In the Supreme Court of the State of California

In re **RICO RICARDO LOPEZ,** On Habeas Corpus.	Case No. S258912

First Appellate District Division One, Case No. A152748
Sonoma County Superior Court, Case No. SCR32760
The Honorable Dana Simonds, Judge

ANSWERING BRIEF ON THE MERITS

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ISSUES PRESENTED

1. Is a trial court's error in instructing a jury with at least one valid theory and one invalid theory of guilt subject to the general harmlessness test from *Chapman v. California* (1967) 386 U.S. 18 or is such error instead subject to a more exacting "protocol" under which the mere mention of the invalid theory in a prosecutorial argument or jury note establishes prejudice regardless of the state of the evidence?

2. 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?

INTRODUCTION

In 2005, a Sonoma County jury convicted Rico Lopez (respondent in the Court of Appeal in this matter) and three codefendants of the first degree murder of Ignacio Gomez. The jury further found that Lopez and his codefendants each intended to kill Gomez, murdered Gomez while actively participating in a street gang, and did so to further the gang's activities. The jury had been instructed on three theories of first degree murder: namely, that the defendant (1) was an actual perpetrator, i.e., he intentionally stabbed Gomez to death with premeditation and deliberation; (2) directly aided and abetted an actual perpetrator; and/or (3) aided and abetted the commission of a different crime, the natural and probable consequences of which included the first degree murder of Gomez.

Nine years later, this Court held in *Chiu* that a defendant cannot be liable for first degree murder based on the natural and

probable consequences doctrine. Lopez filed a petition for writ of habeas corpus in the superior court, arguing that his first degree murder conviction was invalid under *Chiu* because the jury might have convicted him of that crime based on the natural and probable consequences doctrine. Rejecting the prosecutor's argument that the *Chiu* error was harmless, the superior court granted relief.

The Court of Appeal reversed, holding that the *Chiu* error in Lopez's case was harmless beyond a reasonable doubt. The Court of Appeal relied on the jury's true finding on the gang special circumstance, i.e., that Lopez intended to kill Gomez while aiding and abetting his first degree murder even if Lopez was not an actual killer. The Court of Appeal concluded that in light of the record as a whole, the true finding showed beyond a reasonable doubt that the jury would have convicted Lopez as an actual perpetrator or direct aider and abettor of first degree murder even if the trial court had not instructed on the natural and probable consequences theory.

Lopez's challenge to the Court of Appeal's judgment is bifaceted, with neither component persuasive. First, Lopez asks this Court to effectively replace the *Chapman* standard for harmlessness with an even more demanding ad hoc "protocol" for the subclass of instructional errors in which a jury receives instructions on both valid and invalid theories of guilt. Recently, however, this Court in *People v. Aledamat* (2019) 8 Cal.5th 1 held that the *Chapman* standard applies to alternative-theory error as with any other instructional error of federal constitutional

dimension. Lopez provides no good reason for this Court to depart from that determination.

Equally unavailing is Lopez's attack on the Court of Appeal's reliance on the gang special circumstance in finding the *Chiu* error here to be harmless. As he did below, Lopez hypothesizes that the jury might have found true the special circumstance based on his being an aider and abettor rather than the actual killer. If that hypothesis were true, however, then the jury would have known that an aider and abettor must know and share the actual first degree murderer's purpose, i.e., premeditated and deliberate murder. Consequently, the jury could not have found the special circumstance true without finding that Lopez at a minimum specifically intended to kill Gomez with premeditation and deliberation. Thus, positing—as Lopez does—that the jury did not find that he was an actual killer of Gomez, the special circumstance finding *alone* showed beyond a reasonable doubt that the jury would have convicted Lopez of first degree murder as a direct aider and abettor had the trial court not instructed it on a natural and probable consequences theory.

If, on the other hand, the jury found that Lopez *was* Gomez's actual killer—a possibility that Lopez does not address—then the special circumstance finding by itself would *not* render the *Chiu* error harmless because the jury would not have had to find that Lopez premeditated and deliberated Gomez's murder to find the special circumstance true. Nonetheless, the harmlessness of the *Chiu* error in *this* case would still follow from consideration of the special circumstance finding in light of the entire record. By

finding the gang special circumstance true, the jury undisputedly found that Lopez intended to kill Gomez to benefit his Norteño gang subfamily. The evidence at trial, meanwhile, established that Lopez armed himself with a knife before tracking down Gomez; participated in the group attack on Gomez; emerged from that attack with blood on his clothes; wore Gomez's hat afterward as a trophy; and declared that Gomez's killing was in retaliation for the earlier stabbing of his codefendant and fellow Norteño Pete Amante. In light of the jury's finding of Lopez's intent and motive, this evidence left no reasonable doubt that the jury would have convicted Lopez of first degree murder even if it had not considered the natural and probable consequences theory. The Court of Appeal's judgment should therefore be affirmed.

STATEMENT OF THE CASE

A. Evidence at Trial

The facts of the murder of Ignacio Gomez were presented as follows in the Court of Appeal's nonpublished opinion on direct appeal from Lopez's conviction in *People v. Amante* (Sept. 8, 2009, A113655), for which no rehearing petition was filed. (See 1CT 60-65; see also 1CT 19-25 [habeas petition in superior court using same statement of facts]; cf. Cal. Rules of Court, rule 8.500(c)(2) [Supreme Court normally accepts the Court of Appeal opinion's statement facts, absent a petition for rehearing calling attention to any alleged omission or misstatement of fact]; accord, *People v. Vidana* (2016) 1 Cal.5th 632, 635, fn. 2 ["There was no petition

for rehearing in the Court of Appeal, so we rely on that court's statement of the facts"].)[1]

> On the night of June 26, 2002, defendants [Peter Amante, Rogelio Cardenas, Patrick Higuera, and Lopez][2] were hanging out at defendant Amante's apartment on Stony Point Road in Santa Rosa, where he lived with his fiancée Kacee Dragoman and their small child. Defendants were all members of the Norteño street gang. Amante's mother, her boyfriend, Dragoman, Lindsey Ortiz (Amante's teenaged cousin, who lived in a nearby apartment),[3] and Amante's and Dragoman's young son also were present at the apartment. Defendants were drinking beer, playing cards, and watching television. Amante's mother and her boyfriend eventually went upstairs to bed.
>
> Dragoman and defendant Ochoa were talking on a patio outside the living room around midnight, when people heard whistles coming from outside the apartment. According to various witnesses, including the prosecution's expert witness on criminal street gangs, members of the Sureño gang and other Mexican nationals use a particular whistle to identify themselves. Dragoman testified that when she heard the whistle, "It was a bad sign. It's a rival gang whistle." Ochoa reported that he heard the whistle

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[1] Unspecified references to the clerk's transcript and reporter's transcript are to the record in this habeas matter, i.e., *In re Lopez* (Sept. 25, 2019, A152748). Any references to the record on direct appeal are preceded by the signifier "A113655."

[2] "Defendants were tried along with Mario Ochoa-Gonzales (Ochoa), who was acquitted of murder but convicted of being an accessory after the fact (§ 32). Ochoa did not appeal his conviction. All references to 'defendants' are to all five men tried for murder (i.e., defendants and Ochoa)."

[3] "Dragoman and Ortiz testified at trial under grants of immunity."

coming from the other side of a fence that separated the apartment from Santa Rosa Creek and that there were "Scraps" (a derogatory term for a member of the rival Sureño gang) in the area. At the time, members of the Norteño and Sureño gangs had rival claims to the area by the creek near Stony Point Road. Ochoa also whistled. Defendants ran quickly to the kitchen, opened drawers,[4] then left the apartment; Dragoman and Ortiz followed.

On a nearby bridge on Stony Point Road in a parked car were Rebecca Sandoval (Rebecca) and her small child and stepchild; her husband Miguel Sandoval (Miguel) was outside the car speaking with his father. Miguel had seen his friend Ignacio Gomez (who he knew only as "Jose," another name Gomez went by) riding his bicycle on the bridge. Gomez lived with his fiancée in a nearby homeless camp, where he bought and sold methamphetamine and heroin. According to Gomez's fiancée, Gomez was not a gang member, but his friends were associated with the Sureño gang, and he typically wore blue clothing, which was associated with the Sureño gang. Jose, Miguel, and Miguel's father whistled to each other on the bridge and greeted one another.

Rebecca testified that she "heard people jumping a fence," and shortly thereafter she saw Ochoa (who she recognized from a youth center) and someone else head toward the bridge she was on. They were followed about a minute or a minute and a half later by Higuera

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[4] "Ortiz heard drawers opening, silverware sliding, and metal banging when defendants went to the kitchen; however, neither she nor Dragoman was in the room or saw what defendants took from the kitchen. Amante was later seen with a butcher knife. Dragoman saw Lopez after the murder with the handle of a knife from her knife set. Field evidence technicians discovered two pieces of metal, apparently from a broken knife blade, within 10 to 15 feet of the victim's body."

(an acquaintance of Rebecca's) and another man she did not recognize. As the four men crossed the bridge, one of them said, "'What's up'" to Miguel, and another said "'Norte.'" The four crossed the bridge, then three of them went down a bike path under the bridge; Ochoa stayed back.

Dragoman and Ortiz, who were the last to leave Amante's apartment, walked down a path and found Amante (who was wearing a red 49ers jersey) stuck by his pants leg on the fence separating him from the creek. Ortiz described Amante as drunk. While Dragoman and Ortiz were loosening Amante's pants from the fence so that he could get down, a large butcher knife fell from Amante's pocket.

After Amante was freed from the fence, he picked up the knife he had dropped and ran to the people near the car parked on the bridge on Stony Point Road; Amante was holding the knife as if he were going to stab someone. Dragoman and Ortiz left the apartment complex through another route and met up with Amante at the bridge. Amante spoke to the people in the parked car, then dropped the knife he was holding. Dragoman testified that she believed Amante picked up the knife and put it in his pants. Amante crossed the bridge (which was illuminated by street lights), then ran down the path to the creek where the three other defendants had gone. Ortiz followed him but at first could not see anything because it was so dark. Dragoman testified that she saw Amante walk down, meet up with Higuera, Cardenas, Ochoa, and Lopez, then walk back up to the bridge 30 seconds later.

Miguel testified he saw five males and two females on the night of the murder. One of the men asked Miguel if he "bang[ed] Norte," and Miguel answered that he was just talking to his father. Miguel interpreted the question about banging Norte as "he just wanted problems. But at that time, I mean, I'm not a gangster, so, you know, I just told him I don't bang nothing." Miguel saw a black handle in the pocket of

the man who asked if he banged Norte, but he did not know whether it was a knife.

Miguel testified that Gomez rode his bicycle down a path under the bridge. Miguel testified that "that's when I heard they stop him, they stop Jose, and that's when I—when that happened." When the men stopped Jose, Miguel heard one of them ask Jose whether he was a Sureño. He testified that he heard people hitting Gomez and calling him "a lot of bad words," and he heard Gomez yelling "help" and screaming. Miguel saw three men (the person who asked if he "bang[ed] Norte" and two others) hitting Gomez, and he saw one of the men stabbing Gomez with a knife. During the attack, a man wearing a red 49ers jersey over a tank top approached Miguel, dropped a knife on the ground in front of Miguel's car, then picked it up and ran toward the other men. Miguel testified that the man "went all the way to with the other guys where Jose was and the other guy, one of the girls was telling him to stop. And that's when my friend Jose, I heard he was not screaming no more. That's when the other guy and the other two girls came with him to see what happened." He also testified that "the first time I thought it was just fighting, but when the guy—the other guy came running and he dropped a knife, I know something was happening because he was yelling, and after that he just—he was so quiet." After the man who dropped the knife started running to catch the other guys, "[t]hey were all fighting. And that's when the other guy and the two girls came all together. That's when—when there was no noise. And that's when I heard the bike fall on the floor."

Gomez suffered 38 to 40 stab wounds on his head, face, chest, back, and shoulders; he died from multiple wounds to the torso after being stabbed in the heart and lungs. It could not be determined whether one or more stabbing instrument was used. A forensic pathologist opined that one person could have inflicted all of the stab wounds in less than a minute, and that the victim

lived only a couple of minutes after he was stabbed in the heart.

Approximately five minutes after Ortiz had started down the path, Ortiz saw Ochoa (who was not armed) coming up the path. He was followed by Cardenas and Lopez, who ran up the path toward Ortiz. Lopez had blood on his black and white Raiders jersey; Ortiz did not see a knife on him. Ortiz did not see blood on Cardenas, and she never saw him with a knife. Ortiz continued down the path, and eventually saw Amante and Higuera. Amante was running; Higuera's arm was cut, and he was acting as if he were in pain.

After defendants came up from the creek, they returned to Amante's and Dragoman's apartment. As they were walking back across the bridge, Ortiz and defendants lifted their shirts up toward their heads after Ortiz saw a police car and directed the others to hide their faces. Rebecca and Miguel drove to a nearby convenience store so that Rebecca could call 911, because it was obvious to her that "something happened."[5]

When the group returned to Amante's apartment, five members of the Norteño gang joined them. Lopez told Amante that "this was for Cinco de Mayo,"[6] talked

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[5] "In response to the 911 call, a Santa Rosa police officer went to the bridge and looked down the bike path with a flashlight but did not see anyone under the bridge. Police did not find the victim's body until later that morning."

