CA No. 12-35461

Before the Honorable Harry Pregerson, Mary H. Murguia, and
Morgan B. Christen, CJJ
Panel Opinion filed March 27, 2014

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FLOYD MATTHEW MAYES,

Petitioner-Appellant,

v.

JEFF PREMO, Superintendent,
Mill Creek Correctional Facility,

Respondent-Appellee.

D.C. No. 3:06-CV-06334-HU

On Appeal from the United States District Court
for the District of Oregon

BRIEF OF *AMICI* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE, AND CALIFORNIA APPELLATE DEFENSE COUNSEL IN SUPPORT OF PETITION FOR REHEARING AND REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Amici submit the following corporate disclosure statement, as required by FED. R. APP. PROC. 26.1 and 29(c):

Amicus curiae National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation organized under the laws of the District of Columbia. It has no parent corporation, and no publicly held corporation owns ten percent or more of its stock.

Amicus curiae California Attorneys for Criminal Justice ("CACJ") is a nonprofit corporation organized under the laws of California. It has no parent corporation, and no publicly held corporation owns ten percent or more of its stock.

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Respectfully Submitted,

Dated: May 23, 2014.

/s/ Tarik S. Adlai
TARIK S. ADLAI
Counsel for Amici Curiae

INTEREST OF AMICI CURIAE

Amici curiae are nonprofit voluntary professional bar associations that work on behalf of criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. Many of *amici*'s members are regularly engaged in post-conviction practice, including appellate representation and federal habeas corpus proceedings. *Amici*'s members regularly confront whether errors committed in the trial courts have had a prejudicial effect on the proceedings, a conclusion that often controls whether the clients of *amici*'s members will be able to obtain relief as a result of those errors. *Amici*'s members have an ongoing interest in the fair and proper resolution of the standards governing whether an error will be found prejudicial. *Amici* respectfully request rehearing or rehearing en banc because the published Majority Opinion in this case incorrectly states federal law and, in the confusion it may create, may also adversely influence California law. A list and description of *amici* are in an appendix.[1] All parties consent to the filing of this *amicus* brief.

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1. Pursuant to FED. R. APP. PROC. 29(c)(5), *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and its counsel made a monetary contribution to its preparation or submission.

REASONS FOR GRANTING REHEARING AND REHEARING EN BANC

Amici ask the Court to grant rehearing and amend the panel's Majority Opinion by either (a) eliminating its analysis of the prejudicial impact of hearsay evidence found not to be constitutional error or (b) substituting the current discussion with a harmless error analysis recognizing that prejudice is gauged by an error's effect in contributing to the verdict, and not on whether a jury might have reached the same verdict on the remaining evidence. *Amici* alternatively suggest the Court rehear the case en banc to settle important principles governing reviewing courts' assessment of whether an error was prejudicial.

The Majority Opinion commits three interrelated errors in its harmless error analysis. First, although Supreme Court and Ninth Circuit precedent require evaluating the impact an error had on the trial that actually occurred, the Majority Opinion invites analysis based on a hypothetical trial where the challenged error had not occurred. Maj. Op. 29, 32. Second, although Supreme Court and Ninth Circuit precedent instruct that sufficient evidence of guilt apart from the error does not preclude finding prejudice if the error nonetheless had a substantial effect or influence on the verdict, the Majority Opinion

asserts that substantial evidence supporting the verdict after the error has been stripped away "prevents [a petitioner] from demonstrating actual prejudice." Maj. Op. 29. Third, although the Supreme Court has ruled that the prejudicial effect of an error should be assessed in the context of "the entire record" – which includes assessing not only the strengths, but also the weaknesses of the prosecution's case – the Majority Opinion invites a prejudice analysis that asks only whether "the state could have met its burden" with the remaining evidence, divorced from challenges to the reliability of that evidence. Maj. Op. 29.

By repeatedly stating, in a published opinion, that substantial evidence independent of an error established the harmlessness of the error, the Majority endorses a legal standard that conflicts with Supreme Court precedent as well as creates an intra-circuit conflict. By declaring the alleged error harmless when viewing the evidence favorably to the prosecution, the Majority ignores Supreme Court and Ninth Circuit precedent requiring that prejudice be evaluated in light of the "entire record," including "challenges to the prosecution's evidence," and here, too, creates an intra-circuit conflict.

