In the Supreme Court of the State of California

In re Rico Ricardo Lopez, On Habeas Corpus,	)	No. S258912 Court of Appeal (First District, Division One) No. A152748 Sonoma County Superior Court No. SCR-32760

Petitioner's Opening Brief on the Merits

On Review from the Decision of the Court of Appeal
First Appellate District, Division One

From a Judgment of the Superior Court
for the County of Sonoma

Honorable Dana Beernink Simonds, Judge
(habeas corpus proceedings)

Honorable Raima Ballinger, Judge
(jury trial)

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Appointed by the Supreme Court

Table of Contents

Page(s)

Table of Contents (continued)

Page(s)

Table of Contents (continued)

Page(s)

Table of Contents (continued)

Page(s)

Table of Authorities

Page(s)

Cases

Table of Authorities (continued)

Table of Authorities (continued)

Constitutions

Statutes

Table of Authorities (continued)

In the Supreme Court of the State of California

	)	No. S258912
In re	)	
	)	Court of Appeal
Rico Ricardo Lopez,	)	(First District,
	)	Division One)
	)	No. A152748
	)	
On Habeas Corpus,	)	Sonoma County
	)	Superior Court
	)	No. SCR-32760

Petitioner's Opening Brief on the Merits

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Issue for Review

Petitioner Rico Ricardo Lopez's petition for review framed the issue as follows:

"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?" (Petitioner Lopez's petition for review, p. 6.)

Petitioner submits that the answer to this question must be yes.

However, petitioner respectfully submits that, to resolve this issue, it is necessary to address two sub-issues:[1/]

First, when the record contains indications that the jury considered a legally invalid theory, are such indications dispositive in a reviewing court's assessment of whether it is clear beyond a reasonable doubt that the jury based its verdict on the invalid theory, such that the court should not hold the error harmless based on its view of the strength of the evidence in favor of a legally valid theory?

Second, does a jury's true finding on a gang-murder special circumstance fail to establish that the jurors found the defendant both intended to kill and premeditated and deliberated, and therefore fail to establish beyond a reasonable doubt that the jury convicted the defendant on a legally valid theory of first degree murder instead of the legally invalid natural and probable consequences theory of aiding and abetting liability?

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1. See Cal. Supreme Ct., Issues Pending Before the California Supreme Court in Criminal Appeals (April 10, 2020), p. 5 [*In re Lopez,* S258912; "This case presents the following issues: (1) Does a true finding on a gang-killing special circumstance (Pen. Code, § 190.2, subd. (a)(22)) render *Chiu* error (*People v. Chiu* (2014) 59 Cal.4th 155) harmless? (2) To what extent or in what manner, if any, may a reviewing court consider the evidence in favor of a legally valid theory in assessing whether it is clear beyond a reasonable doubt that the jury based its verdict on the valid theory, when the record contains indications that the jury considered the invalid theory? (See *People v. Aledamat* (2019) 8 Cal.5th 1.)"].

Petitioner submits that the answers to both of these questions must be yes as well.

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Introduction to Opening Brief on the Merits

In this People's appeal from the Superior Court's order granting a writ of habeas corpus, petitioner argued that his conviction of first degree murder must be reversed under *People v. Chiu, supra,* 59 Cal.4th 155, because it is not clear beyond a reasonable doubt that his jury based his conviction on a legally valid theory that he both intended to kill and premeditated and deliberated, rather than an invalid theory that a first degree murder was a natural and probable consequence of a target offense aided and abetted by him. (Slip opinion, p. 7.)[2/]

However, the Court of Appeal erroneously rejected his contention. (Slip opinion, pp. 7, 11.) The Court acknowledged that the prosecutor argued that the jury could convict petitioner of first degree murder based on the invalid theory (Slip opinion, p. 3) and that "the jury was considering the [invalid] natural and probable consequences doctrine because jurors sent a note to the trial court on the subject." (Slip opinion, p. 9.) But the Court erroneously dismissed the significance of these events, instead focusing on two things: (1) the evidence supporting a conviction under a legally valid theory, and (2) the jury's true finding on the gang-murder special circumstance. (Slip opinion, pp. 9-11.)

Prior to the Court of Appeal's opinion, this Court in *People v. Aledamat* (2019) 8 Cal.5th 1 affirmed that alternative-

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2. "Slip opinion" refers to the slip opinion in No. A152748, the People's appeal from the Superior Court's order granting petitioner a writ of habeas corpus.

theory error is subject to the harmless error test in *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 87 S.Ct. 824] and stated, "The reviewing court must reverse the conviction unless, after examining the entire cause, including the evidence, and considering all the relevant circumstances, it determines the error was harmless beyond a reasonable doubt." (*Aledamat, supra,* at p. 3.)

This Court should now clarify that indications in the record that the jury considered the invalid theory are dispositive to the prejudice inquiry, so that when such indications are present, the reviewing court should not hold the error harmless based on its view of the strength of the evidence in favor of a legally valid theory. This approach ensures that the harmless error inquiry focuses on whether an error actually contributed to the jury's verdict, not whether the evidence would have supported a valid verdict. In addition, this Court should clarify that a reviewing court should not hold alternative-theory error harmless based on its conclusion that the evidence in favor of a valid theory of conviction is either sufficient to support such a conviction or so overwhelming as to compel such a conviction, unless it can conclude there is no reasonable possibility that one or more jurors could have convicted the defendant under the invalid theory based on the evidence.

This Court should also clarify that a jury's true finding on a gang-murder special circumstance, which requires a finding of intent to kill but not premeditation and deliberation,

cannot establish beyond a reasonable doubt that the jury convicted the defendant of first degree murder based on a legally valid theory requiring both intent to kill and premeditation and deliberation, rather than an invalid theory that a premeditated and deliberate murder by an accomplice was a natural and probable consequence of a target offense aided and abetted by the defendant.

Applying these principles, this Court should hold that the *Chiu* error at petitioner's trial cannot be held harmless, because the record indicates that the jury considered the invalid theory. Furthermore, the true finding on the gang-murder special circumstance does not make it clear beyond a reasonable doubt that petitioner's jury convicted him of first degree murder on a legally valid theory, because the jury was never required to find premeditation and deliberation. This Court should reverse the judgment of the Court of Appeal, and affirm the Superior Court's order granting the writ of habeas corpus to set aside petitioner's conviction of first degree murder.

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Statement of the Case

A first consolidated information charged petitioner Rico Ricardo Lopez and four codefendants, Peter James Amante, Patrick George Higuera, Jr., Mario Ochoa-Gonzalez, and Rogelio Javier Cardenas, with committing the murder (§ 187, subd. (a))[3/] of Ignacio Mesina Gomez, and alleged a gang-murder special circumstance (§ 190.2, subd. (a)(22)) and a gang enhancement (§ 186.22, subd. (b)(1)). (6 CT 1072-1073 (No. A113655); 1 CT 65; 3 CT 564 (No. A152748).)[4/]

At trial, the court instructed the jury concerning the natural and probable consequences theory of aiding and abetting liability for murder. (1 CT 148 (No. A152748).) The prosecutor encouraged the jury to consider this theory to convict petitioner of murder and even first degree murder. (1 CT 193-196; 2 CT 285-286, 340-341, 343-344, 347 (No. A152748).) The jury sent an inquiry to the court during deliberations, disclosing its interest in the theory. (2 CT 361, 363 (A152748).)

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3. Section references are to the Penal Code unless otherwise specified.

4. CT and RT refer respectively to the Clerk's Transcript and Reporter's Transcript on appeal. However, there are two records on appeal that pertain to this case. Although petitioner will typically cite to the record in this habeas corpus appeal in No. A152748, he will sometimes need to cite to the record in his earlier direct appeal in No. A113655. Simultaneous with the filing of this brief, petitioner is filing a request that this Court take judicial notice of the record in No. A113655 pursuant to Evidence Code section 452, subdivision (d).

The jury found petitioner and codefendants Amante, Higuera, and Cardenas guilty of first degree murder and found the gang-murder special circumstance and gang enhancement allegations true as to each of them. (11 CT 2146, 2150, 2154, 2158 (No. A113655); 1 CT 65; 3 CT 549-550, 564 (No. A152748).) The jury acquitted codefendant Ochoa-Gonzalez of murder, but convicted him of accessory after the fact (§ 32) and found the gang enhancement true. (28 RT 6953-6954; 12 CT 2328 (No. A113655).)

The court sentenced petitioner to life imprisonment without possibility of parole. (13 CT 2483, 2505, 2614 (No. A113655); 1 CT 65; 3 CT 552, 564 (No. A152748).)

The Court of Appeal filed its opinion in petitioner's direct appeal in No. A113655, affirming the judgment and rejecting his challenge to the instruction that permitted the jury to convict petitioner of first degree murder based on the natural and probable consequences doctrine of aiding and abetting liability. (1 CT 59, 69, 80, 133 (No. A152748).) This Court denied petitioner's petition for review in No. S176967.

Petitioner subsequently filed a petition for writ of habeas corpus. (1 CT 1 (No. A152748).) The Superior Court issued an order to show cause. (2 CT 365 (No. A152748).) The People filed a Return. (2 CT 376 (No. A152748).) Petitioner filed a Traverse (Answer). (3 CT 653 (No. A152748).)

The Superior Court granted the petition for writ of habeas corpus, reversing petitioner's first degree murder conviction. (4 CT 784-792 (No. A152748).)

In a People's appeal, the Court of Appeal filed its

opinion in No. A152748, reversing the Superior Court's order granting a writ of habeas corpus and remanding with instructions to reinstate the original judgment. (Slip opinion, pp. 1, 11.)

This Court granted petitioner's petition for review in No. S258912.

