In the Supreme Court of the State of California

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

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

RESPONDENT'S ANSWER TO AMICUS CURIAE BRIEF

XAVIER BECERRA
Attorney General of California
LANCE E. WINTERS
Chief Assistant Attorney General
JEFFREY M. LAURENCE
Senior Assistant Attorney General
DONNA M. PROVENZANO
Supervising Deputy Attorney General
AMIT KURLEKAR
Deputy Attorney General
State Bar No. 244230
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 510-3810
Fax: (415) 703-1234
Email: Amit.Kurlekar@doj.ca.gov
Attorneys for Respondent

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INTRODUCTION

The State Public Defender (SPD) raises as amicus curiae two arguments for reversing the Court of Appeal's judgment. The SPD first argues that alternative-theory instructional error—unlike other erroneous instructional misdescriptions of elements—is prejudicial if a jury merely *considers* an erroneous theory. (ACB 14-29.) The SPD next argues that the jury's gang special-circumstance verdict here did not render the alternative-theory error harmless because the special-circumstance instruction did not adequately inform the jury that it needed to find that Lopez had the specific intent to kill. (ACB 30-40.)

Both arguments are meritless. The first argument ignores this Court's central holding in *People v. Aledamat* (2019) 8 Cal.5th 1, which squarely rejected the proposition that the prejudice inquiry "is different for alternative-theory error than for other misdescriptions of the elements of the charged offense." (*Id.* at p. 9.) The second argument, meanwhile, founders in light of the special-circumstance instruction's explicit requirement that the jury determine whether Lopez had the specific intent to kill. Accordingly, the SPD's brief does not undermine the conclusion that the Court of Appeal's judgment was correct and should be affirmed.

ARGUMENT

I. *ALEDAMAT* REJECTED THE NOTION THAT ALTERNATIVE-THEORY ERROR REQUIRES AN ESPECIALLY STRINGENT PREJUDICE STANDARD

The People's answering brief on the merits noted that the harmlessness standard for alternative-theory error is the same as

for instructional omissions of the elements of the charged offense. That brief further explained why that standard does not require a reviewing court to speculate as to the jury's *actual theory* of conviction; instead, the court must ask whether the jury would still have convicted had it never received the invalid theory. (ABM 34-40.)[1] The SPD argues to the contrary that (1) alternative-theory error is harmless only if no reasonable doubt exists that the jury actually convicted on a valid theory rather than an invalid theory; and (2) such reasonable doubt exists merely by virtue of the jury's *consideration* of an invalid theory. (ACB 14-25.) None of the contentions in support of that

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[1] In arguing that alternative-theory error should be harmless only if the jury convicted on a valid theory beyond a reasonable doubt, the SPD disavows the position that such error should be harmless only if the jury convicted on a valid theory beyond *any* doubt. (ACB 18 & fn. 1.) That distinction does not affect the applicability of the arguments in the answer brief, which refute the propriety of *any* harmlessness standard turning on the jury's subjective theory of conviction as opposed to what the jury would have done if correctly instructed. Lopez's position on that distinction, meanwhile, is unclear: at the same time that he insists that he "does *not* maintain that a determination of harmless error is permitted *only* if the jury *actually did* convict the defendant on a *valid theory*," he also would have the error deemed prejudicial "if the record suggests that the jury *actually did* convict, or *may have* convicted, the defendant on an *invalid theory*." (RBM 17.) But disproving that the jury might have convicted on an invalid theory is equivalent to proving that the jury could not have convicted on that theory—meaning that the jury must actually have convicted on the valid theory. Lopez's newly clarified position thus seems indistinguishable from the position that he simultaneously disavows.

argument, however, withstand scrutiny; indeed, they are largely rebutted by arguments already made in the answering brief.

