S258912

Supreme Court No. _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re	)	Court of Appeal (First District, Division One)
RICO RICARDO LOPEZ,	)	No. A152748
On Habeas Corpus,	)	Sonoma County Superior Court
	)	No. SCR-32760

PETITION FOR REVIEW

People's Appeal from Order Granting
Petition for Writ of Habeas Corpus
Challenging the Judgment of the Superior Court
of the State of California for the County of Sonoma

HONORABLE DANA BEERNINK SIMONDS, JUDGE
(habeas corpus proceeding)

HONORABLE RAIMA H. BALLINGER, JUDGE
(jury trial)

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Appointed by the Court of Appeal
under the First District Appellate
Project independent case system

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In re RICO RICARDO LOPEZ, On Habeas Corpus,	)	Court of Appeal (First District, Division One) No. A152748 Sonoma County Superior Court No. SCR-32760

PETITION FOR REVIEW

TO: THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Petitioner and respondent RICO RICARDO LOPEZ, through his counsel, hereby petitions this Court for review of the decision of the Court of Appeal, First Appellate District, Division One, filed September 25, 2019, reversing the order of the Superior Court of Sonoma County which granted respondent Lopez's petition for writ of habeas corpus. A copy of the Court of Appeal's opinion is attached hereto as Appendix "A." Lopez filed no petition for rehearing.

This Court should grant review in respondent Lopez's case under Rule 8.500(b)(1) of the California Rules of Court, in order to settle an important question of law.

ISSUE PRESENTED FOR REVIEW

I. Does submission to a jury of an unauthorized natural and probable consequences theory of aiding and abetting a first degree murder, in violation of *People v. Chiu* (2014) 59 Cal.4th 155, require reversal of a first degree murder conviction, when another verdict by the jury may reflect a finding of intent to kill, but the other verdict did not require any finding of premeditation and deliberation, and other indicia in the record suggest that the jury may have relied on the unauthorized natural and probable consequences theory to convict the defendant?

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STATEMENT OF THE CASE AND FACTS

For purposes of this petition, respondent Lopez hereby adopts the statement of the case and statement of facts contained in the opinion of the Court of Appeal (see slip opinion, pp. 1-5), attached hereto as Appendix "A."

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ARGUMENTS

I

THE TRIAL COURT DID NOT ERR IN GRANTING THE CHIU PETITION AND ORDERING, ALTERNATIVELY, THAT THE PEOPLE RETRY RESPONDENT FOR FIRST DEGREE MURDER OR THAT THE CONVICTION BE REDUCED TO SECOND DEGREE MURDER

Respondent Lopez argued in this People's appeal that the Court of Appeal should affirm the lower court's grant of habeas corpus which vacated Lopez's first degree murder conviction. It was undisputed that *Chiu* instructional error occurred at Lopez's trial. (Slip opinion, pp. 5- 7.) It is settled that a *Chiu* error can be found harmless on habeas corpus only when the People can prove beyond a reasonable doubt that the error did not contribute to the verdict. (*In re Martinez* (2017) 3 Cal.5th 1216, 1226; *In re Loza* (2018) 27 Cal.App.5th 797, 805.) Here, the record supports the lower court's finding that the *Chiu* error in respondent's case was not harmless beyond a reasonable doubt, insofar as (1) the prosecutor in summation encouraged the jury to rely on the invalid natural and probable consequences theory of aiding and abetting for a conviction of first degree murder, (2) the jury on the fifth day of deliberations asked the court for further guidance about relying on the invalid theory for a conviction of first degree murder, and (3) the jury on the sixth day of deliberations returned a verdict finding Lopez guilty of first degree murder. (See slip opinion, pp. 3-4.) Therefore Lopez argued that the Court of Appeal should affirm the lower court's grant of habeas corpus, reversing his first degree murder conviction.

The Court of Appeal mistakenly rejected respondent Lopez's contention. (Slip opinion, pp. 7-11.) The Court reasoned that the *Chiu* error was harmless because the jury found true the gang special circumstance under section 190.2, subdivision (a)(22),[1/] which required a finding that Lopez acted with an intent to kill, as opposed to an intent to commit one of the target crimes. (Slip opinion, p. 9.) The Court did not consider that the jury's true finding on the gang special circumstance did not require a finding that Lopez premeditated and deliberated.