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Statement of Facts

A. Introduction and Summary

Petitioner and three codefendants (Peter Amante, Rogelio Cardenas, and Patrick Higuera) were tried and convicted of first degree murder for the stabbing death of Ignacio Gomez. A fourth codefendant (Mario Ochoa-Gonzalez) was tried and acquitted of murder but convicted of accessory. (11 CT 2146, 2150, 2154, 2158; 12 CT 2328; 28 RT 6953-6954.)[5/]

The events surrounding the stabbing were described by Kacee Dragoman, the mother of Amante's child, and Lindsay Ortiz, a good friend of both Dragoman and Amante. (14 RT 3436-3441; 17 RT 4155.) They testified that the five defendants, Norteño gang members (20 RT 4949, 4967-4987, 5025, 5043, 5082, 5088), were gathered at Amante's apartment when they heard whistling outside, which defendants attributed to rival Sureño gang members. (13 RT 3131; 14 RT 3450-3451; 15 RT 3499-3500; 17 RT 4169-4171; 20 RT 4931.) Some of the men armed themselves with kitchen knives; all five then rushed out to locate the source of the whistling. (14 RT 3450-3453; 15 RT 3499-3501; 17 RT 4169-4173.) Upon arriving at a dark area

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5. All record citations in petitioner's Statement of Facts are to the record on appeal in petitioner's earlier direct appeal in No. A113655. The Court of Appeal's opinion in petitioner's direct appeal in No. A113655 sets forth a more abbreviated statement of facts. (1 CT 60-65 (No. A152748).) The Court of Appeal's opinion in the appeal from the order granting a writ of habeas corpus in No. A152748 sets forth an even more abbreviated statement of facts. (Slip opinion, p. 2.)

by a creek under a bridge, some of the men assaulted Gomez, who died as a result of 41 stab wounds. (14 RT 3459-3460; 15 RT 3508; 16 RT 3851, 3853, 3868-3871; 17 RT 4181-4184.)

An eyewitness, Miguel Sandoval, identified Amante as the man who stabbed Gomez. (16 RT 3939-3941, 3886; 19 RT 4856, 4862; 21 RT 5297.)

No eyewitness identified petitioner as stabbing Gomez or possessing a knife before or during the attack. But Ortiz recalled that after the stabbing, she saw blood on petitioner's jersey and shoes; Dragoman saw blood on his shoes but did not recall seeing blood on his jersey. (14 RT 3462; 15 RT 3518, 3561; 17 RT 4198, 4276.) Dragoman recalled petitioner trying to put a broken piece of a knife handle into her pocket. (17 RT 4194; 18 RT 4400-4401.) Ortiz heard petitioner proclaim, "This is for Cinco de Mayo," a reference to a prior incident when Sureño gang members stabbed Amante. (15 RT 3524, 3563, 3573; 17 RT 4231.)

However, Dragoman admitted she was friends with all defendants except petitioner. (17 RT 4155, 4216-4217.) Similarly, Ortiz was friends with all defendants but did not even like petitioner. (14 RT 3435-3443; 15 RT 3578, 3701.) Both Dragoman and Ortiz repeatedly took steps to dispose of evidence. (15 RT 3613; 17 RT 4194, 4201, 4204-4205; 18 RT 4400-4401.) Both signed immunity agreements requiring them to testify. (15 RT 3536-3538; 17 RT 4214-4215, 4306.) A criminalist did not believe a broken knife blade piece found at the scene was used in the stabbing due to the small amount of blood. (17 RT 4072.)

Richard Smith, an in-custody informant, claimed that petitioner threatened him, "I'll kill you just like I killed that guy in the creek." (19 RT 4683.) But Smith admitted that he hoped his testimony would help him at sentencing in his forgery case (19 RT 4654, 4668, 4674), and that he had written many letters from jail to the prosecutor, asking for a variety of favors. (19 RT 4699, 4705-4707.)

B. The Stabbing Victim

Ignacio Gomez lived in a homeless encampment that included people who associated with Sureños, near Stony Point Creek in Santa Rosa. (13 RT 3106-3111.) Gomez typically wore blue, associated with Sureños, had a Sureño girlfriend, and would whistle to other Sureños. (13 RT 3112-3114, 3130-3133.)

C. Events Before the Stabbing, According to Lindsay Ortiz and Kacee Dragoman

On the night of June 26, 2002, petitioner was socializing with Rogelio Cardenas (Titi), Patrick Higuera (Drifter), Mario Ochoa-Gonzalez (Chucky), Peter Amante (Whacky), Kacee Dragoman, and Lindsay Ortiz at Amante and Dragoman's residence at Stony Creek apartments. (14 RT 3436-3438, 3440, 3444-3446; 17 RT 4156, 4158, 4162, 4165.)

Dragoman was the mother of Amante's child. (17 RT 4155.) Cardenas, Higuera, and Ochoa-Gonzalez were Dragoman's friends, but petitioner was not. (17 RT 4216-4217.)

Lindsay Ortiz was a friend of Amante and Dragoman. (14 RT 3435-3439.) She was "really good friends" with Amante, her child's godfather. (14 RT 3436, 3441.) She considered

Cardenas and Higuera friends, and was sometimes friendly with Ochoa-Gonzalez, but did not like petitioner. (14 RT 3441-3443; 15 RT 3578, 3701.)

The apartment overlooked Santa Rosa Creek, which was separated from the apartment complex by a fence. (14 RT 3449; 15 RT 3499, 3587; 17 RT 4156-4168.) Dragoman heard the whistle of the Sureños gang, rivals to the Norteños, the gang with which she and Amante were associated. (17 RT 4169-4170.) Ochoa-Gonzalez said there were Sureños on the other side of the fence. (13 RT 3131; 14 RT 3450-3451; 15 RT 3499; 20 RT 4931.)

Amante, Cardenas, Higuera, Ochoa-Gonzalez, and petitioner ran into the kitchen; someone opened kitchen drawers. (14 RT 3452-3453; 15 RT 3501; 17 RT 4172.) The five men went outside, followed by Ortiz and Dragoman. (14 RT 3453; 17 RT 4172-4173.) Amante wore a red 49ers shirt, probably over a white undershirt. (15 RT 3564; 17 RT 4188.) Petitioner wore a black and white Raiders jersey. (17 RT 4188.)

Once outside, Ortiz and Dragoman helped Amante extricate himself from being stuck on a fence between the apartments and the creek. (14 RT 3453-3454; 17 RT 4174, 4176.) Ortiz saw a 12-inch butcher knife fall out of Amante's pants. (14 RT 3454-3455; 15 RT 3567.) Dragoman and Ortiz walked on the path to Stony Point Road. (14 RT 3456.) According to Ortiz, Amante ran with the knife in his upraised hand toward a man, woman, and baby near a car on a bridge. (14 RT 3456-3457; 15 RT 3507-3508.) According to Dragoman, Amante made rude

comments to the people and dropped his knife. (17 RT 4177-4178, 4180.) According to Ortiz, Dragoman stopped Amante and took his knife. (14 RT 3456-3458; 15 RT 3508.) But according to Dragoman, Amante picked up the knife and put it in his pants. (17 RT 4179.) Amante was drunk. (15 RT 3510; 17 RT 4175.)

Amante then went down the path toward the creek. (14 RT 3459; 15 RT 3508; 17 RT 4181-4183.) Ortiz never saw anyone but Amante hold a knife. (15 RT 3512, 3557.) Dragoman saw Amante and Higuera encounter each other on the path and walk together toward the creek. (17 RT 4183-4184.)

D. Events Following the Stabbing, According to Ortiz and Dragoman

After a time, the men returned up the path from the creek. (17 RT 4183-4184.) Ortiz recalled that Ochoa-Gonzalez, Cardenas, and petitioner came up the path first. (14 RT 3461.) Blood was on petitioner's white Raiders jersey. (14 RT 3462; 15 RT 3518.) Amante and Higuera then came up the path. (14 RT 3462-3463.) Higuera put his arm, which was cut and bleeding, around Ortiz. (14 RT 3462; 15 RT 3611.)

The five defendants and two women walked on the road to return to the apartment. (14 RT 3463; 17 RT 4184.) When a police car drove by, everyone concealed their faces. (14 RT 3463; 15 RT 3520; 17 RT 4189.) Petitioner tried to put the black handle of a broken knife into Dragoman's pocket, but she stopped him. (17 RT 4194; 8 RT 4400-4401.)

According to Ortiz and Dragoman, petitioner appeared to be excited and pretty happy after they returned to

the apartment. (15 RT 3525; 17 RT 4196.) Petitioner was wearing a blue beanie with the word Sur on it. (15 RT 3524; 17 RT 4190, 4196.) Petitioner talked about "eating" people and about the person dying. (15 RT 3524.) Petitioner told Amante, "This is for Cinco de Mayo," but Amante responded, "What the fuck are you talking about." (15 RT 3524, 3573.) Amante had been stabbed by Sureño gang members on Cinco de Mayo, requiring hospitalization. (15 RT 3563; 17 RT 4231.)

Ochoa-Gonzalez paced back and forth, seeming scared and worried. (15 RT 3525, 3560; 17 RT 4192.) Higuera talked on the phone and applied pressure to his arm. (17 RT 4197.) Cardenas washed his hands. (17 RT 4191-4192.)

Ortiz and Dragoman asked petitioner and Ochoa-Gonzalez to change out of their clothes. (15 RT 3526; 17 RT 4193, 4198.) Ortiz saw blood on petitioner's jersey and shoes, and Dragoman saw blood on petitioner's shoes, but neither one saw blood on Ochoa-Gonzalez's clothes. (15 RT 3561; 17 RT 4198, 4260, 4276-4277.) Ortiz and Dragoman washed the clothes in the laundry. (15 RT 3527-3528; 17 RT 4199.)

