In the Supreme Court of the State of California

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

Petitioner's Reply Brief on the Merits

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

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

Honorable Dana Beernink Simonds, Judge
(habeas corpus proceedings)

Honorable Raima Ballinger, Judge
(jury trial)

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Appointed by the Supreme Court

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Arguments

I

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

A. Introduction

In his opening brief, petitioner set forth a framework that enables a reviewing court to engage in a proper harmless-error inquiry in a case of alternative-theory error, which is but a specific application of the more general *Chapman* standard for

harmless error. The framework enables a reviewing court to conduct such analysis in a manner consistent with *People v. Aledamat* (2019) 8 Cal.5th 1 and other authorities. Applying the framework to the error in violation of *People v. Chiu* (2014) 59 Cal.4th 155 in his own case, petitioner explained that a proper inquiry compels the conclusion that it is not clear beyond a reasonable doubt that the error was harmless, because the record affirmatively shows one or more jurors may have convicted him on the invalid theory. (OBM 30-59.)[1/]

The Attorney General opposes the framework set forth by petitioner and disputes his position that the *Chiu* error cannot be held harmless beyond a reasonable doubt. (ABM 33-83.)[2/] In so doing, the Attorney General misconstrues this Court's holding in *Aledamat*, mischaracterizes petitioner's position, and misinterprets cases applying *Chapman v. California* (1967) 386 U.S. 18 [17 L.Ed.2d 705, 87 S.Ct. 824]. Further, the Attorney General misreads the record in petitioner's case in a futile effort to portray the error in his case as harmless.

As petitioner will explain, the Attorney General's contentions are meritless.

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1. OBM refers to petitioner's Opening Brief on the Merits.

2. ABM refers to the Attorney General's Answering Brief on the Merits.

B. Petitioner's Position is Consistent With *Aledamat* and Other Relevant Authorities

1. *Aledamat*'s holding is not what the Attorney General says it is

The Attorney General contends that petitioner's framework for harmless-error analysis of alternative-theory error is incompatible with *People v. Aledamat, supra,* 8 Cal.5th 1. (See, e.g., ABM 34, 53-59.) Specifically, the Attorney General claims that this Court based its holding in *Aledamat* on its "recognition . . . that *Chapman* requires a holistic review of the record *centering around the evidence* rather than prosecutorial argument or juror questions." (ABM 44, emphasis added; see also ABM 49.) According to the Attorney General, *Aledamat* holds that "the harmlessness inquiry places at least as much weight on the state of the evidence as on argument or juror notes." (ABM 37.) However, this interpretation of *Aledamat* is inaccurate.

This Court held in *Aledamat* that "alternative-theory error is subject to the more general *Chapman* harmless error test." (*Aledamat, supra*, at p. 13.) It rejected an argument that such error "requires reversal unless there is a basis in the record to find that 'the jury has "*actually*" relied upon the valid theory . . . .'" (*Id.* at p. 9, emphasis in original, citation omitted.) In general terms, this Court explained, "The reviewing court must reverse the conviction unless, after examining the entire cause, including the evidence, and considering all relevant circumstances, it determines the error was harmless beyond a reasonable doubt." (*Id.* at p. 13.)

Contrary to the Attorney General's assertion, this Court never suggested in *Aledamat* that the prescribed examination of the "entire cause" should "center[] around the evidence." (ABM 44.) In fact, contrary to the Attorney General's claim (ABM 36-37), this Court in *Aledamat* affirmed the principle that a reviewing court should decline to determine that an alternative-theory error was harmless when there are indicia in the record that the jury may have based its verdict on the invalid theory. This Court did so by expressly stating that its views on harmless-error analysis were consistent with the reasoning it had employed in *People v. Chiu, supra,* 59 Cal.4th 155 and *In re Martinez* (2017) 3 Cal.5th 1216. (*Aledamat, supra*, at pp. 12-13.) This Court in *Aledamat* explained that in *Chiu*, it "noted that questions from the jury during deliberations 'shows that the jury may have based its verdict'" on the invalid theory, and therefore it could not conclude beyond a reasonable doubt that the jury "ultimately" based its verdict on a valid theory. (*Ibid*., quoting *Chiu*, at p. 167.) Similarly, this Court in *Aledamat* explained that in *Martinez* it "noted that the prosecutor had relied heavily on the invalid theory in argument to the jury, and that 'an inquiry by the jury during its deliberations suggested that it was considering the' invalid theory," and therefore this Court could not conclude beyond a reasonable doubt that the jury based its verdict on the valid theory. (*Ibid*., quoting *Martinez*, *supra*, at p. 1227.)

This Court's approval in *Aledamat* of its approach in *Chiu* and *Martinez* was corroborated by its comments suggesting

the importance of looking for indicia in the record that the jury may have based its verdict on the invalid theory. Although this Court in *Aledamat* had no occasion to discuss such indicia, apparently because the record lacked any, this Court did emphasize that "no one," apparently referring to the prosecutor and defense counsel, "ever suggested to the jury that there were two separate ways it could decide whether the box cutter was a deadly weapon," and the defense "did not contest the point." (*Aledamat, supra,* at pp. 5, 14.) This Court's observations disclosed its concern with looking for indicia in the record that could suggest how the parties guided the jury's decision-making. Thus *Aledamat* affirmed the principle that jury questions or arguments by the prosecutor may establish that an alternative-theory error in a particular case cannot be held harmless.

The Attorney General's assertion that *Alemadat* requires that the examination of the entire cause "center[] around the evidence" (see ABM 44) is further undermined by an examination of what this Court chose *not* to do in either *Chiu* or *Martinez.* In each case, this Court declined to reason that the prosecution's strong evidence for a conviction on a valid theory warranted a determination that the error was harmless. This Court in *Chiu* could have concluded that the evidence supported a first degree murder conviction based on a valid theory of direct aiding and abetting with premeditation and deliberation, as the evidence showed that the defendant urged his accomplice to grab a gun and yelled, "shoot him, shoot him." (*People v. Chiu, supra,*

59 Cal.4th 155, 160, 167-168.) But this Court refrained from relying on this evidence to determine that the error was harmless, due to the indicia in the record that the jury may have based its verdict on the invalid theory. (*Id.* at p. 167.) Similarly, this Court in *Martinez* refrained from relying on what was possibly "sufficient evidence to convict Martinez of directly aiding and abetting" to hold the error harmless, because of indicia in the record showing the jury may have based its verdict on the invalid theory. (*In re Martinez, supra,* 3 Cal.5th 1216, 1226-1227.) This undercuts the Attorney General's claim that *Aledamat* establishes that the evidence heard by the jury is central to harmless-error analysis.

The Attorney General inaccurately asserts that this Court's opinion in *People v. Covarrubias* (2016) 1 Cal.5th 838 supports the position that *Aledamat* requires the harmless-error analysis in an alternative-theory error case to be "center[ed] around the evidence." (ABM 37, 38, 44.) This Court's determination of harmless error in *Covarrubias* was based primarily on other verdicts and findings returned by the jury. In *Covarrubias*, the trial court instructed the jury on three theories of burglary, one of which incorrectly permitted the jury to convict the defendant of burglary felony murder based solely on entry into the murder victim's residence with intent to kill, a violation of the merger doctrine. (*Id.* at pp. 880-882.) In applying its harmless-error analysis, this Court noted that the jury convicted the defendant of robbing the victims and found true the robbery-

murder special circumstance allegation (*id.* at p. 883) and that the evidence unequivocally showed that the defendant went to the residence to "steal 'stuff.'" (*Id.* at p. 882.) "By these verdicts and findings, the evidence presented, the prosecution's theory of the case, and the instructions given, the jury necessarily found that that defendant entered the house . . . with the specific intent to steal or commit robbery." (*Id.* at p. 883, citation omitted.) Apparently no indicia in the record in *Covarrubias* showed that the jury may have considered the invalid theory, as the opinion mentioned none. As a result, this Court held the error was harmless because "there is no reasonable doubt that the jury made the determinations necessary for a proper finding of burglary felony murder and burglary-felony-murder special circumstance." (*Ibid.*, citation omitted.)