This Court should grant review, clarify that submission to a jury of an unauthorized natural and probable consequences theory of aiding and abetting a first degree murder, in violation of *People v. Chiu, supra,* 59 Cal.4th 155, requires reversal of a first degree murder conviction, when another verdict by the jury may reflect a finding of intent to kill, but the other verdict did not require any finding of premeditation and deliberation, and other indicia in the record suggest that the jury may have relied on the unauthorized natural and probable consequences theory to convict the defendant, and affirm the lower court's order granting habeas corpus relief to respondent Lopez.

In *People v. Chiu, supra*, 59 Cal.4th 155, this Court articulated the standard of prejudice to be applied to a *Chiu* instructional error on appeal:

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1. Section references are to the Penal Code unless otherwise indicated.

> When a trial court instructs a jury on two theories of guilt, one of which was legally correct and one legally incorrect, reversal is required unless there is a basis in the record to find that the verdict was based on a valid ground. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1128-1129 []; *People v. Green* (1980) 27 Cal.3d 1, 69-71 [].) Defendant's first degree murder conviction must be reversed unless we conclude beyond a reasonable doubt that the jury based its verdict on the legally valid theory that defendant directly aided and abetted the premeditated murder. *(People v. Chun* [(2009)] 45 Cal.4th [1172], 1201, 1203-1205.)

(*Chiu, supra,* at p. 167, parallel citations omitted.)

This Court subsequently held in *In re Martinez, supra,* 3 Cal.5th 1216 that the same standard of determining prejudice must apply to a review of *Chiu* error in a habeas corpus proceeding:

> [O]n a petition for writ of habeas corpus, as on direct appeal, *Chiu* error requires reversal unless the reviewing court concludes beyond a reasonable doubt that the jury actually relied on a legally valid theory in convicting the defendant of first degree murder.

(*Id*. at p. 1218.) This Court in *In re Martinez* explained that this standard of determining prejudicial error is appropriate on habeas corpus review when, due to a change in the law, a trial court has erroneously instructed a jury on what constitutes aiding and abetting a crime, because such an error deprives a defendant of the right to jury trial under the Sixth Amendment, which "implies a right to a jury properly instructed in the relevant law." (*Id.* at p. 1224, citing *Neder v. United States* (1999) 527 U.S. 1, 12 [144 L.Ed.2d 35]; U.S. Const., Amends. VI, XIV.)

Here, it cannot be determined beyond a reasonable doubt that when the jury at respondent Lopez's trial convicted him of first

degree murder, it relied on a legally valid theory rather than the natural and probable consequences theory of aiding and abetting liability.

The Superior Court explained this uncertainty in its Order Granting Petition for Writ of Habeas Corpus. (4 CT 784-792.)[2/] In deciding the charges, the jury's first task was to decide whether respondent committed murder. Its next decision was as to the degree of the murder, although it may have decided that it was first degree as part of the process of deciding that respondent committed murder. Only then would it have decided whether the gang special circumstance was true. In making its first or its first and second decisions, the easier way for the jury to decide whether respondent was guilty of murder was to apply the natural and probable consequences theory. (4 CT 790-791; see ¶ 6.) That is true for two reasons. First, the jury could apply that theory and find that respondent committed or aided and abetted a breach of the peace or an assault and that a killing was the natural and probable result of one of those crimes, without having to decide whether he was the actual killer. (4 CT 789-790; see ¶ 4.) Second, by applying that theory, the jury could decide that respondent was guilty of murder without having to decide whether he intended to kill.

Although the jury ultimately also found true the gang special circumstance (§ 190.2, subd. (a)(22)), requiring a finding of intent to kill, the jury may not have found that respondent had the intent to kill at the time of its first decision, when it initially convicted him of

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2. CT refers to the Clerk's Transcript on appeal in No. A152748.

murder. In other words, when the jury subsequently found true the special circumstance allegation, it may for the first time have decided that respondent had the intent to kill, because it may have previously decided that he was guilty of murder on the natural and probable theory.

In fact, had the jurors convicted respondent of murder on the natural and probable consequences theory of aiding and abetting liability without finding an intent to kill, they would have been accepting the explicit invitation by the prosecutor to do so. The prosecutor argued to the jury on rebuttal at respondent's trial:

> And then the law says, you know what else makes a lot of sense; people who are out there engaged in crimes, need to be responsible for whatever the natural and probable consequences of those crimes are. Meaning, you're out there with your home boys. You're in a gang and you go out with knives. Call it breach of peace, call it assault, call it whatever you want, but if you're out there with knives committing an assault or breach of the peace, and if somebody is murdered, then you're down for that murder if that murder was natural and probable during those circumstances. And that law makes sense.
>
> So are these fall back positions of the DA? No. It's called the law of the State of California, and the judge is going to read it to you in a little while. So that's why I tell you, it just doesn't matter. You do not have to decide whether any particular defendant was an actual stabber. You should decide whether these defendants aided and abetted in the murder itself. *And you should decide whether these defendants aided and abetted in the target offense and the murder being the natural and probable consequence thereof.*

(2 CT 340-341; emphasis added.)

