IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re RICO RICARDO LOPEZ On Habeas Corpus,	Cal. Supreme Court Case No. S258912 First District Court of Appeal Case No. A152748 Sonoma County Superior Court Case No. SCR-32760

BRIEF AMICUS CURIAE BY THE OFFICE OF THE STATE PUBLIC DEFENDER IN SUPPORT OF PETITIONER RICO RICARDO LOPEZ

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

Honorable Dana Beernink Simonds, Judge

(Habeas Corpus proceedings)

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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BRIEF OF AMICUS CURIAE

INTEREST OF AMICUS

The Office of the State Public Defender (OSPD) has represented indigent defendants in their direct appeals from both capital and non-capital convictions since 1976. We are committed to protecting the constitutional and statutory rights of those who have been convicted of crimes and have been instructed by the Legislature to "engage in . . . efforts for the purpose of improving the quality of indigent defense." (Gov. Code, § 15420, subd. (b).)

OSPD has a particular interest in the issues pending in this case. Virtually all of our clients were convicted of murder and many, like the defendant in this case, received a gang-killing special-circumstance finding. Finally, and also like the case below, in a number of OSPD cases, the jury was instructed on both valid and invalid theories of murder liability. Even without regard to the offense or special allegation at issue, the standard of prejudice

applicable to alternative-theory error has and will greatly affect OSPD clients. OSPD has therefore filed amicus briefs in *People v. Guiton* (1993) 4 Cal.4th 1116 (*Guiton*), and more recently in *People v. Aledamat* (2019) 8 Cal.5th 1 (*Aledamat*). As detailed below, OSPD believes it brings a unique perspective to the resolution of the issues before this Court, which will further the fair and orderly administration of the criminal justice system in California.

INTRODUCTION

The right to a jury trial is "the heart and lungs, the mainspring and the center wheel of our liberties, without which the body must die; the watch must run down; the government must become arbitrary." (*United States v. Haymond* (2019) 139 S. Ct. 2369, 2375, citation and internal quotation marks omitted; accord, *Neder v. United States* (1999) 527 U.S. 1, 30 (conc. & dis. opn. of Scalia, J.) (*Neder*) [the right is "the spinal column of American democracy"].) Distilled to its essence, this fundamental right requires that the prosecution convince every member of a jury, beyond any reasonable doubt and on the basis of a legally-valid theory, that a criminal defendant has committed a crime or that a special allegation is true. (See *Ramos v. Louisiana* (2020) 140 S. Ct. 1390, 1397 (*Ramos*); *McDonnell v. United States* (2016) 136 S. Ct. 2355, 2375 (*McDonnell*); *Ring v. Arizona* (2002) 536 U.S. 584, 602; *In re Winship* (1970) 397 U.S. 358, 364; *People v. Croy* (1985) 41 Cal.3d 1, 12-13; *People v. Collins* (1976) 17 Cal.3d 687, 693 (*Collins*).)

When a trial court commits alternative-theory error, a defendant has been deprived of this right to a jury trial. (See *In*

re Martinez (2017) 3 Cal.5th 1216, 1224 (*Martinez*).) The parties in this case do not dispute that when a trial court commits alternative-theory error, a reviewing court may affirm if the jury's actions show, beyond a reasonable doubt, that the error was not prejudicial. For example, in *Aledamat*, *supra*, 8 Cal.5th 1, this Court, drawing from its own opinion in *People v. Chun* (2009) 45 Cal.4th 1172 (*Chun*) and Justice Scalia's concurrence in *California v. Roy* (1996) 519 U.S. 2 (per curiam), concluded that alternative-theory error was harmless by "examin[ing] what the jury necessarily did find and ask[ing] whether it would be impossible, on the evidence, for the jury to find *that* without *also* finding the missing fact as well." (*Aledamat, supra*, 8 Cal.5th at p. 15.)

But *Aledamat* did not specify how to conduct a prejudice inquiry when the jury's findings do not themselves compel a conclusion as to what else it must have found. This case thus presents a question left unanswered by *Aledamat*: "To what extent or in what manner, if any, may a reviewing court consider the evidence in favor of a legally valid theory in assessing whether it is clear beyond a reasonable doubt that the jury based its verdict on the valid theory, when the record contains indications that the jury considered the invalid theory?" The answer to that question—dictated by this Court's precedent, reinforced by the numerous Court of Appeal decisions decided after *Aledamat*, and further supported by the history and text of the California Constitution—is that reversal is required when there are indications that a jury considered an invalid theory. No other rule would accord deference

to the jury-trial right described above, while maintaining confidence, beyond a reasonable doubt, in the validity of the jury's verdict.

Aledamat also had no occasion to answer a more specific question that pertains to a subset of alternative-theory error at issue in this case: "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?" Or, put another way and in the rubric of *Aledamat*, where a jury has found a gang-killing special circumstance true, must a reviewing court always conclude, beyond any reasonable doubt, that it would be impossible for the jury to find the special circumstance true without *also* finding that the defendant either personally committed premeditated and deliberate murder or directly aided and abetted an accomplice in doing the same? The answer to that question is no.

The *Chiu* error in this case led the jurors to believe that the lowered mental state required for the natural and probable consequences doctrine was tantamount to the specific intent to kill required for both first degree murder and the special circumstance. Jurors who relied on the natural and probable consequences theory in finding Petitioner guilty of first degree murder were thus likely to find the special circumstance true, based in part on the same legal error.

ARGUMENT

I. UNDER THIS COURT'S PRECEDENT, INCLUDING *PEOPLE V. ALEDAMAT*, REVERSAL IS REQUIRED WHEN THE RECORD INDICATES THAT A JURY CONSIDERED AN INVALID THEORY.