Dragoman took a broken black knife handle petitioner had been carrying and flushed it down the toilet. (17 RT 4194; 18 RT 4400-4401.) It came from a knife block in Amante and Dragoman's kitchen. (17 RT 4195.) She put the beanie petitioner was wearing in the trash. (17 RT 4201.) Dragoman put the knife Amante was carrying in a kitchen drawer. (17 RT 4196.) Ortiz burned the sweatshirt she was wearing when Higuera put his arm around her. (15 RT 3613.)

A week or two later, Dragoman realized that knives were missing from her block, and that each knife had the same serial number, and thought, "Wow, we need to get rid of these." (15 RT 4204.) She and Amante took the other knives and knife block and dumped them on the side of a road. (17 RT 4204-4205.)

E. Events Surrounding the Stabbing From Miguel and Rebecca Sandoval's Perspective on the Bridge Over the Creek

On the night of the stabbing, Miguel and Rebecca Sandoval stopped their car on the bridge to talk to Miguel's father. (16 RT 3741-3742, 3834-3835.) They saw men climbing over a fence by the apartment complex. (16 RT 3743, 3835.)

According to Rebecca, Ochoa-Gonzalez and another man walked past them on the bridge and continued down to the creek. (16 RT 3743-3744.) A minute later, Higuera and another man arrived on the scene. (16 RT 3745-3746.) One man, who had a black handle in his hand, asked Miguel whether he banged Norte, but Miguel said he was just there to talk to his father. (16 RT 3749, 3837, 3845-3846.) Those four men walked down the path under the bridge, but Ochoa-Gonzalez did not go all the way. (16 RT 3747-3748.) Amante and two women appeared and walked down the path under the bridge. (16 RT 3750-3752, 3756.)

Miguel recalled seeing Ignacio Gomez ride a bicycle over the bridge, then down a path under the bridge. (16 RT 3837-3843.) Four men and two women crossed the bridge. (16 RT 3923.) A fifth man, wearing a red 49ers jersey, ran toward Miguel's car and dropped a small knife. (16 RT 3851, 3869, 3874, 3923.) The

man in the 49ers jersey picked up the knife and ran down to where the other men were. (16 RT 3851.) A woman yelled to the man to stop. (16 RT 3851.) Miguel heard the men under the bridge ask Gomez whether he was Sureño. (16 RT 3871.)

Miguel looked under the bridge and saw two men cursing and hitting Gomez, and one man stabbing him with a knife. (16 RT 3853-3854, 3868-3869.) The stabber was Amante, wearing a white shirt and a red jersey. (16 RT 3941; 21 RT 5297.) Higuera remained at a distance from the attack. (16 RT 3861-3864.) Ochoa-Gonzalez also stood away from the attack, with the women. (16 RT 3866, 3868, 3877, 3927-3928.) The five men and two women walked back up to the bridge. (16 RT 3760-3761, 3855.) Each man covered his face with his shirt. (16 RT 3760, 3855.) Two men had blood on their white shirts. (16 RT 3855, 3882.) Miguel testified he saw no blood on the man in the 49ers jersey but then recalled seeing blood on his jersey. (16 RT 3882, 3942.) The Sandovals called 911. (16 RT 3761-3763.)

Miguel Sandoval identified Amante from a photo line-up as the stabber. (16 RT 3886, 3939-3941; 19 RT 4856, 4862.)

Neither Sandoval identified petitioner, although his photo was in the line-up. (17 RT 4142-4144.) No evidence showed that either Sandoval saw a man in a Raiders jersey, despite Dragoman's testimony that petitioner wore a black and white Raiders jersey. (17 RT 4188.)

F. Investigation

Sergeant Jon Fehlman arrived at the scene at about 12:30 a.m. (13 RT 3048-3050.) He saw no one, but returned at

6:30 a.m. and found Ignacio Gomez, deceased, in some brush on an embankment between the path and the creek. (13 RT 3055-3056, 3058-3059, 3150.) Gomez wore blue clothing. (14 RT 3285.)

Broken pieces of a knife blade were found on the ground nearby. (13 RT 3150-3155, 3176, 3199.) A stain on one piece tested presumptive positive for blood but was not conclusive. (17 RT 4064, 4066.) A criminalist did not believe the broken knife blade was used in the stabbing due to the small amount of blood. (17 RT 4072.) Graffiti was on the path under the bridge. (14 RT 3271-3272.) There was a full moon and clear sky on the night of the stabbing. (13 RT 3050; 14 RT 3310; 15 RT 3509; 16 RT 3897.) Street lights illuminated the bridge but not underneath it. (13 RT 3050.) The location of Gomez's body was visible from the bridge. (14 RT 3311-3312, 3314.)

Two knives and a wooden knife block were found on the side of a road. (13 RT 3208-3211; 17 RT 4080, 4084, 4139.)

G. Victim's Fatal Injuries

Gomez died from 38 to 40 wounds to his head, chest, back, shoulders, and sides, puncturing his heart, lungs, diaphragm, kidneys, and spleen. (14 RT 3385-3389.) The wounds may or may not have been caused by more than one knife. (14 RT 3405.)

H. Police Contacts With Peter Amante, Kacee Dragoman, and Lindsay Ortiz

Both Dragoman and Ortiz lied to police about the incident. (15 RT 3531-3532, 3607 17 RT 4157, 4250.) But Dragoman learned Amante had talked to police upon his arrest.

(17 RT 4289.) After talking to Amante, Dragoman gave a statement to police. (17 RT 4250-4251, 4290.) Dragoman and Ortiz met with Amante in jail and discussed the stabbing. (15 RT 3608, 3639-3630; 17 RT 4251.) Ortiz talked to police at Amante and Dragoman's request. (15 RT 3610-3611, 3694; 17 RT 4251.) Ortiz and Dragoman signed immunity agreements requiring them to testify truthfully. (15 RT 3536-3538; 17 RT 4214-4215, 4306.)

I. Petitioner's Statements to Richard Smith

Richard Smith, an in-custody informant, testified that petitioner became angry in jail and told him, "I'll kill you just like I killed that guy in the creek." (19 RT 4676, 4683.)

Smith had numerous prior convictions. (19 RT 4653-4654, 4685-4689.) At trial, Smith was awaiting sentencing on his forgery case, and hoped his testimony would help him, but he had not been promised any benefit. (19 RT 4654, 4668, 4674.) From jail, Smith wrote letters to the prosecutor and an investigator, asking for favors, and thanking them for favors granted. (19 RT 4699, 4705-4707; Defense Exhibits L-A, L-C, L-D, L-F.)[6/]

Smith once told a correctional officer in jail not to write a disciplinary report because the rules did not apply to him. (19 RT 4707-4708.) No officer ever wrote up Smith's violation. (19 RT 4709.) Smith admitted he received benefits for his services as an informant in Arizona. (19 RT 4714.)

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6. Petitioner intends to request the Superior Court to transmit these exhibits to this Court.

J. Gang Evidence

According to Officer Robert Scott, a gang expert, Norteños are a criminal street gang; VSRN and ATC are Norteño subsets. (19 RT 4882; 20 RT 4907-4909, 4926-4927, 5018.) Norteños members' primary activities are weapons-related assaults. (20 RT 4910.) Norteños are in constant conflict with the rival Sureños gang. (20 RT 5013-5014.) An attack by Norteños may escalate from a fist fight to combat with weapons. (20 RT 5014-5016.) Norteños had been convicted of violent crimes, including against Sureños. (20 RT 4913-4921.)

Scott opined that petitioner was a Norteños member and active participant. (20 RT 4968-4986.) Amante, Cardenas, Higuera, and Ochoa-Gonzalez were also Norteños. (20 RT 4949, 4967, 4987, 5025, 5043, 5082, 5088.) Petitioner associated with Aztec Cholos (ATC); Amante, Cardenas, Higuera, and Ochoa-Gonzalez associated with Varrio Santa Rosa Norteños (VSRN). (15 RT 3523.)

Scott opined that Gomez's blue clothing was consistent with affiliation with the Sureños. (20 RT 4933-4934.) Scott opined that graffiti by Norteños near graffiti by Sureños at the scene of the stabbing was intended to demonstrate disrespect for Sureños. (20 RT 4939-4943.)

Scott opined that a hypothetical fatal stabbing by Norteños gang members of a Sureños affiliate, under circumstances extremely similar to those in this case, would have been committed for the benefit of and in association with the Norteños gang. (20 RT 5089-5090.)

Arguments

I

The *Chiu* Error Requires Reversal Because It is Not Clear Beyond a Reasonable Doubt That the Jury Relied on a Legally Valid Theory to Convict Petitioner of First Degree Murder, Insofar as the Record Establishes That the Prosecutor Argued the Invalid Theory and the Jury Expressed Interest in the Invalid Theory

A. Introduction

Petitioner's conviction of first degree murder must be reversed due to alternative-theory instructional error under *People v. Chiu, supra,* 59 Cal.4th 155, as it is not clear beyond a reasonable doubt that the jury convicted petitioner based on a valid theory rather than the invalid theory. Because the prosecutor repeatedly argued the invalid theory to the jury and the jury expressed an interest in the invalid theory during deliberations, there is strong reason to doubt the error was harmless, without regard to any evidence in favor of a valid theory. But even if this Court considers the evidence in favor of a valid theory, it cannot hold the error harmless, because there is reason to doubt that every juror found that petitioner both intended to kill and acted with premeditation and deliberation.

B. Alternative-Theory Error Under *Chiu* Occurred at Trial

The Court of Appeal acknowledged that petitioner's trial was flawed by alternative-theory instructional error under *People v. Chiu, supra,* 59 Cal.4th 155:

> It is undisputed that *Chiu* error occurred at [petitioner] 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 were also 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.

(Slip opinion, pp. 5-6.)