Thus the record supports the conclusion that the jury may well have based its verdict of guilty of first degree murder on the natural and probable consequences theory of aiding and abetting liability. Therefore it cannot be said that the *Chiu* instructional error was harmless beyond a reasonable doubt as to respondent's first degree murder conviction.

The Court of Appeal's opinion completely overlooked this argument by respondent, which was set forth in the Superior Court's Order Granting Petition for Writ of Habeas Corpus. (See 4 CT 784-792.)

Instead, the Court based its decision on its view that the jury's true finding on the gang special circumstance, which requires a finding of intent to kill, establishes that the *Chiu* instructional error was harmless. (Slip opinion, pp. 9-10.) To do so, the Court had to distinguish *People v. Brown* (2016) 247 Cal.App.4th 211, where the court reversed a defendant's first degree murder conviction for natural and probable consequences instructional error, despite a true finding on the gang murder special circumstance, which required a finding of intent to kill. (*Id*. at pp. 224-227.) The court in *Brown* reasoned that the jury's request for further instruction on the invalid natural and probable consequences theory of aiding and abetting liability shortly before it reached its verdict "tend[ed] to indicate" that at least one of the jurors voted guilty based on the incorrect instruction. (*Id*. at p. 226.)

Although the Court of Appeal acknowledged that respondent's jury similarly asked the court for further explanation of the natural and probable consequences theory, the Court of Appeal reasoned

that "there is no indication that jurors were considering this [natural and probable consequences theory] theory for [respondent] Lopez specifically." (Slip opinion, p. 11.) But the Court did not and could not suggest that there was any indication that the jurors were considering this theory for any one of respondent's codefendants, rather than for respondent. The Court of Appeal could only point to the evidence presented at trial, which the Court called "overwhelming," insofar as respondent "was seen after the murder with blood on his clothes and shoes and holding a knife handle, and he also bragged about the stabbing afterward." (Slip opinion, p. 11.) However, although this evidence certainly implicated respondent in some level of participation in the attack against the victim in which at least five assailants were involved (slip opinion, p. 2), the evidence did not necessarily compel every juror to find that respondent intended to kill or premeditated and deliberated. The evidence permitted jurors to infer that respondent may have acquired his bloodstains as a result of physical contact with the victim or the other assailants following a stabbing by other assailants, and that respondent may never have intended that the victim be stabbed by respondent himself or by any other assailant. The Court of Appeal's observation that respondent did not challenge the sufficiency of the evidence in his direct appeal from the judgment (slip opinion, p. 11) does not bolster its analysis, inasmuch as respondent's claim in this case is that his conviction must be reversed due to a potentially prejudicial instructional error, not due to insufficiency of the evidence.

The Superior Court that granted respondent's petition for

writ of habeas corpus was correct to conclude that it could not find that the *Chiu* instructional error was harmless beyond a reasonable doubt at respondent's trial. Accordingly, respondent's conviction of first degree murder must be reversed.

There now appears to be a conflict or at least some confusion among the intermediate appellate courts about whether a jury's true finding as to a gang special circumstance may or must result in a reviewing court finding that a *Chiu* instructional error was harmless beyond a reasonable doubt. This year, the court in *People v. Anthony* (2019) 32 Cal.App.5th 1102 found that a jury's special circumstance finding that a defendant had an intent to kill rendered it unnecessary to reverse a defendant's conviction of first degree murder that was possibly based on the invalid natural and probable consequences theory of aiding and abetting liability. (*Id.* at pp. 1144-1146.) But previously the court in *People v. Brown, supra,* 247 Cal.App.4th 211 reversed a defendant's first degree murder conviction for natural and probable consequences instructional error, despite a true finding on the gang murder special circumstance, which required a finding of intent to kill. (*Id*. at pp. 224-227.) Granting review in respondent Lopez's case may allow this Court to settle the applicable standard of prejudice in a case of *Chiu* instructional error.