[6] "Amante had been hospitalized after being stabbed twice on Cinco de Mayo, less than two months before Gomez's murder. Amante told a Santa Rosa police officer who stopped him for a traffic violation the night after the murder that he had almost died after the stabbing. Amante told the officer that he had seen graffiti on a fence on Stony Point Road that said "'Whacky [Amante's nickname] die slowly,'" and that he believed he was a 'marked man.'"

about "eating people," then put on a blue beanie hat with "Sur" written on it that he had not been wearing when he left the apartment. Dragoman testified that Lopez "was kind of like bragging like walking around with a little strut, stuff like that, kind of like a larger than life moment for him or something." Ortiz testified that after Lopez made the remark about Cinco de Mayo, "Pete, he said—I think he said, 'What the fuck are you talking about?' And then Rico [Lopez] said something after that and then everyone just got quiet." Ochoa paced nervously, said he was concerned about police being at the creek, and commented, "'I don't think that guy was a Scrap.'" Ochoa flushed a black handle from Dragoman's knife set down the toilet. Higuera was on the telephone, had a t-shirt wrapped around his right arm and was applying pressure to it, and appeared to be in a rush to leave. Lopez had blood on his shoes. Ortiz and Dragoman helped wash Lopez's and Ochoa's clothing.

Police found the victim the next morning near a bike path on the north side of the creek. When police found the victim, his pants were pulled down below his waist. He was wearing blue clothing consistent with what Sureño gang members wear. Police found Sureño and Norteño gang graffiti in the area near where Gomez was found. Some Norteño graffiti had been written over Sureño graffiti, a "'crossout'" that was "a huge form of disrespect in the gang world," according to the prosecution's gang expert. . . . [T]he expert also testified that it was his opinion that defendants were active members of the Norteño street gang at the time of the murder, and that such a murder would be committed for the benefit of the gang because killing a rival gang member would show the gang's power and instill fear of the gang in the community.

On the night of June 28, Detective Leslie Vanderpool returned to the bridge with Miguel, who directed the officer to the apartment where Amante lived. Miguel later identified Amante (in a

photographic lineup) as one of the people who stabbed the victim.

(1CT 60-65, first brackets added.)

B. Relevant Instructions

The trial court instructed the jury that "murder which is perpetrated by any kind of willful, deliberate and premeditated killing with express malice aforethought is murder of the first degree." (1CT 153.) Express malice, in turn, exists "when there is manifested an intention unlawfully to kill a human being." (1CT 153.) The instruction to the jury further clarified that for purposes of first degree murder, "'willful' . . . means intentional," "'deliberate' means formed or arrived at or determined upon as a result of careful thought and weighing against the proposed course of action," and "'premeditated' means considered beforehand." (1CT 153.)

The trial court also instructed the jury on three relevant theories under which a defendant could be found guilty of a crime. (1CT 147-148.) The first theory of guilt was that a defendant "directly and actively commit[ted] the act constituting the crime" (1CT 147)—as relevant here, by actually stabbing Gomez with a premeditated and deliberate intent to kill. The second theory was that a defendant "aid[ed] and abet[ted] the commission of the crime," meaning that the defendant by "act or advice aid[ed], promote[d], encourage[d] or instigate[d]" the first degree murder with both "knowledge of the unlawful purpose of the" stabber and the "intent or purpose of committing or encouraging or facilitating the" stabbing. (1CT 147-148.) The

third theory was that a defendant aided and abetted at least one of five nonmurder offenses, a "co-principal" in that offense committed the murderous stabbing, and the murderous stabbing was a "natural and probable consequence" of the aided and abetted nonmurder offense. (1CT 148.)

If the jury found any defendant guilty of first degree murder through one of the three theories above, it was then to "determine if the following special circumstance [was] true or not true: Penal Code Section 190.2(a)(22): Intentional Killing by Active Street Gang Members." (1CT 156.) The instruction enumerated five elements for this special circumstance: (1) the "defendant intentionally killed the victim" in a murder that (2) "was carried out to further the activities of [a] criminal street gang" (3) while the defendant was "an active participant in a criminal street gang" and (4) had the knowledge that (5) the gang's "members engaged in or ha[d] engaged in a pattern of criminal gang activity." (1CT 156.) In addition, the trial court specifically admonished the jury that if it found "that a defendant was not the actual killer . . . or if [it was] unable to decide whether the defendant was the actual killer or an aider and abettor," then the jury could not "find the special circumstance to be true as to that defendant unless [it was] satisfied beyond a reasonable doubt that such defendant with the intent to kill aided, abetted, counseled, commanded, induced, solicited, requested, or assisted any actor in the commission of the murder in the first degree." (1CT 156.)

C. Closing Arguments

As relevant here, the prosecutor argued "three kinds of legal ways of finding each defendant guilty of murder beyond a reasonable doubt." (1CT 214.) The first theory was that the defendant was "an actual stabber, . . . meaning [he] wielded a knife and [was] the person or one of the persons who stabbed [Gomez] with a knife." (1CT 214-219.) The second theory was that the defendant was an "aider[] and abettor[] to the crime of murder," meaning that the defendant "kn[e]w the unlawful purpose of the perpetrator" and "intend[ed] to commit or encourage or facilitate the crime." (1CT 219-223.) The third theory was that the defendant aided and abetted a "target crime," "one of the people that [he was] aiding and abetting committed the crime of murder," and "that murder . . . was a natural and probable consequence of the target crime." (1CT 223-226.) Unlike the first two theories, the prosecutor explained, "Natural and probable consequences does not require an intent to kill, . . . does not require premeditation, [and] does not require deliberation." (1CT 225.)

The prosecutor later discussed each individual defendant's role in the killing. (1CT 240.) The prosecutor first discussed Ochoa (1CT 240-248), stating that it was "possible" that he was "an actual stabber" (1CT 246-247) and briefly mentioning the theory that Ochoa was an "[a]ider and abettor to the murder" (1CT 247), but ultimately focusing on the natural and probable consequences doctrine (1CT 247-248). In contrast, the prosecutor stressed that Cardenas was a direct aider and abettor to the

murder "beyond a reasonable doubt," while only noting the possibility of him being the "actual stabber" and briefly mentioning the natural and probable consequences doctrine. (1CT 248-249; 2CT 250-268; see especially 2CT 266-268.) The prosecutor's arguments with respect to Amante was similar to that respecting Cardenas. (2CT 286-297 [Amante]; 2CT 297-304 [Higuera]; see especially 296-297 [Amante being the stabber was "possible" but he was "absolutely an aider an abettor to the crime of murder"]; 2CT 304 ["no need to get to" natural and probable consequences because Higuera was "[a]bsolutely" an aider and abettor of murder].)

With particular respect to Lopez, the prosecutor began by summarizing the evidence of Lopez's involvement in a subset of the Norteño gang. (2CT 277-278.) The prosecutor then observed that Lopez "was in the apartment that night . . . with all the other codefendants" and "was wearing a white and black Raiders jersey"—a "white shirt with black numbers on it," which could have been the "white T-shirt" that one of the stabbers wore. (2CT 278.) Lopez was one of the defendants who exited the apartment "through the kitchen area and out the door." (2CT 279.) When Lopez returned from the scene of the stabbing, Ortiz saw "blood on his white Raiders jersey." (2CT 279-280.) He was also "wearing a dark blue knit beanie," which he was not wearing "before the stabbing, nor would he as a Norteño gang member ever wear a blue knit beanie on his head." (2CT 281.) Lopez tried to place "a black knife handle" into Dragoman's pocket—a handle that she recognized as being from the knife set

in her kitchen. (2CT 281.) And once back at the apartment, Lopez boasted, "This is for Cinco de Mayo," while displaying a demeanor that "was overexcited, overzealous, very bouncy, [and] happy." (2CT 282-283.) After being taken into custody, Lopez threatened his fellow prisoner Richard Smith, "'You son of a bitch, I'll kill you just like I killed that guy in the creek.'" (2CT 284.)

From this evidence, the prosecutor argued that Lopez must have used the broken knife and shattered it in the attack against Gomez even though that knife "probably was" not "one of the stabbing instruments." (2CT 282-285.) The prosecutor unequivocally stated, however, that Lopez was "an aider and abettor to murder." (2CT 285.) Although the prosecutor briefly discussed the natural and probable consequences doctrine, he emphasized, "I would submit to you that he is either an actual stabber, which is possible, or *he's an aider and abettor to murder, period*. *You don't even need to get to* [the natural and probable consequences] *theory as to Rico Lopez*." (2CT 286, italics added.) A few sentences later, the prosecutor concluded simply, "Aider and abettor to murder." (2CT 286.)

In his argument, Lopez's counsel first suggested that the prosecutor's presentation of multiple theories betrayed a lack of confidence in any one theory. (A113655 26RT 6469-6470.) Counsel also broadly attacked the credibility of Smith—Lopez's fellow prisoner who testified about Lopez's bragging about killing a man in a creek (A113655 26RT 6470-6472, 6475-6476, 6479-6481, 6488-6489, 6492-6494)—and disputed the prosecutor's theory that Lopez shattered the knife he was carrying during the

attack on Gomez (A113655 26RT 6472-6473, 6505-6506.) Primarily, however, Lopez's counsel observed that only Dragoman and Ortiz could identify him as one of Gomez's assailants, and counsel attacked their testimony as being unreliable. (A113655 26RT 6473-6475, 6477-6492, 6494-6495, 6501-6503.) Counsel concluded by arguing that even if Lopez had participated in killing Gomez, evidence of his intoxication rendered his participation in the crime at worst manslaughter. (A113655 26RT 6506-6512.)

The prosecutor's rebuttal did not focus on any particular defendant's culpability but rather generally addressed several defense themes. (2CT 307-347.) He focused primarily on refuting the defendants' theory that Dragoman and Ortiz were accomplices whose testimony lacked sufficient corroboration. (2CT 309-329.) He then turned to a theory advanced by several of the defendants that Dragoman and Ortiz were biased in favor of helping Amante as opposed to the other defendants. (2CT 329-332.) The prosecutor next addressed the defense claim that the defendants might have been too drunk to form specific intent for express-malice or premeditated murder or for the gang allegations; specifically, the prosecutor noted the lack of evidence that anyone other than Amante was significantly intoxicated and argued that the target crimes were general intent crimes for which intoxication would not remove liability. (2CT 332-335.) After reviewing the forensic evidence pertaining to Gomez's stab wounds (2CT 335-339), the prosecutor reiterated that the jury needed not determine who the actual stabber was and addressed

defense counsels' criticisms of the alternative theories of liability (2CT 339-341). The prosecutor again argued for first degree murder verdicts, acknowledging that at least one person had to have actually stabbed Gomez with the premeditated and deliberated intent to kill. (2CT 341-344.) The prosecutor concluded by addressing the reasonable doubt standard. (2CT 344-347.)

D. The Verdict

In August 2005, the jury found Lopez guilty of first degree murder (§§ 187, 189) and found true both the gang special circumstance (§ 190.2, subd. (a)(22)) and the gang enhancement (§ 186.22, subd. (b)(1)). (A113655 11CT 2158.) The judgment against Lopez was affirmed on direct appeal. (1CT 59-134.)

E. Habeas Proceedings in the Superior Court

In February 2016, Lopez filed a habeas petition in the superior court arguing that his first degree murder conviction had to be reduced to second degree because the jury was allowed to convict him of first degree premeditated and deliberated murder through a natural and probable consequences theory. (1CT 1-50; see also *Chiu*, *supra*, 59 Cal.4th at p. 166 ["where the direct perpetrator is guilty of first degree premeditated murder," a nonperpetrator cannot "be convicted of that greater offense under the natural and probable consequences doctrine"].) After the superior court issued an order to show cause (2CT 365-366), the prosecution filed a return (2CT 376-401). In that return, the prosecutor argued in relevant part that the true finding on the gang special circumstance showed beyond a reasonable doubt

that the jury convicted Lopez either as Gomez's actual stabber or a direct aider and abettor. (2CT 398-400.) The parties also filed postargument briefs. (3CT 728-753 [Lopez]; 4CT 755-772 [prosecutor].)

In September 2017, the superior court issued an order granting habeas relief. (4CT 784-792.) The People appealed. (4CT 794.)

F. The Court of Appeal's Opinion

The Court of Appeal reversed. (Opn. 1-11.) The Court of Appeal observed that it was "undisputed that *Chiu* error occurred at Lopez's trial" because "jurors were instructed that they could convict Lopez of first degree murder under two valid theories and one invalid theory." (Opn. 5.) Specifically, the jurors "were validly instructed that they could convict him if they found that Lopez was a perpetrator or a direct aider and abettor." (Opn. 5.) "But they also were instructed that they could convict him on an aiding and abetting theory under the natural and probable consequences doctrine." (Opn. 5-6.)