SUMMARY OF ARGUMENT

The Majority's prejudice analysis is fundamentally misguided in defining the parts of the record considered when assessing prejudice. The Majority erroneously limits its focus to a hypothetical trial – one where the error never occurred – and then improperly credits all inferences jurors could have drawn favoring the prosecution while ignoring countervailing factors that might have inspired jurors to discount that evidence.

After erroneously defining the facts from which harmlessness is evaluated, the Majority then applies an erroneous standard for assessing prejudice. The Majority erroneously credits the existence of "substantial evidence" as dispositive, misconstrues the relevance of evidentiary weight, and fails to consider whether or how the error had an "effect or influence" on the verdict or contributed to it.

I. The Sixth Amendment Constrains Reviewing Courts' Harmless-Error Analysis

The "most important element" of the right to trial by jury is "to have the jury, rather than the judge, reach the requisite finding of 'guilty.'" *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993). The Sixth

Amendment is not premised on an assumption that juries are better than judges in divining truth, *Duncan v. Louisiana*, 391 U.S. 145, 157 (1968), but is, instead, "a fundamental reservation of power in our constitutional structure." *Blakely v. Washington*, 542 U.S. 296, 306 (2004). As such, a reviewing court's harmless error analysis must be conducted in a manner that is "consistent with the jury-trial guarantee." *Sullivan*, 508 U.S. at 279-80.[2]

II. The Majority Creates an Intra-Circuit Conflict By Endorsing a Harmless-Error Analysis Based On a Hypothetical Trial without the Error and By Crediting the Prosecution's Evidence While Ignoring Its Weaknesses

A. The Prejudicial Effect of an Error Does Not, Under *Brecht*, Involve Hypothesizing a Trial Without the Error

In several instances, the Majority asserts prejudice analysis may be nothing more than assessing what remains after excising the alleged error from the record. Rather than addressing the impact or contribution of the challenged uncross-examined statement by

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2. "Harmless-error analysis is not an excuse for overlooking error because the reviewing court is itself convinced of the defendant's guilt. The determination of guilt is for the jury to make, and the reviewing court is concerned solely with whether the error may have had a 'substantial effect' upon that body." *United States v. Lane*, 474 U.S. 438, 465 (1986) (Brennan, J., concurring and dissenting).

Walking-Eagle, for example, the Majority finds prejudice lacking because "evidence *other than* Walking-Eagle's statement" supported the conviction, Maj. Op. 29, and speculates about what a jury would have done "absent Walking-Eagle's statement." Maj. Op. 32.

But, "the crucial thing is the effect the error had in the proceedings which actually took place, not whether the same thing could have been done in hypothetical proceedings." *Lane*, 474 U.S. at 465 (Brennan, J., concurring and dissenting).

As Justice Scalia explained for a unanimous Supreme Court:

> Harmless-error review looks, we have said, to the basis on which "the jury *actually rested* its verdict." The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. 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.

Sullivan, 508 U.S. at 279 (original emphasis), quoting *Yates v. Evatt*, 500 U.S. 391, 404 (1991).

As Judge Wardlaw has emphasized, "*The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error*." *Sassounian v. Roe*, 230 F.3d 1097, 1111 (9th Cir. 2000) (original emphasis). "The question posed for us by [*Brecht*] is not

. . . whether the jury would have decided the same way even in the absence of the error." *Arnold v. Runnels*, 421 F.3d 859, 869 (9th Cir. 2005), citing *Kotteakos v. United States*, 328 U.S. 750, 763-65 (1946) and *Brecht v. Abrahamson*, 507 U.S. 619, 642-43 (1993) (Stevens, J., concurring).[3]

Reviewing courts must evaluate "all that happened *without stripping the erroneous action from the whole*." *Merolillo v. Yates*, 663 F.3d 444, 454 (9th Cir. 2011) (emphasis added), quoting *Kotteakos*, 328 U.S. at 765. Accord *O'Neal*, 513 U.S. at 437-37; *Arnold*, 421 F.3d at 868.

By suggesting that prejudice is determined by evaluating what remains after ignoring the error, the Majority Opinion contravenes *Brecht* and conflicts with numerous decisions of this Court including *Arnold*, *Sassounian*, and *Merolillo*.