This Court's analysis in *Covarrubias* demonstrated its understanding that a reviewing court should "examine[] what the jury necessarily did find and ask[] whether it would be impossible, on the evidence, for the jury to find *that* without *also* finding the missing fact as well," as it subsequently explained in *People v. Aledamat, supra,* 8 Cal.5th 1. (*Id.* at p. 15, emphasis in original.) Far from rejecting this principle, petitioner has acknowledged the importance of such analysis. (OBM 41-42.) But in light of the apparent absence of any indicia in the record in *Covarrubias* that jurors may have considered the invalid theory, nothing in *Covarrubias* suggests that harmless-error analysis as to alternative-theory error must be centered around the evidence.

2. Petitioner's position is not what the Attorney General says it is

The Attorney General repeatedly and inaccurately asserts that "the fundamental premise underlying Lopez's protocol" is "that alternative theory error is harmless only if the jury *actually did* convict the defendant on a valid theory," a view rejected in *Aledamat*. (ABM 37, emphasis in original; see also ABM 39, 47-49, 61-62.) This mischaracterization of petitioner's position is merely a straw person set up by the Attorney General to be repeatedly knocked down.[3/]

Contrary to the Attorney General's claim, petitioner maintains that a further step of harmless-error review that looks to the evidence is precluded if the record suggests that the jury *actually did* convict, or *may have* convicted, the defendant on an *invalid theory*. (OBM 42-43.) Petitioner does *not* maintain that a determination of harmless error is permitted *only* if the jury *actually did* convict the defendant on a *valid theory*. Petitioner relied on United States Supreme Court opinions to explain that the proper focus in harmless-error analysis is the effect the error had upon the verdict returned by the jury, or in other words, what the jury actually did, rather than the possibility that jurors in a hypothetical error-free trial would have convicted a

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3. As petitioner's position is consistent with *People v. Aledamat, supra,* 8 Cal.5th 1, he will not separately reply to the Attorney General's claim that he is asking this Court to "turn its back on *Aledamat* so soon after deciding it" and "overcome *stare decisis*." (ABM 53.)

defendant based on the evidence. (OBM 37-41.) A reviewing court must focus on circumstances that suggest an error *cannot* be held harmless rather than looking solely to circumstances that *permit* a determination of harmless error.

The Attorney General also incorrectly implies that petitioner insists that a reviewing court never consider evidence heard by the jury when it assesses harmlessness of alternative-theory error. (ABM 38.) To be clear, petitioner has argued that if a reviewing court has "failed to perceive any indicia in the record that the jury considered the invalid theory, [it] may take the next step and consider the evidence in favor of a valid theory." (OBM 44.) Thus petitioner acknowledges that a reviewing court's assessment of the evidence at trial may play a role in harmless-error analysis, depending on the state of the record.

Contrary to the Attorney General's claim (ABM 40), petitioner does not advocate harmless-error analysis that is "different and more demanding" for alternative-theory errors than for omitted or misdescribed elements. The Attorney General misses the point that the method of determining harmless error employed in *People v. Chiu, supra,* 59 Cal.4th 155 and *In re Martinez, supra,* 3 Cal.5th 1216 is "only a specific application of the more general reasonable doubt standard . . . ." (*People v. Aledamat, supra,* 8 Cal.5th 1, 12; accord, *People v. Thompkins* (2020) 50 Cal.App.5th 365, 401 ["an analysis of the actual verdict rendered" that looks to the prosecutor's argument and jury's inquiries is not a different standard of reversal, "but a specific

application of the more general *Chapman* standard"].) Petitioner simply asks this Court to continue analyzing harmless error in alternative-theory cases as it has done in *Chiu* and *Martinez*, as explained, *ante*, at pp. 13-15.

Thus the Attorney General's citation to *People v. Merritt* (2017) 2 Cal.5th 819, in which this Court held that a failure to instruct on all but one element of a charged crime is amenable to harmless error analysis and is not structural error (*id.* at pp. 825, 829), is unavailing. (ABM 40-41.) Contrary to the Attorney General's contention, petitioner does not ask this Court to "erect the same kind of artificial barrier within instructional errors" (ABM 41) that was unsuccessfully urged in *Merritt*. Rather, petitioner urges that in the unique situation of a case of alternative-theory error, indicia in the record that the jury considered relying on the invalid theory precludes a further step of harmlessness review that looks to the evidence in support of a valid theory. This analysis is not new, as it has been applied by this Court in *Chiu* and *Martinez* and by other reviewing courts. (See OBM 42-43 and cases cited.) It does not constitute a "different and more demanding" standard (see ABM 40), but provides guidance to reviewing courts as to which aspects of the record should be considered dispositive to the harmless-error analysis in alternative-theory error cases.

3. California authorities support rather than undermine petitioner's position

Contrary to the Attorney General's claim, petitioner's position is not undermined by cases in which reviewing courts

have relied on evidence heard by jurors to determine that errors in omitting or misdescribing elements were harmless. (See ABM 38, citing *People v. Bolden* (2002) 29 Cal.4th 515, 560-561; *People v. Bush* (2017) 7 Cal.5th 457, 486-488; *People v. Mejia* (2012) 211 Cal.App.4th 586, 618; *People v. Morehead* (2011) 191 Cal.App.4th 765, 774-776.) The trial courts in those cases did not erroneously instruct juries on invalid alternative theories, but instead provided incorrect or incomplete instructions on elements of charged crimes. In such a case, there is no invalid alternative theory that a prosecutor could advocate to a jury, or that a jury could inquire about during deliberations. Thus a reviewing court in such a case cannot look for indicia that jurors considered convicting on an invalid alternative theory. In contrast, in the unique situation of an alternative-theory error case, a reviewing court must look to indicia in the record that the jury considered the invalid theory before it may consider the evidence in support of the valid theory.

The Attorney General further contends that cases relied on by petitioner do not support his position, because "none of them holds that either prosecutorial argument or a jury inquiry on an invalid theory *alone* renders instructional error prejudicial." (ABM 42, emphasis in original.) But the Attorney General's contention fails because in each of those cases, it was prosecutorial argument or jury inquiry that led the reviewing court to decline to hold the error harmless, even without a specific holding to that effect.

Although this Court in its harmless-error analysis in *In re Martinez, supra,* 3 Cal.5th 1216 briefly described in a single sentence the evidence supporting the defendant's guilt under either the valid or invalid theory, this Court did so only to make its point that the evidence may have been sufficient to prove the defendant's guilt under either theory. (*Id.* at p. 1226.) This Court then immediately described in detail the prosecutor's argument, jury's inquiry, and trial court's response that compelled its conclusion that the error could not be held harmless. (*Id.* at pp. 1226-1227.) Thus *Martinez* supports the paramount importance in the harmless-error analysis of indicia in the record that the jury considered the invalid theory.

Likewise, although this Court in *People v. Chiu, supra,* 59 Cal.4th 155 did not explicitly hold that a jury inquiry on an invalid theory alone renders alternative-theory error prejudicial, this Court effectively applied this principle, as it described in detail the events during deliberations that affirmatively showed that the jury may have based its verdict on the invalid theory, and then relied *solely* on those events to determine the error could not be held harmless. (*Id.* at pp. 167-168.)

The court in *In re Loza* (2018) 27 Cal.App.5th 797 similarly did not explicitly hold that prosecutorial argument on an invalid theory alone renders alternative-theory error prejudicial, but it proceeded in implicit accordance with such a rule, as it felt compelled to rule out harmless error for the sole

reason that the prosecutor argued both the valid and invalid theories, even if it were "'highly unlikely'" that the jury convicted on the invalid theory. (*Id*. at p. 806.)

Finally, the court in *People v. Brown* (2016) 247 Cal.App.4th 211 did not explicitly hold that a jury inquiry alone renders alternative-theory error prejudicial, but based its determination that the error was not harmless largely on the jury's request for further instruction on the invalid theory, even though it also mentioned the lack of overwhelming evidence in support of the valid theory as well as irregularities in the taking of the verdicts. (*Id.* at pp. 226-227.)

Therefore, contrary to the Attorney General's argument (ABM 42), petitioner's cited cases support his position.