The Court of Appeal noted that this Court in "*Aledamat* clarified that the 'beyond a reasonable doubt' standard of review established in *Chapman v. California*[, *supra*,] 386 U.S. 18, 24 for federal constitutional error applies in reviewing *Chiu* errors." (Opn. 7.) *Aledamat* "summarized the standard as follows: 'The reviewing court must reverse the conviction unless, after examining the entire cause, *including the evidence*, and considering all relevant circumstances, it determines the error was harmless beyond a reasonable doubt.'" (Opn. 8, quoting

Aledamat, *supra*, 8 Cal.5th at p. 3, italics added in Opn.) "Under *Aledmat*," then, the Court of Appeal deemed it necessary to "consider all the relevant circumstances, including the evidence." (Opn. 9.)

"This was a complex case with multiple defendants," so the Court of Appeal found it "difficult to determine which theory the jury relied on to convict each individual defendant." (Opn. 9.) "It [was] also beyond dispute that the jury was considering the natural and probable consequences doctrine because jurors sent a note to the trial court on the subject." (Opn. 9.) "But while it [was] impossible to determine what theory the jury actually relied upon in convicting each defendant, it [was] clear" to the court "that as to Lopez the error was harmless beyond a reasonable doubt." (Opn. 9.)

"This [was] so," the Court of Appeal explained, "because the jury found true the gang special circumstance under section 190.2, subdivision (a)(22)." (Opn. 9.) In particular, the "true finding as to this circumstance required proof beyond a reasonable doubt that Lopez acted with an intent to kill, as opposed to the intent to commit one of the target crimes." (Opn. 9.) The court acknowledged that "the jury requested clarification on the natural and probable consequences doctrine," but the court found "no indication that jurors were considering this theory for Lopez specifically." The court declined to "infer that they were doing so," moreover, "because the evidence against [Lopez] was overwhelming." (Opn. 11.) Lopez "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." (Opn. 11.) "Under *Aledamat*," accordingly, the court "conclude[d] that *Chiu* error was harmless beyond a reasonable doubt." (Opn. 11.)

SUMMARY OF ARGUMENT

Recently, this Court held in *Aledamat* that "no higher standard of review applies to alternative-theory error than applies to other misdescriptions of the elements" of a crime; that is, *Chapman*'s "beyond a reasonable doubt standard applies to all such misdescriptions, including alternative-theory error." (*Aledamat*, *supra*, 8 Cal.5th at p. 9.) Under this "more general *Chapman* harmless error test," a "reviewing court must reverse the conviction unless, after examining the entire cause, including the evidence, and considering all relevant circumstances, it determines the error was harmless beyond a reasonable doubt." (*Id.* at p. 13.) *Aledamat* expressly rejected the proposition that harmlessness requires "a basis in the record to find that the jury has *actually* relied upon the valid theory." (*Id.* at p. 9.) And while the two dissenting opinions disagreed with the majority as to the outcome under the *Chapman* standard, neither dissenting opinion posited that some other, more rigorous standard applied. (See *id.* at p. 16 (conc. and dis. opn. of Liu, J.) ["I agree with today's opinion that alternative-theory error is subject to the *Chapman* beyond-a-reasonable-doubt harmless error standard"]; *id.* at p. 27 (conc. and dis. opn. of Cuéllar, J.) ["No doubt we'll continue doing our utmost to tread carefully when deciding whether an error was harmless under the *Chapman* standard."].)

Despite *Aledamat*'s apparent resolution of the harmlessness standard for alterative-theory error, Lopez now effectively asks this Court to institute a heightened standard by a different name. Specifically, Lopez argues for a harmlessness "protocol" under which a reviewing court *must* deem alternative-theory error prejudicial—whatever the state of the evidence—if either the prosecutor referenced an invalid theory in argument or the jury sent the trial court a question about the theory during deliberations. Lopez is unable to point to a single case from either this Court or the United States Supreme Court authorizing such a protocol. Indeed, the opinions of both courts consistently illustrate that while prosecutorial argument and jury questions can be relevant *considerations* in determining harmlessness under *Chapman*, the most important considerations are the jury's other verdicts and the evidence supporting the valid theory or theories.

The verdicts and the evidence, of course, are exactly what the Court of Appeal considered in properly adjudging the *Chiu* error harmless here. With respect to the verdicts, the trial court provided the jurors two alternate paths to finding true the gang special circumstance if they convicted Lopez of first degree murder. If a juror found that Lopez was Gomez's actual killer, then that juror could find the special circumstance true only after finding that Lopez had the intent to kill Gomez. If, on the other hand, the juror harbored any doubt that Lopez was Gomez's actual killer, then the juror needed to find that Lopez had the

intent to kill Gomez *and* that Lopez aided and abetted the first degree murder of Gomez.

In the latter scenario—the one on which Lopez's opening brief focuses exclusively—the true finding on the special circumstance would necessarily show that the *Chiu* error was harmless. Embedded in the finding that Lopez aided and abetted the first degree murder was a finding that he shared the actual murderer's mental state of premeditation and deliberation. Accordingly, the special-circumstance finding shows that if the jury had not been presented with the natural and probable consequences theory, it necessarily would have convicted Lopez of being a direct aider and abettor of first degree murder.

In the unlikely but possible event that the jury found Lopez to be one of Gomez's actual stabbers, in contrast, the special-circumstance finding would *not by itself* render the *Chiu* error harmless because the jury would not have had to find that Lopez premeditated and deliberated over Gomez's killing. Even so, the special circumstance finding *in combination with the evidence* would show lack of prejudice beyond a reasonable doubt. The special-circumstance finding established that the jury believed that Lopez had the intent to kill Gomez and was motivated to do so by a desire to promote and benefit his Norteño gang. The finding also showed that the jury believed Dragoman's, Ortiz's, and Smith's testimony, as those witnesses were the ones who actually identified Lopez as one of Gomez's assailants. Given those indications, no reasonable possibility existed that the jury also believed Lopez—who wanted to kill Gomez to benefit his

gang, armed himself with a knife beforehand, wore Gomez's hat as a trophy, and celebrated Gomez's death as retaliation for a Sureño attack on Amante—to have killed Gomez *without* premeditation and deliberation.

Lopez's arguments to the contrary are unpersuasive. His contention regarding the state of the evidence consists largely of an attack on the credibility of Dragoman and Lopez, an attack that was also made by Lopez before the jury and rejected by it when it credited the women's identification of Lopez as one of the five men who ran down to attack Gomez. Lopez's invocation of the prosecutor's closing argument, meanwhile, actually strengthens the case for harmlessness because the prosecutor explicitly asserted that the strength of direct aiding and abetting evidence obviated any need for the jury to consider the natural and probable consequences theory. Finally, the jury's mid-deliberations question to the trial court about natural and probable consequences reveals only that the jury was at some point considering that theory as to some defendant; as the Court of Appeal noted, the question thus sheds little light on whether the jury actually *did* convict *Lopez* on a natural and probable consequences theory, let alone on whether the jury would have convicted him of first degree murder had it not been instructed on that theory. In sum, a review of the entire record—as is required by the proper understanding of *Chapman* articulated in *Aledamat*—leaves no reasonable doubt that the *Chiu* error in this case was harmless.

ARGUMENT

I. THE COURT SHOULD ADHERE TO *ALEDAMAT'S* HOLISTIC READING OF THE *CHAPMAN* HARMLESSNESS STANDARD AND REJECT LOPEZ'S TIERED PROTOCOL

As the Court of Appeal observed, the People agree with Lopez that *Chiu* error occurred in his case. (Opn. 5.) Lopez proposes a four-step "protocol" to determine whether such error—or more generally, any alternative-theory error—is prejudicial: (1) the reviewing court initially presumes that the error is prejudicial; (2) the error is deemed harmless if the verdict forms affirmatively show that the jury "relied on a valid theory to convict the defendant"; (3) if the verdict forms do not *compel* such a conclusion, then the error is automatically deemed prejudicial if either "the prosecutor argued the invalid theory to the jury" or "the jury revealed during deliberations it was considering the invalid theory"; and (4) if neither the second nor the third step of the protocol resolve the issue, only *then* does the reviewing court examine the evidence, at which point it deems the error prejudicial unless sufficient evidence supported only the valid theory and not the invalid theory. (OBM 41-45.)

While Lopez is correct as to the initial presumption of prejudice (*In re Martinez* (2017) 3 Cal.5th 1216, 1224 [discussing *Chiu* error]), the other steps of his proposed protocol cannot be squared with *Aledamat* or earlier cases from the Court applying *Chapman*. (See Argument I.A, *post*.) Lopez's protocol is just as irreconcilable with the decisions of the United States Supreme Court interpreting *Chapman*, the case at the heart of the prejudice standard at issue here. (See Argument I.B, *post*.)

Lopez provides no persuasive reason for this Court to simply jettison the accumulated jurisprudence of both courts and replace it with his ad hoc protocol for purposes of alternative-theory error. (See Argument I.C, *post*.)

A. Lopez's Proposed Protocol Is Incompatible with This Court's Decision in *Aledamat*

In *Aledamat*, this Court held unequivocally "that no higher standard of review applies to alternative-theory error than applies to other misdescriptions of the elements" of a crime: namely, the "beyond a reasonable doubt standard." (*Aledamat*, *supra*, 8 Cal.5th at p. 9.) The jury convicted the defendant in *Aledamat* of assault with a deadly weapon—a box cutter—after being instructed that it could find the box cutter "*either* inherently deadly *or* deadly in the way [the] defendant used it." (*Id.* at pp. 4, 6.) Only the second of these theories was legally valid, however, and the appellate court reversed the conviction. (*Id.* at pp. 5-7.) In doing so, the Court of Appeal eschewed the general *Chapman* test for harmless error and instead held that a reviewing court is "required . . . to reverse the conviction absent a basis in the record to find that the verdict was actually based on a valid ground, which exists only when the jury has *actually* relied upon the valid theory." (*Id.* at p. 5, internal quotation marks omitted.)

This Court reversed the Court of Appeal, rejecting the defendant's and appellate court's theory that "the application of *Chapman* is different for alternative-theory error than for other misdescriptions of the elements of the charged offense." (*Aledamat*, *supra*, 8 Cal.5th at p. 9.) "Applying a different

standard" in alternative-theory error cases than other instructional error cases, *Aledamat* explained, would be "anomalous." (*Id.* at p. 11.) "If the trial court" in that case, for example, "had simply instructed the jury that a box cutter was a deadly weapon as a matter of law, and given no correct instruction whatsoever, the error would clearly [have] be[en] subject to *Chapman* harmless error review." (*Id.* at p. 11, citing *People v. Brooks* (2017) 3 Cal.5th 1, 69.) "Providing the jury with both a valid *and* an invalid theory"—the kind of alternative-theory error that occurred in *Aledamat* and in this case—"should not be subject to a higher standard of review than applies when the court provides the jury *only* with an invalid theory." (*Aledamat*, at pp. 11-12.)

Under that broadly applicable standard of review, the Court concluded, a "reviewing court must reverse the conviction unless, after examining the entire cause, including the evidence, and considering all relevant circumstances, it determines the error was harmless beyond a reasonable doubt." (*Id.* at pp. 3, 13.) After noting that sometimes a reviewing court *can* find harmlessness under *Chapman* based on the verdict without a wider record review, the majority nonetheless went on to conduct that wider review to find the error in *Aledamat* harmless. (*Id.* at pp. 13-15; see also *id.* at p. 8 ["one way of finding [alternative-theory] error harmless that has long been recognized" is the ability to "determine from other portions of the verdict that the jury necessarily found the defendant guilty on a proper theory" (internal quotation marks omitted)]; *id.* at p. 13 [alternative-

theory error harmless under *Chapman* if "it is impossible, upon the evidence, to have found what the verdict *did* find without finding" the rest of the valid theory true (internal quotation marks omitted)].)

Justice Liu dissented but made clear his agreement with the majority "that alternative-theory error is subject to the *Chapman* beyond-a-reasonable-doubt harmless error standard." (*Aledamat*, *supra*, 8 Cal.5th at p. 16 (conc. and dis. opn. of Liu, J.).) Justice Cuéllar also dissented, opining that the majority had "fail[ed] to live up to the more general *Chapman* . . . harmless error test it purport[ed] to apply" but not disagreeing that the "more general *Chapman*" test was in fact the appropriate test. (*Id.* at p. 18 (conc. and dis. opn. of Cuéllar, J.); see also *id.* at p. 27 ["No doubt we'll continue doing our utmost to tread carefully when deciding whether an error was harmless under the *Chapman* standard."].) Indeed, Justice Cuéllar criticized the majority specifically for making "scant reference to the evidence in the record" and observed that the error would have been harmless if "the evidence to support the correct theory . . . was so strong that [the Court could] safely conclude the instructional error did not contribute to the verdict." (*Id.* at p. 23.) Thus, while this Court disagreed over the proper *outcome* under a normal, holistic *Chapman* standard, it unanimously agreed that standard applied.

Aledamat cannot accommodate Lopez's proposed protocol for several reasons. Most saliently, *Aledamat* provides no support for Lopez's designation of prosecutorial argument and juror questions as *per se prejudicial* regardless of the state of the

evidence. To the contrary, *Aledamat*'s repeated mandate that reviewing courts "examin[e] the *entire* cause"—with particular emphasis on "*the evidence*"—counsels that the harmlessness inquiry places at least as much weight on the state of the evidence as on argument or juror notes. (*Aledamat*, *supra*, 8 Cal.5th at p. 3, italics added; see also *id.* at p. 13 [same].) In fact, just three years before *Aledamat*, the Court in *People v. Covarrubias* (2016) 1 Cal.5th 838 looked only at the "verdicts *and evidence*" in holding harmless alternative-theory error as to burglary felony murder. (*Id.* at pp. 881-883, italics added.)