This Court in *People v. Chiu, supra,* 59 Cal.4th 155 held that "the connection between the defendant's culpability and the perpetrator's premeditative state is too attenuated to impose aider and abettor liability for first degree murder under the natural and probable consequences doctrine." (*Ibid.*) Clarifying, this Court held that when the prosecution uses a target offense and the natural and probable consequences doctrine to charge a defendant with a nontarget offense of murder, the only offense the aider and abettor commits is second degree murder. (*Ibid.*)

Petitioner was prosecuted for first degree murder under three theories of liability -- (1) as an actual perpetrator, (2) as an aider and abettor with shared knowledge, intent, and

purpose of the perpetrator, and (3) as an aider and abettor to a target offense, the natural and probable consequence of which was the commission of a first degree murder. (1 CT 66-68 (A152748).)

The court instructed the jury with CALJIC No. 3.00 that principals in a crime include those who "directly and actively commit the act constituting the crime" and those who "aid and abet the commission of the crime" with "knowledge of the unlawful purpose of the perpetrator" and "the intent or purpose of committing or encouraging or facilitating the commission of the crime." (1 CT 147-148 (A152748).)

In addition, and over petitioner's objection (24 RT 5925-5927, 5935 (A113655)), the court instructed the jury with CALJIC No. 3.02 concerning the natural and probable consequences theory of aiding and abetting liability for murder. The jury was told, "One who aids and abets another in the commission of a crime or crimes is not only guilty of those crimes, but is also guilty of any other crime committed by a principal which is a natural and probable consequence of the crimes originally aided and abetted." Five potential target offenses were listed -- breach of peace, assault, battery, assault with a deadly weapon, and assault by means of force likely to produce great bodily injury. Jurors were permitted to convict petitioner of murder if they were to find he aided and abetted a target offense and the crime of murder was a natural and probable consequence thereof, even without unanimous agreement as to the specific target offense. (1 CT 148 (No. A152748).)

The court also instructed on the charged crime of murder (CALJIC No. 8.10), malice (CALJIC No. 8.11), willful, deliberate, and premeditated first degree murder (CALJIC No. 8.20), and second degree murder (CALJIC Nos. 8.30, 8.31), as well as the target offenses of assault (CALJIC Nos. 9.00, 9.01), assault with deadly weapon (CALJIC No. 9.02), assault by means of force likely to produce great bodily injury (CALJIC Nos. 9.02, 9.08), battery (CALJIC Nos. 16.140, 16.141) , and breach of peace (CALJIC No. 16.260). (1 CT 153-154, 158-159 (No. A152748).)

C. Indications That the Prosecutor Argued the Invalid Theory to the Jury or That the Jury Expressed Interest in the Invalid Theory Are Dispositive to the Harmlessness Inquiry, Such That a Reviewing Court Should Not Hold Alternative-Theory Instructional Error Harmless Based on Its View of the Strength of the Evidence in Favor of a Legally Valid Theory

1. Introduction

To determine whether the error at petitioner's trial compels reversal of his first degree murder conviction, this Court must clarify the extent to which, and the manner in which, a reviewing court may consider evidence in favor of a legally valid theory in assessing whether it is clear beyond a reasonable doubt that the jury based its verdict on a valid theory, in a case such as petitioner's, where the record contains indications that the jury considered the invalid theory.

This Court should conclude that in order to ensure that the harmless error inquiry focuses on whether an error

actually contributed to the jury's verdict, indications in the record that the jury considered the invalid theory are dispositive to the prejudice inquiry, so that a reviewing court in such a case should not hold the error harmless based on its view of the strength of the evidence in favor of a legally valid theory. Moreover, a reviewing court should not hold the error harmless based on its view of the strength of the evidence in favor of a valid theory unless it can conclude there is no reasonable possibility that one or more jurors convicted the defendant under the invalid theory.

2. This Court's opinions explain alternative-theory harmless-error analysis under *Chapman*

This Court's opinions in *People v. Chiu, supra,* 59 Cal.4th 155, 167; *In re Martinez* (2017) 3 Cal.5th 1216, 1227; and *People v. Aledamat, supra,* 8 Cal.5th 1, 3 affirm that the correct standard for determining whether alternative-theory error is harmless is the "beyond a reasonable doubt" standard of review established in *Chapman v. California, supra,* 386 U.S. 18, 24 for federal constitutional error. Under this standard, an error is harmless when the reviewing court determines "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman, supra*, at p. 24.) But when there is "'a reasonable possibility'" that the error may have contributed to the verdict, reversal is required. (*Ibid.*)

In *People v. Chiu, supra,* 59 Cal.4th 155, this Court explained that a first degree murder conviction must be reversed if the defendant may have been convicted improperly as an aider

and abettor under the natural and probable consequences doctrine, unless the reviewing court can "conclude beyond a reasonable doubt that the jury based its verdict on the legally valid theory that [the] defendant directly aided and abetted the premeditated murder." (*Id.* at p. 167, citation omitted.) Communications between the trial court and deliberating jury in *Chiu* led this Court to reverse, concluding that "the jury may have been focusing on the natural and probable consequences theory of aiding and abetting" to convict the defendant, and therefore it was not clear beyond a reasonable doubt that the jury ultimately based its first degree murder verdict on a valid theory. (*Id*. at pp. 167-168.)

Subsequently, this Court in *In re Martinez, supra,* 3 Cal.5th 1216 affirmed the duty of a reviewing court in a case of *Chiu* alternative-theory error to analyze the record to determine whether it is clear beyond a reasonable doubt that the jury based its verdict on a legally valid theory. (*Id.* at p. 1225.) This Court noted that an improper instruction on an invalid theory "deprives a defendant of the right to a jury trial under the Sixth Amendment to the United States Constitution; that right implies a right to a jury properly instructed on the relevant law." (*Id*. at p. 1224, citing *Neder v. United States* (1999) 527 U.S. 1, 12 [144 L.Ed.2d 35, 119 S.Ct.1827].) This Court explained that "once [the defendant] has shown that the jury was instructed on correct and incorrect theories of liability, the presumption is that the error affected the judgment." (*Id*. at p. 1224.)

Applying these principles, this Court noted that two events undermined any certainty the jury must have relied on a valid theory -- (1) "the prosecutor argued the natural and probable consequences theory to the jury at length during closing argument and rebuttal," and (2) "an inquiry by the jury during its deliberations suggested that it was considering the natural and probable consequences theory of liability." (*Martinez, supra,* at pp. 1226-1227.) Therefore the error could not be held harmless. (*Id*. at p. 1227.)

This Court recently continued to clarify the standard for assessing prejudice in a case of alternative-theory error in *People v. Aledamat, supra,* 8 Cal.5th 1. The trial court in *Aledamat* instructed on two alternative theories under which the jury could find the box cutter used by the defendant in an assault was a deadly weapon. Although the theory that the defendant had used the box cutter as a deadly weapon was valid, the other theory that the box cutter was an inherently deadly weapon was legally invalid. (*Id.* at pp. 7, 13-14.) This Court explained, "The reviewing court must reverse the conviction unless, after examining the entire cause, including the evidence, and considering all the relevant circumstances, it determines the error was harmless beyond a reasonable doubt." (*Aledamat, supra,* at p. 3.)

This Court held the error in *Aledamat* harmless beyond a reasonable doubt. (*Id.* at pp. 3-4, 15.) The record apparently lacked indications the jury considered the invalid

theory. Moreover,"no one ever suggested to the jury that there were two separate ways it could decide whether the box cutter was a deadly weapon," and the defense "did not contest the point." (*Id.* at pp. 5, 14.) Although the defense argued the defendant did not assault the victim with the box cutter, which necessarily meant he did not use it as a deadly weapon, the guilty verdict of assault showed the jury rejected the defense argument. (*Id.* at p. 14.) Thus this Court concluded, "'No reasonable jury that made all of these findings [required by the instructions and reflected in the verdicts] could have failed to find' that defendant used the box cutter in a way that is capable of causing or likely to cause death or great bodily injury [as required by the legally valid theory]." (*Id.* at p. 15, citation omitted.)

However, this Court in *Aledamat* did not discuss to what extent or in what manner a reviewing court may consider the evidence in favor of a legally valid theory in assessing whether alternative-theory error was harmless, when the record contains indicia that the jury considered the invalid theory, as was the case in *Chiu* and *Martinez*.

3. The United States Supreme Court's harmlessness analysis has consistently focused on an error's effect on the jury's verdict

To clarify further the correct application of the *Chapman* "beyond a reasonable doubt" standard for harmlessness to the context of alternative-theory error, this Court should rely on the United States Supreme Court's repeated pronouncements

that the proper focus in harmlessness analysis must be the effect the error had upon the verdict returned by the jury, rather than the possibility that a jury in a hypothetical error-free trial could have convicted a defendant based on the evidence presented.

The High Court in *Yates v. Evatt* (1991) 500 U.S. 391 [114 L.Ed.2d 432, 111 S.Ct. 1884], overruled on other grounds in *Estelle v. McGuire* (1991) 502 U.S. 62, 72, fn. 4 [116 L. Ed. 2d 385, 112 S.Ct. 475] reversed a conviction due to an unconstitutional burden-shifting presumption presented to the jury, because the error was not harmless. (*Id.* at p. 411.) The Court explained:

> To satisfy *Chapman*'s reasonable-doubt standard, it will not be enough that the jury considered evidence from which it could have come to the verdict without reliance on the presumption. Rather, the issue under *Chapman* is whether the jury actually rested its verdict on evidence establishing the presumed fact beyond a reasonable doubt, independently of the presumption.

(Id. at p. 404.)

Subsequently, the High Court in *Sullivan v. Louisiana* (1993) 508 U.S. 275 [124 L.Ed.2d 182, 113 S.Ct. 2078] affirmed its focus on whether an error actually contributed to the jury's verdict, not whether the evidence supported the verdict. The Court reversed a conviction due to an erroneous reasonable doubt instruction, holding the error not amenable to harmless-error analysis because it "vitiate[d] all the jury's findings." (*Id.* at p. 281.) But the Court also elaborated on "the proper role of an appellate court engaged in the *Chapman* inquiry" (*id.* at p. 280):

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> Consistent with the jury-trial guarantee, the question [*Chapman*] instructs the reviewing court to consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. [] 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 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, supra*, at pp. 279-280, citations omitted.)