The Attorney General cites two other cases, incorrectly claiming they undermine petitioner's position. (ABM 42-43.) *People v. Gonzalez* (2012) 54 Cal.4th 632 did not involve alternative-theory error but a misdescription of the element of premeditation and deliberation. (*Id.* at pp. 661-662.) The court determined the error was harmless despite an inquiry by the jury about the misdescribed element because the inquiry was completely ambiguous, as it may have been prompted by any one of several concerns. (*Id.* at pp. 665-666.) *Gonzalez* is inapposite to petitioner's case, as there was no invalid alternative theory in which the jury could have expressed interest.

Although an alternative-theory error was declared harmless in *In re Lucero* (2011) 200 Cal.App.4th 38 despite the

prosecutor's brief mention of the invalid theory in argument, the court explained that the invalid theory was "virtually ignored in closing arguments to the jury," noted that the prosecutor "never suggested . . . that the issue of malice would be moot if [the jurors] followed the felony-murder instruction," and reasoned that to convict on the invalid theory, the jury "would had to have taken a tangled route through the jury instructions that was neither advocated nor suggested." (*Id.* at pp. 48-50.) Thus neither *Gonzalez* nor *Lucero* undermines petitioner's position.

4. Recent California authorities applying the *Aledamat* standard establish that petitioner's position is consistent with *Aledamat*

Further proof that petitioner's position is consistent with *Aledamat* is provided by recent cases in which reviewing courts have applied the rule articulated in *Aledamat* to consder whether alternative-theory errors were harmless.

The recent opinion in *People v. Thompkins, supra,* 50 Cal.App.5th 365 is an outstanding example. Alternative-theory error was committed when the jury was instructed on an invalid "kill zone" theory of attempted murder. (*Id.* at pp. 394-396.) Although the evidence was sufficient to convict under the valid theory of intent to kill, the court found more noteworthy that the prosecutor expressly "invited the jury to employ the [invalid] kill zone instruction." (*Id.* at pp. 397-398.) Citing *Aledamat*, the court described the harmless-error analysis as follows:

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> As we understand the standard of review, the question is not whether we think it clear beyond a reasonable doubt that the defendants were actually guilty beyond a reasonable doubt of five attempted murders based on the valid theory, but whether we can say, beyond a reasonable doubt, *the jury's actual verdicts* were not tainted by the inaccurate jury instructions. We focus on the likelihood that the jury relied on the kill zone instruction in reaching its verdicts, not simply the likelihood of defendants' guilt under a legally correct theory.

(*Id*. at p. 399, emphasis added.) Applying this standard, the court concluded that it "cannot say beyond a reasonable doubt that some jurors at least, did not rely on the faulty element of the [invalid] kill zone instruction." (*Id*. at p. 400.)

In addition, the *Thompkins* court explained its rejection of the Attorney General's claim in a rehearing petition that the correct standard of reversal "'is not whether reviewing court can say beyond a reasonable doubt that the "*jury's actual verdicts* were not tainted by the inaccurate jury instruction"' . . ., but 'whether it is "'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error."'"' (*Ibid*., citations omitted, emphasis in original.) The court in *Thompkins* remarked that the Attorney General's "formulation of the applicable test" was "not only inconsistent with *Chapman* itself, but sets the bar for affirmance too low under *Aledamat*." (*Thompkins, supra,* at p. 400.) *Thompkins* emphasized the United States Supreme Court's explanation in *Sullivan v. Louisiana* (1993) 508 U.S. 275 [124 L.Ed.2d 182, 113 S.Ct. 2078] that "'the question [*Chapman*] instructs the reviewing court to consider is

not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand.'" (*Thompkins, supra,* at p. 400, quoting *Sullivan, supra,* at p. 279.)

The court in *Thompkins* clarified that *Aledamat* holds that "an analysis of the actual verdict rendered is but a specific application of the more general *Chapman* standard, which looks to whether, upon an examination of 'the entire cause, including the evidence, and considering all relevant circumstances,' the error was harmless beyond a reasonable doubt." (*Thompkins, supra*, at p. 401, quoting *Aledamat, supra*, at p. 13.) Thus the *Thompkins* court's harmless-error analysis was "fully consistent with *Aledamat*." (*Thompkins, supra*, at p. 401.)

The *Thompkins* analysis is also consistent with petitioner's position, as the court in *Thompkins* devoted its attention to "'what effect [the error] had upon the guilty verdict in the case at hand'" (*Thompkins, supra,* at p. 400, quoting *Sullivan, supra*, at p. 279) and relied on the prosecutor's argument to determine that the error was not harmless.

Numerous other cases involving alternative-theory error and applying the *Aledamat* standard prove that petitioner's position on the proper stages of the harmless-error analysis is consistent with *Aledamat.* Some courts have discussed evidence heard by the jury in resolving the harmless-error analysis, but each case is otherwise entirely consistent with petitioner's position. In most cases, the court's determination that error was

not harmless was linked to the prosecutor's argument advocating the invalid theory. Most importantly, in *no* case did a reviewing court decide that alternative-theory error was *harmless* based on its review of the evidence *despite* indicia in the record that the prosecutor argued the invalid theory or that the jury expressed interest in the invalid theory. (See *People v. Cardenas* (2020) 53 Cal.App.5th 102, 117-119 [error not harmless when evidence for valid theory was sufficient but "not overwhelming," jury could have drawn "multiple reasonable inferences," and prosecutor's argument relied on erroneous instruction]; *In re Rayford* (2020) 50 Cal.App.5th 764, 783 [error not harmless when "prosecutor's closing argument compounded the error" of instruction]; *People v. Mariscal* (2020) 47 Cal.App.5th 129, 139-140 [error was harmless based solely on "undisputed evidence" for valid theory, in case with apparently no indicia in record that jury considered invalid theory]*; People v. Sanchez* (2020) 46 Cal.App.5th 637, 645, review granted June 10, 2020, S261768 [error not harmless when "prosecutor urged both theories to the jury" and evidence was "sufficient under either theory"]; *People v. Garcia* (2020) 46 Cal.App.5th 123, 156-157 [error not harmless because prosecutor argued invalid theory to jury]; *People v. Medellin* (2020) 45 Cal.App.5th 519, 535-536 [court could not determine error was harmless after reviewing evidence supporting invalid theory but "more importantly" noting that prosecutor "adopted [invalid theory] as his theory to prove guilt"]; *People v. Martell* (2019) 42 Cal.App.5th 225, 234-237 [court determined error was

not harmless after noting evidence supported either valid or invalid theory but emphasizing prosecutor told jury to focus on invalid theory]; *People v. Medrano* (2019) 42 Cal.App.5th 1001, 1019-1021, review granted March 11, 2020, S259948 [error not harmless in light of prosecutor's invitation to jury to rely on invalid theory]; *People v. Stringer* (2019) 41 Cal.App.5th 974, 984-986 [error not harmless in light of verdicts on other counts necessarily suggesting jury may have relied on invalid theory, jury note consistent with inclination to convict on invalid theory, and evidence enabling reliance on invalid theory].)

The foregoing cases refute the Attorney General's claim that petitioner's position is inconsistent with *Aledamat*.

5. Petitioner's position does not conflict with United States Supreme Court authorities

In his opening brief, petitioner relied on three United States Supreme Court opinions solely for the proposition that the proper focus in harmless-error analysis must be the effect the error had upon the verdict returned by the jury, or in other words, what the jury actually did, rather than the possibility that a jury in a hypothetical error-free trial could have convicted a defendant based on the evidence presented. (OBM 37-41, citing *Yates v. Evatt* (1991) 500 U.S. 391 [114 L.Ed.2d 432, 111 S.Ct. 1884], overruled on other grounds in *Estelle v. McGuire* (1991) 502 U.S. 62, 72, fn. 4 [116 L. Ed. 2d 385, 112 S.Ct. 475]; *Sullivan v. Louisiana. supra,* 508 U.S. 275; and *McDonnell v. United States* (2016) 579 U.S. __ [195 L.Ed.2d 639, 136 S.Ct. 2355].)