This Court's alternative-theory error jurisprudence allows for "specific applications" of the *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*) reasonable-doubt test to determine, whenever possible, whether the instructional error actually affected the jury's verdict. (*Aledamat*, *supra*, 8 Cal.5th at p. 12.) This doctrine follows from the purpose behind, and meaning of, the right to a jury trial. The right "reflect[s] a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." (*Duncan v. Louisiana* (1968) 391 U.S. 145, 156.) The "most important element" of the right is a criminal defendant's "right to have the *jury*, rather than the *judge*, reach the requisite finding of 'guilty.'" (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 277 (*Sullivan*), italics added.) "Thus, although a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he [or she] may not direct a verdict for the State, no matter how overwhelming the evidence." (*Ibid.*; see also *People v. Flood* (1998) 18 Cal.4th 470, 481 [same, under California Constitution].) This "directed verdict prohibition arises out of the jury's absolute power to acquit the accused." (*People v. Figueroa* (1986) 41 Cal.3d 714, 726, fn. 12.)

Of course, the jury's powers are not without limitation. It is axiomatic that a verdict grounded on insufficient evidence is

unacceptable. (See, e.g., *People v. Johnson* (1980) 26 Cal.3d 557, 575-578.) In the same vein, appellate courts will not let stand a conviction that relies on a legal theory that does not constitute a crime. (See, e.g., *McDonnell*, *supra*, 136 S. Ct. at p. 2375.)

Taken together, our judicial system and this Court's precedent vigorously protect a defendant's jury-trial right and a given jury's determination of the facts in accordance with the law. By doing so, the system and the courts maintain confidence that defendants do not stand convicted by juries for acts that are not crimes. In keeping with these principles, when there is instructional error, to the extent practicable appellate review focuses on what the jury in the case at hand *actually did*, not on what a reasonable jury *would* have done. (See OBM 37-41; RBM 17-18, 23-25; see also *People v. Lewis* (2006) 139 Cal.App.4th 874, 888 [explaining that "(t)he *Neder* majority made it clear . . . that it was not disturbing the focus in *Chapman* (and other cases) on the question of whether the error contributed to the jury's verdict, and that its formulation of the harmless error inquiry was to be applied only in a 'narrow class of cases like the present one'"], quoting *Neder*, *supra*, 521 U.S. at p. 17, fn. 2.)

This Court's recent decision in *Aledamat*, *supra*, 8 Cal.5th 1, confirms the point. There, the Court discussed *Chiu*, *supra*, 59 Cal.4th 155 and *Martinez*, *supra*, 3 Cal.5th 1216, which, respectively, reversed convictions due to indications the jury relied on and considered an invalid theory. (See *Aledamat, supra*, 8 Cal.5th at p. 12.) *Aledamat* did not reject these cases, but instead, ratified them as "specific application[s]" of the *Chapman* reasonable

doubt test. (*Aledamat*, *supra*, 8 Cal.5th at p. 12.) Thus, central to *Aledamat*'s holding is a "focus on the impact of the erroneous instruction rather than the strength of the evidence of guilt." (*People v. Thompkins* (2020) 50 Cal.App.5th 365, 399 (*Thompkins*).)

In turn, and contrary to the Attorney General's attempt to import the harmless-error test articulated in *Neder*—an omitted-element case—*Aledamat* did not "firmly establish[] that alternative-theory error is harmless . . . when the jury beyond a reasonable doubt would have convicted on the valid theory had it not received the invalid theory." (ABM 38; see also ABM 49-50 [arguing that *Neder* and other cases "reinforce the same principles that this Court espoused in *Aledamat*," including that "an error is harmless . . . if no reasonable doubt exists that the jury would have convicted on (the valid) theory had it been properly instructed"].) The *Aledamat* majority simply did not say as much.

Moreover, recent precedent has squarely rejected the notion that *Aledamat* requires the *Neder* omitted-element formulation of *Chapman*, a formulation which in its phrasing focuses on the strength of the evidence, as opposed to how the jury arrived at its verdict. As Lopez explains in his reply brief (RBM 23-25), the Attorney General recently made the same argument it does here (see *Thompkins*, *supra*, 50 Cal.App.5th at p. 400). The Court of Appeal rejected it, explaining that "[t]he Attorney General's formulation of the applicable test, which is based on his selectively italicizing a quotation from *Neder* in [a California Supreme Court] opinion, is not only inconsistent with *Chapman* itself, but sets the bar for affirmance too low under *Aledamat*." (*Thompkins, supra*, 50

Cal.App.5th at p. 400.) The court explained that rather, "[w]hat *Aledamat* holds . . . is 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*, 50 Cal.App.5th at p. 401, quoting *Aledamat*, *supra*, 8 Cal.5th at p. 13.)

Requiring reversal when the record indicates that a jury considered an invalid theory is consistent with these considerations. *Aledamat*, like its predecessors *Chiu* and *Martinez*, engaged in a "specific application" of the reasonable doubt test. (*Aledamat*, *supra*, 8 Cal.5th at p. 12.) It did not, in *all potential applications*, "apparently resol[ve] . . . the harmlessness standard for alternative-theory error." (ABM 30.) However, it left open the narrower question presented by this case: "To what extent or in what manner, if any, may a reviewing court consider the evidence in favor of a legally valid theory in assessing whether it is clear beyond a reasonable doubt that the jury based its verdict on the valid theory, when the record contains indications that the jury considered the invalid theory?"

As this Court's precedent makes clear, juror notes and prosecutorial argument are frequent indications of what the jury did, not baseless conjecture. (See, e.g., *Martinez*, *supra*, 3 Cal.5th at pp. 1226-1227; see also *People v. Brown* (2016) 247 Cal.App.4th 211, 226 (*Brown*) [jury request for further instruction "leads to a reasonable inference there were not 12 votes for guilty" based on the

valid theory].) Thus, any characterization of these items as inviting unwarranted "speculation as to what the jury actually decided" (ABM 51), is wholly unfounded.