B. Harmless-Error Analysis Requires Evaluating the Whole Record, Including Weaknesses in the Prosecution's Evidence

"Just because the prosecution's evidence, *if credited*, would

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3. The Supreme Court has treated Justice Stevens' concurrence as the *Brecht* Court's dispositive pronouncement. *O'Neal v. McAninch*, 513 U.S. 432, 438-39 (1995).

provide strong support for a guilty verdict, it does not follow that [contrary] evidence . . . [was] weak." *Holmes v. South Carolina*, 547 U.S. 319, 330 (2006) (original emphasis).

In assessing an error's impact, the evidence is not construed in the light most favorable to the prosecution but, instead, the conclusion must be made "in light of the whole record." *Brecht*, 507 U.S. at 638. *See also Murtishaw v. Woodford*, 255 F.3d 926, 973 (9th Cir. 2001). "Focus[ing] on the totality of the effect of the error" requires considering "the entire record." *Sechrest v. Ignacio*, 549 F.3d 789, 808, 812 (9th Cir. 2008).[4]

An error's prejudicial effect is not muted merely because "sufficient" or "substantial" evidence exists from which jurors might still have made found against the defense. Rather, "the true strength of the prosecution's proof cannot be assessed without considering challenges to the reliability of the prosecution's evidence." *Holmes*, 547 U.S. at 330. See, e.g., *Guevara v. Gipson*, – Fed.Appx. – (9th Cir. Feb. 6, 2014) (No. 10-55835) (Christen, J., dissenting).

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4. Accord *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986); *Kennedy v. Lockyer*, 379 F.3d 1041, 1054 n.15 (9th Cir. 2004) (collecting cases).

Before considering the individual factors relevant to assessing prejudice from a Confrontation Clause violation, the Majority states "Just like the jury, we consider Hall's and Knight's testimony in our prejudice analysis." Maj. Op. 29. However, after acknowledging that "Knight certainly had a motive to minimize his own involvement," the Majority Opinion discounts his obvious bias by opining jurors were nonetheless "free to decide that Knight had no reason to conjure up Mayes's participation in the crime." Maj. Op. 31. *But see Babb v. Lozowsky*, 719 F.3d 1019, 1035 (9th Cir. 2013) (Murguia, J.) ("We emphasize that the issue is not simply whether we can be reasonably certain that the jury *could* have convicted Babb.") (original emphasis).

Amici agree reviewing courts may properly consider the testimony of a rewarded informer and a co-defendant attempting to minimize his culpability. What the Majority Opinion should not have done, however, is assume jurors would accept, in toto, testimony whose credibility was disputed. "The gap in this logic is that the court had to assume that the jury accepted the prosecution's version of the evidence." *Hanna v. Riveland*, 87 F.3d 1034, 1038 (9th Cir. 1996). This flawed logic also contravenes the Sixth Amendment. "Where the credibility of the

prosecution's witnesses or the reliability of its evidence is not conceded, the strength of the prosecution's case cannot be assessed without making the sort of factual findings that have traditionally been reserved for the trier of fact." *Holmes*, 547 U.S. at 330.

In "The Principal Evidence" section of its opinion, the Majority confirms "Conway, the only adult eyewitness to the crime other than the participants, could never confidently identify Mayes," Hall "suffered some credibility problems" and "was not positive he had correctly identified . . . Mayes," and Knight confessed his role while claiming "he only agreed to go along because he was afraid of Mayes, Washington, and Walking-Eagle." Maj. Op. 9-10. When evaluating whether any error was harmless, however, these facts are nowhere mentioned – and given no weight – in an analysis that emphasizes only evidence tending to connect Mayes to the crime.

"By evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side." *Holmes*, 547 U.S. at 331. By assuming the full strength of the prosecution's disputed evidence, the Majority disregards *Holmes* and *Brecht*, and ignores with the "whole record" review required by *Murtishaw* and *Sechrest*.