In response, the Attorney General argues that petitioner's framework for determining harmless error in an alternative-theory case runs afoul of United States Supreme Court precedent that authorize reviewing courts to consider the evidence when evaluating whether an instructional error was prejudicial. (ABM 43-51, citing *Yates v. Evatt, supra,* 500 U.S. 391; *Neder v. United States* (1999) 527 U.S. 1 [144 L.Ed.2d 35, 119 S.Ct. 1827]; and *Hedgpeth v. Pulido* (2008) 555 U.S. 57 [172 L.Ed.2d 388, 129 S.Ct. 530].) This argument is flawed.

First of all, petitioner does not contend that a reviewing court's assessment of the evidence may never play a role in harmless-error analysis. To be clear, petitioner has argued that if a reviewing court has "failed to perceive any indicia in the record that the jury considered the invalid theory, [it] may take the next step and consider the evidence in favor of a valid theory." (OBM 44.) A reviewing court in such a case would proceed to assess the evidence heard by the jury.

Secondly, the cited United States Supreme Court cases do not support the Attorney General's position that "*Chapman* requires a holistic review of the record *centering around the evidence* rather than prosecutorial argument or juror questions." (ABM 44, emphasis added.)

Yates v. Evatt, supra, 500 U.S. 391 was a case in which the High Court clarified the proper application of harmless error analysis to instructions on erroneous presumptions. Although the Court encouraged a reviewing court to assess such

an error "in relation to everything else the jury considered on the issue in question, as revealed in the record" (*id.* at p. 403), the Court had no occasion to discuss whether some aspects of the record such as prosecutor's arguments or jury inquiries may carry more weight than an assessment of the evidence.

Neder v. United States, supra, 527 U.S. 1 [4/] was a

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4. In a footnote, the Attorney General cites *Neder* for an additional reason, noting that "*Neder* spoke of 'a rational jury' rather than individual jurors." (ABM 46, fn. 8, citing *Neder, supra*, at p. 17.) The Attorney General spins this three-word phrase in *Neder* into a claim that the United States Supreme Court "long ago rejected 'single juror' analysis," citing *Harrington v. California* (1969) 395 U.S. 250, 254 [89 S. Ct. 1726, 23 L. Ed. 2d 284]. Thus the Attorney General challenges petitioner's argument that "[i]f even one juror may have relied on the invalid theory, the error would not be harmless." (OBM 43.) Although this issue was not presented for review, petitioner will reply to the Attorney General's claim. First, nothing in *Neder* suggests that a constitutional error would be harmless if only one juror may have been impacted. Second, although the High Court in *Harrington* mentioned a party's contention that it "must reverse if [it] can imagine a single juror whose mind might have been made up" by improperly admitted confessions, the Court never clearly rejected this point. (*Harrington, supra*, at p. 254.) Third, it is settled that both "persuasive authority [and] common sense compel[] the conclusion that a hung jury is a more favorable result [for a defendant] than a guilty verdict," and therefore reversible error may be determined when an error may have affected the vote of "at least one juror." (*People v. Soojian* (2010) 190 Cal.App.4th 491, 521, and cases cited; accord, *Sassounian v. Roe* (9th Cir. 2010) 230 F.3d 1097, 1110.) The court in *People v. Brown, supra,* 247 Cal.App.4th 211 applied this reasoning and declined to find a *Chiu* alternative-theory error harmless because the record indicated "one or more jurors voted guilty based on" the invalid theory. (*Id.* at pp. 226-227.)

case in which the High Court held that the erroneous omission of an element of a charged crime was not structural error subject to automatic reversal but was instead amenable to a harmlessness analysis pursuant to *Chapman*. (*Id.* at pp. 4, 8-9, 15.) The Court remarked that harmless error may be found when two conditions are met -- (1) "the omitted element was uncontested," presumably because no evidence would support a finding that the element was not proved, and (2) proof of the element was "supported by overwhelming evidence." (*Id.* at p. 17.) But the Court had no occasion to discuss whether some aspects of the record may carry more weight than an assessment of the evidence in a *Chapman* harmless error analysis in an alternative-theory error case.

Hedgpeth v. Pulido, supra, 555 U.S. 57 was a collateral attack on a state court judgment in a federal habeas corpus proceeding in which the High Court rejected an argument that alternative-theory error is structural error, holding instead that it is amenable to harmless-error analysis. (*Id.* at pp. 60-62.) The Court's comment that "drawing a distinction between alternative-theory error" and other types of instructional errors would be "'patently illogical,'" which is quoted in the Attorney General's brief (ABM 48-49), was directed to the unsuccessful claim that alternative-theory error cannot be subject to harmless-error analysis. (*Id.* at p. 61, citation omitted.) But the Court in *Hedgpeth* had no occasion to discuss whether some aspects of the record may carry more weight than an assessment of the evidence once a reviewing court begins to conduct *Chapman* harmless

error analysis in a case of alternative-theory error.

The Attorney General attempts to undermine petitioner's reliance on four cases he cited to support his position that California courts have consistently followed the United States Supreme Court's pronouncements that the proper focus in harmless-error analysis must be the effect the error had upon the verdict returned by the jury, rather than the possibility that a jury in a hypothetical error-free trial could have convicted a defendant based on the evidence presented. (ABM 51-52; OBM 40.) But nothing in the Attorney General's discussion of *People v. Neal* (2003) 31 Cal.4th 63, *People v. Grimes* (2016) 1 Cal.5th 698, *People v. Pearson* (2013) 56 Cal.4th 393, or *People v. Aranda* (2012) 55 Cal.4th 342 alters the fact that each of those courts relied on the High Court's opinion in *Sullivan v. Louisiana. supra,* 508 U.S. 275, which explained that "[h]armless-error review looks . . . to the basis on which 'the jury actually rested its verdict.'" (*Id.* at p. 279.) This principle is incompatible with the Attorney General's claim 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." (ABM 51, emphasis added.)

For all the above-stated reasons, this Court should reject the Attorney General's misinterpretation of *Aledamat* and its misguided criticism of the framework set forth by petitioner for analyzing harmlessness in alternative-theory cases.

C. It is Not Clear Beyond a Reasonable Doubt That the Jury Convicted Petitioner of First Degree Murder Based on a Legally Valid Theory

The Attorney General offers reasons why it is clear beyond a reasonable doubt that the error in petitioner's case was harmless. (ABM 59-83.) None have merit.[5/]

The Attorney General constructs various scenarios and asserts they imply there is a reasonably possibility that the jury convicted petitioner on a valid theory. But what is important to harmless-error analysis is not whether it is *possible* that the conviction was based on a *valid* theory. Rather the question is whether there is a reasonable possibility that one or more jurors may have concluded that the only way to convict petitioner of first degree murder was under the *invalid* natural and probable consequences theory of aiding and abetting liability, because one or more jurors were not convinced beyond a reasonable doubt that he actually premeditated and deliberated.

One scenario postulated by the Attorney General in support of a finding of harmless error is based on the premise that the jury concluded petitioner was not an aider and abettor but an actual killer. (ABM 71 ["assuming that the jury found that

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5. Among reasons offered by the Attorney General for a determination of harmless error is the jury's true finding on the gang-murder special circumstance. (ABM 60-70.) Consistent with the structure of the arguments in his opening brief, petitioner will reply to the Attorney General's points concerning the special circumstance in Argument II, *post*, of petitioner's reply brief.

Lopez was an actual killer"]; see also ABM 68-70.) But this scenario is undermined by the record, as the prosecutor felt compelled by the weakness of the evidence to argue explicitly to the jury that petitioner was an aider and abettor to murder rather than an "actual stabber." (2 CT 285-286 (No. A152748).)

Noting the three hallmarks of premeditation and deliberation -- pre-murder planning activity, motive to kill, and manner of killing that reflects preconceived design (ABM 72, see *People v. Anderson* (1968) 70 Cal.2d 15, 26-27), the Attorney General asserts that the true finding on the gang-murder special circumstance suggests the jurors were convinced petitioner's role in the attack was motivated by gang affiliation. (ABM 72-73.)