More generally, *Aledamat* rejected the fundamental premise underlying Lopez's protocol: namely, that alternative-theory error is harmless only if the jury *actually did* convict the defendant on a valid theory. (See OBM 34-35, citing *Martinez*, *supra*, 3 Cal.5th at p. 1225 and *Chiu*, *supra*, 59 Cal.4th at pp. 167-168; see also OBM 42-43 [arguing that prosecutorial argument and juror notes are per se bases for prejudice because they "clearly indicate the basis on which the jury actually rested its verdict"].) Similar to Lopez here, the defendant in *Aledamat* argued "that, by focusing on what the jury actually did, *Chiu* and *Martinez* stated a standard different, and higher, than *Chapman*'s reasonable doubt standard." (*Aledamat*, *supra*, 8 Cal.5th at p. 12.) The Court rebuffed that characterization of *Chiu* and *Martinez*, however, explaining that those cases "were only a specific application of the more general reasonable doubt test" for constitutional instructional error. (*Ibid.*)

Aledamat thus firmly established that alternative-theory error is harmless not only when the jury demonstrably convicted on a valid theory but also when the jury beyond a reasonable doubt would have convicted on the valid theory had it not received the invalid theory. (See also *id.* at p. 19 (conc. and dis. opn. of Cuéllar, J.) [error is harmless not only when a reviewing court can "conclude, beyond a reasonable doubt, that the jury based its verdict on a legally valid theory" but also when the court "can determine beyond a reasonable doubt that the jury verdict would have been the same absent the error" (internal quotation marks omitted)].) And on this point as well, the Court previewed *Aledamat*'s holding in *Covarrubias*, finding alternative-theory error harmless where there was "no reasonable doubt that the jury *made the determinations necessary*" for a true special circumstance finding on a valid theory. (*Covarrubias*, *supra*, 1 Cal.5th at p. 883, italics added.)

Independently fatal to Lopez's protocol proposal—on at least three levels—is *Aledamat*'s insistence that reviewing courts treat alternative-theory error no differently for purposes of prejudice than any other "misdescriptions of the elements." (*Aledamat*, *supra*, 8 Cal.5th at p. 9.) First, in cases where a trial court has either omitted or misinstructed on an element, the Court has often first looked to the state of the evidence in finding such error harmless. (See, e.g., *People v. Bolden* (2002) 29 Cal.4th 515, 560-561 [citing numerous cases that "found error in failing to instruct that the felony-murder special circumstance requires intent to kill to be harmless when . . . the evidence of intent to kill was

overwhelming and the jury returning the special circumstance finding could have had no reasonable doubt that the defendant had the intent to kill"].) The lower appellate courts have taken the same approach. (See, e.g., *People v. Bush* (2017) 7 Cal.App.5th 457, 486-488 [failure to "instruct on the elements of an unlawful sale of marijuana" harmless where "the evidence . . . proved beyond a reasonable doubt that if the trial court had included the instruction on the elements of an unlawful sale of marijuana, it would not have altered the jury's verdict"]; *People v. Mejia* (2012) 211 Cal.App.4th 586, 618 [putative failure to properly instruct on first degree murder mens rea was harmless because "the evidence was overwhelming" that all defendants premeditated the killing], citing *People v. Concha* (2010) 182 Cal.App.4th 1072, 1089-1090; *People v. Morehead* (2011) 191 Cal.App.4th 765, 774-776 [any failure "to instruct the jury on the actual and reasonable fear" required for robbery was harmless where "the evidence of actual and reasonable fear [was] overwhelming"].)

Second, Lopez's proposal that alternative-theory error should be harmless only where the jury actually convicted on a valid theory cannot survive *Aledamat*'s directive to treat such error the same as "other misdescriptions of the elements." (*Aledamat*, *supra*, 8 Cal.5th at p. 9.) When a trial court misinstructs on an element or omits it altogether, the jury effectively receives *only* an invalid theory of guilt. (*Id.* at pp. 11-12.) In such a case, the jury necessarily cannot convict on a *valid* theory, meaning that omissions and misinstructions would as a

practical matter constitute structural error. That, of course, is manifestly not the law.

Finally, the fourth step of Lopez's protocol—under which error can be harmless only when sufficient evidence supports the valid theory but not the invalid one—would lead to similarly absurd results if applied to a trial court's erroneous omission of an element. In such a case, a validly instructed theory of guilt would simply consist of all of the elements of that crime, i.e., the erroneous instruction plus the omitted element. But if the evidence was sufficient to support *all* of the elements of a crime, it necessarily would have been sufficient to support some subset of those elements. Accordingly, the evidence could *never* be sufficient to support the valid theory without supporting the erroneous instruction, rendering any error in incomplete instruction of elements structural. Again, this is manifestly not the law.

In sum, adopting Lopez's protocol would contravene *Aledamat* by effectively subjecting alternative-theory error to a different and more demanding prejudice standard than the other instructional errors subject to *Chapman*. Even before *Aledamat*, the Court cautioned against such differential treatment between subclasses of instructional errors. *People v. Mil* (2012) 53 Cal.4th 400, for example, rejected the argument that a failure to instruct on multiple elements constitutes structural error while a failure to instruct on one element does not. (*Id.* at pp. 409-417.) "Perhaps the most persuasive" basis for that rejection was "the utter artificiality of the line [the defendant] purported to draw"

between "the omission of a single element" and the omission of more than one element. (*Id.* at pp. 412-413.) The Court subsequently refused to find that a failure to instruct on all elements of a crime constituted structural error, observing that doing otherwise would be "as artificial as the rule the defendant urged in *Mil*." (*People v. Merritt* (2017) 2 Cal.5th 819, 828-829.) Here, the protocol that Lopez offers would erect the same kind of artificial barrier within instructional errors misdescribing the elements of a crime. This Court should again decline the invitation to create such strata of instructional error.

None of the cases Lopez cites in support of his protocol actually do so. Lopez primarily relies on *Martinez* as support for the third—and most stringent—step of his protocol, under which prosecutorial argument or a juror question about the invalid theory would automatically render alternative-theory error prejudicial. (OBM 36, 42-43, citing *Martinez*, *supra*, 3 Cal.5th at pp. 1226-1227.) But while "the prosecutor [in *Martinez*] argued the natural and probable consequences theory to the jury at length during closing argument and rebuttal" and "an inquiry by the jury during its deliberations suggested that it was considering the natural and probable consequences theory of liability," nothing in this Court's opinion indicated that either of those facts was alone *dispositive* of the harmlessness inquiry. (*Martinez*, at pp. 1226-1227.) To the contrary, the prejudice analysis in *Martinez* began with the Court's observation that "the *evidence* in [that] case [did] not compel the conclusion that the jury must have relied on a direct aider and abettor theory." (*Id.*

at p. 1226, italics added.) If anything, then, *Martinez* only confirms the primacy of the evidence in the prejudice analysis for alternative-theory error.

Lopez's other cited cases are no more helpful to his position because—like *Martinez*—none of them holds that either prosecutorial argument or a jury inquiry on an invalid theory *alone* renders instructional error prejudicial. (See generally *Chiu*, *supra*, 59 Cal.4th at pp. 167-168 [jury convicted only after replacement of juror who expressed inability to convict on natural and probable consequences theory]; *In re Loza* (2018) 27 Cal.App.5th 797, 805-806 [prosecutor relied primarily on natural and probable consequences theory because evidence of direct aiding and abetting was particularly weak]; *People v. Brown* (2016) 247 Cal.App.4th 211, 226-233 ["evidence [supporting valid theory] was not overwhelming"; other verdicts precluded conviction on actual perpetrator theory; and "irregularities in the taking of the verdicts . . . preclude[d] finding [the *Chiu*] error harmless"]; *People v. Lewis* (2006) 139 Cal.App.4th 874, 890-891 ["the jury was instructed *solely* on the invalid theory of murder," which "the prosecutor, in her closing argument, strongly emphasized"].)[7] To the contrary, this Court has held instructional error harmless under *Chapman* even when a jury asked a question during deliberations directly

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[7] While the People focus here on the failure of Lopez's cited cases to support the establishment of his protocol, the People discuss *post*—in Argument II.C.2—why those cases are also *factually* distinguishable and therefore fail to support a finding of prejudice in this case.

touching upon the error. (*People v. Gonzalez* (2012) 54 Cal.4th 643, 663-667 [juror question about second degree murder after being misinstructed on premeditation and deliberation].) And the Court of Appeal in *In re Lucero* (2011) 200 Cal.App.4th 38 similarly held that alternative-theory error on second degree murder was harmless even though the prosecutor invoked the invalid theory in argument along with valid ones. (*Id.* at p. 49.) Accordingly, Lopez's protocol not only is foreclosed by *Aledamat* but has no support in California case law.

B. United States Supreme Court Precedent Further Counsels Against Adoption of Lopez's Protocol

Given that the prejudice standard for federal constitutional error is at issue, Lopez is correct that United States Supreme Court precedent should guide this Court's inquiry. That precedent, however, only underscores the need to reject Lopez's protocol.

"The *Chapman* test" in its broadest formulation "is whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" (*Yates v. Evatt* (1991) 500 U.S. 391, 402-403, quoting *Chapman*, *supra*, 386 U.S. at p. 24 and disapproved on other grounds in *Estelle v. McGuire* (1991) 502 U.S. 62, 72, fn. 4.) "To say that an error did not contribute to the verdict is," *Yates* explained, "to find that error unimportant in relation to *everything* else the jury considered on the issue in question, as revealed in the record." (*Yates*, at p. 403, italics added.) The error at issue in *Yates* was instructing the jury with a rebuttable presumption that effectively shifted the

burden of proof on one or more elements to the defendant. (*Id.* at pp. 401-402.) In that context, "to say that [the] instruction . . . did not contribute to the verdict is to make a judgment about the significance of the presumption to reasonable jurors, *when measured against the other evidence considered by those jurors* independently of the presumption." (*Id.* at pp. 403-404, italics added.) In other words, the reviewing court "must . . . weigh the probative force of that evidence as against the probative force of the presumption standing alone." (*Id.* at p. 404.) Applying these principles, the United States Supreme Court examined the "whole record" in that case and found the error prejudicial because "the evidentiary record simply [was] not clear on" the presumed element. (*Id.* at pp. 408-411.)

Yates, then, reinforces this Court's recognition in *Aledamat* that *Chapman* requires a holistic review of the record centering around the evidence rather than prosecutorial argument or juror questions. *Yates* also instructed that one evaluates the state of the evidence by measuring how overwhelming that evidence would be absent the error. Applying that principle to alternative-theory error, a reviewing court should find such error harmless if the evidence leaves no reasonable doubt that the jury would have convicted had the invalid theory not been given. The court should *not*—as Lopez suggests (OBM 45)—find alternative-theory error prejudicial simply because substantial evidence supports the invalid theory, no matter how overwhelming the evidence is in favor of the valid theory. While Lopez quotes *Yates*'s statement that "'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'" (OBM 38, quoting *Yates*, *supra*, 500 U.S. at p. 404), he ignores the very next sentence: "Since that enquiry cannot be a subjective one into the jurors' minds, a court must approach it by asking whether the force of the evidence . . . is so overwhelming as to leave it beyond a reasonable doubt that the verdict resting on that evidence would have been the same in the absence of the presumption" (*Yates*, at pp. 404-405).

The United States Supreme Court built on its *Yates* analysis in its seminal case on instructional error, *Neder v. United States* (1999) 527 U.S. 1. A jury convicted Neder of various fraud offenses, but the trial court erred by not instructing on the materiality element for those offenses. (*Id.* at p. 6.) *Neder* reiterated that the proper "test for determining whether a constitutional error is harmless" is "whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" (*Id.* at p. 15, quoting *Chapman*, *supra*, 386 U.S. at p. 24.) The court distilled the test to the question, "Is is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?" (*Id.* at p. 18.)