III. The Majority Disregards Supreme Court Precedent and Creates an Intra-Circuit Split in the Standards Employed to Evaluate Whether an Error was Prejudicial

A. Prejudice Analysis Neither Requires, Nor Permits, Fact-Finding by an Appellate Court

"It is the responsibility of the jury – not the court – to decide what conclusions should be drawn from evidence admitted at trial." *Coleman v. Johnson*, 132 S.Ct. 2060, 2062 (2012); *Sparf v. United States*, 156 U.S. 51, 78-79 (1895). Reviewing judges are in no position to observe "the variations in demeanor and tone of voice that bear so heavily on" jurors' assessments of credibility. *Anderson v. Bessemer*, 470 U.S. 564, 575 (1985). A witness's inflection may reveal confidence, diffidence, or evasion, but the record reads the same.

When considering the prejudicial effect of statements the defense could not cross-examine, the Supreme Court has admonished that reviewing courts "cannot speculate as to whether the jury, as sole judge of the credibility of a witness, would have" eventually credited the witness. *Davis v. Alaska*, 415 U.S. 308, 317 (1974); *Van Arsdall*, 475 U.S. at 684 (the "correct inquiry" must "assum[e] that the damaging

potential of the cross-examination were fully realized").[5]

In discounting prejudice because "the jury was free to decide that Knight had no reason to conjure up Mayes's participation," Maj. Op. 31, the Majority Opinion authorizes judicial endorsement of witnesses whose credibility was contested at trial.

The defendant's probable guilt is not the focus:

> [T]he question is *not* were they (the jurors) right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting.
>
> This must take account of what the error meant to them, not singled out and standing alone, but in relation to all else that happened. And one must judge others' reactions not by his own, but with allowance for how others might react and not be regarded generally as acting without reason. This is the important difference, but one easy to

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5. In the context of hearsay statements by a person who did not testify, the Majority's focus on cross-examination of the testifying witness seems misplaced. Cross-examining someone who claims to have heard an out-of-court statement is generally no substitute for cross-examining the out-of-court declarant him- or herself. *Cf.* Maj. Op. 12, 31-32. The adequacy of other cross-examination concerns the declarant who made the questioned statement, not the person testifying the out-of-court statement was made. *Merolillo*, 663 F.3d at 457; see also *Ocampo v. Vail*, 649 F.3d 1098, 1117 (9th Cir. 2011). *Amici* withhold judgment on the import of Anna's inclination towards intoxicants when the opinion is unclear whether she was inebriated when the uncross-examined statement was allegedly made.

ignore when the sense of guilt comes strongly from the record.

Brecht, 507 U.S. at 642-43 (original emphasis) (Stevens, J., concurring), quoting *Kotteakos*, 328 U.S. at 764. Accord *Arnold*, 421 F.3d at 867-68.

As the late Judge T.G. Nelson acknowledged in *Standen v. Whitley*, 994 F.2d 1417 (9th Cir. 1993), "the cold record left me with an abiding belief in Warren Standen's guilt. . . . However, the jury is the body whose conclusion matters." *Id.*, at 1426 (T.G. Nelson, J., concurring). When, instead of asking whether the error *contributed* to the verdict, a reviewing court asks "what a reasonable jury would have done . . . 'the wrong entity judges the defendant guilty.'" *Sullivan*, 508 U.S. at 281, quoting *Rose v. Clark*, 478 U.S. 570, 578 (1986). *Cf.* Maj. Op. 32.

B. Substantial *Influence*, not Substantial *Evidence*

The Majority's assertion that "substantial evidence other than [the challenged statement] . . . prevents [Mayes] from demonstrating actual prejudice," Maj. Op. 29, fails to "put the burden on the beneficiary of the error [here, the State] to prove that there was no injury." *O'Neal*, 513 U.S. at 437 (brackets original; ellipses omitted).

The threshold for sufficiency requires that "no rational trier of fact could have found guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 317 (1979). Foreclosing relief whenever the remaining evidence survives a bare sufficiency review would preclude a finding of prejudice in what is likely the vast majority of cases: where reasonable jurors could have gone either way and the State, just as easily, could have lost the trial had it not benefitted from the error.

Prejudice turns, instead, on "whether the erroneously admitted evidence had a substantial and injurious effect or influence in determining the jury's verdict." *Doody v. Ryan*, 649 F.3d 986, 1022 (9th Cir. 2011) (en banc). This standard "requires a reviewing court to decide that the error did not influence the jury, and that the judgment was not substantially swayed by the error." *Brecht*, 507 U.S. at 642 (Stevens, J., concurring).