But the Attorney General argues with far less credibility that the record discloses evidence of "events before the murder that indicate planning" (ABM 72, quoting *People v. Gonzalez, supra,* 54 Cal.4th 632, 663) that must have convinced the jurors that petitioner premeditated and deliberated. (ABM 73.) The Attorney General inaccurately asserts, "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." (ABM 73.) But what the jury actually heard was that Lindsey Ortiz recalled that "everyone," specifically, all five defendants, ran into the kitchen (14 RT 3452-3453; 15 RT 3499 (No. A113655)) and she heard drawers opening (14 RT 3452; 15 RT 3501 (No. A113655)), but neither Ortiz nor Kacee Dragoman saw anyone take anything

from the kitchen. (15 RT 3501; 17 RT 4172 (No. A113655).) Thus no evidence proved to the jurors that petitioner armed himself with a knife for the attack. And, as petitioner explained in his opening brief, the evidence that he had a broken knife handle *after* the attack did not necessarily convince each juror that he armed himself with a knife *before* the attack. (OBM 55-57.)

The only other evidence of "planning" cited by the Attorney General is petitioner's boasting and celebrating in the apartment *after* the fatal attack, which the Attorney General maintains "foreclose[s] any suggestion that Lopez's role in the killing was impulsive or unconsidered." (ABM 73.) The Attorney General's point is nonsensical, because a defendant's exuberant behavior *after* an attack could not have logically established to the jurors that he engaged in acts of planning *before* the crime.

Finally, it is noteworthy that the Attorney General makes no effort to argue that the evidence about the stabbing attack disclosed a manner of killing that convinced the jurors petitioner had a preconceived design, the third hallmark of premeditation and deliberation. In sum, the evidence that petitioner may have premeditated and deliberated was far less convincing to the jurors than the Attorney General asserts.

More importantly, the sufficiency of evidence to prove premeditation and deliberation is immaterial to a determination whether the error in petitioner's case was harmless. As petitioner explained in his opening brief, courts have repeatedly declined to determine that alternative-theory error was harmless when

evidence was clearly sufficient for a valid theory of conviction. (OBM 53-54 and cases cited.) Here, the sufficiency of evidence to prove a valid theory of premeditation and deliberation is especially insignificant because the evidence is also sufficient for a conviction under the invalid theory, as petitioner explained in his opening brief. (OBM 54-55.) Thus the Attorney General's contention concerning the sufficiency of the evidence does not weigh in favor of a determination of harmless error.

The Attorney General further argues that it is significant that, like the defendant in *People v. Gonzalez, supra,* 54 Cal.4th 632, petitioner did not "seriously contest premeditation and deliberation." (ABM 73.) The Attorney General's assertion is inaccurate.

At the outset of his summation, petitioner's counsel criticized the prosecutor's argument that the jury could convict petitioner of first degree murder under either aiding and abetting theory that was provided to the jury, arguing, "[U]nder the prosecutor's theory, all of these people can be guilty of a premeditated deliberate murder if they're aiders and abettors." (26 RT 6469; see also 26 RT 6470 (No. A113655).) Later, petitioner's counsel specifically contested premeditation and deliberation, based in part on evidence that petitioner had been drinking and was intoxicated. (26 RT 6508-6509 (No. A113655).) His counsel argued, "Does it sound like planning and premeditation and deliberation or does it sound like . . . the Three Stooges or something like that going out, you know, to get into a

brawl." (26 RT 6509 (No. A113655).) Petitioner's counsel continued, "[H]e's saying that they were premeditating and deliberating all of that time. Premeditating and deliberating what?" (*Ibid*.) Counsel referred to the instruction on premeditation and deliberation and argued, "[Y]ou should read it very carefully because first degree murder is not something that's going on all the time around here." (*Ibid*.) He argued, "[T]his is very important to you because if there is no first degree murder in this case, then there is no special circumstance." (26 RT 6510 (No. A113655).) Finally, he explained that "to say that the only possible explanation of a multiple stabbing is premeditation and deliberation is simply not true." (26 RT 6511 (No. A113655).) Therefore premeditation and deliberation were indeed contested.

The Attorney General criticizes petitioner for "attacking Dragoman and Ortiz's credibility." (ABM 75.) But petitioner simply maintains it is reasonably possible that jurors may have believed some, but not 100%, of those two witnesses' testimony about petitioner. (OBM 55-56.) This is significant because petitioner challenges the reasoning by the Court of Appeal that "the evidence [of premeditation and deliberation] against [petitioner] was overwhelming," as petitioner "was seen after the murder with blood on his clothes and shoes and holding a knife handle, and he also bragged about the stabbing afterward." (Slip opinion, p. 11.) As petitioner has argued, substantial evidence supported the inference at trial that Dragoman and Ortiz may have gilded the lily in their testimony

implicating petitioner so as to shift blame from Peter Amante, the father of Dragoman's child and "really good friend[]" to Ortiz (14 RT 3436-3441; 17 RT 4155 (No. A113655)) and the only defendant seen stabbing the victim. (16 RT 3939-3941, 3886; 19 RT 4856, 4862; 21 RT 5297 (No. A113655).) Although jurors evidently believed Dragoman and Ortiz's testimony that petitioner joined in the attack on the victim, one or more jurors may have doubted the credibility of those witnesses' assertions portraying petitioner as the most culpable attacker. For example, jurors may have doubted that after the attack, petitioner had blood on his clothes and shoes, possessed a broken knife handle, and bragged about and celebrated the stabbing attack. Those doubts may have influenced the jurors' determinations as to whether petitioner was a stabber or an aider and abettor, and whether or not he premeditated and deliberated over his participation in the killing.

The Attorney General finds significant the prosecutor's argument that petitioner was "either an actual stabber . . . or . . . an aider and abettor to murder," and that the jury did not "even need to get to [the natural and probable consequences theory" as to petitioner. (ABM 77, quoting 2 CT 285-286 (No. A152748).) But the Attorney General fails to mention that *immediately* preceding this argument, the prosecutor told the jury that "whether he is an actual stabber or not, whether he aided and abetted with the intent to kill or not, he's guilty of murder as a natural and probable consequence of

his act." (2 CT 285-286 (No. A152748).) Then, on rebuttal, the prosecutor argued that first degree murder was the correct verdict for an actual stabber, an aider and abettor with intent to kill, and an aider and abettor who aids and abets a crime "with first degree murder being a natural and probable consequences of the crime aided and abetted." (2 CT 343-344 (No. A152748).) Contrary to the Attorney General's assertion, the prosecutor expressly invited the jury to rely on the invalid theory to convict petitioner of first degree murder. "The likely damage [from the instruction on the invalid theory in petitioner's case] is best understood by taking the word of the prosecutor . . . ." (See *Kyles v. Whitley* (1995) 514 U.S.419, 444 [131 L.Ed.2d 490, 115 S.Ct. 1555] [High Court determined failure to disclose eyewitnesses' inconsistent statements was prejudicial when prosecution told jury the eyewitnesses were its best witnesses].)

The Attorney General attempts to distinguish petitioner's case from cases in which alternative-theory errors were found prejudicial, claiming that the prosecutor at petitioner's trial merely "*mentioned* that the jury could convict Lopez on the natural and probable consequences theory as a fallback position" (ABM 78-79, emphasis in original), whereas the prosecutors in other cases emphasized the invalid theory. (ABM 77-79, citing *In re Martinez, supra,* 3 Cal.5th 1216, *In re Loza, supra,* 27 Cal.App.5th 797, *People v. Nunez* (2013) 57 Cal.4th 1, *People v. Lewis* (2006) 139 Cal.App.4th 874.) Contrary to the Attorney General's claim, the prosecutor

explicitly argued to petitioner's jury, "So are these fall back positions of the DA? No. It's called the law of the State of California . . . ." (2 CT 340-341 (No. A152748.) The prosecutor's repetition and description of the jury's option of relying on the invalid theory to convict petitioner in his summation and rebuttal belie the Attorney General's assertion that the prosecutor merely *mentioned* the invalid theory. (1 CT 193-196; 2 CT 285-286, 340-341, 343-344, 347 (No. A152748).)