Review is warranted so that this Court may clarify that submission to a jury of an unauthorized natural and probable consequences theory of aiding and abetting a first degree murder, in violation of *People v. Chiu, supra,* 59 Cal.4th 155, requires reversal of

a first degree murder conviction, when another verdict by the jury may reflect a finding of intent to kill, but the other verdict did not require any finding of premeditation and deliberation, and other indicia in the record suggest that the jury may have relied on the unauthorized natural and probable consequences theory to convict the defendant.

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CONCLUSION

For the above-stated reasons, respondent Lopez requests that review be granted in his case, in order that this Court may consider and resolve the important question of law raised thereby, and affirm the lower court's order granting habeas corpus relief to respondent.

DATED: November 1, 2019

Respectfully submitted,

/s/ Victor J. Morse
VICTOR J. MORSE

Attorney for Respondent,
RICO RICARDO LOPEZ

CERTIFICATE

Pursuant to rule 8.504(d)(1) of the California Rules of Court, I certify that this petition for review contains 2,584 words, as counted by the word processing program that produced this petition.

DATED: November 1, 2019

/s/ Victor J. Morse
VICTOR J. MORSE

Attorney for Respondent
RICO RICARDO LOPEZ

Appendix “A”

Filed 9/25/19 In re Lopez CA1/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re RICO RICARDO LOPEZ, on Habeas Corpus.	A152748 (Sonoma County Super. Ct. No. SCR-32760)

Rico Ricardo Lopez was tried for murder under three different legal theories in connection with a 2002 gang-related stabbing. A jury convicted him of first degree murder and also found true the gang special circumstance that he intentionally killed the victim while an active participant in a criminal street gang (Pen. Code, § 190.2, subd. (a)(22)).[1] After the Supreme Court held in *People v. Chiu* (2014) 59 Cal.4th 155, 167 (*Chiu*) that one of the theories under which Lopez was tried, the natural and probable consequences doctrine, could not be the basis of a first degree murder conviction, Lopez filed a petition for a writ of habeas corpus in the trial court. The trial court granted the petition, reversed Lopez's murder conviction, and remanded the matter for either retrial or the acceptance of a second degree murder conviction. The People appealed. We conclude that under the standards clarified in our Supreme Court's recent decision in *People v. Aledamat* (Aug. 26, 2019, S248105) ___ Cal.5th ___ (*Aledamat*), any error under *Chiu* was harmless beyond a reasonable doubt. We therefore reverse the trial court's order.

[1] All statutory references are to the Penal Code.

I.
FACTUAL AND PROCEDURAL BACKGROUND

On the night of June 26, 2002, Lopez was in a Santa Rosa apartment with a group of men and women drinking beer, playing cards, and watching television. Lopez and at least four other men present were members of the Norteño street gang. Around midnight, members of the group heard the distinctive whistle of the rival Sureño gang coming from the other side of a fence that separated the apartment from Santa Rosa Creek, in an area in which the Norteño and Sureño gangs had rival claims. The five gang members ran to the kitchen, where at least some of them grabbed knives, then left the apartment. They ran down a path to the creek and confronted Ignacio Gomez, who was wearing blue clothing consistent with what Sureño gang members wear. Gomez was stabbed to death after suffering 38 to 40 wounds on his head, face, chest, back, and shoulders.

One of the gang members was seen before the murder with a butcher knife, and Lopez was seen after the murder with a knife handle. Two pieces of metal that appeared to be from a broken knife blade were found within 10 to 15 feet of the victim's body. Lopez also was seen after the murder with blood on his jersey and his shoes. One witness identified the person with the butcher knife as having stabbed the victim, but it was not established whether multiple people stabbed him. When the group returned to the apartment, Lopez said "this was for Cinco de Mayo," a reference to a member of their group being stabbed less than two months before the murder, and he also "was kind of like bragging like walking around with a little strut, stuff like that, kind of like a larger than life moment for him or something."

Lopez and the four other gang members were tried for first degree murder, with a special circumstance that they intentionally killed the victim while they were active participants in a criminal street gang, and that the crime was carried out to further the activities of the gang (§ 190.2, subd. (a)(22)), along with an enhancement alleging they committed the crime for the benefit of a street gang (§ 186.22, subd. (b)(1)).

Defendants were tried for murder under three different theories: (1) that they were the actual perpetrators; (2) that they aided and abetted the murder; and (3) that they aided and abetted one of five "target crimes" (breach of peace, assault, battery, assault with a deadly weapon, or assault by means of force likely to produce great bodily injury), and first degree murder was a natural and probable consequence of the target crime. During closing argument, the prosecutor explained all three of these theories, and also stated that jurors did not need to decide who actually stabbed the victim in order to convict defendants of first degree murder.