When there are indications the jury considered an invalid theory, reversal is required because the appellate court can have no confidence, beyond any reasonable doubt, that *this jury* did not rely on the invalid theory. (See *Thompkins*, *supra*, 50 Cal.App.5th at p. 399 ["the question is not whether we think it clear beyond a reasonable doubt that the defendants were actually guilty of (the offenses) 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 instruction"]; accord, *People v. Baratang* (Oct. 22, 2020, A155108) ___ Cal.App.5th ___, 2020 WL 6193975 at *6 [it is the People's burden to show, beyond a reasonable doubt, "that the jury relied on the legally valid theory in convicting the defendant"].)[1] And because the record shows *this jury* may have rejected the remaining valid theory, the jury's prerogative can only be respected by declining to hypothesize or substitute factual findings for those the jury was asked to—but indicated it did not—make. Put another way, requiring reversal when there are indications that a jury considered an invalid theory is the "specific application" of *Chapman* that is consistent with the jury-trial right.

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[1] To be clear, affirmance does *not* require the conclusion that the jury, as a matter of definite fact, relied on the valid theory. (Contra, ABM 37, 39, 47, 53.)

II. THE EXTENT AND MANNER IN WHICH REVIEWING COURTS MAY CONSIDER THE EVIDENTIARY RECORD MUST ACCORD DEFERENCE TO THE JURY-TRIAL RIGHT.

"[N]o maxim of the old law has been more carefully preserved in its integrity under our system" than that of "*[a]d qu[a]estionem juris responde[]nt judices, ad qu[a]estionem facti responde[]nt juratores*." (*People v. Durrant* (1897) 116 Cal. 179, 200-201.)[2] In plainer terms, the foundation of the jury right rests on leaving resolution of contested facts to juries, questions resolved unanimously after sober and considered deliberation. Thus, this Court should resolve the question before it by reinforcing the jury right's clear demarcation of the jury as a factfinder and by respecting its fundamental requirement of unanimity.

A. Indications of What the Jury Did, and Not an Appellate Court's View of the Evidence, Must be Given Primacy Under *Chapman*.

In alternative-theory error cases, this Court has consistently conducted harmless error analysis least intrusive of the jury's domain by looking to what the jury in the case at hand did, i.e., its verdicts, or must have done.[3] In none of these cases did this Court

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[2] "Judges answer to a question of law, jurors to a question of fact." (1 Burrill, A New Law Dictionary and Glossary (1850) p. 35.)

[3] (See *People v. Beck and Cruz* (2019) 8 Cal.5th 548, 645 [instructions and arguments showed no possibility jury relied on invalid theory]; *Aledamat*, *supra*, 8 Cal.5th at pp. 13-15 [instructions, arguments, and evidence showed jury found facts needed for valid theory]; *People v. Canizales* (2019) 7 Cal.5th 591, 597, 615 [evidence, prosecutor's argument, and jury questions

elevate its view of the evidence over the actions taken by the jury, a body necessarily informed by the prosecutorial argument presented to it. If anything, courts do the opposite. (See Footnote 3, *supra*; cf. *In re Loza* (2018) 27 Cal.App.5th 797, 805 ["Under *Chapman*, we also take particular note of a prosecutor's closing arguments"].) Thus, a rule that would "center[] around the evidence" (ABM 44), and which permits reviewing courts to look past the jury's conduct or the prosecution's argument, would wrongly elevate an appellate court's view of the evidence over the deliberations of the jury that sat as a factfinder at trial (see *Sullivan*, *supra*, 508 U.S. at p. 277).

Other cases are not to the contrary. The Attorney General interprets *People v. Gonzalez* (2012) 54 Cal.4th 643 (*Gonzalez*) as

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showed jury may have relied on invalid theory]; *People v. Hardy* (2018) 5 Cal.5th 56, 94 [other findings showed jury relied on valid theory]; *Martinez*, *supra*, 3 Cal.5th at pp. 1226-1227 [no showing jury made findings needed for valid theory, evidence sufficient for both theories, prosecutor argued invalid one at length, and inquiry suggested jury considered it]; *People v. Covarrubias* (2016) 1 Cal.5th 838, 883 [verdicts and findings, evidence, prosecution's theory of case, and instructions showed no reasonable doubt jury made determinations needed for valid theory]; *People v. Johnson* (2015) 61 Cal.4th 734, 772-774 [prosecutor's argument, instructions, and evidence left Court unable to tell theory jury relied on]; *Chiu*, *supra*, 59 Cal.4th at pp. 167-168 [jury note and discussion with trial court showed jury may have relied on invalid theory]; *People v. Nunez* (2013) 57 Cal.4th 1, 42 (*Nunez*) [instructions and prosecutor's argument left Court unable to tell theory jury relied on]; *People v. Pearson* (2012) 53 Cal.4th 306, 320 [other findings showed jury relied on valid theory]; *People v. Farley* (2009) 46 Cal.4th 1053, 1116, fn. 22 [prosecutor's argument, other findings, and evidence showed jury made findings needed for valid theory]; *Chun*, *supra*, 45 Cal.4th at p. 1205 [any juror relying on invalid theory made finding essential to valid one].)

embracing an approach that focuses on the evidence and not on the jury's actual deliberations. Specifically, the Attorney General cites *Gonzalez* for the proposition that instructional error can be harmless even if the jury asked a question directly touching upon the error. (ABM 42-43.) *Gonzalez,* however, was not an alternative-theory error case. Rather, *Gonzalez* equated the instructional error in that case with "omitted element" error, and thus used the *Neder* formulation of *Chapman*. (*Gonzalez*, at pp. 662-663.) This is a critical distinction. The *Neder* formulation, applied in the "limited" context of missing-element cases, "serves the useful purpose of preventing [reviewing courts] from setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial." (*Aledamat*, *supra*, 8 Cal.5th at p. 26 (conc. & dis. opn. of Cuéllar, J.), citation and internal quotation marks omitted.) The same cannot be said when the record contains indications that the jury relied on the invalid theory. Moreover, *Gonzalez*'s discussion of the applicable prejudice test does not support the uniform application of *Neder* to all instructional errors. *Gonzalez* affirms the opposite: that the specific application of the *Chapman* harmless-error test can vary. (See *Gonzalez*, at pp. 665-666.)