For example, "where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless." (*Neder*, *supra*, 527 U.S. at p. 17.) *Neder* accordingly found the failure to instruct

on the element of materiality harmless beyond a reasonable doubt because "evidence that Neder failed to report over $5 million in income . . . incontrovertibly establishe[d] that [his] false statements were material." (*Id.* at p. 16.) Thus, *Neder*—like *Yates*—continued to place the emphasis of the harmlessness inquiry on gauging the effect of the evidence on the jury absent the error.[8]

Lopez all but ignores *Neder*, instead relying heavily on *Sullivan v. Louisiana* (1993) 508 U.S. 275 for the proposition that *Chapman* focuses "on whether the error actually contributed to the jury's verdict, not whether the evidence supported the verdict." (OBM 38-39, citing *Sullivan*, at pp. 279-280.) But the

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[8] Although Lopez focuses on whether one or more jurors could have convicted the defendant under the invalid theory (OBM 43), *Neder* spoke of "a rational jury" rather than individual jurors. (*Neder*, *supra*, 527 U.S. at p. 17.) And the United States Supreme Court long ago rejected "single juror" analysis. (*Harrington v. California* (1969) 395 U.S. 250, 254 ["It is argued that we must reverse if we can imagine a single juror whose mind might have been made up because of [erroneously admitted] confessions and who otherwise would have remained in doubt and unconvinced. We of course do not know the jurors who sat. Our judgment must be based on our own reading of the record and on what seems to us to have been the probable impact of the two confessions on the minds of an average jury"]; see also *Strickland v. Washington* (1984) 466 U.S. 668, 695.) Varying the objective analysis of prejudice based on the number of fact finders would increase the chance of error being harmless error as the number of fact finders decreased. Although the United States Supreme Court has used a "one or more jurors" standard in the context of a capital case and its heightened reliability concerns (e.g., *Cone v. Bell* (2009) 556 U.S. 449, 475), it did not thereby reject *Harrington*'s holding.

defendant in *Neder* similarly relied on *Sullivan* in arguing "that a finding of harmless error may be made only upon a determination that the jury rested its verdict on evidence that its instructions allowed it to consider," not upon even "overwhelming record evidence of guilt the jury did not *actually* consider" because the jury was unaware of the relevant element. (*Neder*, *supra*, 527 U.S. at p. 17.) *Neder* rejected that argument, observing that "in the context of an omitted element, . . . the jury's instructions preclude any consideration of evidence relevant to the omitted element, and thus there could be no harmless-error analysis." (*Id.* at pp. 17-18; see also *Gonzalez*, *supra*, 54 Cal.4th at p. 666 ["the *Neder* court concluded a demonstration of harmless error does not require proof that a particular jury *actually* rested its verdict on the proper ground" (internal quotation marks omitted).])

In other words—as noted *ante* in Argument I.A—finding an instructional error harmless only if the jury actually convicted on a valid theory would mean that omission of an element would *never* be harmless. (See *Neder*, *supra*, 527 U.S. at p. 17 [argument based on *Sullivan* was "at bottom . . . simply another form of the argument that a failure to instruct on any element of the crime is not subject to harmless-error analysis"].) Having already concluded the opposite—i.e., that "harmless-error analysis is appropriate in such a case"—*Neder* held that the harmless error inquiry for instructional error "must be essentially the same" as that for constitutional evidentiary errors: "Is it clear beyond a reasonable doubt that a rational

juror would have found the defendant guilty absent the error?" (*Id.* at p. 18; accord, *Gonzalez*, *supra*, 54 Cal.4th at p. 663.)

Answering that question, the high court explained, "will often require that a reviewing court conduct a thorough examination of the record." (*Neder*, *supra*, 527 U.S. at p. 19; accord, *Gonzalez*, *supra*, 54 Cal.4th at p. 666.) "If, at the end of that examination, the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error[,] . . . it should not find the error harmless." (*Neder*, at p. 19.) Inversely, the failure to instruct on an element *is* harmless unless "the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element." (*Ibid.*; accord, *Gonzalez*, at p. 666; *Mil*, *supra*, 53 Cal.4th at p. 417.) Thus, *Neder* reaffirmed *Yates*'s conclusion that the prejudice inquiry for instructional error focuses on what the jury rationally would have concluded on the evidence before it, without being limited to what the jury actually did conclude.

Nine years after *Neder*, the United States Supreme Court clarified in *Hedgpeth v. Pulido* (2008) 555 U.S. 57 that the prejudice inquiry for alternative-theory error should track that of other constitutional instructional errors. In language echoed by this Court in *Aledamat*, the high court acknowledged: "Although [*Neder* and other] cases did not arise in the context of a jury instructed on multiple theories of guilt, one of which is improper, nothing in them suggests that a different harmless-error analysis should govern in that particular context." (*Hedgepeth*, at p. 61; accord, *Aledamat*, *supra*, at p. 11.) "In fact, drawing a distinction

between alternative-theory error and the instructional errors in *Neder* [and other cases] would be patently illogical, given that such a distinction reduces to the strange claim that, because the jury received both a good charge and a bad charge on the issue, the error was somehow more pernicious than where the *only* charge on the critical issue was a mistaken one." (*Ibid.*, internal quotation marks omitted.)[9]

Yates, *Neder*, and *Hedgpeth* thus reinforce the same principles that this Court espoused in *Aledamat*. First, a court reviewing alternative-theory error should examine the entire record, especially the state of the evidence. Second, the evidentiary review should focus on the strength of the evidence in favor of a lawful theory of guilt rather than requiring the evidence in favor of the unlawful theory to be weak. Third, an error is harmless not only if the jury actually did convict on a valid theory, but also if no reasonable doubt exists that the jury would have convicted on that theory had it been properly

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[9] While *Hedgpeth* "involved collateral review on habeas corpus," *Aledamat* noted that subsequently "the high court 'clarif[ied]' that harmless-error analysis 'applies equally to cases on direct appeal.'" (*Aledamat*, *supra*, 8 Cal.5th at p. 11, quoting *Skilling v. United States* (2010) 561 U.S. 358, 414, fn. 46.) Moreover, "*Hedgpeth*'s statement that nothing 'suggests that a different harmless-error analysis should govern' alternative-theory error . . . leaves no doubt that the same *Chapman* analysis of harmless error applies to alternative-theory error as applies to other kinds of misdescription of the elements." (*Aledamat*, at p. 11, quoting *Hedgpeth*, *supra*, 555 U.S. at p. 61.)

instructed. As discussed at length in Argument I.A, these principles are fatal to Lopez's proposed protocol.[10]

Lopez cites to a single sentence from one post-*Neder* case to support the proposition that the United States Supreme Court "continue[s] to analyze harmlessness by focusing on what the jury actually did." (OBM 39, quoting *McDonnell v. United States* (2016) 136 S.Ct. 2355, 2375 ["Because the jury was not correctly instructed on the meaning of 'official act,' it may have convicted Governor McDonnell for conduct that is not unlawful"].) Saying that the jury might have convicted a defendant because of an error, however, is just another way of saying that reasonable doubt exists whether "the error complained of . . . contribute[d] to the verdict obtained." (*Chapman*, *supra*, 386 U.S. at p. 24.) And the brief statement quoted from *McDonnell* does not purport to overrule *Neder* or call into question *Neder*'s explication of the *Chapman* standard: an error is harmless if it is "clear beyond a

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[10] The role of the record may vary depending on the nature of the instructional error. In a case such as this—which involves an unambiguous instruction—a party's argument might be relevant to whether the error is harmless. In the case of an ambiguous instruction, where the court must first determine whether there was error using the reasonable likelihood test of *Boyde v. California* (1990) 494 U.S. 370, 380, a party's argument may help resolve whether there was error. Thus, the assumption "that counsel's arguments clarified an ambiguous charge" "is particularly apt when it is the *prosecutor's* argument that resolves an ambiguity in favor of the *defendant*." (*Middleton v. McNeil* (2004) 541 U.S. 433, 438.) But the *Boyde* test is a test of error, not prejudice. (*Calderon v. Coleman* (1998) 525 U.S. 141, 146.) If one part of a party's argument did not clarify an instruction, another part might be relevant to prejudice.

reasonable doubt that a rational juror would have found the defendant guilty absent the error." (*Neder*, *supra*, 527 U.S. at p. 18.)

Lopez also cites numerous California cases that he claims support his view of United States Supreme Court jurisprudence. (OBM 40.) None of them do, however. To the contrary, Lopez's cited cases actually execute the framework outlined in *Neder* and *Aledamat*. In *People v. Grimes* (2016) 1 Cal.5th 698, for example, the erroneous exclusion of hearsay evidence negating the defendant's intent to kill was harmless as to a felony-murder special circumstance because other evidence "overwhelmingly demonstrate[d] that [the] defendant was a major participant in the offense" and "acted with reckless indifference to life." (*Id.* at pp. 720-721.) In contrast, the error was *not* harmless "at the penalty phase, when the jury was asked to fix a penalty for [the] defendant's involvement in the death of [the victim]—whether, as [he] argued, he was merely a follower . . . or, as the prosecution argued, [the] defendant was directly responsible for the planning of the murder." (*Id.* at p. 722.) Exclusion of the evidence was therefore prejudicial when and only when it could not reasonably have affected the jury's understanding of the evidence as a whole.

Grimes thus vividly illustrates that harmlessness turns not on a reviewing court's speculation as to what the jury actually decided, but rather more reliably on whether the strength of the evidence removed any reasonable doubt as to what that jury would have done absent the error. In *People v. Pearson* (2013) 56 Cal.4th 393, similarly, this Court found harmless the

admission of hearsay autopsy evidence because the "prosecution's evidence, apart from the autopsy evidence, overwhelmingly established the[] elements" of first degree murder and the nature of the victim's death. (*Id.* at pp. 463-464.) Inversely, *People v. Neal* (2003) 31 Cal.4th 63 held prejudicial the admission of the defendant's involuntary confessions because they were the "centerpiece of the prosecution's case in support of conviction" and the remaining evidence was not so strong as to render the confessions "unimportant in relation to everything else the jury considered." (*Id.* at pp. 86-87, internal quotation marks omitted.) And *People v. Aranda* (2012) 55 Cal.4th 342 expressly observed that "the harmless error inquiry for the erroneous omission of instruction on one or more elements of a crime"—the inquiry that *Hedgpeth* and *Aledamat* held applicable to alternative-theory error—"focuses *primarily* on the weight of the evidence adduced at trial." (*Aranda*, at p. 367, citing *Neder*, *supra*, 55 Cal.4th at p. 17.)[11] Like Lopez's other cited authorities, then, these cases do not support his contentions but instead counsel against this Court altering the *Chapman* analysis for alternative-theory error.

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[11] As Lopez acknowledges (OBM 40), the language from *Aranda* upon which he relies concerns the failure to instruct on reasonable doubt, which this Court explicitly distinguished from instructional error misdescribing the elements of a crime (*Aranda*, *supra*, 55 Cal.4th at p. 368).

C. Lopez Provides No Reason Why This Court Should Reconsider the Prejudice Standard It Reaffirmed in *Aledamat*

As illustrated *ante* in Arguments I.A and I.B, Lopez's protocol proposal effectively invites this Court to discard *Aledamat* and ignore the most apposite precedent from the United States Supreme Court. The protocol's second step, while correctly recognizing that "examination of the actual verdict may be sufficient to demonstrate harmlessness" (*Aledamat*, *supra*, 8 Cal.5th at p. 13), wrongly confines harmlessness to cases in which "the jury *necessarily relied on* a valid theory" (OBM 41, italics added) instead of encompassing cases in which the jury necessarily *would have relied on* a valid theory had the invalid theory not been given. The protocol's third step improperly prioritizes prosecutorial argument and juror questions over the state of the evidence in determining harmlessness, going so far as to preclude reviewing courts from even considering the evidence if any argument or question referenced the invalid theory. And the protocol's final step would deem error prejudicial merely because sufficient evidence supports the invalid theory no matter how overwhelming the evidence in favor of a valid theory.

To justify having this Court turn its back on *Aledamat* so soon after deciding it, Lopez would have to "overcome *stare decisis*—the special care [courts] take to preserve [their] precedents." (*Kisor v. Wilkie* (2019) 139 S.Ct. 2400, 2418.) "Overruling precedent is never a small matter" because "[a]dherence to precedent is a foundation stone of the rule of law." (*Id.* at p. 2422, internal quotation marks omitted.) "It promotes

the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." (*Ibid.*) While "*stare decisis* is not an inexorable command," "any departure from the doctrine demands special justification—something more than an argument that the precedent was wrongly decided." (*Ibid.*) A court deciding whether to abandon a rule from a prior case should consider "whether the rule has proven to be intolerable simply in defying practical workability . . . ; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation . . . ; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine . . . ; or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." (*Planned Parenthood of Southeastern Pa. v. Casey* (1992) 505 U.S. 833, 854-855.)

Here, no factual or legal development since *Aledamat* has brought that decision into question. To the contrary, it is Lopez's protocol that conflicts with well-established precedent even beyond its dissonance with *Aledamat* and *Neder*. Particularly incongruous is the elevation of closing argument over evidence in determining harmlessness, given that juries are routinely instructed not to consider attorneys' arguments as evidence and that the Court has cited that instruction in holding harmless an improper argument. (See, e.g., *People v. Rivera* (2019) 7 Cal.5th

306, 335 [prosecutor's reference to facts not in evidence harmless beyond a reasonable doubt because, inter alia, jury was instructed that "statements made by the attorneys during the trial are not evidence"]; see also 1CT 140 [identical instruction given to jury in this case].) Because the Court has also found that a juror's consideration of improper materials can be harmless based on the strength of the evidence, it would also be incongruous for a juror's mere consideration of an improper *theory* to preclude any review of the evidence to determine harmlessness. (See, e.g., *People v. Danks* (2004) 32 Cal.4th 269, 305-309 [jurors' sharing of Bible passages with fellow jurors and conversations with pastors about deliberations was harmless based in part on "compelling penalty phase evidence"].) The *Aledamat* test, on the other hand, harmonizes with both this Court's prior decisions and the United States Supreme Court's decisions on harmless error.