A. The SPD's Reading of *Aledamat* Is Irreconcilable with the Clear Reasoning of That Decision

The SPD's primary contention in support of her proposed harmlessness test is that alternative-theory error demands a more stringent test than that applicable to the omission of an element. (ACB 16-17, 20-21 [arguing that prejudice test articulated in *United States v. Neder* (1999) 527 U.S. 1 does not apply to alternative-theory error].) That contention ignores that the central holding of *Aledamat* rejected of the defendant's and appellate court's theory that "the application of *Chapman* is different for alternative-theory error than for other misdescriptions of the elements of the charged offense." (*Aledamat*, *supra*, 8 Cal.5th at p. 9; see also *id*. at p. 11 [differential treatment of alternative-theory error would be unsustainably "anomalous"].) The SPD also ignores *Aledamat's* specific observation that "[p]roviding the jury with both a valid and an invalid theory"—as in *Aledamat* and this case—"should not be subject to a higher standard of review than applies when the court provides the jury only with an invalid theory," as an instructing court would with omitted-element error. (*Id*. at pp. 11-12.) Indeed, *Aledamat* dismissed as "'patently illogical'" the very "'distinction between alternative-theory error and the instructional errors in [several cases including *Neder*]'" that the SPD postulates here. (*Id*. at p. 11, quoting *Hedgpeth v. Pulido* (2008) 555 U.S. 57, 61 ["such a distinction reduces to the strange

claim that, because the jury received both a good charge and a bad charge on the issue, the error was somehow more pernicious than where the only charge on the critical issue was a mistaken one"].)

The SPD's effort to separate the test for alternative-theory error from that for omitted-element error is understandable; as explained in the answering brief, *Aledamat's* holding that the two tests are the same conclusively refutes the principle that reviewing courts must focus on the actual theory of conviction but cannot consider evidence of guilt. (ABM 38-40.) Indeed, the SPD concedes that "the *Neder* omitted-element formulation of *Chapman* . . . focuses on the strength of the evidence, as opposed to how the jury arrived at its verdict." (ACB 16.) Given *Aledamat's* central holding that alternative-theory error is treated the same as omitted-element error, that concession is fatal to the SPD's (and Lopez's) attempts to preclude consideration of the evidence on the theory that the evidence does not reveal the jury's actual theory of conviction.

The SPD's other primary contention is that this Court (1) focused on what the jury actually did in *People v. Chiu* (2014) 59 Cal.4th 155 and *In re Martinez* (2017) 3 Cal.5th 1216; and (2) then in *Aledamat* endorsed that focus as "'a specific application'" of the *Chapman* test. (ACB 15-17, 25, quoting *Aledamat*, *supra*, 8 Cal.5th at p. 12.) The SPD's truncated quotation of *Aledamat* again ignores this Court's main reasoning in that case. The defendant in *Aledamat* argued "that, by focusing on what the jury actually did, *Chiu* and *Martinez* stated

a standard different, and higher, than *Chapman's* reasonable doubt standard." (*Aledamat*, at p. 12.) In rejecting that argument, this Court explained that *Chiu* and *Martinez* "were *only* a specific application of the more general reasonable doubt test"—those cases did not *require* a focus on what the jury actually did or *preclude* consideration of the evidence. (*Ibid.*, italics added.) And more generally, *Aledamat* reversed an appellate court decision holding that a reviewing court is "required . . . to reverse the conviction absent a basis in the record to find that the verdict was actually based on a valid ground, which exists only when the jury has *actually* relied upon the valid theory." (*Id.* at p. 5, internal quotation marks omitted.)

In short, *Aledamat's* plainly stated analysis forecloses both the SPD's focus on what the jury actually did and its reasoning behind that focus.[2] The SPD grapples with none of that analysis, and her failure to do so is especially striking given that the points foreclosing the SPD's argument were all set forth in our answering brief. (ABM 34-38, 48-49.) If anything, the SPD's failure to explain how her position can reconcile with *Aledamat's* actual reasoning merely underscores that she—like Lopez himself—is effectively inviting this Court to abandon that

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[2] Instead of invoking *Aledmat's* reasoning, the SPD relies heavily on *People v. Thompkins* (2020) 50 Cal.App.5th 365 and *People v. Baratang* (2020) 56 Cal.App.5th 252, which contain language supporting the SPD's position that alternative-theory error requires a focus on the actual theory of conviction. (ACB 16-18.) We respectfully ask that this Court disapprove of the prejudice analysis in those cases as conflicting with *Aledamat*.

decision. Given both the correctness of *Aledamat's* reasoning itself and principles of stare decisis (ABM 53-59), this Court should decline that invitation.