In explaining the natural and probable consequences doctrine to the jury, the prosecutor stated, "Natural and probable consequences does not require an intent to kill. It does not require premeditation. It does not require deliberation. That's very important because when you go out to confront a rival gang member in a breach of the peace situation or in a simple assault without the intent to kill and somebody is murdered, what happens? Do you have to share in the specific intent to kill? Do you have to have the same frame of mind as the person or persons who are repeatedly stabbing [the victim]? No, you do not." He further explained, "And once you're an aider and abettor in that target crime and that chain of events from the target leads all the way to [the victim's] murder, it's too bad. That is the law. You're a gang member and you planned in your own mind to commit a breach of the peace or an assault. And if murder was a natural and probable consequence of that, and on these facts, ladies and gentlemen, I'm asking you, then you also are guilty of murder and it does not matter whether you intended to kill." After explaining the three theories of guilt, the prosecutor proceeded to explain the difference between first degree and second degree murder. He said that second degree murder was "a good logical starting point" and that in order to find that defendants committed first degree murder, the jury would have to find that the murder was willful, deliberate, and premeditated.

On the fifth day of deliberations, the jury sent the trial court the following note: "We are having difficulties with the sentence [from CALJIC No. 8.20 (deliberate and premeditated murder)] 'To constitute a deliberate and premeditated killing, the slayer

must weigh and consider the question of killing and the reasons for and against such a choice and, having in mind the consequences, he decides to and does kill[,'] versus deliberated and premeditated breach of peace or assault that results in a killing. [¶] We need more clarification of premeditation and deliberation and how to relate it to section [presumably, CALJIC No.] 3.02 [the instruction regarding the natural and probable consequences doctrine]." After discussion with the attorneys, the trial court sent the following response: "The term 'deliberate and premeditate' refers only to First Degree Murder. First Degree Murder is defined by jury instruction 8.20. [¶] The term 'deliberate and premeditate' is not an element of any of the following: Breach of the Peace, Assault, Battery, Assault by Means of Force likely to Produce Great Bodily Injury, or Assault with a Deadly Weapon. Those crimes are defined elsewhere in the Court's instructions: [¶] Breach of the Peace is defined in jury instruction 16.260. [¶] Assault is defined in jury instruction 9.00. [¶] Battery is defined in jury instruction 16.140. [¶] Assault by Means of Force likely to produce Great Bodily Injury is defined in jury instruction 9.02. [¶] Assault with a Deadly Weapon is defined in jury instruction 9.02. [¶] Jury instruction 3.02 may refer to First Degree Murder, Second Degree Murder or Voluntary Manslaughter, depending upon what you determine the facts to be. Those crimes are defined elsewhere in the court's instructions."

The next day, the jury found Lopez and three of his codefendants guilty of first degree murder, but the jury verdict forms did not reveal the theory upon which the murder conviction was based. As to all four of them, the jury also found true the gang allegations, including the special circumstance under section 190.2, subdivision (a)(22), which required jurors to find that defendants were active participants in a criminal street gang, that the murder was carried out to further the activities of that gang, and that they "intentionally killed the victim." The fourth codefendant was acquitted of murder but was convicted of being an accessory after the fact (§ 32).

The trial court sentenced Lopez to life without the possibility of parole. Lopez appealed but did not challenge the sufficiency of the evidence supporting his conviction and instead focused on the trial court's decision not to dismiss a juror for alleged bias and

misconduct. Division Four of this court affirmed Lopez's conviction. (*People v. Amante et al.* (Sept. 3, 2009, A113655) [nonpub. opn.].)

Five years after Lopez's conviction was upheld, the Supreme Court held in *Chiu, supra*, 59 Cal.4th 155, that a first degree murder conviction cannot be based on an aiding and abetting theory under the natural and probable consequences doctrine.[2] The decision is retroactive to cases already final. (*In re Martinez* (2017) 3 Cal.5th 1216, 1222.) Lopez filed a petition for a writ of habeas corpus in the trial court in February 2016 and argued that *Chiu* required the trial court to either reverse his sentence or reduce it to second degree murder. The district attorney disagreed, arguing that any error under *Chiu* was harmless because the verdict was otherwise based on a valid ground.

The trial court granted Lopez's petition. It concluded that although the jury could have convicted Lopez of first degree murder based on a valid theory, the *Chiu* error was not harmless beyond a reasonable doubt. The court reversed the conviction for first degree murder and directed the matter returned to the trial court where the People could either accept a conviction of second degree murder or retry Lopez for first degree murder. The People appealed.