"This is not a sufficiency of the evidence" standard. *Hanna*, 87 F.3d at 1038. "[W]e must determine, not whether there was substantial evidence to convict[], but whether [the error] had a substantial influence on the conviction." *Hanna*, 87 F.3d at 1039.

Accord *Taylor v. Maddox*, 366 F.3d 992, 1017 (9th Cir. 2004).[6] An error may be prejudicial, by adversely influencing the verdict, "regardless of whether there is sufficient evidence to support the conviction apart from the error." *Ghent v. Woodford*, 279 F.3d 1121, 1127 (9th Cir. 2002).

Neither the word "effect" or "influence" appears anywhere in the Majority Opinion which, obviously, never considers whether any such "effect or influence" was substantial. The Majority never questions whether the out-of-court statements contributed to the verdict.[7]

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6. "There is no basis in our law for [] a [sufficient evidence] review of constitutional error committed by a state trial court." *Standen*, 994 F.2d at 1423. The *Brecht* "standard is not whether the evidence was sufficient or whether the jury would have decided the same way even in the absence of the error. The question is whether the error influenced the jury." *Arnold*, 421 F.3d at 869.

7. In discounting the significance of the prosecution's summation, *cf. Ocampo*, 649 F.3d at 1114 (prosecutor's reference to erroneously admitted evidence tends to establish, not negate, prejudice), the Majority declares the *prosecutor's reference* "not likely" to have impacted the jury "in light of the other evidence admitted at trial." Maj. Op. 30. Besides simply relying on the abstract existence of "other evidence" divorced from whether it was compelling, uncontested, or overwhelming, the Majority also employs the wrong standard. "A 'substantial and injurious effect' means a 'reasonable probability' that the jury would have arrived at a different verdict," *Byrd v. Lewis*, 566 F.3d 855, 860 (9th Cir. 2009), which is "is not whether the defendant would more likely have received a different verdict." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

By ignoring entirely whether the challenged evidence had an "effect" or "influence" on the verdict and focusing only on sufficient evidence apart from the error, the Majority ignores this Court's en banc opinion in *Doody* and creates an intra-circuit conflict with the panels in *Ghent*, *Hanna*, *Taylor*, and *Arnold*, among others.[8]

C. Considerations of Evidentiary Strength

Amici do not dispute the relevance of considering "the overall strength of the prosecution's case." *Van Arsdall*, 475 U.S. at 684. Accord *Ocampo*, 649 F.3d at 1114. The ultimate strength of the prosecution's case is relevant "because a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Parle*, 505 F.3d at

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8. The importance of evaluating the effect of an error, as opposed to whether substantial evidence remained absent the error, is confirmed by the fact that "an evidentiary error . . . is not necessarily rendered harmless by the fact there was other, cumulative evidence properly admitted." *Parle v. Runnels*, 505 F.3d 922 (9th Cir. 2007), citing *Krulewitch v. United States*, 336 U.S. 440, 444-45 (1949) (in a close case, erroneously admitted evidence – even if cumulative – can "tip[] the scales" against the defendant); *Hawkins v. United States*, 358 U.S. 74, 80 (1958) (erroneously admitted evidence, "though in part cumulative," may have "tip[ped] the scales against petitioner on the close and vital [disputed] issue").

928 (internal quotations omitted).

What *Amici* wish to stress, and what the Majority does not express sensitivity to, is that a judicial assessment of the strength of the prosecution's case must not trench on the jury's constitutional role.

Courts have found prejudice lacking where "the evidence was so overwhelming that the constitutional error *cannot be said to have had an effect* upon the verdict." *Morales v. Woodford*, 388 F.3d 1159, 1172 (9th Cir. 2004) (emphasis added). See also *Jackson v. Brown*, 513 F.3d 1057, 1079 (9th Cir. 2008); *Moses v. Payne*, 555 F.3d 742, 755 (9th Cir. 2009); *Shaw v. Terhune*, 380 F.3d 473, 480 (9th Cir. 2003) (overwhelming *uncontradicted* evidence negated prejudice).[9]

That prosecution evidence was "strong" or "weighty" does not alone negate prejudice. *Cf.* Maj. Op. 32.[10] This Court has rejected

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[9]. However, even while endorsing consideration of the relative strength of the undisputed prosecution evidence, the Supreme Court has "admonished . . . against giving too much emphasis to 'overwhelming evidence' of guilt." *Harrington v. California*, 395 U.S. 250, 254 (1969).

