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FILED WITH PERMISSION

February 4, 2022

The Honorable Jorge E. Navarrete
Clerk/Administrator
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

RE: *In re Lopez*, Case No. S258912
California Court of Appeal, First Appellate District, Case No. A152748
Supplemental Letter Brief re AB 333

Dear Mr. Navarrete:

We write in response to this Court’s December 22, 2021 order requesting “supplemental briefing addressing the following question: What effect, if any, does Assembly Bill No. 333 (Stats. 2021, ch. 699) have on the issues presented in this case?” As explained *post*, Assembly Bill No. 333 (2021-2022 Reg. Sess.) (AB 333) has no effect on this case because it has no effect on final judgments like the one at issue here. The new statute therefore does not alter the conclusion—set forth in the answer brief on the merits—that the judgment should be affirmed.

AB 333 effected several amendments to Penal Code section 186.22, the statutory provision defining numerous terms for purposes of gang offenses and enhancements.¹ AB 333 also added section 1109, which requires bifurcation of gang participation and enhancement charges from other substantive offenses. AB 333, however, became effective on January 1, 2022—long after a jury convicted Lopez, he unsuccessfully appealed, and this Court denied review of the affirmance. Accordingly, AB 333 affects the issues in this case if and only if the statute retroactively applies to his criminal case. It does not.

The starting point of any retroactivity analysis with respect to the Penal Code is section 3, which states: “No part of [the Penal Code] is retroactive, unless expressly so

¹ Unspecified statutory references are to the Penal Code.

declared.” “[T]he language of section 3 erects a strong presumption of prospective operation, codifying the principle that, in the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature must have intended a retroactive application.” (*People v. Brown* (2012) 54 Cal.4th 314, 324, internal quotation marks omitted; accord, *People v. Buycks* (2018) 5 Cal.5th 857, 880.)

In *People v. Estrada* (1965) 63 Cal.2d 740, this Court stated “an important, contextually specific qualification to the ordinary presumption that statutes operate prospectively.” (*Brown, supra*, 54 Cal.4th at p. 323.) Specifically, “[w]hen the Legislature has amended a statute to reduce the punishment for a particular criminal offense, [a court] will assume, absent evidence to the contrary, that the Legislature intended the amended statute to apply to all defendants whose judgments are not yet final on the statute’s operative date.” (*Ibid.*, citing *Estrada*, at pp. 742-748.) As *Brown* explained, “*Estrada* today is properly understood, not as weakening or modifying the default rule of prospective operation codified in section 3, but rather as informing the rule’s application in a specific context by articulating the reasonable presumption that a legislative act mitigating the punishment for a particular criminal offense is intended to apply to all *nonfinal* judgments.” (*Brown*, at p. 324, italics added.)

In contrast, “in the absence of an express retroactivity provision or unless it is very clear from extrinsic sources that the Legislature or the voters must have intended a retroactive application, ameliorative legislation does not affect convictions that *have become final*.” (*People v. Martinez* (2018) 4 Cal.5th 647, 655, italics added and internal quotation marks omitted [statutory amendment effective in 2013 had no effect on conviction that became final in 2010].) Here, the Court of Appeal affirmed the judgment against Lopez in 2009, and this Court denied review in December of that same year, meaning that the judgment became final in 2010. Nothing in the text or legislative history of AB 333 contravenes section 3’s presumption that the statute operates prospectively only and therefore has no effect on such final judgments. Thus, just as the statutory amendment in *Martinez* had no effect on the final judgment in that case, AB 333 has no effect on this case.

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Accordingly, the judgment of the Court of Appeal should be affirmed for the reasons set forth in the answer brief on the merits.²

Sincerely,

/s/ **Amit Kurlekar**
AMIT KURLEKAR
Deputy Attorney General
State Bar No. 244230

For **ROB BONTA**
Attorney General

AK:

SF2020200114

² Even if AB 333 did apply retroactively to Lopez's case, the statute would not affect the validity of his first degree murder conviction. With respect to the validity of that conviction, the sole significance of the jury's true finding on the gang special circumstance was that it reflected the jury's findings on Lopez's state of mind—i.e., that he had at least the intent to kill and (if not the actual killer) aided and abetted a premeditated and deliberated murder. (See generally ABM 60-76.) AB 333's amendments to section 186.22 would not affect those findings in any way.

DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

Case Name: *In re Lopez on Habeas Corpus*

No.: S258912

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On February 4, 2022, I electronically served the attached **Letter Brief to Honorable Jorge E. Navarrete, Clerk/Administrator** by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on February 4, 2022, I placed a true copy enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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The Honorable Jill Ravitch
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First District Appellate Project
Attn: Executive Director
eservice@fdap.org

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on February 4, 2022, at San Francisco, California.

J. Espinosa
Declarant

/s/ **J. Espinosa**

Signature

SF2020200114

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **LOPEZ (RICO RICARDO) ON H.C.**

Case Number: **S258912**

Lower Court Case Number: **A152748**

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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.

2/4/2022
Date

/s/Amit Kurlekar
Signature

Kurlekar, Amit (244230)
Last Name, First Name (PNum)

California Dept of Justice, Office of the Attorney General
Law Firm