The Attorney General likewise cites *In re Lucero* (2011) 200 Cal.App.4th 38, as permitting primary focus on the evidence. Specifically, the Attorney General cites *Lucero* for the proposition that instructional error can be harmless even if the prosecutor discusses the invalid theory in closing argument. (ABM 43.) But *Lucero*, if anything, supports reversal when there are indications

that a jury considered an invalid theory. There, the Court of Appeal focused *exclusively* on counsel's arguments and the instructions (*id.* at pp. 48-52), rather than on the allegedly "overwhelming" weight of the evidence, as the Attorney General now proposes.

In sum, there is simply no support in the alternative-theory caselaw for substituting the weight of the evidence, in the abstract, over concrete indications that the jury considered an invalid theory.

B. Prioritizing an Appellate Court's View of the Evidence Over Indications of What the Jury Did Would Undermine the Division of Authority Between Juries and Judges.

Consider the following case.[4] A defendant is charged with first degree murder. The prosecution proceeds on two theories: (1) felony murder and (2) premeditated murder. During deliberations, the jury sends the following note to the trial judge:

> The jurors are split over (1) malice aforethought [and] (2) felony murder. Some agree that (1) has been proven but not (2). [¶] Some believe (2) has been proven but not (1). [¶] Our understanding is that if all jurors agree to one or the other, this is sufficient to find the defendant guilty [of] the crime of murder in [the] first degree.

The court sends a response confirming that the jurors do not all need to agree on the same theory to convict the defendant of first

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[4] The facts in this paragraph are from *People v. Wear* (2020) 44 Cal.App.5th 1007, where the Court of Appeal reversed a first degree murder conviction because "the record affirmatively show[ed] that some jurors convicted [the defendant] based on the insufficiently supported premeditated-murder theory." (*Id.* at p. 1010.)

degree murder. The jury then convicts the defendant of first degree murder.

On appeal, the defendant argues that his conviction must be reversed because the jury was improperly instructed on the felony-murder theory, and thus, there was alternative-theory error. Under any prejudice test that accords with this Court's longstanding respect for the jury that sat in the case at hand, the reviewing court would reverse, for it is abundantly clear that *some jurors* convicted on the basis of an invalid theory and did not reach a finding on the valid theory.[5]

But, under the Attorney General's rule, an appellate court could merely elevate its own view of the evidence over contrary indications of what the jury actually did. According to the Attorney General, "an error is harmless not only if the jury actually did

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[5] According to the Attorney General, a stray passage from *Harrington v. California* (1969) 395 U.S. 250, 254 (*Harrington*), dictates that unlike in capital cases, the *Chapman* prejudice inquiry in a non-capital case only concerns itself with "a rational jury" and *not* with a "single juror" or "one or more jurors." (ABM 46, fn. 8.) But at most, *Harrington* stands for the proposition that under *Chapman* it is improper to simply *speculate* about what a single juror might have done. Because "a single juror's vote to acquit is enough to prevent a conviction" (*Ramos*, *supra*, 140 S. Ct. at p. 1394), it is axiomatic that "[e]rrors can contribute to verdicts by changing . . . the mind of one juror" (Griffin, *Criminal Adjudication, Error Correction, and Hindsight Blind Spots* (2016) 73 Wash. & Lee L. Rev. 165, 207). Unsurprisingly, the courts of this state have routinely grounded their alternative-theory-error prejudice analysis on a "single juror" or "one or more jurors." (See, e.g., *Baratang*, *supra*, 2020 WL 6193975, at *7; *Thompkins*, *supra*, 50 Cal.App.5th at p. 400; *People v. Jackson* (2018) 26 Cal.App.5th 371, 380; *Brown*, *supra*, 247 Cal.App.4th at p. 226.)

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 instructed." (ABM 49-50; see also ABM 48 ["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"]; ABM 79-80 ["even if the jury *did* subjectively convict on (the natural and probable consequences) 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"].) Under this rule, if an appellate court determines that the evidence in support of first degree murder was "overwhelming," it can disregard that *actual jurors*—the figures delegated by our Constitution as the sole factfinders—had trouble resolving the issue. (See ABM 44-45; contra, *Thompkins, supra*, 50 Cal.App.5th at p. 399 [alternative-theory error "is not the type of error that can be rendered harmless by 'overwhelming' evidence of guilt alone"].)[6]

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[6] The Attorney General's proposed rule is also inconsistent with this Court's prejudice standard for factually-invalid theories, i.e., "the theory is incorrect only because the evidence does not support it." (*Aledamat, supra*, 8 Cal.5th at p. 7.) In that context, a reviewing court affirms "unless a review of the entire record affirmatively demonstrates a reasonable probability that the jury in fact found the defendant guilty solely on the unsupported theory." (*Guiton*, *supra*, 4 Cal.4th at p. 1130.) Thus, while that test would focus on the actual jury, under the Attorney General's proposed test, alternative-theory error—nominally analyzed under the heightened *Chapman* test—would nonetheless require consideration of what a hypothetical jury would have done.

That is not, and cannot be, the law. In *McDonnell*, *supra*, 136 S. Ct. 2355, the Supreme Court made that clear that where a jury "*may have* convicted" the defendant on the basis of an invalid theory, it could not conclude that the error was harmless. (*Id.* at p. 2375, italics added.) Likewise, and as stated above, in *Aledamat*, *supra*, 8 Cal.5th 1, this Court explicitly ratified its prior decisions in *Chiu* and *Martinez*. (See *Aledamat*, *supra*, 8 Cal.5th at p. 12.) In those cases, the Court reversed convictions where, respectively, the jury "*may have* based its verdict" on an erroneous theory and there was a "suggest[ion] that [the jury] was *considering*" the invalid theory. (*Chiu*, *supra*, 59 Cal.4th at p. 167, italics added; *Martinez*, *supra*, 3 Cal.5th at p. 1227, italics added.) If a *possibility* of a jury basing a conviction on an invalid theory requires reversal, then, *a fortiori*, strong record indications that a jury actually did so should likewise require reversal. This Court should therefore decline the Attorney General's implicit invitation to (1) contravene *McDonnell* and (2) disapprove *Chiu* and *Martinez*.