[10]. Rather than find comments on post-*Miranda* silence harmless because evidence of guilt was "weighty," *Brecht* found the error harmless because, in addition to the evidence being weighty, the references "were infrequent," especially given "the State's extensive and permissible references to petitioner's pre-*Miranda* silence." *Brecht*, 507 U.S. at 639.

arguments that constitutional error "was harmless 'because the evidence of guilt was compelling' [and] that 'the State presented devastating evidence directly connecting [Arnold] to [the crime],'" because that approach "misapprehends the *[Brecht]* harmless error standard." *Arnold*, 421 F.3d at 868-69.

When assessing the evidentiary strength of the prosecution's case, the court must not "become in effect a second jury to determine whether the defendant is guilty. Rather a court, in typical appellate court fashion, asks whether the record contains evidence that could rationally lead to a contrary finding." *Neder v. United States*, 527 U.S. 1, 19 (1999). Accord *Conde v. Henry*, 198 F.3d 734, 741-42 (9th Cir. 1999).

Thus, the reviewing court's concern is not ensuring jurors could have reached the same result, *cf.* Maj. Op. 32; *Babb*, 719 F.3d at 1035, but ensuring there is no reasonable possibility jurors might have reached a different conclusion. *Holly v. Yarborough*, 568 F.3d 1091, 1101 (9th Cir. 2009). For example, an error might be found harmless where the error does not affect facts "supported by uncontroverted evidence" and there is no "evidence sufficient to support a contrary

finding." *Neder*, 527 U.S. at 18-19. Or an error may be harmless where it relates to a fact that "was not in dispute" and therefore "did not contribute to the verdict." *Id.,* at 7.

In this case, rather than resolving prejudice by asking whether "the jury was free to" credit prosecution witnesses, a proper prejudice analysis would have recognized that jurors were equally free to reject Hall's testimony because he "had a reason to lie given his plea agreement." *E.g.*, *Doody*, 649 F.3d at 1022. Rather than simply state Knight's testimony "was corroborated" by Thornton, Maj. Op. 29, a proper analysis would have not only acknowledged the suspect nature of Knight's testimony given his "motive to minimize his own involvement," but also discounted the strength of corroboration by a witness who "several times prior to trial [] retracted her statement that Mayes had confessed to her." Maj. Op. 11 n.6.[11]

The linchpin is not simply whether the evidence was "weighty" or

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[11] *Amici* clarify that our concern is not whether the remaining testimony established (or negated) prejudice, or whether Hall's or Knight's testimony was (or was not) sufficiently corroborated. Our concern is the rules the Majority apply; rather than focusing on whether the prosecution's version *could* have been credited, the focus should have been on whether there was "evidence sufficient to support a contrary finding." See Part III.A, *ante*.

even "overwhelming," but whether the other evidence was *so compelling* that any effect the error might have had can be dismissed as insubstantial.[12] *Renderos v. Ryan*, 469 F.3d 788, 798 (9th Cir. 2006) (remaining evidence not only "damning" but also "unchallenged"); *Parle v. Runnels*, 387 F.3d 1030, 1045 (9th Cir. 2004); *Lawson v. Borg*, 60 F.3d 608, 613 (9th Cir. 1995) (harmlessness possible where improper evidence "rendered insignificant by overwhelming evidence of guilt").

However, where the reviewing court "cannot say that the evidence . . . was overwhelming," "a finding by this court that there is sufficient evidence for a rational jury to [convict] would deny appellant's their right to have a jury decide this question." *United States v. Recio*, 371 F.3d 1093, 1103 (9th Cir. 2004). See also Gregory Mitchell, *Against "Overwhelming" Appellate Activism: Constraining Harmless Error Review*, 82 CAL. L. REV. 1335 (1994).