The novel fourth step of Lopez's protocol, meanwhile, would lead to its own anomalous consequences. First, Lopez has effectively proposed that the harmlessness of a *legally* invalid should turn on whether that theory is also *factually* invalid (and harmless). (See *People v. Guiton* (1993) 4 Cal.4th 1116, 1128 [theory of guilt is factually invalid if based on insufficient evidence and is harmless if jury was presented with factually valid theory].) He provides no basis, however, for this "two wrongs make a right" approach to prejudice. Nor does he confront the absurdity of finding legal alternative-theory error to be prejudicial merely because sufficient evidence supports the

invalid theory. One can imagine, for example, a pre-*Chiu* case in which the evidence just barely cleared the standard for instructing on the natural and probable consequences doctrine, while the evidence of premeditation and deliberation included the defendant's detailed handwritten plan to kill the victim and a videotape of the defendant explaining that he has decided to kill the victim after careful consideration. Finding prejudice in such a case—as Lopez would have this Court do—would, as Chief Justice Traynor observed, "'encourage[] litigants to abuse the judicial process and bestir[] the public to ridicule it.' R. Traynor, The Riddle of Harmless Error 50 (1970)." (*Neder*, *supra*, 527 U.S. at p. 18.)

The only reason Lopez suggests for this Court to retreat from *Aledamat* is to avoid having appellate courts engage in factfinding normally conducted by trial juries. (OBM 44, quoting *Merritt*, *supra*, 2 Cal.5th at p. 835 (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"].) As an initial matter, Justice Liu precisely targeted the quoted language from his concurring opinion in *Merritt* to the failure of the trial court in that case to instruct on *any* elements of the crime, and he further recognized that both *Neder* and *Mil* otherwise found appropriate an evidentiary analysis to determine prejudice. (*Merritt*, at pp. 834-835 (conc. opn. of Liu, J.) ["Although appellate factfinding is permitted to cure a failure to instruct on one or two elements, . . . [a] reviewing court goes too far in exercising the jury's

function when it undertakes its own evaluation of the evidence in determining whether *a wholesale failure to instruct the jury on the elements of an offense* is harmless" (italics added)].)

More generally, Lopez's concern cannot be squared with the existence of harmless error analysis for misdirection as to an offense. Nor is his concern that appellate courts engage in factfinding correct. "Rather a court, in typical appellate court fashion, asks whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element. If the answer to that question is 'no,' holding the error harmless does not reflect a denigration of the constitutional rights involved." (*Neder*, *supra*, 527 U.S. at p. 19, internal quotation and edit marks omitted.) And any concern that errors will too often be found harmless—based on a gut instinct about how often is too often—is unwarranted; the harmless beyond a reasonable doubt standard, which "plac[es] the risk of doubt on the State" (*O'Neal v. McAninch* (1995) 513 U.S. 432, 439), self-calibrates to minimize the frequency that error is harmless (cf. *Addington v. Texas* (1979) 441 U.S. 418, 423 [trial burden of persuasion "'instruct[s] the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions" and "serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision"]; see also *People v. Hurtado* (2002) 28 Cal.4th 1179, 1194 [concluding *Chapman* applies to sexually violent predator proceeding given deprivation of liberty and lasting stigma].)

Lopez provides no empirical evidence that reviewing courts are actually overreaching in analyzing the evidence to salvage infirm convictions through harmless error. If anything, the published case law since *Aledamat* belies Lopez's speculation and illustrates that reviewing courts reverse convictions absent compelling evidentiary support for the valid theory. (See, e.g., *People v. Thompkins* (2020) 48 Cal.App.5th 676, 710 ["While the evidence may have been sufficient to convict under a [valid attempted murder] theory, . . . we cannot say it was overwhelming and we certainly cannot say it was uncontroverted"]; *In re Rayford* (June 16, 2020, B264402) 50 Cal.App.5th 754 [2020 WL 3248460, *17] [evidence that jury would have convicted on valid attempted murder theory instead of kill zone theory insufficient to render error harmless]; *People v. Medellin* (2020) 45 Cal.App.5th 519, 535-536 [misinstruction diluting "great bodily injury" standard was prejudicial where "evidence related to the actual injuries sustained was that the injuries were not overwhelmingly severe"]; *People v. Martell* (2019) 42 Cal.App.5th 225, 235 [alternative-theory error as to Vehicle Code section 10851 was prejudicial even though substantial evidence supported valid theory where substantial evidence also weighed against valid theory]; *People v. Stringer* (2019) 41 Cal.App.5th 974, 984-986 [instructing jury on invalid theory of aggravated kidnapping by extortion was prejudicial where evidence showed that victim might have "consented to the taking of his property"].)

Accordingly, Lopez's suggestion that his protocol is necessary to prevent appellate factfinding attacks a straw man. It certainly does not satisfy the high standard he must meet to have this Court replace *Aledamat*'s holistic *Chapman* test with his proposed protocol.

II. UNDER THE PROPER UNDERSTANDING OF *ALEDAMAT*, THE *CHIU* ERROR IN THIS CASE WAS HARMLESS BEYOND A REASONABLE DOUBT

As referenced *ante* in part D of the Statement of the Case, the jury not only convicted Lopez of first degree murder but also found true the gang special circumstance, which required underlying findings that Lopez intended to kill Gomez and that he did so to benefit a criminal street gang. If any juror had a reasonable doubt that Lopez was one of Gomez's actual killers, then that juror would also have had to find that Lopez aided and abetted the first degree murder of Gomez. Whether or not the jurors considered Lopez an actual killer, however, the *Chiu* error in this case was harmless beyond a reasonable doubt. If Lopez was not an actual killer, then the true finding on the special circumstance *by itself* necessarily rendered the *Chiu* error harmless. (See Argument II.A, *post*.) If Lopez was an actual killer, on the other hand, then the special circumstance finding alone did not render the error harmless (see Argument II.B, *post*); but that finding in conjunction with the evidence in the case *did* render it harmless (see Argument II.C, *post*.) In either event, therefore, this Court should affirm the judgment of the Court of Appeal.

A. The True Finding on the Gang Special Circumstance by Itself Rendered the *Chiu* Error Harmless Unless Lopez Was One of Gomez's Actual Killers

The trial court instructed that if the jury found Lopez guilty of first degree murder, then it was to "determine if the [gang] special circumstance [was] true or not true." (1CT 156.) If, moreover, the jury did not definitively find that Lopez was an "actual killer" of Gomez—i.e., if the jury either affirmatively found that he "was not the actual killer" or was "unable to decide whether [he] was the actual killer or an aider and abettor"—then it could find the gang special circumstance true only if Lopez "with the intent to kill aided [and] abetted . . . any actor in the commission of the murder in the first degree." (1CT 156.) Lopez does not—and could not plausibly—dispute that the "murder in the first degree" referenced in the special circumstance instruction was the only theory of first degree murder that could serve as a target offense: premeditated and deliberated first degree murder. (See *People v. Beck and Cruz* (2019) 8 Cal.5th 548, 644-645 [even though jury was improperly allowed to convict defendants of first degree murder based on natural and probable consequences of coconspirators' acts, such *Chiu* error was harmless where jury also found that defendants conspired to commit target offense of murder].)

Accordingly, if the jury did not find Lopez to be one of Gomez's actual killers—a premise seemingly underlying Lopez's theory of prejudice (see, e.g., OBM 68)—then it could only have found the gang special circumstance true by finding that Lopez

directly aided and abetted the first degree murder of Gomez. This finding, in turn, settles beyond a reasonable doubt that had the jury not been given the natural and probable consequences theory of first degree murder, it would necessarily have convicted Lopez of first degree murder on the valid theory of direct aiding and abetting. And that inexorable conclusion renders any *Chiu* error harmless under *Aledamat*.

Lopez raises two arguments why the gang special circumstance does not render *Chiu* error harmless. He first contends that even if the jury ultimately found him to be a direct aider and abettor given the special circumstance verdict, that finding would not matter because the jury could still have subjectively relied on a natural and probable consequences theory when it initially convicted him of the first degree murder. (OBM 61-62, 65-67.) That contention fails because it rests on his flawed premise—refuted *ante* in Argument I—that a verdict shows alternative-theory error to be harmless only when it demonstrates that the jury actually subjectively convicted on a valid theory.

Indeed, Division Two of the First District Court of Appeal recently rejected the essentially identical contention in *People v. Anthony* (2019) 32 Cal.App.5th 1102. The defendants in *Anthony* argued that *Chiu* error was prejudicial because "the jurors were instructed only to consider the special circumstance if they had already found the defendant guilty of first degree murder" and "they could have done so under the improper natural and probable consequence of assault theory." (*Id.* at p. 1146.) The

Court of Appeal held that those "arguments lack[ed] merit in light of the jury's special circumstance findings that each defendant, including . . . the shooter, did act with the intent *to kill*." (*Ibid.*) "This finding show[ed] that the jury concluded that" the shooter "acted to murder [the victim] and not merely to assault him," meaning that the aider and abettor defendants had that same intent regardless of the original subjective theory of conviction. (*Ibid.*) That same logic applies here.

If anything, Lopez's contention illustrates the absurdity of his "actually convicted" theory of prejudice because that theory would virtually belie this Court's observation that "[a]n examination of the actual verdict may be sufficient to demonstrate harmlessness." (*Aledamat*, *supra*, 8 Cal.5th at p. 13.) Specifically, Lopez's theory would prevent a verdict from demonstrating the harmlessness of alternative-theory error in even the most straightforward cases. In *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, for example, this Court found instruction on an invalid sodomy murder theory harmless because the jury's true findings on robbery and burglary special circumstances demonstrated that they also deemed the defendant guilty of robbery murder and burglary murder. (*Id.* at pp. 95-96.) Similarly, *Covarrubias* found harmless an erroneous instruction that burglary murder could rest on an underlying intent to kill because the jury's finding that the defendant entered the dwelling with the intent to rob left "no reasonable doubt that the jury made the determinations necessary for a proper finding of

burglary felony murder." (*Covarrubias*, *supra*, 1 Cal.5th at pp. 882-883.)

Under Lopez's theory, however, the alternative-theory error in *Coffman* would not have been harmless because the jury could subjectively have convicted the defendants of sodomy murder and only later effectively determined their liability for burglary and robbery murder through the special circumstance findings. Nor would the error in *Covarrubias* been harmless, as the jury could subjectively have rested its burglary murder finding on a predicate intent to kill and only subsequently made the finding that the defendant committed robbery. Lopez provides no authority or analysis for why harmlessness should depend in this way on the temporal happenstance of the jury's findings rather than the *substance* of those findings.

Lopez's second contention is that while the gang special-circumstance instruction required a finding that Lopez intended to kill Gomez, the instruction did not explicitly instruct the jury that Lopez had to act with premeditation and deliberation. (OBM 62-65, 67-69; citing *Chiu*, *supra*, 59 Cal.4th at p. 167 ["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" and would thus "act[] with the mens rea required for first degree murder"].) But no such explicit instruction was necessary. As noted *ante* in Statement of the Case part B, the jury was given CALJIC No. 3.01, which instructed that an aider and abettor must have both "knowledge of the unlawful purpose of the" direct perpetrator and the "intent

or purpose of committing or encouraging or facilitating the" predicate crime. (1CT 147-148.) Accordingly, the jury here necessarily understood it could find via the gang special circumstance that Lopez aided and abetted the premeditated and deliberated murder of Gomez only if it also found that Lopez himself premeditated and deliberated Gomez's murder. (See *Coffman*, *supra*, 34 Cal.4th at p. 96 ["Given . . . that the jury was instructed that aider and abettor liability required knowledge of the perpetrator's criminal purpose and acting with the intent or purpose of committing, encouraging or facilitating the commission of the crime," the jury had to "necessarily find [that the defendant] had the requisite specific intent to commit robbery, burglary and sodomy" when it found true those respective special circumstances (citing CALJIC No. 3.01)].)

This Court has agreed that any time a jury has concluded that a defendant has aided and abetted the target crime of premeditated and deliberate murder, the jury will also have found that the aider and abettor premeditated and deliberated. (*People v. Daveggio and Michaud* (2018) 4 Cal.5th 790 (*Daveggio*).) The trial court in *Daveggio* erroneously instructed that an aider and abettor was "equally guilty" to the actual perpetrator of a first degree murder without the jury needing to expressly find that the aider and abettor premeditated and deliberated as well. (*Id.* at p. 847.) The defendants in *Daveggio* argued that the jury was allowed to convict them of first degree murder without expressly needing to find that they premeditated and deliberated. (*Ibid.*) The Court rejected that argument, reasoning that "it

would be virtually impossible for a person to know of another's intent to murder and decide to aid in accomplishing the crime without at least a brief period of deliberation and premeditation, which is all that is required." (*Ibid.*) Thus, the jury's conclusion that one of the defendants in *Daveggio* aided and abetted the other was tantamount to a "conclusion that [the aider and abettor] aided in the crime after 'at least a brief period of deliberation and premeditation'—which, again, 'is all that [was] required'" for first degree murder mens rea. (*Ibid.*, internal quotation marks omitted.)