Furthermore, contrary to the Attorney General's claim (ABM 78-79), petitioner's case is not comparable to *In re Lucero, supra,* 200 Cal.App.4th 38, in which the reviewing court determined the error was harmless despite the prosecutor's brief mention of the invalid theory in argument. The court in *Lucero* reasoned that the invalid theory was "virtually ignored in closing arguments to the jury," explained that the prosecutor "never suggested . . . that the issue of malice would be moot if [the jurors] followed the felony-murder instruction," and noted that in order to convict on the invalid theory, the jury "would had to have taken a tangled route through the jury instructions that was neither advocated nor suggested." (*Id.* at pp. 48-50.) In contrast, the prosecutor explicitly told petitioner's jury that a first degree murder verdict was the correct verdict for an aider and abettor who aids and abets a crime "with first degree murder being a natural and probable consequences of the crime aided and abetted." (2 CT 343-344 (No. A152748).)

The Attorney General dismisses the significance of

the jury's request for clarification of the requirement of proof of premeditation and deliberation in the natural and probable consequences theory of aiding and abetting. (ABM 79.) But the court's response made it easy for the jurors to apply the invalid theory to return a first degree murder verdict without finding premeditation and deliberaion, because the court stated that "[j]ury instruction 3.02 may refer to First Degree Murder," and that "[t]he term 'deliberate and premeditate' is not an element of any" of the target offenses that would provide a basis for applying the invalid theory. (2 CT 363 (A152748).) Moreover, the jury's colloquy with the court was closely linked to its verdict, as the jury deliberated for four days before sending the note (2 CT 361; 3 CT 545-549 (No. A152748)) but then was able to convict petitioner of first degree murder the day after receiving the court's response. (3 CT 549 (A152748).)

The Attorney General contends that "even if the jury *did* subjectively convict on that [invalid] 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." (ABM 79-80, emphasis in original.) But as petitioner has argued, the United States Supreme Court has consistently explained that "the proper focus in harmless-error analysis must be the effect the error had upon the verdict returned by the jury, rather than the possibility that a jury in a hypothetical error-free trial could have convicted a defendant based on the evidence presented." (OBM 38.) Moreover,

in neither *People v. Chiu, supra,* 59 Cal.4th 155 nor *In re Martinez, supra,* 3 Cal.5th 1216 did this Court consider "whether the jury would have convicted on *another*, valid theory had the natural and probable consequences theory not been given." (See ABM 79-80, emphasis in original.) Instead, once this Court concluded the jury may have convicted on the invalid theory, it determined the error not harmless. (*Chiu, supra*, at p. 167; *Martinez, supra*, at p. 1227.) The Attorney General's inappropriate vision of harmless-error analysis would be an unwarranted departure from this Court's jurisprudence.

The Attorney General quotes with approval the Court of Appeal's reasoning in its opinion, "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." (ABM 80, quoting slip opinion, p. 11.) However, the Attorney General fails to cite authority for the proposition that a different harmless error standard applies in multiple defendant cases, one in which the burden is not on the beneficiary of the error to prove harmless error beyond a reasonable doubt, but on the defendant to prove that the error was prejudicial beyond a reasonable doubt.

The Attorney General attempts but fails to distinguish *People v. Brown, supra,* 247 Cal.App.4th 211, in which the court reversed after determining that *Chiu* error could not be held harmless. (ABM 80-81; see *Brown, supra*, at pp. 224-227, 234; see OBM 69.) But the Attorney General overlooks the

fact that petitioner's jury, like the jury in *Brown*, requested further instruction on natural and probable consequences "late in its deliberations" (see *Brown, supra,* at p. 226), as it was the fourth day of deliberations. (3 CT 545-549 (No. A152748).) As in *Brown*, "if there had been agreement [on a valid theory of first degree murder], there would have been no reason to request further instruction on a third, unnecessary theory of murder." (See *Brown, supra,* at p. 226.) Like the jury in *Brown*, petitioner's jury returned a verdict shortly after it received further instruction on natural and probable consequences, as the jury returned its verdict at 12:07 p.m. the day after it received the court's response to its inquiry sometime after 3:05 p.m. and before its adjournment at 4:30 p.m. (3 CT 549 (No. A152748).) This close connection between the court's response and the jury's verdict indicates one or more jurors may have voted guilty based on the natural and probable consequences theory. Thus, as in *Brown*, the error in petitioner's trial cannot be seen as harmless.

Nevertheless, the Attorney General maintains that the court in *Brown* reversed only because it noted that the evidence supporting a valid theory was not overwhelming and there were multiple irregularities in the taking of the verdicts. (ABM 31.) However, the court discussed its view that the evidence in support of a valid theory was "more than sufficient" but "not overwhelming," only *after* it had already concluded that the defendant "could have been found guilty with one or more jurors finding liability on an improper theory." (*Brown, supra,*

at p. 226.) Thus *Brown*'s discussion of the sufficiency of the evidence seems gratuitous. Additionally, the court devoted five paragraphs of its opinion to a discussion of the harmless error issue before it concluded it could not hold the error harmless. (*Id.* at p. 227.) Only *after* reaching this conclusion did the court add, "Moreover, irregularities in the taking of the verdicts . . . precludes finding this error was harmless," and proceed to discuss the additional issue. (*Ibid.*) This suggests the *Brown* court found the error prejudicial *prior* to analyzing the taking of the verdicts. Thus the Attorney General fails to distinguish *Brown*.

The Attorney General also fails to distinguish *People v. Chiu, supra,* 59 Cal.4th 155 and *In re Martinez, supra,* 3 Cal.5th 1216, by arguing that the circumstances in those cases "leav[e] *no doubt* that the juries in that case [sic] were considering natural and probable consequences as to those defendants." (ABM 82, emphasis added.) But the Attorney General has again flipped the *Chapman* harmless error standard on its head. The *Chapman* standard requires "the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman v. California, supra,* 386 U.S. 18, 24.) It does not require a defendant to establish that a constitutional error was prejudicial beyond a reasonable doubt. This Court never concluded in *Chiu* or *Martinez* that there was *no doubt* that the jury was considering the invalid theory. This Court in *Chiu* simply held that the circumstances indicated that the jury "*may*

have been" considering the invalid theory. (*Chiu, supra*, at p. 168, emphasis added.) Similarly, this Court in *Martinez* held that "the record does not permit us to rule out a reasonable possibility" that the jury considered the invalid theory. (*In re Martinez, supra,* 3 Cal.5th 1216, 1226.) Thus any insignificant differences between *Chiu* and *Martinez* and petitioner's case do not compel a different outcome in petitioner's case.

For all the above-stated reasons, the error in this case cannot be held harmless.

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II

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

In his opening brief, petitioner explained that the jury's true finding on the gang-murder special circumstance cannot render the *Chiu* instructional error harmless beyond a reasonable doubt in his case, because the jury made this finding only *after* it had reached a verdict convicting a defendant of first degree murder, and also because the finding did not require the jury to find that petitioner premeditated and deliberated, and therefore does not establish that his jury found this essential element for a conviction of first degree murder based on a valid theory. (OBM 60-70.)

But the Attorney General maintains that the jury's true finding on the special circumstance establishes that the jury convicted petitioner of a valid theory of first degree murder requiring premeditation and deliberation. (ABM 60-67.) As petitioner will explain, the Attorney General's position is unsupported.

The Attorney General argues that the instruction concerning the special circumstance required the jury to find either that petitioner was the actual killer or that he aided and abetted a first degree murder with *both* intent to kill *and*

premeditation and deliberation. (ABM 60, 66.) Contrary to the Attorney General's claim, what the instruction actually required was a finding that petitioner "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." (1 CT 156 (No. A152748); CALJIC No. 8.80.1.) This instruction was applicable only *after* the jury had found petitioner "guilty of murder in the first degree," possibly on an aiding and abetting theory.

Moreover, although the special circumstance instruction explicitly mentioned "the intent to kill," there was no mention of premeditation and deliberation. Even if the jurors were unacquainted with the maxim "expressio unius est exclusio alterius," jurors are just as capable of applying the common sense principle as judges are. (*People v. Aranda, supra,* 55 Cal.4th 342, 387 (conc. & dis. opn. of Liu, J.); *People v. Castillo* (1997) 16 Cal.4th 1009, 1020 (conc. opn. of Brown, J.).)