Indeed, apart from considerations of stare decisis, the Court should affirm its past precedent because when assessing prejudice from instructional error, a reviewing court intrudes no further than is absolutely necessary to determine if the verdict was just. (See *Neder*, *supra*, 527 U.S. at p. 18.) To disregard what the jury indicated it was considering and instead rely on a judicial reassessment of the weight of the evidence, based on a cold and abstract record, would not only invade, but would trample upon, the jury right. The risk of usurping the jury's role greatly increases when reviewing courts shift focus from whether error affected *this*

jury to wading into a factfinding role by deciding what the weight of the evidence shows. (See *Carella v. California* (1989) 491 U.S. 263, 269 (per curiam) (conc. opn. of Scalia, J.); *People v. Merritt* (2017) 2 Cal.5th 819, 834 (conc. opn. of Liu, J.).)

In sum, this Court should affirm its precedent which affords primacy to the jury and not to the reviewing court's view of the evidence.

III. THE HISTORY AND TEXT OF THE STATE CONSTITUTIONAL RIGHTS TO A JURY TRIAL AND UNANIMOUS VERDICT PROVIDE FURTHER SUPPORT FOR REQUIRING REVERSAL WHEN THERE ARE INDICATIONS THAT A JURY CONSIDERED AN INVALID THEORY.

Overriding indications of what the jury did would also violate the state constitution, specifically, the jury-trial provision. Article I, section 16 of the California Constitution provides every defendant the right to a 12-person jury, who may only convict upon a unanimous verdict. (Cal. Const., art. I, § 16; *Collins*, *supra*, 17 Cal.3d at p. 693.) To discern the meaning of this provision, this Court has examined the circumstances underlying its adoption and the statements of the delegates. (See, e.g., *Mitchell v. Superior Court* (1989) 49 Cal.3d 1230, 1242-1244 (*Mitchell*).)

In *Mitchell*, *supra*, 49 Cal.3d 1230, the Court noted that the state jury-trial provision was "debated extensively at the 1879 Constitutional Convention." (*Id.* at p. 1242.) Indeed, it was "the most vigorously debated" provision of the Declaration of Rights. (*Id.* at p. 1243.) A proposal that would have allowed conviction by less than a unanimous jury was "strongly denounced." (*Ibid.*)

Further examination of the debates shows that the framers specifically believed that twelve people were more apt to accurately resolve the facts of a case than one, and thus, a jury's judgment was better than a judge's. (See 1 Willis and Stockton, Debates and Proceedings, Cal. Const. Convention (1881) 302-303, Statement of Mr. Johnson [hereafter 1878 Debates].)[7] Moreover, the framers believed that unanimity was so important that jettisoning unanimity would be tantamount to abandoning jury trials altogether. (See *id.* at p. 298, Statement of Mr. Winans; see also *id.* at p. 295, Statement of Mr. Barnes ["the infallibility of the verdict of a jury rests upon its being unanimous"]; 3 1878 Debates, *supra*, at p. 1174, Statement of Mr. Andrews ["If there is anything more dear to the American heart than another, it is that a man shall not be deprived of life or liberty without the unanimous verdict of twelve good men"]; *id.* at p. 1175, Statement of Mr. Reddy [if no need for unanimity, no purpose in instructing on benefit of reasonable doubt].)

The unanimity provision and the circumstances of its adoption thus reflect the framers' belief that a judge invades the jury's role when—as done by the Court of Appeal here and proposed

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[7] The framers at the 1849 Constitutional Convention felt the same. During debate on a provision that would have allowed judges to state testimony and declare the law, even those opposed to the provision conceded that under English common law, a jury is a better judge of facts and that it would invade the jury's role were a judge to undertake to judge facts. (Report of the Debates from in the Convention of California on the Formation of the Constitution (1849), p. 236, Statement of Mr. Botts [hereafter 1849 Debates].)

by the Attorney General—it undertakes its own review of the facts in derogation of a record which indicates what the jury did.

But the state constitutional implications run further than that. When there are indications that at least one juror was *considering* a legally invalid theory, it is fair to assume that at least one member *did* in fact rely on that theory. That is because in any trial involving alternative-theory error, "there is a substantial risk that the jury may have based its verdict on an improper theory," which "follows from the necessarily limited number of theories presented to the jury, and from the fact that the jury's decision-making is carefully routed along paths specifically set out in the instructions." (*Zant v. Stephens* (1983) 462 U.S. 862, 901 (conc. opn. of Rehnquist, C.J.).)

Not every case displays clear evidence of what an individual juror or jurors considered. But in many cases, as in this one, a jury may still have "substantial incentives to take the easier path urged by" the prosecutor's argument and the court's instructions, and thus, relying on a legally incorrect theory may "spare[] the jury from grappling with" a more difficult question. (*People v. Green* (1980) 27 Cal.3d 1, 73 (*Green*); accord, *Thompkins*, *supra*, 50 Cal.App.5th at p. 399 [alternative-theory error prejudicial where "(t)he instruction . . . gave the jury a potential short-cut for reaching a guilty verdict"].)[8] In such a situation, "there is no reason to believe the jury would

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[8] In *Aledamat*, *supra*, 8 Cal.5th 1, this Court "disapprove[d] of any interpretation" of *Green* "that limits the reviewing court to an examination of the jury's findings as reflected in the verdict itself or that is otherwise inconsistent with this opinion." (*Id.* at p. 13.) Neither principle applies to the text quoted above.

have deliberately undertaken the more difficult task" (*Sandstrom v. Montana* (1979) 442 U.S. 510, 526, fn. 13; accord, *Connecticut v. Johnson* (1983) 460 U.S. 73, 84-85 (plur. opn.)), and it is fair to assume that the invalid theory contributed to the verdict (see, e.g., *Nunez*, *supra*, 57 Cal.4th at p. 42). Put another way, a jury's consideration of an invalid theory that is easier to resolve than the valid one is like water flowing downhill; it will travel the path of least resistance. The risk in this case was particularly heightened, where the prosecutor expressly argued that the jury could convict without reaching the more difficult theory. (See OBM 46, citing record at trial)

If at least one juror likely traveled the "easier path," a defendant has been deprived of his or her right to a unanimous, 12-person verdict that is based on a valid theory. And where an appellate court nonetheless affirms such a conviction based on its independent view of the evidence, a second state constitutional violation would occur, as the court's view of the strength of the evidence would trump the defendant's core entitlement to the legally-valid factual determination of an actual jury. Or, as one of the framers put it, "[p]ermit me to state the facts, sir, and you give me the power to mould the verdict to suit myself." (1849 Debates, *supra*, at p. 236, Statement of Mr. Botts.) Cautioned by this principle, this Court should require reversal when there are indications that a jury considered an invalid theory.