The Court's analysis in *Daveggio* directly applies to Lopez here. By finding true the gang special circumstance (assuming the Lopez was not the actual killer), the jury expressly found that Lopez aided and abetted the actual killer of Gomez with the intent to kill. That finding, in turn, necessarily implicated the findings that Lopez knew of the actual killer's "intent to murder" and that Lopez decide[d] "to aid in accomplishing" that murder. (*Daveggio*, *supra*, 4 Cal.5th at p. 847, internal quotation marks omitted.) It was therefore "virtually impossible" for Lopez not to have intended to kill with "at least a brief period of deliberation and premeditation," satisfying the mens rea for first degree murder. (*Ibid.*; see also *Anthony*, *supra*, 32 Cal.App.5th at p. 1146 [true finding on gang special circumstance rendered *Chiu* error harmless because "it would have been nonsensical for the jury to conclude that, while [the actual shooter] acted with premeditation and deliberation in committing the murder, he was

aided and abetted [by] three defendants who did not form the intent to kill until the murder occurred"].)[12]

Daveggio and the other cases above also show that Lopez's hypothetical illustration of prejudice (OBM 68) is not tenable. In this illustration, a juror might have found that Lopez (1) directly aided and abetted second degree murder; (2) convicted Lopez of first degree murder anyway based on a natural and probable consequences theory; and (3) found true the gang special circumstance, "which requires only intent to kill, but not premeditation and deliberation." (OBM 68.) The third step of Lopez's hypothesis, however, misstates what the jury had to find because the special circumstance instruction required finding that a nonkiller aided and abetted a "murder *in the first degree*," i.e., with premeditation and deliberation. (1CT 156, italics added.) As the cases cited *ante* establish, finding that Lopez aided and abetted such a murder necessarily implied the finding that he acted with premeditation and deliberation himself.

Lopez cites *Brown*, *supra*, 247 Cal.App.4th 211 as a case in which the gang special circumstance finding did not necessarily render *Chiu* error harmless. (OBM 69.) But the defendant in *Brown* was undisputedly convicted as the actual killer rather than as a potential aider and abettor. (*Brown*, at pp. 226-227.) Accordingly—as explained *post* in Argument II.B—the gang

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[12] This language from *Anthony* belies Lopez's assertion that *Anthony* simply "equat[ed] intent to kill with premeditation and deliberation" in relying on the gang special circumstance to find harmlessness. (OBM 64.)

special circumstance did not *automatically* render *Chiu* harmless but rather was properly considered as part of the holistic *Chapman* inquiry required in *Aledamat*.[13] *Brown* therefore does not disturb the conclusion that *unless* the jury found Lopez to be one of Gomez's actual killers, the gang special circumstance necessarily rendered the *Chiu* error harmless in this case.

B. If the Jury Found Lopez Was an Actual Killer, the Gang Special Circumstance Would Not Necessarily Render the *Chiu* Error Harmless But Would Instead Be Part of the Holistic *Chapman* Inquiry

As observed at numerous points *ante*, Lopez's prejudice theory presumes that the jury convicted him without finding him to be an actual killer. Lopez's hypothetical illustrating how prejudice might have unfolded expressly describes him as having "aided and abetted the killing." (OBM 68.) And Lopez does not discuss the impact of the gang special circumstance had he been one of Gomez's actual killers. Lopez's presumption is understandable and perhaps appropriate. The prosecutor stressed an aider and abettor theory while only mentioning the possibility that Lopez was a stabber, and the prosecutor also expressed doubt that the knife handle that Lopez took away from the murder scene was itself a murder weapon.

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[13] Even with respect to that holistic inquiry, Lopez misdescribes *Brown* as "primarily" relying on a juror question in finding prejudice. (OBM 69.) To the contrary, *Brown* relied on numerous considerations, which—as explained in detail *post* in Argument II.C.2—easily distinguish that case from this one.

The possibility that Lopez was an actual killer nonetheless merits discussion for two reasons. First, the possibility should be addressed for sake of completeness, i.e., to fully answer the question of whether a true finding on a gang special-circumstance allegation renders *Chiu* error harmless. Second, while the jury *likely* convicted Lopez as a nonkiller, substantial evidence existed that—as the prosecutor observed—he might have been an actual killer. Given the sheer number of stab wounds to Gomez's body, it was possible that the broken knife "inflicted at least a couple of those stab wounds." (2CT 285 [prosecutor's argument].) Alternatively, in the midst of the melee Lopez could have used a different knife to stab Gomez than the one belonging to the broken handle. Additionally, Richard Smith testified that Lopez threatened him with the statement, "I'll kill you just like *I* killed the guy in the creek." (A113655 19RT 4683, italics added [Smith testimony]; see also 2CT 284 [prosecutor's argument].)[14]

When a juror has determined that a defendant is an actual killer, that juror can only find the gang special circumstance true by finding that the defendant had the intent to kill. (1CT 156.) Unlike when the defendant is not definitively a killer, the juror does *not* have to find that the defendant shared the mental state of the first degree murderer, i.e., by premeditating and deliberating the murder. Accordingly, a pre-*Chiu* juror faced

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[14] Of course, should this Court disagree that the jury reasonably could have deemed Lopez an actual killer, then the gang special circumstance would necessarily render the *Chiu* error harmless for the reasons set forth *ante* in Argument II.A.

with two defendants who were actually killers could theoretically have concluded that (1) the first defendant committed premeditated and deliberate first degree murder; (2) the second defendant intentionally killed the victim without premeditation and deliberation; and (3) the second defendant aided and abetted the first defendant's commission of a different felony, the natural and probable consequences of which included the premeditated and deliberated murder. In that scenario, the juror could have validly convicted the second defendant of first degree murder on a natural and probable consequences theory and then found true the gang special circumstance as to the second defendant based on that defendant's intent to kill.

More concretely, one could read the verdicts in this case alone—without considering them in light of the evidence at trial—as conceivably reflecting findings that Lopez intentionally killed Gomez without premeditation and deliberation; another defendant killed Gomez *with* premeditation and deliberation; and Lopez aided and abetted that defendant in the commission of a nonmurder target offense with the natural and probable consequence of a premeditated and deliberated murder. Again, this scenario was possible only for a juror who determined that Lopez was an actual killer because such a determination would have obviated the need for the juror to find that Lopez had aided and abetted a first degree murder. Accordingly, should this Court conclude that a juror could reasonably have found Lopez to be one of Gomez's actual killers, then the gang special circumstance finding *by itself* would not render the *Chiu* error

harmless. The Court would instead have to examine the entire record—focusing on the evidence—as part of the holistic *Chapman* review described in *Aledamat*, *Yates*, *Neder*, and the other cases cited *ante* in Argument I. As explained in detail immediately *post*, this holistic review would also compel a conclusion that the *Chiu* error in this case was harmless.

C. Reviewed As a Whole, the Record Illustrates Beyond Any Reasonable Doubt That the *Chiu* Error Was Harmless Even if Lopez Was an Actual Killer

1. Taken together, the evidence and the verdict demonstrate the jury's finding that Lopez premeditated and deliberated Gomez's murder

In reaffirming a holistic *Chapman* review standard, *Aledamat* specifically endorsed the principle that when "'other aspects of the verdict or evidence leave no reasonable doubt that the jury made the findings necessary for'" a valid theory, the giving of an invalid theory "'was harmless.'" (*Aledamat*, *supra*, 8 Cal.5th at p. 10, quoting *People v. Chun* (2009) 45 Cal.4th 1172, 1204-1205; accord, *Covarrubias*, *supra*, 1 Cal.5th at p. 882.) Under this rubric, the reviewing court takes the findings logically compelled by the jury's verdict as a starting point and asks whether the evidence in light of that verdict removes any reasonable doubt that the jury would have convicted on a valid theory. (See *Covarrubias*, at pp. 881-883; *Gonzalez*, *supra*, 54 Cal.4th at pp. 663-666.)

In *Covarrubias*, for example, the jury convicted the defendant of burglary murder after being presented the invalid

theory of entering a dwelling with intent to kill. (*Covarrubias*, at pp. 881-882.) This Court, however, considered the jury's verdict that the defendant had robbed the victims with evidence that the defendant intended to and did rob the victims inside the burglarized dwelling. (*Id.* at pp. 882-883.) Taken together, the verdict and the evidence left "no reasonable doubt that the jury made the determinations necessary for a proper finding of burglary felony murder"—that is, burglary "with the specific intent to steal or commit robbery." (*Id.* at p. 883.) And that lack of reasonable doubt rendered "the error in instructing on the invalid theory . . . harmless beyond a reasonable doubt." (*Ibid.*) In *Gonzalez*, meanwhile, this Court found harmless the failure to instruct on premeditation and deliberation where (1) the jury expressly found that the defendant had the unlawful intent to kill; and (2) the evidence "was quite strong" that *if* the defendant had not acted in self-defense or defense of others, then the killing was premeditated and deliberated. (*Gonzalez*, *supra*, 54 Cal.4th at pp. 664-666.)

Here, then—assuming that the jury found that Lopez was an actual killer and that the gang special circumstance thus did not automatically render the *Chiu* error harmless—harmlessness would require that the gang special circumstance finding and the evidence together show beyond a reasonable doubt that the jury would have convicted Lopez of directly perpetrating the first degree murder. The special circumstance demonstrated the jury's view that Lopez killed Gomez intentionally. Because the only instructed theory of manslaughter was predicated on a lack

of intent to kill (1CT 154), the jury thus effectively found that Lopez intentionally killed, i.e., murdered, Gomez.

To make that murder one of the first degree, the jury would have also had to find that Lopez acted with premeditation and deliberation. (See *People v. Potts* (2019) 6 Cal.5th 1012, 1027 ["'A murder that is premeditated and deliberate is murder of the first degree'"].) This Court has "identified three categories of evidence relevant to determining premeditation and deliberation: (1) events before the murder that indicate planning; (2) a motive to kill; and (3) a manner of killing that reflects a preconceived design to kill." (*Gonzalez*, *supra*, 54 Cal.4th at p. 663, citing *People v. Anderson* (1968) 70 Cal.2d 15, 26-27; accord, *Potts*, at p. 1027.) The Court has also "repeatedly pointed out" that the "*Anderson* guidelines are descriptive, not normative," and that they "are not all required." (*Gonzalez*, at p. 663, internal quotation marks omitted; see also *People v. Hovey* (1988) 44 Cal.3d 543, 556 ["Evidence of all three elements is not essential . . . to sustain a conviction"]; accord, *People v. Edwards* (1991) 54 Cal.3d 787, 813.) In particular, *Hovey* observed that the prosecution can establish premeditation and deliberation with "evidence of a motive to kill, coupled with evidence of either planning activity *or* a manner of killing which indicates a preconceived design to kill." (*Hovey*, at p. 556, italics added, citing *Anderson*, at pp. 26-27; accord, *Edwards*, at pp. 813-814.)

The gang special circumstance here established definitively not only that Lopez murdered Gomez but also that he had the motive to kill a Sureño to further the interests of his own Norteño

subset gang. Thus, the *Chiu* error was harmless if no rational jury would have found insufficient evidence of planning activity. That was precisely the case here. The jury heard uncontroverted evidence that Lopez and the other defendants ran into the kitchen precisely to arm themselves with knives to stage a group attack on a putative Sureño. Foreclosing any suggestion that Lopez's role in the killing was impulsive or unconsidered were the facts that he wore Gomez's hat afterward as a trophy, displayed a boastful and proud attitude over the killing while his codefendants expressed misgivings, and declared that Gomez's killing was in retaliation for the earlier stabbing of Amante.

Indeed, like the defendant in *Gonzalez*, Lopez did not seriously contest premeditation and deliberation separately from his contention that he lacked the intent to kill altogether as a result of intoxication. (A113655 26RT 6506-6512; see also *Gonzalez*, *supra*, 54 Cal.4th at p. 664 ["Apart from disputing her intent to kill, Perla introduced no evidence or argument challenging the prosecution's case on the *Anderson* premeditation and deliberation factors".) In short, "'the facts supporting premeditation and deliberation were uncontradicted once the intent element was established.'" (*Ibid.*) Therefore, "no rational juror could find that [Lopez] intended to murder [Gomez] but did not personally act with premeditation and deliberation." (*Gonzalez*, at pp. 664-665.)

The Court of Appeal in *Anthony* found *Chiu* error harmless in a similar gang-related killing on likewise strong evidence of premeditation and deliberation. (*Anthony*, *supra*, 32 Cal.App.5th

at pp. 1144-1146.) The defendants in *Anthony* rode in a car into Berkeley with a fellow gang member, who exited the car and shot a man to death as the defendants "visibly celebrated." (*Id.* at p. 1106.) The Court of Appeal found that "[t]hese circumstances indicate[d]" that the defendants "were intent upon murder when they drove together into Berkeley, and were intent upon murdering [the victim] specifically when they came upon him because of his familial relationship to [a] reputed Berkeley gang member." (*Id.* at p. 1145.) Here, similarly, Lopez celebrated Gomez's murder after tracking down Gomez based on the belief that Gomez was a Sureño who had to answer for the earlier stabbing of Amante. Like the defendants in *Anthony*, Lopez's "actions show[ed] planning, motive and a preexisting intent to kill, rather than unconsidered, impulsive actions." (*Ibid.*)

Lopez asserts that the evidence of his premeditation and deliberation was less than that in *Anthony*. (OBM 70.)[15] In large part, however, his arguments on that score attack the straw man that *sufficient* evidence of a valid theory would satisfy the *Chapman* standard. (OBM 53-55.) The People have never taken that position, nor—contrary to Lopez's characterization (OBM 55)—did the Court of Appeal below. To the contrary, the Court of Appeal described the evidence against Lopez as "overwhelming" and referenced his decision not to argue insufficiency only as a

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[15] Lopez also observes that the defendants in *Anthony* were convicted of conspiracy to commit murder (OBM 70), but that was only one of three reasons why the Court of Appeal found the *Chiu* error harmless. (*Anthony*, *supra*, 32 Cal.App.5th at pp. 1145-1146.)

sign that—alone among his codefendants—he himself recognized how strong the evidence against him was. (Typed Opn. at p. 11.)