II.
DISCUSSION

It is undisputed that *Chiu* error occurred at Lopez's trial. That is, jurors were instructed that they could convict Lopez of first degree murder under two valid theories and one invalid theory. They were validly instructed that they could convict him if they found that Lopez was a perpetrator or a direct aider and abettor. But they also were

[2] The Legislature has since amended section 189 to change some types of aider and abettor liability for murder. The amendments mean that a defendant cannot be convicted of murder unless the person was the actual killer, acted with the intent to kill, or was a major participant in an underlying felony who acted with reckless indifference to human life. (Senate Bill No. 1437 (Stats. 2018, ch. 1015, § 3.) We requested supplemental briefing on the effect of the legislative amendments and the addition of section 1170.95, which permits those convicted under the previous version of the law to seek resentencing. We need not address the issues raised in those briefs in light of *Aledamat*, which was decided after those briefs were filed.

instructed that they could convict him on an aiding and abetting theory under the natural and probable consequences doctrine. Specifically, they were told under this theory that they could find Lopez guilty of first degree murder if they found that one of five target crimes was committed (breach of peace, assault, battery, assault with a deadly weapon, or assault by means of force likely to produce great bodily injury), that Lopez aided and abetted one of those crimes, that a co-principal committed murder, and that first degree murder was the natural and probable consequence of the target crime. As summarized in a case decided before *Chiu*, for a defendant to be convicted under the natural and probable consequences doctrine, "the trier of fact must find that the defendant, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of a predicate or target offense; (3) by act or advice aided, promoted, encouraged or instigated the commission of the target crime. But the trier of fact must also find that (4) the defendant's confederate committed an offense *other than* the target crime; and (5) the offense committed by the confederate was a natural and probable consequence of the target crime that the defendant aided and abetted." (*People v. Prettyman* (1996) 14 Cal.4th 248, 262, fn. omitted.)

Chiu held that the natural and probable consequences doctrine cannot support a conviction for first degree murder because it does not establish that the defendant had the requisite culpability. (*Chiu*, *supra*, 59 Cal.4th at p. 167.) Rather than focusing on whether the defendant had the relevant intent to commit first degree murder, the doctrine focuses on whether first degree murder was a reasonably foreseeable consequence of the target crime. (*Id.* at pp. 164–166.) The court noted that "[i]n the context of murder, the natural and probable consequences doctrine serves the legitimate public policy concern of deterring aiders and abettors from aiding or encouraging the commission of offenses that would naturally, probably, and foreseeably result in an unlawful killing. . . . It is also consistent with reasonable concepts of culpability. Aider and abettor liability under the natural and probable consequences doctrine does not require assistance with or actual knowledge and intent relating to the nontarget offense, nor subjective foreseeability of

either that offense or the perpetrator's state of mind in committing it. [Citation.] It only requires that under all of the circumstances presented, a reasonable person in the defendants' position would have or should have known that the nontarget offense was a reasonably foreseeable consequence of the act aided and abetted by the defendant." (*Id.* at pp. 165–166.) That same public policy concern is not present with respect to a defendant's liability for aiding and abetting a first degree premeditated murder because "whether a direct perpetrator commits a nontarget offense of murder with or without premeditation and deliberation has no effect on the resultant harm. The victim has been killed regardless of the perpetrator's premeditative mental state. Although we have stated that an aider and abettor's 'punishment need not be finely calibrated to the criminal's mens rea' [citation], the connection between the defendant's culpability and perpetrator's premeditative state is too attenuated to impose aider and abettor liability for first degree murder under the natural and probable consequences doctrine, especially in light of the severe penalty involved and the above stated public policy concern of deterrence." (*Id.* at p. 166.)

As the parties recognize, there was *Chiu* error here because the jury might have convicted Lopez of first degree murder based on his aiding in one of the five target crimes, and he may therefore have received a sentence—life without the possibility of parole—that was out of proportion to his role in aiding and abetting that target crime. The sole question we must decide is whether the error was prejudicial. *Aledamat* establishes that it was not.

"When a trial court instructs a jury on two theories of guilt, one of which was legally correct and one legally incorrect, reversal is required unless there is a basis in the record to find that the verdict was based on a valid ground." (*Chiu*, *supra*, 59 Cal.4th at p. 167.) *Aledamat* clarified that the "beyond a reasonable doubt" standard of review established in *Chapman v. California* (1967) 386 U.S. 18, 24 for federal constitutional error applies in reviewing *Chiu* errors. That is, we "must reverse the conviction unless, after examining the entire cause, including the evidence, and considering all relevant circumstances, [we] determine[] the error was harmless beyond a reasonable doubt."