Years after *Sullivan*, the High Court continued to analyze harmlessness by focusing on what the jury actually did. The Court in *McDonnell v. United States* (2016) 579 U.S. __ [195 L.Ed.2d 639, 136 S.Ct. 2355] held that reversible error occurred at a defendant's bribery trial because jury instructions defining an "official act" were "significantly overinclusive." (*Id.*, 579 U.S. at p. __ [136 S.Ct. at p. 2374].) The Court explained how it was "possible" that the jury may have convicted the defendant "without finding that he committed or agreed to commit an 'official act,' as properly defined." (*Id.*, 579 U.S. at p. __ [136 S.Ct. at pp. 2374-2375].) Thus the Court could not hold the instructional errors harmless beyond a reasonable doubt because the jury "may have convicted [the defendant] for conduct that is not unlawful." (*Id.*, 579 U.S. at p. __ [136 S.Ct. at p. 2375].)

In its jurisprudence, this Court has followed the High Court's approach. It did so in *People v. Neal* (2003) 31 Cal.4th 63 when it held that erroneous admission of a defendant's confession was not harmless, quoting *Chapman*, *Yates*, and *Sullivan*:

> The beyond-a-reasonable-doubt standard of *Chapman* "requir[es] the beneficiary of a [federal] constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." [] "To say that an error did not contribute to the ensuing verdict is ... to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." [] Thus, the focus is what the jury actually decided and whether the error might have tainted its decision. That is to say, the issue is "whether the ... verdict actually rendered in this trial was surely unattributable to the error."[]

(*Neal, supra*, at p. 86 [citations omitted].)

Since *Neal*, this Court has continued to focus on the effect of an evidentiary or instructional error on the jury's verdict. (See, e.g., *People v. Grimes* (2016) 1 Cal.5th 698, 723 [citing *Neal* and *Sullivan* and holding exclusion of defense evidence not harmless error]; *People v. Pearson* (2013) 56 Cal.4th 393, 463 [citing *Neal* and *Sullivan* but finding admission of autopsy reports harmless error]; *People v. Aranda* (2012) 55 Cal.4th 342, 368 [citing *Sullivan* and holding omission of standard reasonable doubt instruction harmless error as to one conviction but not harmless as to enhancement].)

The principle set forth by the High Court and consistently applied by this Court -- that a reviewing court's

harmlessness inquiry must focus on what the jury actually did -- provides guidance for this Court to determine the extent to which, and the manner in which, a reviewing court may consider the evidence in favor of a valid theory in assessing whether alternative-theory error was harmless, when the record contains indicia that the jury considered the invalid theory.

4. This Court should adopt the following protocol for a reviewing court to apply harmless-error analysis to alternative-theory error

The principle set forth in the foregoing authorities compels the adoption of the following protocol to be applied by a reviewing court tasked with determining whether it is clear beyond a reasonable doubt that a jury convicted a defendant based on a valid theory rather than an invalid theory.

First, a reviewing court must begin with the presumption that alternative-theory error requires reversal. (*In re Martinez, supra,* 3 Cal.5th 1216, 1224.)

Second, a reviewing court may hold alternative-theory error harmless if it can determine beyond a reasonable doubt from the jury's other verdicts that the jury necessarily relied on a valid theory to convict the defendant. "The reviewing court examines what the jury necessarily did find and asks whether it would be impossible, on the evidence, for the jury to find *that* without *also* finding the missing fact as well." (*People v. Aledamat, supra,* 8 Cal.5th 1, 15, emphasis in original [jury's findings in verdicts indicated it must have made findings for valid

theory of conviction].) This Court in *Aledamat* noted that it had applied this harmlessness test to alternative-theory error in its earlier opinion in *People v. Chun* (2009) 45 Cal.4th 1172, in which it explained, "'If other aspects of the verdict or the evidence leave no reasonable doubt that the jury made the findings necessary for [a conviction based on a valid theory], the erroneous [] instruction [on an invalid theory] was harmless.'" (*Aledamat, supra,* at pp. 10, 14-15, quoting *Chun, supra,* at pp. 1204-1205.)

Third, a reviewing court that cannot determine that the jury necessarily relied on a valid theory based on "what the jury necessarily did find" in its other verdicts (see *Aledamat, supra,* at p. 15) should then proceed to consider the entire cause, but it should consider *first* those aspects of the record that most clearly indicate the basis on which the jury actually rested its verdict. This is consistent with the United States Supreme Court's insistence on focusing on the effect an error had upon the verdict actually returned by the jury, rather than considering evidence from which the jury could have come to the verdict without reliance on an erroneous instruction. (See *Sullivan v. Louisiana, supra,* 508 U.S. at pp. 279-280.)

Accordingly, if the record shows the prosecutor argued the invalid theory to the jury, this indicates the jury considered the invalid theory at trial, and reversal is required because the court cannot determine beyond a reasonable doubt that the jury did not rely on the invalid theory for its verdict. (See *In re Martinez, supra,* 3 Cal.5th 1216, 1226-1227 [prosecutor

argued invalid theory to jury "at length during closing argument and rebuttal"]; *In re Loza* (2018) 27 Cal.App.5th 797, 805 [prosecutor argued invalid theory]; *People v. Lewis* (2006) 139 Cal.App.4th 874, 881, 891, 895 [prosecutor argued invalid "no-brainer" theory].)

Likewise, if the record shows the jury revealed during deliberations it was considering the invalid theory, then reversal is required because the court cannot determine beyond a reasonable doubt that the jury did not rely on the invalid theory for its verdict. (See *Martinez, supra,* at p. 1227 ["an inquiry by the jury during its deliberations suggested that it was considering the [invalid] natural and probable consequences theory of liability"]; *People v. Chiu, supra,* 59 Cal.4th 155, 178-168 [communications between court and deliberating jury showed "the jury may have been focusing on the natural and probable consequences theory of aiding and abetting" to convict].)

Any such sign that the jury considered the invalid theory compels reversal because it "tends to indicate one or more jurors voted guilty based on the [invalid] theory." (See *People v. Brown* (2016) 247 Cal.App.4th 211, 226 [jury expressed interest in invalid theory late in deliberations].) If even one juror may have relied on the invalid theory, the error would not be harmless. (See *People v. Moore* (2011) 51 Cal.4th 386, 413 [jurors need not agree on single theory of first degree murder].) The presence of such indicia in the record would preclude a finding of harmlessness, thereby completing the reviewing court's inquiry.

But if the prosecutor did not argue the invalid theory, and if the jury did not express interest in the invalid theory, then the possibility remains that the error may be held harmless. At this point, as this Court explained in *Aledamat*, "The reviewing court must reverse the conviction unless, after examining the entire cause, including the evidence, and considering all the relevant circumstances, it determines the error was harmless beyond a reasonable doubt." (*Aledamat, supra,* at p. 3.) Having failed to perceive any indicia in the record that the jury considered the invalid theory, a reviewing court may take the next step and consider the evidence in favor of a valid theory .

It is crucial that a reviewing court take this next step *only* when the record lacks indications that the jury considered the invalid theory. This is because a reviewing court's consideration of the evidence risks an improper focus on whether a hypothetical jury would render the same verdict in the absence of the error. (See *Carella v. California* (1989) 491 U.S. 263, 269 [105 L.Ed.2d, 109 S.Ct. 2419] (conc. opn. of Scalia, J.) [erroneous instruction to apply a conclusive presumption "would not be cured by an appellate court's determination that the record evidence unmistakably established guilt, for that would represent a finding of fact by judges, not by a jury"]; *People v. Merritt* (2017) 2 Cal.5th 819, 834 (conc. opn. of Liu, J.) ["when a reviewing court considers the strength of the evidence in order to fill a gap in the jury's findings, the court is wading into the factfinding role reserved for the jury"].)

Finally, if a reviewing court reaches the stage where it decides to consider the evidence, the question to be resolved is not whether the evidence would be sufficient to support a conviction based on a valid theory, but rather, whether the evidence could support *only* the valid theory and not the invalid theory. (See *In re Martinez, supra,* 3 Cal.5th 1216, 1226 [*Chiu* error not harmless although sufficient evidence would support conviction based on valid theory, because sufficient evidence would similarly support conviction based on invalid theory].)

D. It Cannot Be Held to Be Clear Beyond a Reasonable Doubt That the Jury Convicted Petitioner of First Degree Murder Based on a Legally Valid Theory Because the Prosecutor Argued the Invalid Theory and the Jury Expressed Its Interest in the Invalid Theory

1. Introduction

Based on the protocol set forth, *ante*, a review of the record precludes this Court from holding it clear beyond a reasonable doubt that the jury relied on a legally valid theory to convict petitioner of first degree murder. The prosecutor repeatedly argued the invalid theory, and the jury expressed its interest in relying on the invalid theory to reach a verdict. Even if this Court were to consider the evidence at trial, it cannot determine the error was harmless beyond a reasonable doubt.

2. The prosecutor repeatedly argued the invalid theory to the jury

First, the prosecutor's argument to the jury precludes a holding of harmlessness.

In his summation, the prosecutor encouraged the jury to consider relying on the natural and probable consequences doctrine of aiding and abetting liability to convict petitioner and his codefendants of first degree murder. (1 CT 193-196 (No. A152748).) The prosecutor advised the jurors:

> Natural and probable consequences does not require an intent to kill. It does not require premeditation. It does not require deliberation.

