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November 8, 2022

Jorge E. Navarrete,
Clerk and Executive Officer
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-3600
(by TrueFiling)

Re: In re Rico Ricardo Lopez
California Supreme Court No. S258912
California Court of Appeal No. A152748
Sonoma County Superior Court No. SCR 32760

Dear Mr. Navarrete:

I am counsel for petitioner Rico Ricardo Lopez in the above-captioned appeal.

Petitioner files this supplemental letter brief to address new authorities that were not available in time to be included in his briefs on the merits. (Cal. Rules of Court, rule 8.520(d)(1).) Specifically, petitioner relies on *People v. Pacheco* (2022) 76 Cal.App.5th 118, review granted May 18, 2022, S2274102 (*Pacheco*) and *People v. Curiel*, slip opinion in G058604, review granted January 26, 2022, S272238 (*Curiel*), which are presently pending before this Court.

Mr. Jorge E. Navarette
PAGE TWO
November 8, 2022

Petitioner submits that the reasoning set forth in both *Pacheco* and *Curriel* supports his position that the jury's true finding on the gang-murder special circumstance in his case does not establish beyond a reasonable doubt that the jury convicted petitioner of first degree murder based on a valid theory requiring intent to kill, premeditation, and deliberation.

Petitioner has advanced reasons why the true finding on the special circumstance, which required a finding that petitioner had an intent to kill, cannot render the alternative-theory instructional error in his case harmless beyond a reasonable doubt. (Opening Brief on the Merits, pp. 60-70.) The Office of the State Public Defender has advanced additional reasons supporting petitioner's position. (Brief Amicus Curiae, pp. 30-40.)

In this letter brief, petitioner argues that *Pacheco* and *Curriel* provide *yet another* reason why this Court cannot conclude that the true finding on the special circumstance in petitioner's case renders the alternative-theory instructional error in his case harmless beyond a reasonable doubt. This is because the jury's true finding on the gang-murder special circumstance, which required the jury to find that petitioner "intentionally killed" (3 CT 549 (No. A152748)), does not establish that the jury found that he *aided and abetted the killing with intent to kill*.

The courts in *Pacheco* and *Curriel* reversed summary denials of defendants' resentencing petitions pursuant to former Penal Code section 1170.95 (now 1172.6) at the prima facie stage, rejecting the Attorney General's contention that true findings on the gang-murder special circumstances rendered the defendants ineligible as a matter of law. (*Pacheco*, *supra*, 76 Cal.App.5th at p. 121; *Curriel*, *supra*, slip opinion in G058604, at p. 2.)

Mr. Jorge E. Navarette
PAGE THREE
November 8 , 2022

The court in *Pacheco* explained its reasoning:

Here, the jury's true finding on the gang special circumstance certainly establishes Pacheco intended to kill Abraham Sanchez at the time of his killing (the mens rea). But the gang circumstance instruction does not establish -- as a matter of law -- that Pacheco directly aided and abetted the killing of Sanchez (the actus reus). In other words, without weighing the evidence, it is possible Pacheco intended to kill, but he did nothing to directly “aid, facilitate, promote, encourage, or instigate” the target crime of murder. (See CALCRIM No. 401.)

Critical to our analysis is that the court instructed the jurors they could find Pacheco guilty of murder if he aided and abetted one of the three target crimes (assault with a deadly weapon, assault, or disturbing the peace) and the nontarget crime (murder) was a natural and probable consequence of one of the target crimes. (See CALCRIM Nos. 400, 401.) Therefore, the jury could have potentially found Pacheco intended to kill Sanchez under the gang special circumstance enhancement (the mens rea), but under the natural and probable consequence theory, Pacheco only actually aided and abetted the nontarget crime of disturbing the peace (the actus reus). [Citation omitted.]

To reiterate and conclude, at least at the prima facie stage, Pacheco's gang special circumstance enhancement does not establish as a matter of law

Mr. Jorge E. Navarette
PAGE FOUR
November 8, 2022

that Pacheco had both “had the requisite intent” (the mens rea), and he “engaged in the requisite acts” (the actus reus), to prove he directly aided and abetted the target crime of murder. [Citation omitted.]

(*Pachecho, supra*, at p. 128.) The court’s reasoning in *Curiel* is similar. (*Curiel, supra*, slip opinion in G058604 at pp. 6-8.)

This reasoning applies to petitioner’s case as well. Regardless whether the special circumstance establishes that petitioner had the intent to kill, it does not establish -- as a matter of law -- that he directly aided and abetted the killing of the victim (the actus reus). In other words, it is possible the jury found that petitioner intended to kill, but did not find he *did anything* to directly aid, facilitate, promote, encourage, or instigate the target crime of murder.

As in *Pachecho*, the court instructed petitioner’s jurors they could find him guilty of murder if he aided and abetted one of the target crimes (breach of peace, assault, battery, assault with a deadly weapon, and assault by means of force likely to produce great bodily injury) and the nontarget crime (murder) was a natural and probable consequence of one of the target crimes. (1 CT 148 [No. A152748].) Therefore, the jury could have potentially found petitioner intended to kill the victim under the gang-murder special circumstance (the mens rea), but under the natural and probable consequence theory, petitioner only actually aided and abetted one of the nontarget crimes (the actus reus). The jury’s finding sheds no light on whether petitioner actually encouraged or assisted the perpetrator(s) in carrying out the murder. As a result, the jury’s finding on the special circumstance does not establish that petitioner *both* had the requisite intent

Mr. Jorge E. Navarette
PAGE FIVE
November 8, 2022

(the mens rea) *and* committed the requisite acts (the actus reus) to prove he directly aided and abetted the target crime of murder.

Accordingly, this Court cannot conclude that the special circumstance in petitioner's case renders the alternative-theory instructional error harmless beyond a reasonable doubt.

Thank you for bringing this letter brief to the attention of the Supreme Court.

Sincerely,

Victor J. Morse

Victor J. Morse
(SBN 120916)

Attorney for Petitioner
Rico Ricardo Lopez

Certificate of Word Count

Counsel for petitioner Rico Ricardo Lopez hereby certifies that this supplemental letter brief consists of 1,042 words (excluding proof of service), according to the word count of the computer word-processing program that produced this brief. (California Rules of Court, rule 8.520(c)(1).)

Dated: November 8, 2022

/s/ Victor J. Morse

Victor J. Morse

Attorney for Petitioner
Rico Ricardo Lopez

**Declaration of Service By Mail
and Electronic Service By Truefiling**

In re Rico Ricardo Lopez on Habeas Corpus (No. S258912)

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 **Petitioner’s Additional Supplemental Letter Brief** on the following, by placing copies thereof in envelopes addressed as follows:

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| Mr. Rico Ricardo Lopez # F 23451 California State Prison, Los Angeles County P.O. Box 8457 Lancaster, CA 93539-8457 | District Attorney 600 Administration, # 212-K Santa Rosa, CA 95403 Superior Court Clerk 600 Administration Drive Santa Rosa, CA 95403 <i>(Attn.: Judge Dana Beernink Simonds)</i> |
|---|---|

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| Nerissa Huertas Senior Deputy State Public Defender nerissa.huertas@ospd.ca.gov | Samuel Weiscovitz Deputy State Public Defender samuel.weiscovitz@ospd.ca.gov |

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Executed on November 8, 2022, at San Francisco, California.

/s/ Victor J. Morse

Victor J. Morse

STATE OF CALIFORNIA
Supreme Court of California

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Date

/s/Victor Morse

Signature

Morse, Victor (120916)

Last Name, First Name (PNum)

Law Office of Victor J. Morse

Law Firm