Certainly nothing in the instructions on the theory of direct aiding and abetting with shared intent (1 CT 147-148 (A152748); CALJIC No. 3.01) and the natural and probable consequences theory of aiding and abetting liability (1 CT 148 (No. A152748); CALJIC No. 3.02) suggested that either theory of murder was the exclusive method of proving that petitioner "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," as required by the special

circumstance instruction. (See 1 CT 156 (No. A152748); CALJIC No. 8.80.1.) The message that a guilty verdict based on the natural and probable consequences theory would constitute a finding that petitioner aided and abetted the murder was reinforced by the prosecutor's argument that the jurors could "decide whether these defendants *aided and abetted* in the target offense *and the murder* being the natural and probable consequence thereof." (2 CT 340-341 (No. A152748), emphasis added.) Therefore, any juror who convicted petitioner of first degree murder on the natural and probable consequences theory, because the juror was not convinced that petitioner premeditated and deliberated, would still have concluded that petitioner "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," as required for the special circumstance. (See 1 CT 156 (No. A152748); CALJIC No. 8.80.1.) Thus such a juror would have felt free to find the special circumstance true.

Furthermore, it is not even certain that all the jurors inferred from the special circumstance instruction that they were required to find that petitioner acted with a true intent to kill. The instructions presented the jury with a glaring inconsistency concerning whether the requirement of intent to kill actually meant a true intent to kill. One instruction told them,"The crime of First Degree Murder requires the specific intent to kill," and, "The special circumstance of Penal Code Section 190.2(a)(22)

requires the specific intent to kill." (1 CT 151 (No. A152748); CALJIC No. 3.31.) But another instruction informed them that a conviction of murder could be based on the natural and probable consequences doctrine, without mentioning any intent to kill. (1 CT 148 (No. A152748); CALJIC No. 3.02.) The message of this instruction was reinforced by the court's response to the jury's inquiry in deliberations. (2 CT 363 (A152748).) Thus the instructions created an inconsistency about whether a requirement of intent to kill actually meant that the jurors had to find that petitioner intended to kill the victim. "Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity." (*Frances v. Franklin* (1985) 471 U.S. 307, 322 [85 L.Ed.2d 344, 105 S.Ct. 1965]; accord, *People v. Gay* (2008) 42 Cal.4th 1195, 1225-1226.) The court's inconsistent messages about the requirement of the intent to kill were amplified by the prosecutor's argument that "[n]atural and probable consequences does not require an intent to kill." (1 CT 195 (No. A152748); see also 2 CT 285-286 (No. A152748) ["whether he aided and abetted with the intent to kill or not, he's guilty of murder as a natural and probable consequence of his act"].)

Thus, for multiple reasons, the true finding on the gang-murder special circumstance does not prove that every juror convicted petitioner of first degree murder on a valid theory.

The Attorney General asserts petitioner's position is undermined by *People v. Anthony, supra,* 32 Cal.App.5th 1102.

(ABM 61-62.) In his opening brief (OBM 64), petitioner criticized the holding in *Anthony* that *Chiu* error was harmless due to the jury's special circumstance findings (*Anthony, supra,* at pp. 1144-1146), because of the *Anthony* court's failure to explain how it equated intent to kill with premeditation and deliberation.

Petitioner would further argue here that the *Anthony* court provided defective reasons for rejecting the contention that the special circumstance could not establish that the jury convicted on a valid theory.[6/] First, the court noted that "murder conspirators are necessarily guilty of first degree murder" (*id*. at p. 1145, citation omitted), but the opinion in *Anthony* does not indicate that any defendant was convicted of conspiracy. Rather the prosecutor argued that the instructions allowed the jury to forego finding the defendants "intended to commit first degree murder," and instead convict the defendants of first degree murder "by find[ing] they aided and abetted in, or *conspired to commit*, a firearm assault on [the victim], the natural and probable consequences of which was [the shooter's] first degree murder of [the victim]." (*Id*. at p. 1143, emphasis added.) But the

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6. In his opening brief, petitioner criticized *Anthony* (OBM 64) and distinguished it as well. (OBM 69-70.) Upon further review of *Anthony*, petitioner withdraws his statement that "there was apparently no indication in the record [in *Anthony*] that the jury considered the invalid theory" (OBM 69-70), as the opinion discloses that the prosecutor argued that if the jurors did not find the defendants intended to commit first degree murder, they should nonetheless convict them of first degree murder under the natural and probable consequences theory. (*Anthony, supra*, at p. 1143.)

Anthony court mentioned nothing in the verdicts to suggest that the jury convicted based on a theory of conspiracy requiring premeditation and deliberation.

Second, the court in *Anthony* inappropriately looked to the evidence instead of what the jury actually may have done, when it stated that the evidence of premeditation and deliberation was so "overwhelming" that it would have been "nonsensical" for any juror to rely on the invalid natural and probable consequences theory. (*Id.* at p. 1146.) The court arrived at this conclusion despite the record showing that the prosecutor felt compelled by his assessment of the equivocal state of the evidence to argue that if the jurors did not find the defendants intended to commit first degree murder, they should nonetheless convict them of first degree murder under the natural and probable consequences theory. (*Id.* at p. 1143.)

Third, the *Anthony* court reasoned that the special circumstance finding that each defendant had the intent to kill ruled out the possibility that the jurors convicted the defendants under the natural and probable consequences theory. (*Id.* at p. 1146.) But the court's reasoning on this point fails to reckon with the reasonable possibility that a juror could conclude that a defendant intended to kill, but nonetheless convict him of first degree murder solely on the natural and probable consequences theory because the juror was not convinced that the defendant premeditated and deliberated, and then proceed to find true the gang-murder special circumstance, which does not require a

finding of premeditation and deliberation. Therefore petitioner submits that *Anthony* was wrongly decided.

The Attorney General's reliance on *People v. Beck and Cruz* (2019) 8 Cal.5th 548 is unavailing. (ABM 60.) The court in *Beck and Cruz* determined that *Chiu* error in instructing that jurors could convict a defendant of first degree murder as an aider and abettor under natural and probable consequences was harmless because the jury was charged with conspiracy to commit murder, not conspiracy to commit a target offense. (*Id.* at pp. 644-645.) As a result, there was "no possibility [defendants] were found guilty of murder on a natural and probable consequences theory." (*Id.* at p. 645.) Unlike *Beck and Cruz*, petitioner's case involved a special circumstance finding, not a conviction of conspiracy to commit murder, and therefore his jury made no finding that petitioner conspired to commit first degree murder with premeditation and deliberation.

The Attorney General again inaccurately asserts that petitioner maintains that alternative-theory error is harmless only if the jury "actually convicted" the defendant on a valid theory. (ABM 62; see also ABM 37, 39, 47-49.) The Attorney General relies on *People v. Coffman and Marlow* (2004) 34 Cal.4th 1 and *People v. Covarrubias, supra,* 1 Cal.5th 838 to contend that petitioner's supposed theory "would prevent a verdict from demonstrating the harmlessness of alternative-theory error in even the most straightforward cases." (ABM 62.) The Attorney General has misrepresented petitioner's argument.

First, petitioner maintains that a reviewing court should not determine that alternative-theory error is harmless if the record suggests that the jury *actually did* convict, or *may have* convicted, the defendant on an *invalid theory*. (OBM 42-43.) Petitioner does *not* maintain that a determination of harmlessness is permitted *only* if the jury *actually did* convict the defendant on a *valid theory*. Second, petitioner explicitly acknowledges that "a reviewing court may hold alternative-theory error harmless if it can determine beyond a reasonable doubt from *the jury's other verdicts* that the jury necessarily relied on a valid theory to convict the defendant." (OBM 41.) Therefore, contrary to the Attorney General's claim, neither *Coffman and Marlow, supra,* 34 Cal.4th 1, 96 [error in instructing jury on invalid felony murder theory of sodomy was rendered harmless by other verdicts establishing first degree murder conviction was based on valid theories of felony murder] nor *Covarrubias, supra,* 1 Cal.5th 838, 882-883 [error in instructing jury on invalid felony murder theory of burglary with intent to kill was rendered harmless by other verdicts establishing first degree murder conviction was based on valid theories of felony murder] is inconsistent with petitioner's position.