(1 CT 195 (No. A152748).) He also argued the doctrine applied to petitioner specifically:

> Even if you think that he was down there just trying to stab a Scrap, maybe. Maybe, despite all the evidence, he just wanted to really seriously wound the guy. It doesn't matter. He aided and abetted in that serious attack someone that was right there with him. Murdered Jose. And of course under those circumstances, that was inevitable. [¶] So whether he is an actual stabber or not, whether he aided and abetted with the intent to kill or not, he's guilty of murder as a natural and probable consequence of his act.

(2 CT 285-286 (No. A152748).)

On rebuttal, the prosecutor reminded jurors they could rely on the natural and probable consequences doctrine of aiding and abetting liability to convict any defendant:

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> 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 (No. A152748), emphasis added.)

The prosecutor applied this principle directly to the first degree murder charge when he asked, "It's a first degree as to whom? Who's responsible for first?" (2 CT 343 (No. A152748).) He answered by arguing that first degree murder was the correct verdict for an actual stabber, an aider and abettor with intent to kill, and an aider and abettor who aids and abets a crime "with first degree murder being a natural and probable consequences of the crime aided and abetted." (2 CT 343-344 (No. A152748).) He asked, "[C]an anybody reasonably claim that this murder was not

a natural and probable consequence of five nortenos out on the path that night armed with knives, one person dressed as a sureno, alone?" (2 CT 347 (No. A152748).)

3. The jury expressed interest in the invalid theory during deliberations

A second reason precluding a holding of harmlessness is the jury's indication it was considering the invalid theory to return a first degree murder verdict.

On the fourth day of deliberations (3 CT 545-549 (No. A152748)), the jury requested clarification of how premeditation and deliberation related to CALJIC No. 3.02, which explained the natural and probable consequences theory of aiding and abetting liability for murder:

> We are having difficulties with the sentence "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 3.02 [sic].

(2 CT 361 (A152748).)

The court responded, over petitioner's objection (28 RT 6906-6908, 6919-6921, 6930-6931 (No. A113655)), by telling jurors they could apply the natural and probable consequences theory of aiding and abetting liability set forth in CALJIC No. 3.02 to first degree murder:

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> 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 on what you determine the facts to be. Those crimes are defined elsewhere in the court's instructions.
>
> If this response does not address your concern, please submit a further request.

(2 CT 363 (A152748), emphasis added.)

The jury convicted petitioner of first degree murder the day after the court responded. (3 CT 549 (A152748).)

4. The prosecutor's argument and jury's inquiry are dispositive to the harmlessness inquiry

The prosecutor's explicit invitation to the jury to rely on the invalid theory for a conviction of first degree murder, and the jury's note expressing its interest in the invalid theory for

such a conviction, as well as the court's response affirming that the invalid theory may apply to first degree murder, establish conclusively that it cannot be held clear beyond a reasonable doubt that the jury convicted petitioner based on a valid theory. (See *Martinez, supra,* at pp. 1226-1227 [*Chiu* error not harmless when prosecutor argued invalid theory to jury and jury indicated it was considering invalid theory].)

Although the prosecutor argued valid theories of liability in addition to the invalid theory, his argument in support of the invalid theory precludes a holding of harmless error. (See *In re Loza, supra*, 27 Cal.App.5th 797, 804 [*Chiu* error not harmless when prosecutor argued both valid and invalid theories to jury and commented that inference underlying invalid theory was "[n]ot likely" but "could be" warranted].) Moreover, the prosecutor's implicit characterization of the invalid theory as the easiest theory to apply (see 1 CT 195; 2 CT 285-286 (No. A152748)) encouraged jurors to rely on the invalid theory as a short cut to first degree murder. (See *People v. Nunez* (2013) 57 Cal.4th 1, 41-42 [instructional error not harmless when court's instructions and prosecutor's argument facilitated jury's task by relieving jury of obligation to determine who personally used murder weapon].) Thus the prosecutor's argument inviting petitioner's jury to rely on the invalid theory created a "reasonable possibility" that jurors would accept his invitation. (See *Chapman v. California, supra,* 386 U.S. 18, 24 [reversal is required when "a reasonable possibility" exists that error

contributed to verdict].) As petitioner's jury was not required to agree unanimously on a single theory of first degree murder (see *People v. Moore, supra,* 51 Cal.4th 386, 413), the reasonable possibility that at least one of the jurors relied on the invalid theory precludes a holding of harmless error.

The Court of Appeal's opinion acknowledged that the prosecutor argued that the invalid theory could support a conviction of not just murder, but first degree murder specifically. (Slip opinion, p. 3; see 1 CT 195; 2 CT 343-344 (No. A152748).) But the Court failed to account for the prosecutor's argument when it analyzed harmlessness. (Slip opinion, pp. 9-11.)

Furthermore, although the Court of Appeal acknowledged the jury's expression of interest in the invalid theory (slip opinion, pp. 3-4, 11), the Court dismissed the significance of this event by noting "there is no indication that jurors were considering this theory for [petitioner] Lopez specifically." (Slip opinion, p. 11.) However, the Court's analysis turned the standard of review on its head. It is not petitioner's burden to establish that the jury was considering the invalid theory for petitioner specifically, rather than for a codefendant. Under *Chapman*, "the beneficiary of the error [is required] either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment." (*Chapman, supra*, at p. 24.) As the Superior Court noted in its order granting the writ of habeas corpus, "the record does not demonstrate that [the jury] did *not* have petitioner Lopez in mind when considering that [invalid]

theory of liability." (4 CT 789 (No. A152748), emphasis added.)

Thus the error cannot be held harmless in petitioner's case due to the prosecutor's argument and jury's expression of interest in the invalid theory. This Court should not hold the error harmless based on its view of any trial evidence that would support a guilty verdict under a valid theory.

5. Even if this Court were to consider the evidence in favor of a valid theory, the error cannot be held harmless

Even if the evidence in favor of a valid theory were considered, the *Chiu* error could not be held harmless.

To hold an alternative-theory error harmless based on the evidence presented, a reviewing court must not rely on its conclusion that there was sufficient evidence in the record to convict a defendant based on a valid theory, or its view that the evidence was overwhelming in support of convicting him under the valid theory, unless the reviewing court can conclude there is no reasonable possibility (see *Chapman, supra*, at p. 24) that one or more jurors could have convicted the defendant under the invalid theory.

In determining the *Chiu* error harmless, the Court of Appeal concluded that "the evidence against [petitioner] was overwhelming," inasmuch as petitioner "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.) But the Court added, "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." (Slip opinion, p. 11.) Thus the Court's reasoning appears to be based both on its view that the evidence was "sufficient" to support a valid theory of conviction and its conclusion that the evidence was "overwhelming." However, the Court's reasoning was critically flawed on both points.

First, sufficiency of the evidence to support a conviction under a valid theory can never justify a holding that it is clear beyond a reasonable doubt that the jury did not rely on the invalid theory. This Court declined to hold the error harmless in *People v. Chiu, supra,* 59 Cal.4th 155 because the record showed the jury may have based its verdict on the invalid theory, even though the evidence clearly would have supported a first degree murder conviction based on a valid theory of direct aiding and abetting with premeditation and deliberation, insofar as it showed the defendant urged his accomplice to grab a gun and yelled, "shoot him, shoot him." (*Id.* at pp. 160, 167-168; see also *People v. Morgan* (2007) 42 Cal.4th 593, 613-616 [instructional error concerning kidnapping charge not harmless because prosecutor argued invalid theory to jury, even though evidence would have supported conviction under valid theory]; *In re Loza, supra*, 27 Cal.App.5th 797, 800, 805-806 [*Chiu* error not harmless because record showed prosecutor argued invalid theory to jury, even though evidence showed defendant tried to shoot gun, but

when gun failed to work, passed it to accomplice who shot victim].)

A holding of harmless error based on the sufficiency of evidence to support a conviction on a valid theory would be especially unjustified when the evidence at trial may also be sufficient to support a conviction on the invalid theory. This Court recognized as much in *In re Martinez, supra,* 3 Cal.5th 1216 when it held a *Chiu* error not harmless (*id.* at p. 1227), noting, "Although the Court of Appeal and Attorney General may be correct that there is sufficient evidence to convict Martinez of directly aiding and abetting, the evidence also supports the [invalid] theory that the murder was a natural and probable consequence of the assaults that Martinez and his codefendant committed." (*Id.* at p. 1226.)

In petitioner's case, the evidence certainly would have supported a first degree murder conviction based on the invalid theory that an accomplice's murder of the victim was a natural and probable consequence of the assault aided and abetted by petitioner. Petitioner was observed going to and from the scene of the attack with four codefendants. But Miguel Sandoval, the sole eyewitness to the attack, saw two men hitting and cursing the victim and saw only Amante stabbing him. (16 RT 3853-3854, 3868-3869, 3939-3941; 19 RT 4862; 21 RT 5297 (No. A113655).) The prosecutor explicitly told jurors that the trial evidence could support petitioner's conviction of first degree murder under the invalid theory. (2 CT 343-344; see also 2 CT 285-286, 347

(No. A152748).) As the evidence would be sufficient for a conviction under the invalid theory, the sufficiency of the evidence under a valid theory is of no consequence.

The second flaw in the Court of Appeal's reasoning is its equation of sufficient evidence with overwhelming evidence. The evidence cited by the Court of Appeal (slip opinion, p. 11), even if sufficiently compelling to induce some jurors to convict petitioner of first degree murder on a valid theory, is not so overwhelming as to preclude the possibility that one or more jurors convicted petitioner on the invalid theory. Although the jurors heard damaging evidence that petitioner held a broken knife handle after the stabbing, had blood on his clothes and shoes, and boasted about the killing, the jurors were not necessarily compelled to find that petitioner was a perpetrator or direct aider and abettor with intent to kill, or that he premeditated and deliberated.