IV. THE *CHIU* ERROR TAINTED THE JURY'S UNDERSTANDING OF THE "INTENT TO KILL" REQUIREMENT OF THE SPECIAL CIRCUMSTANCE.

In *Chiu*, *supra*, 59 Cal.4th 155, this Court held that a defendant aider-abettor cannot be found guilty of first degree murder under the natural and probable consequences doctrine—i.e., the actual killer's premeditation and deliberation cannot be imputed to the defendant who merely aids or abets a target offense. (*Id.* at p. 166.) It is undisputed that *Chiu* error occurred at Lopez's trial. (See 1CT:86 [CALJIC No. 3.02]; Slip opinion, p. 5.)

Lopez argues that the jury's "intent to kill" finding of the gang special circumstance does not necessarily establish that the jury also determined he premeditated and deliberated, as required for first degree murder. (See, e.g., OBM 62-66.) We agree, and as amicus, emphasize a predicate point: the *Chiu* error cannot be wholly separated from the special-circumstance finding as proposed by the Attorney General. This result obtains because the *Chiu* error itself tainted the jury's understanding of the "intent to kill" requirement for the special circumstance, the finding upon which the Attorney General relies in advancing its harmlessness theory.

As in *Chiu*, Lopez's jury was improperly instructed that a defendant's intent to commit a target crime that could naturally and probably lead to another person's commission of first degree murder was tantamount to a finding that the defendant himself had a specific intent to kill, with premeditation and deliberation. But the natural and probable consequences doctrine asks jurors to assess the risk of murder *objectively*, and not based on the defendant's subjective awareness of the risk of death. The standard required to

satisfy the natural and probable consequences doctrine is therefore lower than even a "reckless indifference to human life," the mens rea standard applied to felony murder. As explained below, the instructions, read as a whole, did not clearly distinguish the diluted mens rea standard that supplied the intent to kill for first degree murder from the "intent to kill" required for the special circumstance.

Given the lowered mens rea standard permitted by the *Chiu* error in this case, there is reason to doubt the jury properly understood and applied the correct definition of "intent to kill" when it made the special-circumstance finding. The true finding on the gang special circumstance therefore cannot render the *Chiu* error harmless.

A. The *Chiu* Error Gave the Jurors an Incorrect Legal Definition of "Intent to Kill."

The Attorney General argues that because the jury found the gang special circumstance true, the jurors must have determined that Lopez, even if only as an aider-abettor, acted with a specific intent to kill, "regardless of the original subjective theory of conviction." (ABM 62.) But the Attorney General's reasoning contains a critical flaw—it assumes the *Chiu* error did not itself prejudice the jury's evaluation of the special circumstance. Proceeding from that assumption, the Attorney General argues that the *Chiu* error was harmless based on the special-circumstance finding.

But this basic assumption is flawed—the *Chiu* error in this case gave jurors an invalid definition of "intent to kill," a definition

which jurors likely applied to their evaluation of the special circumstance. As a result, the special-circumstance finding is not separable from the *Chiu* error, and cannot be relied upon in finding the error harmless.

1. Under *Chiu*, the Natural and Probable Consequences Doctrine Could Not Support a First Degree Murder Finding.

At the time of Lopez's trial, a person who knowingly aided and abetted criminal conduct was guilty of not only the intended crime (target offense), but also of any other crime the perpetrator actually committed (nontarget offense) that was a natural and probable consequence of the intended crime. (*People v. Medina* (2009) 46 Cal.4th 913, 920 (*Medina*); see *Chiu*, *supra*, 59 Cal.4th at p. 161; *People v. Prettyman* (1996) 14 Cal.4th 248, 260.) Thus, if a person aided and abetted only an intended assault, but a murder resulted, that person could be guilty of that murder, even if unintended, if it was a natural and probable consequence of the intended assault. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117 (*McCoy*).)[9]

This Court determined the natural and probable consequences doctrine served the policy interest of deterring aiders and abettors from aiding or encouraging the commission of offenses that would naturally, probably, and foreseeably result in homicide,

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[9] The Legislature has since abolished the natural and probable consequences theory of liability for murder, effective January 1, 2019. (§ 188, subd. (a)(3), as amended by Senate Bill No. 1437 [SB 1437].) For purposes of determining how the jury evaluated Lopez's culpability, however, this brief analyzes the jury instructions as they were given to the jury.

by holding them culpable for the perpetrator's commission of the nontarget offense of second degree murder. (*Chiu*, *supra*, 59 Cal.4th at p. 165, citing *People v. Knoller* (2007) 41 Cal.4th 139, 143, 151-152.) That public policy concern, however, "los[t] its force in the context of a defendant's liability as an aider and abettor of a first degree premeditated murder." (*Id.* at p. 166.) Thus, before the enactment of SB 1437, the natural and probable consequences doctrine could only lead to a finding of second degree murder (*ibid.*), unless the defendant knowingly and intentionally assisted a confederate to kill someone (*id.* at pp. 166-167, citing *McCoy*, *supra*, 25 Cal.4th at pp. 1117-1118). A defendant could not be convicted of first degree premeditated murder under the natural and probable consequences doctrine. (*Chiu*, *supra*, 59 Cal.4th at pp. 166-167.)