B. The SPD's Policy Arguments Mischaracterize Our Position and Present This Court with a False Choice as to the Applicable Prejudice Test

The bulk of the SPD's brief is devoted to policy arguments extolling the importance of safeguarding the role of the jury from judicial intrusion. (ACB 14-15, 19-20, 25-29.) But the SPD perceives such intrusion only because she misapprehends the holistic *Chapman* inquiry set forth in our answering brief.

The SPD's arguments present this Court with two candidates for the prejudice test for alternative-theory error. As her preferred candidate, the SPD proposes that alternative-theory error is harmless only if no reasonable doubt exists that the jury subjectively convicted on a valid theory and not on an invalid theory. Under this proposed test, the reviewing court looks only at the jury's verdict forms and deliberation notes and the prosecutor's arguments, not the evidence.[3] As a foil to her proposed test, the SPD describes the *People's* proposed test as one in which the reviewing court simply determines on its own whether a hypothetical jury would have found the defendant guilty beyond a reasonable doubt based on the strength of the

[3] Lopez's proposed "protocol" is only slightly different in that it might allow consideration of the evidence, but only if no jury note mentioned an invalid theory *and* the prosecutor never argued the invalid theory. (OBM 44; RBM 18.)

evidence. In the SPD's telling, the reviewing court under this test would ignore everything the actual jury did and substitute its view of the evidence for the jury's.

The SPD's articulation of these two candidate tests presents this Court with a falsely constricted choice, ignoring the actual test for alternative-theory error dictated by *Aledamat* and *Hedgpeth*. As argued in the answer brief, a reviewing court should consider alternative-theory error harmless if it determines beyond a reasonable doubt that the jury would have convicted on a valid theory had the invalid theory never been presented. (E.g., ABM 36-41, 49-50.) Inversely, the court should deem the error prejudicial if any reasonable doubt exists that the jury might have acquitted on the valid theory if that alone had been presented. In applying this test, the court looks at "the entire cause, including the evidence, and . . . all relevant circumstances." (*Aledamat*, *supra*, 8 Cal.5th at pp. 3, 13.) Those relevant circumstances, of course, include the prosecutor's arguments, the jury's verdict forms, and any notes submitted to the court during deliberations. In short, the ultimate goal of alternative-theory-error review required by *Aledamat* and its predecessors is to determine neither what the defendant's jury actually did nor what a hypothetical jury would have done based on the evidence, but rather what a jury in the shoes of the defendant's jury would have done on the evidence at trial if it had been presented only with a valid theory. And what such a jury would have done can be exemplified or illuminated by the actual verdicts and deliberations notes.

Even a cursory reading of the answer brief belies the SPD's characterization of the People's position. Nowhere does that brief argue that a reviewing court looks only at the evidence to determine whether alternative-theory error is harmless. To the contrary, the brief's explanation of why the *Chiu* error in this case was harmless started with the jury's verdict finding true the gang special-circumstance allegation. (ABM 60-70.) The brief specifically explained why this finding logically compelled the conclusion that Lopez's jury would have found him guilty as a direct aider and abettor of first degree murder *unless* they considered him an actual killer. (ABM 60-70.) The brief further explained that in the latter scenario, the verdict form *in conjunction with* the strong evidence of premeditation and deliberation showed beyond a reasonable doubt that Lopez's jury would still have convicted him of first degree murder as an actual killer. (ABM 70-76.)

Notably—and contrary to the SPD's characterization—the People did *not* argue that the evidence of premeditation and deliberation by itself would have rendered the *Chiu* error in this case harmless; indeed, the brief never considered the significance of the strength of the evidence untethered from the significance of the special-circumstance finding that Lopez had a specific intent to kill. Nor did the People argue that the prosecutor's argument or the jury's notes during deliberation were categorically irrelevant. To the contrary, the People described how the prosecutor's argument actually weighed strongly *in favor of* harmlessness and how the notes did not create any reasonable

doubt that Lopez's jury would have failed to convict on a valid theory in light of all of the other circumstances, i.e., the verdict, the evidence, and the arguments. (ABM 76-83.)