For one thing, the jurors may have doubted the trustworthiness of testimony by Kacee Dragoman and Lindsay Ortiz implicating petitioner, due to the witnesses' likely bias toward incriminating petitioner and exculpating the codefendants and themselves. Dragoman was friends with all defendants except petitioner. (17 RT 4155, 4216-4217 (No. A113655).) Similarly, Ortiz was friends with all defendants but did not even like petitioner. (14 RT 3435-3443; 15 RT 3578, 3701 (No. A113655).) Both Dragoman and Ortiz repeatedly took steps to dispose of evidence. (15 RT 3613; 17 RT 4194, 4201, 4204-4205; 18 RT 4400-4401 (No. A113655).) Both signed immunity

agreements requiring them to testify. (15 RT 3536-3538; 17 RT 4214-4215, 4306 (No. A113655).) The defense argued to the jury that their testimony implicating petitioner was not credible because they were committed to portraying themselves as innocent bystanders and shifting blame from Amante and the others. (26 RT 6479-6485, 6489-6490, 6494, 6503-6504 (No. A113655).)

Even had they accepted Dragoman's and Ortiz's assertions about petitioner, the jurors may well have doubted that this evidence proved petitioner took part in the killing. Their testimony did not indisputably prove that he stabbed the victim or was even armed with a knife at the time of the stabbing. Ortiz recalled seeing blood on petitioner's jersey and shoes; Dragoman saw blood on his shoes but did not recall seeing blood on his jersey. (14 RT 3462; 15 RT 3518, 3561; 17 RT 4198, 4276 (No. A113655).) But petitioner's apparel could have become bloodstained as a result of him taking part in an unarmed group attack in close range during which only one attacker actually pulled out a knife and stabbed the victim. This inference would be consistent with Miguel Sandoval's testimony that he saw two men hitting and cursing the victim and only Amante stabbing him (16 RT 3853-3854, 3868-3869, 3939-3941; 19 RT 4862; 21 RT 5297 (No. A113655)), and the pathologist's opinion that the victim's wounds may or may not have been caused by more than one knife. (14 RT 3405 (No. A113655).)

Although Dragoman recalled petitioner trying to put

a broken knife handle into her pocket *after* the stabbing, and admitted she later flushed it down a toilet (17 RT 4194; 18 RT 4400-4401 (No. A113655)), no witness testified to seeing petitioner with a knife before or at the time of the stabbing. Only Amante was seen with a knife before the stabbing. (15 RT 3512, 3557 (No. A113655).) The evidence that broken pieces of a knife blade were found on the ground near the victim's body (13 RT 3150-3155, 3176, 3199 (No. A113655)) and that Amante, who was drunk, had earlier dropped his knife, perhaps twice (14 RT 3454-3455; 15 RT 3510, 3567; 16 RT 3851, 3869, 3874, 3923; 17 RT 4175-4178, 4180 (No. A113655)), suggests that petitioner may have merely picked up the handle of a broken knife that had been dropped by Amante. The evidence suggests that Amante was armed with more than one knife, inasmuch as Ortiz saw a 12-inch butcher knife fall out of Amante's pants (14 RT 3454-3455; 15 RT 3567 (No. A113655)) and Miguel Sandoval saw Amante drop a small knife (16 RT 3851, 3869, 3874, 3923 (No. A113655)). Moreover, the broken knife handle temporarily in petitioner's possession may never have been used in the stabbing, inasmuch as a criminalist did not believe the broken knife blade pieces found at the scene were used in the stabbing due to the small amount of blood. (17 RT 4072 (No. A113655).) Thus petitioner's possession of a knife handle would be consistent with him being unarmed at the time of the stabbing or simply not a person who stabbed. This evidence would allow jurors to rely on the invalid theory that petitioner was aider

and abettor only to the assault, not the murder.

As for the Court of Appeal's reliance on evidence that petitioner "bragged about the stabbing afterward" (slip opinion, p. 11), even if this evidence were to compel a conclusion that petitioner actually stabbed the victim, it would not in any way establish that he premeditated and deliberated over the fatal stabbing. Moreover, jurors may have doubted the credibility of this evidence as to whether petitioner was indeed a stabber. Richard Smith, an in-custody informant, claimed that petitioner threatened him, "I'll kill you just like I killed that guy in the creek" (19 RT 4683 (No. A113655)), but Smith admitted that he hoped his testimony would help him at sentencing in his forgery case (19 RT 4654, 4668, 4674 (No. A113655)), and that he had written many letters from jail to the prosecutor, asking for numerous favors. (19 RT 4699, 4705-4707 (No. A113655).) The defense argued to the jury that Smith's claim about petitioner's boasting threat was untrustworthy because Smith testified to obtain favors, including a reduced sentence. (26 RT 6470-6471, 6480-6481, 6488-6489, 6492-6494 (No. A113655).)

Therefore, even if it were appropriate to consider the evidence in favor of the valid theory despite the indications in the record that the jurors considered the invalid theory, the evidence is not so overwhelming that it necessarily proved to every juror that petitioner was an actual stabber, that he was even armed, that he boasted about the stabbing, that he intended to kill, or that he premeditated and deliberated over the killing. Thus a reviewing court could not hold it clear beyond a reasonable doubt

that the jury based its verdict on a valid theory requiring intent to kill, premeditation, and deliberation. The error cannot be held harmless.

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II

The *Chiu* Error at Petitioner's Trial Requires Reversal Because This Court Cannot Infer From the Jury's True Finding on the Gang-Murder Special Circumstance That It is Clear Beyond a Reasonable Doubt That the Jury Convicted Petitioner of First Degree Murder Based on a Legally Valid Theory

A. Introduction

In holding the *Chiu* error at petitioner's trial harmless, the Court of Appeal relied heavily on the jury's finding that the gang-murder special circumstance (§ 190.2, subd. (a)(22)) allegation was true. The Court noted that the instruction on the special circumstance "required proof beyond a reasonable doubt that [petitioner] Lopez acted with an intent to kill, as opposed to the intent to commit one of the target crimes." (Slip opinion, p. 9.) But the Court's conclusion that the error was harmless was unwarranted, for two independent reasons.

First, a jury can find true a gang-murder special circumstance that requires a finding of intent to kill only *after* it has reached a verdict convicting a defendant of first degree murder, which the jury may or may not have based on intent to kill, if the jury was instructed on the natural and probable consequences doctrine in violation of *Chiu*. Secondly, a true finding on such a special circumstance does not require a jury to find a defendant premeditated and deliberated, and therefore does not establish that a jury found this essential element for a conviction of first degree murder based on a valid theory.

B. A Jury's True Finding on a Gang-Murder Special Circumstance Cannot Establish That Its First Degree Murder Verdict Was Based on a Valid Theory That the Defendant Intended to Kill and Acted With Premeditation and Deliberation

It is settled that a reviewing court may hold alternative-theory error harmless and affirm a judgment of conviction if it can determine beyond a reasonable doubt from the jury's verdicts that the jury necessarily relied on a valid theory to convict the defendant. "The reviewing court examines what the jury necessarily did find and asks whether it would be impossible, on the evidence, for the jury to find *that* without *also* finding the missing fact as well." (*People v. Aledamat, supra,* 8 Cal.5th 1, 15, emphasis in original, citing *People v. Chun, supra,* 45 Cal.4th 1172, 1204-1205.)

However, a jury's true finding on a gang-murder special circumstance cannot establish beyond a reasonable doubt that a jury found all the essential requirements for a conviction of first degree murder under a valid theory and therefore did not rely on an invalid theory in a trial tainted by *Chiu* error.

First of all, a jury's gang-murder special circumstance finding does not compel a holding that *Chiu* error was harmless, because it does not establish that the jury found intent to kill when it convicted the defendant of first degree murder. A jury may rely on an invalid natural and probable consequences theory to convict a defendant of first degree murder, and then find intent to kill only afterward, when it finds the special circumstance true.

The first task of a jury deliberating on a murder charge and special circumstance allegation is to decide whether a defendant committed murder. Its second task is to decide the degree of murder. Only after those two decisions are made does a jury have the occasion to decide whether a gang-murder special circumstance allegation is true. (See CALCRIM No. 700; CALJIC No. 8.80.1.)

Thus, when a jury makes its third decision, as to whether a special circumstance allegation is true, it may have already decided that a defendant is guilty of first degree murder under an invalid natural and probable consequences theory that requires neither intent to kill nor premeditation and deliberation. A jury's finding on a gang-murder special circumstance may be the first time the jury determines that a defendant intended to kill. Thus the jury's finding of intent to kill in conjunction with the special circumstance is not inconsistent with its earlier finding of guilt of first degree murder under an invalid natural and probable consequences doctrine.

Secondly, a jury's true finding on a gang-murder special circumstance cannot render *Chiu* error harmless because the findings a jury is required to make for the special circumstance do not include essential elements of a valid conviction of first degree murder -- willfulness, premeditation, and deliberation.

This Court in *People v. Chiu, supra,* 59 Cal.4th 155 explained these requirements:

> First degree murder, like second degree murder, is the unlawful killing of a human being with malice aforethought, but has the additional elements of willfulness, premeditation, and deliberation . . . . [] That mental state is uniquely subjective and personal. It requires more than a showing of intent to kill; the killer must act deliberately, carefully weighing the considerations for and against a choice to kill before he or she completes the acts that caused the death. []

(*Id*. at p. 166, citations omitted.)

Willfulness, premeditation, and deliberation are essential to convict either an actual killer or a direct aider and abettor of first degree murder. In its opinion invalidating the natural and probable consequences doctrine of aiding and abetting liability for first degree murder, this Court in *People v. Chiu, supra,* 59 Cal.4th 155 clarified, "Aiders and abettors may still be convicted of first degree premeditated murder based on direct aiding and abetting principles." (*Id.* at p. 166, citing *People v. McCoy* (2001) 25 Cal.4th 1111, 1117-1118.) This Court explained, "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." (*Id.* at p. 167, citing *McCoy,* at p. 1118.) Thus this Court in *Chiu* affirmed that premeditation and deliberation are required for direct aider and abettor liability for first degree murder. "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." (*Ibid.*)

But a true finding on a gang-murder special circumstance requires only intent to kill, not premeditation and deliberation. (See § 190.2, subd. (a)(22); CALCRIM No. 736; CALJIC No. 8.81.22.) Insofar as a jury's true finding on a gang-murder special circumstance does not require the jury to find that the defendant premeditated and deliberated, it cannot establish that the jury convicted the defendant of first degree murder under a valid theory requiring premeditation and deliberation.

