silent differs from other possible motivations for remaining silent — e.g., fear, anger, or pride. The Constitution is not implicated when a defendant remains silent because he or she is afraid, angry, or prideful. But it does protect a defendant's right to remain silent when the defendant subjectively relies on the Constitution's protection. (See *People v. Jennings* (2003) 112 Cal.App.4th 459, 473, fn. 2 ["silence remains constitutionally protected if it appears to be an assertion of the right to remain silent"].)

Thus, reliance on the Fifth Amendment's right to remain silent is deserving of special treatment. Where evidence supports an inference that a defendant remained silent based on the invocation of the Constitution's protection, the jury ought to know that such reliance bars consideration of the defendant's silence as evidence of guilt.

The modification was not argumentative. It was necessary to guide the jury's consideration of the trial evidence, which

supported a reasonable inference that Torrez relied on a right to remain silent.

C. The instructional error violated Torrez's Fourteenth Amendment right to a fair trial, and the error was prejudicial under *Chapman v. California*.

The instructional error had the practical effect of permitting the jury to use Torrez's invocation of his constitutionally protected right of silence as evidence of guilt, contrary to due process. (See *Doyle, supra*, 426 U.S. at pp. 618-619; *Eshelman, supra*, 225 Cal.App.3d at p. 1520; U.S. Const., 14th Amend.; see also Part II, *ante*.) Accordingly, the instructional error requires reversal under *Chapman, supra*, 386 U.S. 18. Insofar as the error permitted the jury to consider the tacit admission evidence addressed above, the error was prejudicial for the same reasons. (See Part IV, *ante*.)

D. This case presents the Court an opportunity to grant review and hold that it is error to deny a request to instruct the jury that it may consider evidence that the defendant relied on his right to remain silence when determining whether the defendant's silence was an adoptive admission.

The Court should grant review to decide this important question of law. This case gives the Court an opportunity to review the adequacy of CALCRIM No. 357 when the trial evidence supports an inference that the defendant relied on a constitutional right to remain silent. Since such silence is constitutionally protected, the jury should be informed that it

cannot consider the defendant's silence if it concludes the defendant relied on his or her constitutional right to remain silent.

Accordingly, this Court should grant review and hold that the trial court must instruct on the right to remain silent when such a modification of CALCRIM No. 357 is requested and supported for substantial evidence.

VI. The above errors' cumulative prejudicial effect denied Torrez his Fourteenth Amendment right to a fair trial.

"Under the 'cumulative error' doctrine, errors that are individually harmless may nevertheless have a cumulative effect that is prejudicial." (*In re Avena* (1996) 12 Cal.4th 694, 772, fn. 32.) Multiple errors' combined effect violates due process where that effect renders the resulting criminal trial fundamentally unfair. (*Chambers v. Mississippi* (1973) 410 U.S. 284, 298, 302–303; U.S. Const., 14th Amend.)

Here, the errors above had a "synergistic effect," building on one another to deny Torrez a fair trial. (*People v. Hill* (1998) 17 Cal.4th 800, 847.) If this Court were to conclude that *some* of the tacit admissions should have been excluded as a matter of state statutory law (see Part I, *ante*; AOB Part I) or federal due process (see Parts II & III, *ante*; AOB Part II.C.1–2), and that the instructional error tainted the jury's assessment of the remaining tacit admissions (see Part V, *ante*; AOB Part III), then it should conclude that the errors' combined prejudicial effect was prejudicial. If this Court reaches those conclusions, then the jury would have

ORIGINAL

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7 OF MOTION FOR LEAVE TO PROCEED IN FORMA
8 PAUPERES

JURISDICTION

10 THE DATE ON WHICH THE HIGHEST STATE
11 COURT DECIDED MY CASE WAS MARCH 29 2023
12 A COPY OF THAT DECISION APPEARS AT
13 APPENDIX C.

14 THE JURISDICTION OF THIS COURT IS
15 INVOKED UNDER 28 U.S.C. § 1257 (A)

LIST OF PARTIES

16 ALL PARTIES APPEAR IN THE CAPTION OF THE
17 CASE ON THE COVER PAGE.

20 RECEIVED

21 MAY 18 2023

22 OFFICE OF THE CLERK
23 SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

PETITIONER RESPECTFULLY PRAYS THAT A WRIT
OF CERTIORARI ISSUE TO REVIEW THE JUDGEMENT
BELOW.

OPINIONS BELOW

STATE COURT:

- THE OPINION OF THE HIGHEST STATE COURT TO REVIEW THE MERITS APPEARS AT APPENDIX C. TO THE PETITION AND IS UNPUBLISHED
- THE OPINION OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIFTH APPELLATE DISTRICT, APPEARS AT APPENDIX B TO THE PETITION AND IS UNPUBLISHED

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(A)

RECEIVED SOME INADMISSIBLE TACIT ADMISSESS
AND (B) APPLIED AN INCOMPLETE INSTRUCTION
TO THE ADMISSIBLE TACIT ADMISSESS - THESE
ERRORS ALTERED THE JURY'S ASSESSMENT
OF THE EVIDENCE AND TORREZ'S SELF-
DEFENSE CLAIM, REQUIRING REVERSAL
AND REMAND FOR A NEW TRIAL.

BECAUSE AT LEAST ONE OF THE ABOVE
ERRORS VIOLATED THE FEDERAL CONSTITUTION
(SEE PARTS II & III, ANTE; AND PART II, C. 1-2),
THE PEOPLE MUST PROVE PROVE BEYOND A
REASONABLE DOUBT THAT THE COMBINED
ERRORS DID NOT AFFECT THE JURY'S VERDICTS.
(CHAPMAN, *supra*, 386 U.S. AT P. 24.)
THE PEOPLE CANNOT SATISFY THAT BURDEN,
SO THIS COURT SHOULD REVERSE THE JUDGMENT
AND REMAND FOR A NEW TRIAL.

CONCLUSION

FOR THE REASONS ABOVE, THIS COURT SHOULD
GRANT CERTIORARI REVIEW.

April 30, 2023

RESPECTFULLY SUBMITTED

Julio Angel Torrez Jr

Julio Torrez

Defendant-Appellant

CERTIFICATION OF WORD COUNT

I, JUAN ANGEL TORREZ JR, HEREBY CERTIFY
THAT, ACCORDING TO ~~THE~~ MY COUNT,
APPELLANT'S PETITION FOR CERTIORARI, REVIEW
CONTAINS 6,946 WORDS. WHICH IS LESS
THAN THE 8,400 WORDS MAXIMUM.

I DECLARE UNDER PENALTY OF PERJURY
UNDER THE LAWS OF THE STATE OF CALIFORNIA
THAT THE FOREGOING IS TRUE AND CORRECT.

EXECUTED APRIL 30, 2023, IN LANCASTER,
CALIFORNIA.

JUAN ANGEL TORREZ JR.

APPELLANT AND DEFENDANT

JUAN TORREZ