Perhaps nothing more vividly illustrates the SPD's misapprehension of the candidate tests before the Court than the hypothetical she presents on pages 22 to 24 of her brief. The jury in the SPD's hypothetical informs the trial court in a note that some jurors have found the defendant guilty on a valid theory but not an invalid theory, while other jurors have found the exact opposite. Contrary to the SPD's supposition (ACB 23-24), we agree that the alternative-theory error in that hypothetical could not be harmless. Specifically, the error would be prejudicial because the record shows that had the jury heard only the valid theory, it would not have convicted the defendant on that theory.

More illuminating than the SPD's hypothetical is one in which Lopez's jury sends the trial court the following note:

> The jurors all agree beyond a reasonable doubt that Lopez is guilty of first degree murder on all three theories we have been presented. That is, we agree that Lopez is guilty as an actual killer, i.e., that he inflicted fatal stab wounds with a premeditated and deliberated intent to kill. We also agree that Lopez directly aided and abetted at least one codefendant commit the target crime of premeditated and deliberate murder. And we agree that Lopez aided and abetted at least one codefendant in breach of the peace, the natural and probable consequences of which included the premeditated and deliberate murder of the victim. Do we need to choose only one of those theories on which to convict?

After the trial court responds that the jury need not designate only one theory, the jury convicts Lopez of first degree

murder. Under the People's reading of *Aledamat*, the alternative-theory error in this hypothetical would be harmless because no reasonable doubt exists that the jury would have convicted Lopez of first degree murder under a valid theory had the invalid theory not been presented. Under the SPD's—and, for that matter, Lopez's—version of the harmless error test, in contrast, the error would be prejudicial because the jury considered the invalid theory, sent the court a note about that theory, and very possibly could have subjectively based its verdict on that theory. The SPD (and Lopez) would thus have a reviewing court find alternative-theory error even when the record clearly showed the jury's willingness to convict the defendant on a valid theory. This Court should not countenance such an absurd consequence.

The absurdity compounds when one focuses on the SPD's insistence that alternative-theory error is prejudicial when a jury merely *considers* an invalid theory. For example, Lopez's jury could have instead sent a note stating:

> We agree beyond a reasonable doubt that Lopez fatally stabbed the victim with a premeditated and deliberate intent to kill. We also think that Lopez is guilty under the natural and probable consequences theory, but we're not totally sure we understand that theory. Do we need to come to a conclusion on that theory if we already agree he's guilty of first degree murder as the actual stabber?

The jury in this hypothetical clearly *considered* the invalid theory and found it somewhat persuasive, but the jury just as clearly was more ready to convict on the valid theory than on the invalid theory. Despite the lack of any reasonable doubt that the

jury would have convicted Lopez under a valid theory in this scenario, the SPD's (and Lopez's) tests would deem the note conclusive evidence of prejudice—an even less tenable conclusion than in the previous hypothetical. In sum, when one compares the possible results of the SPD's test against those of the *actual* test set forth in the answering brief, the latter test is the one that reaches the result more commensurate with the jury's assessment of the evidence and the defendant's culpability. Those results, in turn, bolster the doctrinal analysis set forth *ante* in Argument I.A, namely that *Aledamat* requires a holistic inquiry into whether a reasonable doubt exists that the jury would have convicted the defendant on a valid theory had it never been presented the invalid theory.

II. THE JURY COULD FIND THE GANG SPECIAL-CIRCUMSTANCE ALLEGATION TRUE ONLY UPON FINDING LOPEZ'S SPECIFIC INTENT TO KILL

As the SPD acknowledges (ACB 37), the gang special-circumstance instruction required the jury to find that Lopez "intentionally killed the victim" to find the allegation true. (1CT 156.) The SPD nonetheless argues that the jury could reasonably have understood the instruction not to mean what it plainly says; instead, the SPD asserts, the jury could have found true the allegation without finding that Lopez intended to kill. (ACB 30-40.)

The SPD's assertion rests on two instructions given by the trial court: (1) that both "First Degree Murder" and the gang "special circumstance . . . require[] the specific intent to kill" (1CT 150-151); and (2) that the jury could find Lopez guilty of

murder under the natural and probable consequences doctrine, i.e., without finding that he had the specific intent to kill (1CT 148). The SPD infers from these two instructions that the jury might have interpreted "specific intent to kill" as including the lesser mens rea required for natural and probable consequences liability.