The court in *People v. Anthony* (2019) 32 Cal.App.5th 1102 erred when it determined that a jury's special circumstance findings that defendants had the intent to kill rendered it unnecessary to reverse the defendants' convictions of first degree murder despite a *Chiu* instructional error. (*Id.* at pp. 1144-1146.) The reasoning by the court in *Anthony* equating intent to kill with premeditation and deliberation simply cannot be reconciled with this Court's recognition in *Chiu* that premeditation is a far more culpable state than intent to kill, which was the principal basis of its repudiation of natural and probable consequences as a theory for first degree murder. (See *People v. Chiu, supra,* 59 Cal.4th at p. 166.)

Similarly, although the court in *People v. Brown, supra,* 247 Cal.App.4th 211 declined to find a *Chiu* error harmless for entirely correct reasons that the record indicated that "one or more jurors voted guilty based on" the invalid theory,

and the evidence in support of a valid theory was "not overwhelming" (*id.* at pp. 226-227), the court in *Brown* erred when it commented that "[i]t it possible in a given case to conclude" that a *Chiu* instructional error "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." (*Id.* at p. 226, emphasis in original.) The *Brown* court's reasoning on this point overlooks the fact that the gang-murder special circumstance does not require the jury to find that the defendant premeditated and deliberated over the killing.

Therefore a jury's true finding on the gang-murder special circumstance cannot establish that the jury found the defendant committed first degree murder under a valid theory requiring premeditation and deliberation.

C. The Jury's True Finding on the Gang-Murder Special Circumstance Does Not Render the *Chiu* Error at Petitioner's Trial Harmless

Applying the foregoing principles to petitioner's case, this Court cannot conclude beyond a reasonable doubt from the gang-murder special circumstance that petitioner's jury convicted him of first degree murder based on a valid theory requiring proof of willfulness, premeditation, and deliberation.

First of all, as the Superior Court reasoned in its order granting the writ of habeas corpus, the easiest way for

petitioner's jury to decide his guilt of murder, and specifically first degree murder, was to apply the invalid natural and probable consequences theory of aiding and abetting liability. (4 CT 790-791 (No. A152748).) Relying on the invalid theory did not require the jury to find that petitioner actually stabbed the victim, intended to kill, or premeditated and deliberated. The jury needed to find only that *someone* premeditated and deliberated, and that petitioner should have foreseen that a premeditated and deliberated murder was a natural and probable consequence of petitioner's participation in a target offense such as assault. The jury's reliance on the invalid but easiest theory was especially likely in light of Miguel Sandoval's testimony that he saw two men hitting and cursing the victim and only Amante stabbing him (16 RT 3853-3854, 3868-3869, 3939-3941; 19 RT 4862; 21 RT 5297 (No. A113655)), as well as the prosecutor's explicit invitation to rely on the invalid theory and the jury's expressed interest in the invalid theory during deliberations. (4 CT 790 (No. A152748).)

Thus, when the jury made its subsequent decision as to whether the special circumstance allegation was true, the jury may have already found petitioner guilty of first degree murder under the invalid theory that required neither intent to kill nor premeditation and deliberation. The court instructed the jury that it could decide the special circumstance allegation only if it *first* found petitioner guilty of first degree murder, and that a true finding required a finding that petitioner intended to kill.

(CALJIC Nos. 8.80.1, 8.81.22; 1 CT 156 (No. A152748).) The jury's finding on the special circumstance may have been the first time the jury determined that petitioner intended to kill. Thus the jury's finding of intent to kill in conjunction with the special circumstance is not inconsistent with its earlier finding of guilt of first degree murder under the invalid natural and probable consequences doctrine.

Secondly, the court instructed that to find that the murder was premeditated and deliberate, petitioner's jury had to find that the decision to kill was "considered beforehand," and "formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against" the killing. (1 CT 153 (A152748); CALJIC 8.20.) This was essential regardless whether the jury were to convict petitioner as a perpetrator or a direct aider and abettor, inasmuch as the court instructed the jury that a person aids and abets a crime when he or she "aids, promotes, encourages or instigates the commission of the crime" with "knowledge of the unlawful purpose of the perpetrator" and "the intent or purpose of committing or encouraging or facilitating the commission of the crime." (1 CT 147-148 (A152748); CALJIC No. 3.00.)

But to find the gang-murder special circumstance allegation true, the jury was told it had to find that petitioner intended to kill, and never instructed it had to find that he premeditated and deliberated over the killing. (CALJIC No. 8.81.22; 1 CT 156 (No. A152748).) Premeditation and deliberation were simply not required for the special

circumstance.

Thus the true finding on the gang-murder special circumstance does not establish that the jury found that petitioner premeditated and deliberated when it convicted him of first degree murder.

Petitioner is not suggesting the jury returned inconsistent verdicts. Rather, it is reasonably possible that one or more jurors in petitioner's case, having heard the evidence, instructions, and prosecutor's arguments, proceeded to reason as follows:

> I am convinced Lopez aided and abetted the killing with intent to kill, but not convinced he premeditated and deliberated. As a result, I can vote to convict him as a direct aider and abettor only of second degree murder. But the prosecutor has asked us to vote to convict Lopez of first degree murder, and suggested that we can do so based on the natural and probable consequences doctrine of aiding and abetting liability explained in CALJIC No. 3.02. The judge has told us in response to our inquiry during deliberations that CALJIC No. 3.02 may refer to first degree murder. Therefore, instead of voting to convict Lopez of second degree murder as a direct aider and abettor with intent to kill, I will vote to convict him of first degree murder based on the natural and probable consequences doctrine of aiding and abetting liability. Then I will vote to find the gang-murder special circumstance true, which requires only intent to kill, but not premeditation and deliberation.

Thus the true finding on the gang-murder special circumstance does not establish that the jury convicted petitioner under a valid theory of first degree murder, especially in light of the indications the jury considered the invalid theory before

convicting petitioner.

Finally, even if this Court were to agree with *People v. Anthony, supra,* 32 Cal.App.5th 1102 and *People v. Brown, supra,* 247 Cal.App.4th 211 that *in some cases* it may be possible to find that *Chiu* error was harmless based on the jury's true finding on a gang special circumstance (*Anthony, supra*, at pp. 1144-1145; *Brown, supra*, at p. 226), the *Chiu* error in petitioner's case cannot be held harmless.

The court in *Brown* declined to hold the *Chiu* error was harmless, although the jury found a gang-murder special circumstance true. (*Brown, supra*, at pp. 225-227.) The court primarily relied on the "fact that the jury requested further instruction on natural and probable consequences late in its deliberations," then reached a verdict shortly afterward, which indicated "one or more jurors voted guilty based on" the invalid theory. (*Id.* at p. 226.) In addition, the court's view was bolstered by its conclusion that the evidence in support of a valid theory was sufficient but "not overwhelming," and by the record that revealed "irregularities in the taking of the verdicts." (*Id.* at pp. 226-227.) Likewise, the error in petitioner's case cannot be held harmless because the prosecutor's argument and jury's note to the court similarly indicate that one or more jurors may well have relied on the invalid theory to convict petitioner.

In *Anthony*, the court's finding that the *Chiu* error was harmless should be viewed in the context of the unique circumstances of that case. First, there was apparently no

indication in the record that the jury considered the invalid theory. Secondly, the court's holding of harmlessness depended largely on its observation that "murder conspirators are necessarily guilty of first degree murder" and its conclusion that "[e]very aspect of [the defendants'] conduct indicates they acted with willfulness, deliberation, and premeditation to murder [the victim]." (*Anthony, supra,* at p. 1145.) Petitioner's case is distinguishable inasmuch as the record clearly indicates that his jury considered the invalid theory, he was not convicted of conspiracy to murder, and his conduct does not compel the view that he premeditated and deliberated, as petitioner has explained, *ante*. Thus the holding of harmlessness in *Anthony* is inapplicable in petitioner's case.

Therefore, the true finding on the gang-murder special circumstance does not establish that the jury convicted petitioner of first degree murder based on a valid theory requiring intent to kill, premeditation, and deliberation. Reversal is required because the *Chiu* alternative-theory error cannot be held harmless.

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Conclusion

For all the foregoing reasons, this Court should reverse the judgment of the Court of Appeal, affirm the Superior Court's order granting the writ of habeas corpus to set aside petitioner's conviction of first degree murder, and remand the case to the Superior Court for resentencing.

Dated: May 20, 2020

Respectfully submitted,

/s/ Victor J. Morse
Victor J. Morse

Attorney for Petitioner
Rico Ricardo Lopez

Certificate of Word Count

Counsel for petitioner Rico Ricardo Lopez hereby certifies that this opening brief on the merits consists of 13,970 words (excluding tables and 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: May 20, 2020

/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 Opening Brief on the Merits** 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

District Attorney
600 Administration, # 212-K
Santa Rosa, CA 95403

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

Each said envelope was then, on May 20, 2020, 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 May 20, 2020, 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

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on May 20, 2020, at San Francisco, California.

/s/ Victor J. Morse
Victor J. Morse

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

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Case Name: **LOPEZ (RICO RICARDO) ON H.C.**
Case Number: **S258912**
Lower Court Case Number: **A152748**

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**

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5/20/2020
Date

/s/Victor Morse
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Morse, Victor (120916)
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