(*Aledamat, supra*, ___ Cal.5th ___ [p. 1].) Under this standard, the error here was harmless.

In *Aledamat*, the defendant was charged with assault with a deadly weapon (a box cutter). (*Aledamat, supra*, ___ Cal.5th ___ [p. 1].) The trial court correctly instructed the jury that it could convict the defendant if it found that he used the box cutter in a deadly way. (*Ibid.*) But the court also instructed the jury that it could convict the defendant if it found that the box cutter was inherently deadly, which was erroneous because a box cutter is not inherently deadly as a matter of law. (*Ibid.*) The Court of Appeal reversed, believing that it was required to do so absent a basis in the record to conclude that the verdict was actually based on a valid ground; i.e., that there was a reason to conclude the jury had actually relied on a valid theory. (*Id.* at p. ___ [p. 4].) In briefing to the Supreme Court, the defendant in *Aledamat* relied on *Chiu* and *In re Martinez*, *supra*, 3 Cal.5th 1216, to argue that a reviewing court should properly focus on what a jury "actually did." (*Aledamat*, pp. ___ [pp. 14–15].) The Supreme Court disagreed and reversed, explaining that "[i]n both *Chiu* and *Martinez*, we examined the record and found that it affirmatively showed the jury might have based its verdict on the invalid theory. Because no other basis to find the error harmless beyond a reasonable doubt was at issue, we did not explore whether other ways of finding the error harmless existed. Those cases merely provide one way in which a court might evaluate harmlessness. *They do not preclude other ways*." (*Id.* at p. ___ [p. 16], italics added.) The court summarized the standard as follows: "The reviewing court must reverse the conviction unless, after examining the entire cause, *including the evidence*, and considering all relevant circumstances, it determines the error was harmless beyond a reasonable doubt." (*Id.* at p. ___ [p. 17], italics added.) Applying that standard, *Aledamat* analyzed the jury instruction, both attorneys' arguments to the jury, and the facts of the case, and concluded that no reasonable jury could have failed to find that the defendant used the box cutter in a way capable of causing or likely to cause death or great bodily injury. (*Id.* at pp. ___ [pp. 17–20].) The instructional error thus was harmless beyond a reasonable doubt.

Under *Aledamat*, we must consider all the relevant circumstances, including the evidence. This was a complex case with multiple defendants, and it would be difficult to determine which theory the jury relied on to convict each individual defendant. It is also beyond dispute that the jury was considering the natural and probable consequences doctrine because jurors sent a note to the trial court on the subject. But while it is impossible to determine what theory the jury actually relied upon in convicting each defendant, it is clear that as to Lopez the error was harmless beyond a reasonable doubt. (*Aledamat, supra*, ___ Cal.5th ___ [p. 1].)

This is so because the jury found true the gang special circumstance under section 190.2, subdivision (a)(22). The jury was instructed on the special circumstance as follows: "If you find that a defendant was not the actual killer of a human being, or if you are unable to decide whether the defendant was the actual killer or an aider and abettor, you cannot find the special circumstance to be true as to that defendant unless you are satisfied beyond a reasonable doubt that such defendant *with the intent to kill aided, abetted*, counseled, commanded, induced, solicited, requested, or assisted any actor *in the commission of the murder in the first degree*." (CALJIC No. 8.80.1, italics added.) A true finding as to this circumstance required proof beyond a reasonable doubt that Lopez acted with an intent to kill, as opposed to the intent to commit one of the target crimes.

Chiu itself made clear that in some circumstances a defendant may be convicted of first degree, premeditated murder under direct aiding and abetting principles. (*Chiu, supra*, 59 Cal.4th at p. 166.) "Under those principles, the prosecution must show that the defendant aided or encouraged the commission of the murder with knowledge of the unlawful purpose of the perpetrator and with the intent or purpose of committing, encouraging, or facilitation its commission. [Citation.] Because the mental state component—consisting of intent and knowledge—extends to the entire crime, it preserves the distinction between assisting the predicate crime of second degree murder and assisting the greater offense of first degree premeditated murder. [Citations.] An aider and abettor who knowingly and intentionally assists a confederate to kill someone

could be found to have acted willfully, deliberately, and with premeditation, having formed his own culpable intent. Such an aider and abettor, then, acts with the mens rea required for first degree murder." (*Id.* at p. 167.) The findings on the gang special circumstance support a finding on such a mens rea here.