2. The Jury was Improperly Instructed that the Intent to Commit a Target Crime Plus a Reasonable Foreseeability that Murder Could Occur—a Mens Rea Standard Lower than Even Recklessness—was Tantamount to an Intent to Kill.

At the time of Lopez's trial, liability under the natural and probable consequences doctrine was "measured by whether a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted." (*Medina*, *supra*, 46 Cal.4th at p. 920, citing *People v. Nguyen* (1993) 21 Cal.App.4th 518, 535 (*Nguyen*).) To be "reasonably foreseeable," the consequence need not have been a strong probability; a possible consequence that might reasonably have been contemplated was enough. (*Ibid.*)

Application of the natural and probable consequences doctrine did not depend on the foreseeability of every element of the nontarget offense, or on "whether the aider and abettor actually foresaw the nontarget offense." (*Chiu*, *supra*, 59 Cal.4th at pp. 161-162, 165.) Instead, at issue was whether that outcome was *objectively* likely or foreseeable. (*Ibid.*) Under the natural and probable consequences doctrine then, a defendant could be liable for murder even if he or she did not subjectively foresee the murder occurring, so long as the situation, when viewed objectively, could lead a reasonable person to discern the possibility that a murder might result.

The mental state required to satisfy the natural and probable consequences doctrine was thus even lower than the mens rea standard applied to aider-abettors in felony-murder circumstances—i.e., "reckless indifference to human life," which "requires the defendant to be *subjectively* aware that his or her participation in the felony involved a grave risk of death." (*People v. Banks* (2015) 61 Cal.4th 788, 807 (*Banks*), citing *People v. Mil* (2012) 53 Cal.4th 400, 417, emphasis included.) *Banks* addressed felony-murder circumstances and not the natural and probable consequences doctrine, but the Court's discussion of the mens rea standards clarifies that a defendant's knowing participation in a crime that could foreseeably result in death does not rise to the level of "reckless indifference to human life." (*Id.* at p. 808, discussing *Edmund v. Florida* (1982) 458 U.S. 782, 799 and *Tison v. Arizona* (1987) 481 U.S. 137, 157.)

In this case, the *Chiu* error took the following form. First, the natural and probable consequences instruction (CALJIC No. 3.02) provided that if a defendant: (1) intended to commit a target crime, i.e., breach of peace, assault, battery, assault with a deadly weapon, or assault by means of force likely to produce great bodily injury, and; (2) objectively viewed, that target crime could naturally and probably result in another person's commission of murder, the defendant's intent to commit the target crime sufficed for a murder finding. (1CT:148 [CALJIC No. 3.02].) Second, the natural and probable consequences instruction was coupled with separate instructions providing that both first degree murder and the special circumstance require the "specific intent to kill" (1CT:151 [CALJIC No. 3.31]), and that first degree murder requires "the additional mental states of premeditation and deliberation" (1CT:151 [CALJIC No. 4.21]). Third, the prosecution argued that "[n]atural and probable consequences does not require an intent to kill," nor did it require premeditation or deliberation (25RT:6278), but it nevertheless could support a first degree murder finding because all that was required was an intent to aid the underlying target offense, so long as another person's "premeditated, deliberated, intentional murder was a natural and probable consequence" of that target crime (27RT:6680-6681). Finally, after the jury asked for "clarification of premeditation and deliberation and how to relate it to [the natural and probable consequences instruction] 3.02" (2CT:361), the court explained, "Jury instruction 3.02. may refer to First Degree Murder . . ." (2CT:363).

It is with this background of consistent instructions—providing that the natural and probable consequences doctrine could support a first degree murder finding—that the jury was asked to analyze the mens rea requirements for the special circumstance. However, close inspection of the special-circumstance instructions illustrates that the jury was told to refer back to the instructions on murder to understand the meaning of "specific intent to kill." Because these very instructions provided the natural and probable consequences doctrine as a legal exception to the "specific intent" requirement, the jury was able to satisfy the special-circumstance finding *without* necessarily finding any specific intent to kill.

The analysis of the jury's special-circumstance finding must begin with CALJIC No. 3.31, which, as a chronological matter, is the first instruction which touches on the special circumstance. In this instruction, the jury was told that "[i]n the crimes of First Degree Murder . . . and in the special circumstance, there must exist . . . a certain specific intent in the mind of the perpetrator" and that both "First Degree Murder" and the "special circumstance of Penal Code Section 190.2(a)(22) requires the specific intent to kill." (1CT:150-151 [CALJIC No. 3.31].) However, the terms "specific intent" and "specific intent to kill" were not defined in this instruction. Instead, the jury was told specifically that the definition for the "specific intent" required was "included in the definitions of the crimes or allegations set forth elsewhere in these instructions[.]" (*Ibid.*) This instruction did two things. First, it clearly equated the mens rea standards for first degree murder and for the special circumstance, suggesting that the jury's evaluation of the "specific intent to kill"

requirement for first degree murder would be the same as its evaluation of the "specific intent to kill" requirement for the special circumstance. Second, it instructed the jury to look elsewhere to understand what conduct would satisfy the requirement of "specific intent."

If, as instructed, the jury looked to the underlying crime of murder to understand the term "specific intent," from CALJIC No. 3.31, it would encounter the natural and probable consequences theory provided in CALJIC No. 3.02. Therein, the jury was instructed that if "[t]he defendant aided and abetted" a target offense of which "murder was a natural and probable consequence" then the defendant was guilty of "First Degree Murder" (2CT:363). And though "First Degree murder" was defined as requiring an "intent on the part of the defendant to kill," (CALJIC No. 8.20), the natural and probable consequences doctrine was simultaneously provided as a means to *satisfy* the requirements of first degree murder. (CALJIC No. 3.02.) Thus, the jury would have understood the natural and probable consequences doctrine as a legal stand-in for "intent to kill."

In other words, the invalid natural and probable consequences instruction provided the very same shortcut to reaching the requirement of "specific intent" for the special circumstance that it did in allowing the jury to reach a finding of first-degree murder.