More substantively, Lopez reprises his attempts at trial to attack Dragoman and Ortiz's credibility. (OBM 55-56.) But the jury's verdict and true finding on the gang special circumstance establishes beyond a reasonable doubt that it believed both women, who were the only individuals who put Lopez at the scene. Inversely, if the jury disbelieved Dragoman and Ortiz, it would have had no reason to convict Lopez at all, let alone find that he had the intent to kill Gomez and either killed him or aided and abetted his premeditated murder. (See *People v. Ortiz* (2002) 101 Cal.App.4th 410, 416 [failure to instruct on force element of felony dissuasion of a witness was harmless beyond a reasonable doubt where victim testified as to force and verdict showed that "the jury necessarily accepted [the victim's] testimony" of dissuasion].) To the extent that Lopez now asks this Court to second-guess the jury's manifest decision to believe Dragoman and Ortiz, "it is not a proper appellate function to reassess the credibility of witnesses." (*People v. Friend* (2009) 47 Cal.4th 1, 41, internal quotation marks omitted.) Rather, Lopez's attacks at most highlight a "simple conflict[] in the evidence that w[as] for the jury to resolve." (*Ibid.*) And Lopez's attempt to undo that resolution is particularly ironic given his professed disapproval of "a reviewing court . . . wading into the factfinding role reserved for the jury." (OBM 44, internal quotation marks omitted.)

Lopez next contends that "[e]ven had [the jurors] accepted Dragoman's and Ortiz's assertions about [him], the jurors may well have doubted that this evidence proved [he] took part in the killing." (OBM 56.) Again, Lopez does not—and cannot—explain how this argument squares with the special circumstance finding that he either intentionally killed Gomez or aided and abetted Gomez's premeditated murder. Finally, Lopez's numerous arguments that the evidence did not show him to be the killer (OBM 56-58) merely worsen matters for him. Specifically, if the jurors did not believe that he was the actual killer, then the gang special circumstance necessarily reveals that they believed he aided and abetted premeditated murder with the intent to kill, which means that he was guilty as a direct aider and abettor. (See Argument II.A, *ante*.) In sum, Lopez's evidentiary arguments fail to analyze that evidence in light of the jury's verdict on the special circumstance. Considering the evidence and that verdict *together*, as the Court has repeatedly done, leaves no reasonable doubt that the jury would have convicted Lopez on a valid theory even if he were one of Gomez's actual killers.

2. Neither the prosecutor's argument nor the jury's question during deliberations raises a reasonable doubt that the *Chiu* error was prejudicial

As explained *ante* in Argument I.A, Lopez's cited cases do not support his position (OBM 42-43, 49-50) that alternative-theory error is necessarily prejudicial simply because a prosecutor argues the invalid theory or a juror asks a question on

that theory during deliberations. These cases also fail to support the weaker claim that the argument and question in this case rendered the error prejudicial in the context of the whole record. If anything, these extra considerations bolster the conclusion of harmlessness compelled by the jury's verdict and the evidence of Lopez's premeditation and deliberation.

In particular, Lopez's account of the prosecutor's argument (OBM 45-48) focuses on the prosecutor's general explanation of the theories of murder while largely ignoring the prosecutor's argument as to Lopez specifically. While the prosecutor did briefly mention the natural and probable consequences theory with respect to Lopez, the prosecutor was adamant that Lopez was "an aider and abettor to murder." (2CT 285-286.) Especially striking is Lopez's omission of the prosecutor's statement, "I would submit to you that he is either an actual stabber, which is possible, or *he's an aider and abettor to murder, period. You don't even need to get to* [the natural and probable consequences] *theory as to Rico Lopez*." (2CT 285-286, italics added.) Lopez also omits that the prosecutor concluded his presentation by stating simply, "Aider and abettor to murder." (2CT 286.) These arguments as to Lopez stood in contrast to the prosecutor's reliance on the natural and probable consequences theory as to Ochoa. (2CT 240-248.)

This case is thus distinguishable from *Martinez*, in which "the prosecutor argued the natural and probable consequences theory to the jury *at length* during closing argument and rebuttal." (*Martinez*, *supra*, 3 Cal.5th at pp. 1226-1227, cited at

OBM 42-43, 50.) *Loza*, also cited by Lopez (OBM 43, 50), is actually the inverse of this case because the prosecutor in *Loza emphasized* the natural and probable consequences theory because of the "difficulty" of proving direct aiding and abetting—the only other viable theory—on the evidence at trial. (*Loza*, *supra*, 27 Cal.App.5th at pp. 805-806.) Lopez's remaining cited cases are similarly inapposite. (See *People v. Nunez and Satele* (2013) 57 Cal.4th 1, 41-42 [prosecutor admitted that he "did not prove" facts required for valid theory], cited at OBM 50; *Lewis*, *supra*, 139 Cal.App.4th at pp. 890-891 [prosecutor "strongly emphasized" the invalid theory, called that theory "*a no-brainer*," and told the jury it did not need to even consider valid theory], cited at OBM 43.)

The prosecutor's argument in this case was far more like the one supporting harmlessness in *Lucero*, in which the trial court instructed the jury on an invalid felony-murder theory and a valid theory of murder committed with malice aforethought. (*Lucero*, *supra*, 200 Cal.App.4th at pp. 48-50.) The prosecutor in *Lucero* "at one point . . . said that" the facts supporting the invalid theory were "probably the easiest conclusion [the jury could] come to in [the] trial." (*Id.* at p. 49.) Nonetheless, the Court of Appeal observed that the invalid theory "was given short shrift" overall, with the prosecutor focusing on "an all-out attack on the defendants' assertion" of imperfect self-defense, i.e., an absence of malice. (*Id.* at pp. 48-49.) Similarly, while the prosecutor here *mentioned* that the jury could convict Lopez on the natural and probable consequences theory as a fallback

position, the prosecutor deemphasized that theory in favor of the valid direct aiding and abetting theory. "In sum, although the [natural and probable consequences] route was available as a shortcut for arriving at a [first degree] murder verdict, it was virtually ignored in closing arguments to the jury" *as to Lopez*. (*Id.* at pp. 49-50.) The prosecutor's argument here therefore reaffirms the lack of prejudice; at the very least, it does not overcome the clear showing of harmlessness flowing from the verdicts and evidence.

Also unhelpful to Lopez's prejudice argument is the jury's note during deliberations asking for "more clarification of premeditation and deliberation and how it relate[d] to" the instruction on the natural and probable consequences doctrine. (2CT 361.) Specifically, the jury appeared to be unsure whether a first degree murder theory based on natural and probable consequences required that the target offenses themselves be premeditated and deliberated. (2CT 361.) The trial court responded that the "term 'deliberate and premeditate' refer[red] only to First Degree Murder" as defined in the murder instruction and was "not an element of any of the" target offenses. (2CT 363.)

Lopez argues that the jury's question about natural and probable consequences creates a reasonable doubt over whether the jury convicted him on that theory. (OBM 43, 51-52, 69-70.) But even if the jury *did* subjectively convict on that theory, such conviction would not raise a reasonable doubt whether the jury would have convicted on *another*, valid theory had the natural

and probable consequences theory not been given. Lopez's prejudice argument thus reduces to his incorrect premise that alternative-theory error is harmless only where the jury subjectively did convict on a valid theory. Consequently, his inference of prejudice from the jury's question falls with the harmlessness test on which it rests.

In any event, Lopez is mistaken that the jury's question is significantly probative of the theory on which he was convicted. "Although the jury requested clarification of the natural and probable consequences doctrine, there is no indication that jurors were considering this theory for Lopez specifically," let alone that they ultimately convicted him on that theory. (Opn. 11; see also *Gonzalez*, *supra*, 54 Cal.4th at p. 666 [jury's question reflecting that it might have been "focused on" misinstructed element did not render error prejudicial because "other concerns may have just as easily prompted the request"].) The weak probative value of the juror question was therefore insufficient to undermine the combined force of the verdicts, the "overwhelming" evidence against Lopez (Opn. 11), and the prosecutor's argument minimizing the natural and probable consequences theory as a basis for conviction.

As noted *ante*, Lopez relies heavily on *Brown*, describing that case as "primarily rel[ying] on the 'fact that the jury requested further instruction on natural and probable consequences late in its deliberations.'" (OBM 69, quoting *Brown*, *supra*, 247 Cal.App.4th at p. 226; see also OBM 43.) The Court of Appeal in this case, however, accurately explained why

Lopez's description of *Brown* is wrong. "First, unlike here, there were multiple irregularities in the taking of the verdicts that also precluded finding the error harmless." (Opn. 10, citing *Brown*, at pp. 215, 227.) If anything, that description understates the egregious basis for reversal in *Brown*, namely that the trial court received both guilty and not guilty verdicts on the same count and "unilaterally decided which verdict it was going to enter (the guilty verdict)" without inquiring of the jury or "even informing counsel of the existence of" the conflicting verdicts. (*Brown*, at pp. 232-233.) Lopez identifies no similarly egregious conduct in this case.

Second, "the evidence against the defendant [in *Brown*] was not overwhelming, because the only person who identified him as the shooter was a witness who took a plea bargain for a six-year sentence in exchange for his testimony." (Opn. 10, citing *Brown*, at pp. 226-227.) Finally, the defendant in *Brown* was the only defendant, so no question existed that the jury was inquiring into the natural and probable consequences theory *as to him*. Other than wrongly stating that the evidence against him was not overwhelming, Lopez does not address any of these bases for distinguishing *Brown* from this case.[16]

The two cases that Lopez cites from this Court are also distinguishable on multiple levels. (OBM 43, citing *Martinez*,

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[16] The Court of Appeal below additionally distinguished this case from *Brown* on the basis that *Brown* reached its verdict only three hours after receiving the trial court's answer to its question on natural and probable consequences. (Opn. 10, citing *Brown*, *supra*, 247 Cal.App.4th at p. 226.)

supra, 3 Cal.5th at p. 1227 and *Chiu*, *supra*, 59 Cal.4th at pp. 167-168.) The petitioner in *Martinez* was the only nonkiller defendant and the defendant in *Chiu* was the only defendant at all, leaving no doubt that the juries in that case were considering natural and probable consequences as to those defendants. (*Martinez*, at p. 1219; *Chiu*, at p. 160.) Indeed, the juror interaction in *Chiu* was far more robust—and therefore far more probative—than the single question in this case. In *Chiu*, the jury convicted only after the trial court replaced a holdout juror who expressed unwillingness to "put[] an aider and abettor in the shoes of a perpetrator." (*Chiu*, at pp. 167-168.) "These events indicate[d] that the jury may have been focusing on the natural and probable consequence theory of aiding and abetting and that the holdout juror prevented a unanimous verdict on first degree premeditated murder based on that theory." (*Id.* at p. 168.) No such direct causal relationship here connected the jury's question with its verdict as to any defendant, let alone Lopez.

Martinez and *Chiu* are also distinguishable because neither involved a special circumstance or other verdict that would have established their respective defendants' mens rea for first degree murder, as the gang special circumstance does for nonkillers. (*Martinez*, *supra*, 3 Cal.5th at p. 1219; *Chiu*, *supra*, 59 Cal.4th at pp. 160-161.) *Martinez* is additionally distinguishable because "the only assistance [the defendant] rendered to his codefendant was incidental to" the target offense, i.e., the defendant's "assault on" the victim's friend. (*Martinez*, at p. 1226.) The evidence of the defendant's premeditation and deliberation in *Martinez* was

thus far less compelling than the evidence here. Viewed as a whole, then, neither *Martinez* nor *Chiu* involved the combination of verdict-established jury findings and mental state evidence that rendered the *Chiu* error in *this* case harmless as to Lopez. In short, Lopez provides no persuasive reason why the Court of Appeal erred in its application of the holistic *Chapman* prejudice review required by this Court in *Aledamat*.

CONCLUSION

Accordingly, the judgment of the Court of Appeal should be affirmed.

Dated: August 18, 2020 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **ANSWERING BRIEF ON THE MERITS** uses a 13 point Century Schoolbook font and contains 19,707 words.

Dated: August 18, 2020

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

Case Name: **In re R. Lopez on Habeas Corpus** No.: **S258912**

I declare:

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I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on August 18, 2020, at San Francisco, California.

J. Espinosa	/s/ ***J. Espinosa***
Declarant	Signature

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