People v. Brown (2016) 247 Cal.App.4th 211, cited by the trial court and upon which Lopez relies, does not direct a contrary result. In *Brown*, the defendant was prosecuted for first degree murder under the same three theories at issue here. (*Id.* at p. 213.) During deliberations, the jury at one point sent a note stating it was unable to reach a verdict, and it also asked for clarification on the natural and probable consequences doctrine. (*Id.* at p. 226.) The jury convicted the defendant of first degree murder a few hours later, and it also found true the gang special circumstance under section 190.2, subdivision (a)(22). (*Brown*, at pp. 215, 225–226.) In evaluating whether the *Chiu* instructional error was harmless, *Brown* acknowledged that "[i]t is possible in a given case to conclude the giving of an erroneous natural and probable consequences instruction was harmless beyond a reasonable doubt when the jury finds the defendant guilty of first degree murder *and* finds the gang special circumstance true, because the special circumstance required finding the defendant intentionally killed. In such a situation, it might be concluded the jury necessarily rejected the natural and probable consequences theory of aider and abettor liability and instead found the defendant was either the actual killer or aided and abetted the actual killer while sharing the killer's intent to kill." (*Brown*, at p. 226.) The court was nonetheless unable to reach such a conclusion for several unique reasons. First, unlike here, there were multiple irregularities in the taking of the verdicts that also precluded finding the error harmless. (*Id.* at pp. 215, 227.) Second, the fact that the jury requested further instruction on the natural and probable consequences doctrine late in deliberations supported a reasonable inference that there were not sufficient votes to convict on a valid basis. (*Id.* at p. 226.) Third, the evidence against the defendant was not overwhelming, because the only person who identified him as the shooter was a witness who took a plea bargain for a six-year sentence in exchange for his testimony. (*Id.* at pp. 226–227.)

These circumstances were not present here. Although the jury requested clarification on the natural and probable consequences doctrine, there is no indication that jurors were considering this theory for Lopez specifically. And we need not infer that they were doing so, because the evidence against him was overwhelming. He was seen after the murder with blood on his clothes and shoes and holding a knife handle, and he also bragged about the stabbing afterward. His appellate attorney in the original appeal did not even challenge the sufficiency of the evidence supporting his first degree murder conviction, which was reasonable given the record. Under *Aledamat*, we conclude that *Chiu* error was harmless beyond a reasonable doubt.

III.
DISPOSITION

The trial court's order granting Lopez's petition for a writ of habeas corpus is reversed. The case is remanded with instructions to reinstate the original judgement against Lopez.

_____

Humes, P.J.

WE CONCUR:

_____

Banke, J.

_____

Sanchez, J.

In re Lopez A152748

DECLARATION OF SERVICE BY MAIL
AND ELECTRONIC SERVICE BY TRUEFILING

In re Rico Ricardo Lopez Case No. A152748

I, VICTOR J. MORSE, declare that I am a citizen of the United States, over 18 years of age, employed in the County of San Francisco, State of California, and not a party to the subject cause. My business address is 3145 Geary Boulevard, PMB # 232, San Francisco, California 94118-3316. I served a true copy of the attached

PETITION FOR REVIEW

on the following, by placing copies thereof in envelopes addressed as follows:

Mr. Rico Ricardo Lopez # F 23451
California Correctional Institution
P.O. Box 1902
Tehachapi, CA 93581

Jill Ravitch, District Attorney
Hall of Justice
600 Administration, Room 212-J
Santa Rosa, CA 95403

Arlene Junior, Superior Court Clerk
600 Administration Drive
Santa Rosa, CA 95403
(Attn.: Judge Dana Beernink Simonds)

The envelopes were then, on November 1, 2019, sealed and deposited, in the United States Mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

On November 1, 2019, I caused the TrueFiling website to transmit a PDF version of this document by electronic mail to each of the following using the email addresses indicated:

First District Appellate Project
eservice@fdap.org

Attorney General
SFAGDocketing@doj.ca.gov

Pursuant to an understanding with the Court of Appeal (First Appellate District), I served the Court of Appeal with this petition by filing this petition with TrueFiling.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on November 1, 2019, at San Francisco, California.

/s/ Victor J. Morse
VICTOR J. MORSE

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **In re Rico Ricardo Lopez**
Case Number: **TEMP-S7MWGVCK**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **victormorse@comcast.net**

3. I served by email a copy of the following document(s) indicated below:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

11/1/2019
Date

/s/Victor Morse
Signature

Morse, Victor (120916)
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