The Attorney General relies on the jury's receipt of CALJIC No. 3.01, which instructed that an aider and abettor must have both "knowledge of the unlawful purpose" of the perpetrator and the "intent or purpose of committing or encouraging or facilitating the commission of the crime."

(1 CT 147-148 (No. A152748).) The Attorney General contends that as a result of this instruction, "the jury here 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." (ABM 64, citing *Coffman and Marlow, supra,* 34 Cal.4th 1.) But there are two flaws in the Attorney General's argument. First, the quoted instructional language pertained only to the theory of direct aiding and abetting with shared intent, not the natural and probable consequences theory of aiding and abetting on which one or more jurors may have relied. Second, the jury was never required by the special circumstance instruction to find that petitioner "aided and abetted the premeditated and deliberated murder." Instead, the instruction required the jury to find that petitioner "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." (1 CT 156 (No. A152748); CALJIC No. 8.80.1.) Premeditation and deliberation were not mentioned in this requirement. Given that one or more jurors may have convicted petitioner of first degree murder on an aiding and abetting theory, albeit an invalid one, those jurors were sure to feel confident that they had already found that petitioner "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" (*ibid.*) even though they were not

convinced that petitioner premeditated and deliberated.

Finally, the Attorney General relies on *People v. Daveggio and Michaud* (2018) 4 Cal.5th 790 to support the proposition that the true finding on the special circumstance required the jurors to find that petitioner premeditated and deliberated. (ABM 64.) However, *Daveggio and Michaud* fails to support the proposition. The issue in that case was a jury instruction that stated that the theory of aiding and abetting liability posited that "[e]ach principal, regardless of the extent or manner of participation is equally guilty." (*Id*. at p. 844.) This Court observed that "[i]t is . . . possible for a direct perpetrator and an aider and abettor to be guilty of different degrees of the same offense, depending on whether they harbored different mental states." (*Id.* at pp. 845-846.) Nevertheless, this Court also noted that "'[a]ll principals, including aiders and abettors, are "equally guilty" in the sense that they are all criminally liable,'" even when though they can be found guilty of different degrees of the same offense. (*Id.* at p. 846, citation omitted.) Reviewing the instructions given at trial, this Court emphasized that "the court advised the jury (per CALJIC No. 3.01) that in order to find that either defendant was an aider and abettor, the jury had to find that the defendant knew of the perpetrator's unlawful purpose and acted with the intent or purpose of committing, encouraging, or facilitating the crime." (*Id.* at p. 847.) Based on this instruction, this Court stated that "'[i]t 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*., citation omitted.) Analyzing the circumstances in *Daveggio and Michaud,* including one defendant's concession of premeditation and deliberation and the fact that "the evidence of premeditation and deliberation was unusually direct" (*id.* at pp. 847-848), this Court determined that "it is exceedingly unlikely that a jury convinced that one of the defendants was an aider and abettor, but not provided with the 'equally guilty' language, would have reached a different result regarding premeditation." (*Id*. at p. 846.)

However, this Court's reasoning in *Daveggio and Michaud* does not compel a determination that the jury in petitioner's case necessarily found that he premeditated and deliberated. First of all, *People v. Daveggio and Michaud, supra,* 4 Cal.5th 790 was not a case about determining harmlessness of an alternative-theory error, but rather a case about determining whether a potential ambiguity in a jury instruction was reasonably likely to mislead a jury. (*Id*. at p. 846.) Thus the question considered by this Court -- whether a hypothetical jury that was *not* provided the challenged instruction would likely have reached a different result -- is not the appropriate question to consider in petitioner's case. The appropriate question in petitioner's case is whether it is clear beyond a reasonable doubt that the jury based its verdict on the valid theory, when the record contains indications that the jury considered the invalid

theory. (See *In re Martinez, supra,* 3 Cal.5th 1216, 1225.)

Secondly, the finding that "the defendant knew of the perpetrator's unlawful purpose and acted with the intent or purpose of committing, encouraging, or facilitating the crime" required by the instruction on direct aiding and abetting liability discussed by this Court in *Daveggio and Michaud* (*id.* at p. 847) does not apply to petitioner's case. This is because the issue in this case is whether one or more jurors who may have convicted petitioner of first degree murder on the invalid alternative theory of aiding and abetting liability, which does *not* require knowledge of the perpetrator's purpose and intent (1 CT 148 (No. A152748); CALJIC No. 3.02), were permitted by the language of the special circumstance instruction to find the allegation true without concluding that petitioner premeditated and deliberated. As the special circumstance instruction required only that jurors find that petitioner "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" (1 CT 156 (No. A152748); CALJIC No. 8.80.1), the jurors were not required to find that petitioner *knew* that the perpetrator intended to kill and was premeditating and deliberating the killing, so long as jurors found that petitioner was guilty of first degree murder, even if the verdict was based on the natural and probable consequences doctrine of aiding and abetting liability. Thus *Daveggio and Michaud* does not support the Attorney General's position.

The Attorney General fails to distinguish *People v. Brown, supra,* 247 Cal.App.4th 211, in which the court declined to hold a *Chiu* error harmless even though the jury found a gang-murder special circumstance true, because the record indicated that one or more jurors voted guilty based on the natural and probable consequences theory. (ABM 66; see OBM 69, citing *Brown, supra*, at pp. 225-227.) The Attorney General asserts that "the defendant in *Brown* was undisputably convicted as the actual killer rather than as a potential aider and abettor." (ABM 66, citing *Brown, supra*, at pp. 226-227.) This is absolutely incorrect. The court in *Brown* explained that only one witness testified that the defendant was the shooter, that this witness's credibility was dubious, and that there was evidence suggesting the witness was the actual shooter. (*Id.* at pp. 226-227.) Moreover, the record indicated that one or more jurors voted guilty based on the natural and probable consequences theory rather than a theory that the defendant was the actual killer. (*Id.* at p. 226.) Thus the Attorney General's effort to distinguish *Brown* fails. As for the Attorney General's other criticisms of petitioner's reliance on *Brown* (ABM 66-67, and fn. 13), petitioner has refuted those claims, *ante*, at pp. 22, 41-43.

The fundamental flaw with the Attorney General's position concerning what is established by the true finding on the gang-murder special circumstance is the Attorney General's inability to address the situation of a juror who was convinced *both* that petitioner aided and abetted the murder with intent to

kill *and* that petitioner should be convicted of first degree murder under the natural and probable consequences, but was *not* convinced that petitioner premeditated and deliberated. The Attorney General cannot offer any convincing reason to refute the reasonable possibility that one or more of petitioner's jurors would hold that set of views, or the reasonable possibility that such a juror would feel enabled to find the gang-murder special circumstance allegation true.

Therefore, the true finding on the gang-murder special circumstance does not establish beyond a reasonable doubt that the jury convicted petitioner of first degree murder based on a valid theory requiring premeditation and deliberation, rather than the invalid theory. Reversal is required.

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Conclusion

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

Dated: October 8, 2020

Respectfully submitted,

/s/ Victor J. Morse
Victor J. Morse

Attorney for Petitioner
Rico Ricardo Lopez

Certificate of Word Count

Counsel for petitioner Rico Ricardo Lopez hereby certifies that this reply brief on the merits consists of 11,745 words (excluding tables and proof of service), according to the word count of the computer word-processing program that produced this brief. (California Rules of Court, rule 8.520(c)(1).)

Dated: October 8, 2020

/s/ Victor J. Morse
Victor J. Morse

Attorney for Petitioner
Rico Ricardo Lopez

Declaration of Service By Mail
and Electronic Service By Truefiling

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

I, Victor J. Morse, declare that I am a citizen of the United States, over 18 years of age, employed in the County of San Francisco, State of California, and not a party to the subject cause. My business address is 3145 Geary Boulevard, PMB # 232, San Francisco, California 94118-3316. I served a true copy of the attached **Petitioner's Reply Brief on the Merits** on the following, by placing copies thereof in envelopes addressed as follows:

Mr. Rico Ricardo Lopez # F 23451
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(Attn.: Judge
Dana Beernink Simonds)

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on October 8, 2020, at San Francisco, California.

/s/ Victor J. Morse
Victor J. Morse

STATE OF CALIFORNIA
Supreme Court of California

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10/8/2020
Date

/s/Victor Morse
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