To be sure, the jurors were instructed that the special-circumstance finding required, *inter alia*, that "[t]he defendant intentionally killed the victim." (1CT:156 [CALJIC No. 8.81.22].)

Having been told, however, that *both* first degree murder and the special circumstance required a "specific intent to kill" (1CT:150-151 [CALJIC No. 3.31]) and that a defendant's satisfaction of the intent required for the natural and probable consequences instruction could satisfy the mens rea requirements of first degree murder, reasonable jurors would believe that they had already evaluated the intent required for the special circumstance when they found the Lopez guilty of first degree murder under a natural and probable consequences theory.

Thus, the *Chiu* error led the jury to believe that, as a matter of law, the mere intent to commit a target crime, plus a reasonable foreseeability that a murder could occur—a standard even lower than recklessness—was tantamount to an intent to kill. These instructions provide a reason to doubt that the jury applied the correct standard of intent to *both* first degree murder and the special-circumstance finding.

B. The Jurors Likely Deferred to the Definition of "Specific Intent to Kill" They Were Given, with the Lowered Mens Rea Standard.

While jurors are presumed to be intelligent people who apply logic and common sense to their reading of instructions (see, e.g., *People v. Sanchez* (2001) 26 Cal.4th 834, 852), they are "not experts in legal principles; to function effectively, and justly, they must be accurately instructed on the law" (*Carter v. Kentucky* (1981) 450 U.S. 288, 302). "Most jurors encounter the arcane language of instructions infrequently—maybe once in a lifetime—and it is therefore important to give them instructions that do not require

scholastic glossators to impart meaning. [Citation.]" (*United States v. Ramsey* (7th Cir. 1986) 785 F.2d 184, 190.) "It is always necessary for the judge to put the thought in language that those who see the inside of a court only once in a lifetime can understand." (*United States v. Burke* (7th Cir. 1985) 781 F.2d 1234, 1240; accord, e.g., *Bollenbach v. United States* (1946) 326 U.S. 607, 612 [court must provide a "lucid statement of the relevant legal criteria" for lay jurors].)

This Court presumes jurors view the instructions as a whole. (See, e.g., *People v. Ochoa* (1998) 19 Cal.4th 353, 421.) Indeed, the natural and probable consequences, first degree murder, and special-circumstance instructions given here were part of the same set of guilt-phase jury instructions. The jury thus heard these instructions in one sitting and read them as part of one packet. The jurors were not instructed that the mens rea standard for the natural and probable consequences doctrine and the "intent to kill" standard for the special circumstance were legally distinct, as the Attorney General's argument presumes. Nor were they told to disregard the natural and probable consequences theory when evaluating whether the gang special circumstance was true against Lopez. Instead, jurors are presumed to follow the instructions they are given (*People v. Holt* (1997) 15 Cal.4th 619, 662), and this jury was provided a series of instructions suggesting that the mental state required by the natural and probable consequences doctrine could suffice for a "specific intent to kill" finding for purposes of *both* first degree murder and the special circumstance (see 1CT:151 [CALJIC No. 3.31]). The jury's note, asking for "clarification of

premeditation and deliberation and how to relate it to [the natural and probable consequences instruction] 3.02" (2CT:361), was itself proof that the jury was confused about the interplay of the instructions.

The *Chiu* error thus tainted the jury's evaluation of the "intent to kill" requirement for the special circumstance.

Given these instructions, there is reason to doubt that the jurors, on their own, were able to disregard the faulty instructions and understood the proper legal meaning of "intentionally killed the victim" when evaluating the special circumstance.

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V. CONCLUSION

The Court should make clear the following two propositions of law, which follow from the government's burden in an alternative-theory error case to convince a reviewing court, beyond any reasonable doubt, that every member of a jury convicted on the basis of a valid theory. First, when there is alternative-theory error, a reviewing court must reverse when the record indicates that the jury considered an invalid theory. Second, a true finding on a gang-killing special circumstance does not, in and of itself, render *Chiu* error harmless. By reaching these conclusions, this Court will accord proper deference to the jury-trial right and maintain confidence that defendants do not stand convicted by juries based on invalid legal theories. For these reasons, amicus respectfully requests that this Court reverse the decision of the Court of Appeal.

DATED: November 23, 2020

Respectfully submitted,

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I, Samuel Weiscovitz, have conducted a word count of this brief using our office's computer software. On the basis of the computer-generated word count, I certify that this brief is 8,274 words in length excluding the tables and this certificate.

DATED: November 23, 2020

Respectfully submitted,

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DECLARATION OF SERVICE

Case Name: ***In re: Rico Ricardo Lopez***
Case Number: **Supreme Court Case No. S258912**

I, **Glenice Fuller**, declare as follows: I am over the age of 18, and not party to this cause. I am employed in the county of Oakland. My business address is 1111 Broadway, Suite 1000, Oakland, CA 94607. I served a true copy of the following document:

BRIEF AMICUS CURIAE BY THE OFFICE OF THE STATE PUBLIC DEFENDER IN SUPPORT OF PETITIONER RICO RICARDO LOPEZ

by enclosing it in envelopes and placing the envelopes for collection and mailing with the United States Postal Service with postage fully prepaid on the date and at the place shown below following our ordinary business practices.

The envelopes were addressed and mailed on **November 23, 2020**, as follows:

Mr. Rico Ricardo Lopez, #F23451 California Correctional Institution P.O. Box 1902 Tehachapi, CA 92581	Superior Court Clerk 600 Administration Drive Santa Rosa, CA95403 (Attn.: Judge Dana Beernink Simonds
	District Attorney 600 Administration, #212-K Santa Rosa, CA 95403

The aforementioned document(s) were served electronically (via TrueFiling) to the individuals listed below on **November 23, 2020**:

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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. Signed on **November 23, 2020**, at Oakland, CA.

/s/ Glenice Fuller
Glenice Fuller

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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

1. At the time of service I was at least 18 years of age and not a party to this legal action.

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Date

/s/Glenice Fuller

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Office of the State Public Defender

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