CONCLUSION

Amici take no position whether the hearsay evidence (if constitutional error) was prejudicial. The Majority states that

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12. "[T]he threshold of overwhelming evidence is far higher than mere sufficiency to uphold conviction." *Lane*, 474 U.S. at 450.

testimony of two other witnesses "was strong," that the uncross-examined statement "added nothing new," and that the challenged statement may have been "not very important in this week-long trial." Maj. Op. 30-31. *Amici* do not opine on the strength of these factors beyond noting that the Majority's interpretation of the record may have been colored by its focus on whether the same verdict was possible instead of whether a different verdict was impossible.

Amici appreciate that "busy appellate judges sometimes write imperfect opinions." *Calderon v. Coleman*, 525 U.S. 141, 147 (1998) (Stevens, J., dissenting). The Court's focus was properly on a fact-intensive *Batson* claim that spawned a dissent and whether the hearsay statement by a co-defendant who pled guilty and was likely available to the prosecution violated the Confrontation Clause, both made more complex by AEDPA. Having found no error, Maj. Op. 25-28, the intricacies of harmless error may have appeared only secondary.

But "the evaluation of an error as harmless or prejudicial is one of the most significant tasks of an appellate court, as well as one of the most complex." R. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 80 (1970). Because significant portions of its analysis either endorse an

approach to prejudice that is erroneous as a matter of law or, if not erroneous, phrased in a way likely to cause confusion as to the proper approach when evaluating whether constitutional error is prejudicial, *Amici* respectfully request the Court grant rehearing and amend its opinion. Rehearing en banc is justified because the error here is not unique. *United States v. Lopez*, – F.3d – (9th Cir. Apr. 2, 2014), *pet'n reh'g filed* Apr. 25, 2014 (No. 12-50464).

Respectfully Submitted,

Dated: May 23, 2014.

/s/ Tarik S. Adlai
TARIK S. ADLAI
Counsel of Record

APPENDIX

Identity of Amici and Interests

***

NACDL was founded in 1958. NACDL has a nationwide membership of approximately 10,000 and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors and judges. NACDL provides amicus assistance on the federal and state level in cases that present issues of importance, such as the one presented here, to criminal defendants, criminal defense lawyers, and the proper and fair administration of criminal justice.

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CACJ is a non-profit corporation founded in 1972. It has over 1,700 dues-paying members, primarily criminal defense lawyers. CACJ is a statewide organization of criminal defense counsel who practice mainly in California, including lawyers who defend the indigent and counsel in private practice who represent clients by appointment or by retainer. A principal purpose of CACJ, as set forth in its bylaws, is to defend the rights of individuals guaranteed by the United States Constitution. CACJ is concerned that the Majority's published opinion

in this case would undermine criminal defendants' rights to due process and adequate assistance of counsel and fair and reliable determinations for post-conviction relief. CACJ has appeared before this Court on several occasions on matters, like this one, which are of importance to its membership.

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CADC is a state-wide organization of approximately four hundred appellate lawyers who regularly represent criminal defendants in California's appellate courts and in federal habeas corpus proceedings challenging judgments in criminal cases arising out of California. CADC's members regularly confront the legal standards for addressing whether error is prejudicial both in the context of litigating issues on behalf of their clients as well as in selecting the issues worthy of being pursued during post-conviction review.

CERTIFICATE OF COMPLIANCE

Pursuant to FED. R. APP. PROC. 29 and Ninth Circuit Rule 29-2, I certify that this brief is proportionally spaced, has a typeface of 14 points or more, and contains 4,173 words according to the word-count feature of the word processing system used to prepare this brief.

Dated: May 23, 2014.

/s/ Tarik S. Adlai
Tarik S. Adlai

CERTIFICATE OF SERVICE
U.S.C.A. No. 12-35461

I hereby certify that on May 23, 2014, I electronically filed the foregoing **BRIEF OF *AMICI* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE, AND CALIFORNIA APPELLATE DEFENSE COUNSEL IN SUPPORT OF PETITION FOR REHEARING AND REHEARING EN BANC** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Tarik S. Adlai
Tarik S. Adlai

CERTIFICATE

Mayes v. Premo

Case No. 12-35461

Pursuant to Rule 6(c) of the Administrative Order Regarding Electronic Filing in All Ninth Circuit Cases I certify that this brief is identical to the version submitted electronically on May 23, 2014.

Dated: May 27, 2014.

/s/ Tarik S. Adlai

Tarik S. Adlai