The SPD's argument fails because "[j]urors are presumed able to understand *and correlate* instructions and are further presumed to have followed the court's instructions." (*People v. Sanchez* (2001) 26 Cal.4th 834, 852, italics added.) In this case, the correlation of the instructions was not particularly difficult or confusing; therefore, no reasonable likelihood exists that the jury understood the instructions in the manner the SPD posits. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 72.) The trial court first instructed the jury on "Principals"—that a defendant would be "equally guilty" of murder whether by (1) "directly and actively commit[ting] the act constituting the crime"; (2) aiding and abetting that crime; or (3) aiding and abetting any one of five target crimes where a "co-principal in that [target] crime committed the crime of murder" and the "murder was a natural and probable consequence of the commission of" the target crime. (1CT 147-148.) Having set forth the three ways that a defendant could be *guilty* of a murder—only one of which required Lopez to have actually inflicted lethal stab wounds—the court instructed the jury on the elements of murder itself. As noted previously, the court instructed that both "First Degree Murder" and the gang "special circumstance . . . require[] the specific intent to

kill." (1CT 150-151.) And in separate instructions, the court restated the need for an intent-to-kill finding for both first degree murder and the gang special circumstance. (1CT 154, 156.)

A reasonable jury would have harmonized these instructions to understand that the commission of first degree murder required the specific intent to kill but that a defendant could be guilty of that murder without personally committing it, either as a direct aider and abettor or through the natural and probable consequences doctrine. The SPD shows no reasonable likelihood that the jury would have misunderstood the natural and probable consequences instruction as completely displacing the elements of first degree murder as opposed to providing a path to liability for that murder. In particular, nothing in the instructions told the jury that the mental state required for liability under the natural and probable consequences doctrine—intent that a target crime be committed—was *the same as* a specific intent to kill.[4] In any event, the SPD certainly has not explained why it is reasonably likely that the jury would have misunderstood the natural and probable consequences instruction as completely displacing the elements of the *special-circumstance* allegation, given that the instruction did not create vicarious liability for (or even mention) that allegation.

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[4] Under the SPD's logic, the jurors could also have unreasonably misunderstood that the actus reus required for liability under the natural and probable consequences doctrine—some act in furtherance of breach of the peace, for example—was *the same as* actually delivering a fatal blow.

Ironically, the SPD's argument reveals a deep distrust of the competence of those same jurors whose power she desires to safeguard. The SPD also fails to confront the logical consequences of that distrustful viewpoint: if the SPD were correct that the natural and probable consequences instruction here left the jury unable to understand the meaning of "specific intent to kill," then a jury could *never* reliably find true a special circumstance allegation requiring an intent to kill if it was also instructed on natural and probable consequences. The SPD unsurprisingly cites not a single case even suggesting such a rule.

To the contrary, this Court has routinely credited juries' special-circumstance findings even where those juries have also been instructed on the natural and probable consequences doctrine. (See, e.g., *People v. Hardy* (2018) 5 Cal.5th 56, 92-94 [*Chiu* error harmless in light of special-circumstance findings]; *People v. Richardson* (2008) 43 Cal.4th 959, 1021-1022 [crediting special-circumstance finding "'that defendant[] had the specific intent to kill the victim'" from jury also instructed with CALJIC No. 3.02 (quoting *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 107)]; *People v. Avila* (2006) 38 Cal.4th 491, 567-570 [crediting special-circumstance finding of intent to kill by jury instructed on natural and probable consequences doctrine]; see also *People v. Anthony* (2019) 32 Cal.App.5th 1102, 1143-1146 [Chiu error harmless in light of special-circumstance finding of intent to kill].) And the Courts of Appeal have similarly affirmed the dismissal of Penal Code section 1170.95 petitions on the ground that special-circumstance findings showed that the

petitioners had the proper mens rea for murder even after the reforms of Senate Bill No. 1437. (E.g., *People v. Nunez* (2020) 57 Cal.App.5th 78, 90-91; *People v. Bentley* (2020) 55 Cal.App.5th 150, 153-154; *People v. Gutierrez-Salazar* (2019) 38 Cal.App.5th 411, 419.) Accordingly, this Court should reject the SPD's unsupported contention that jurors could not understand the special-circumstance instruction to mean what it says.

CONCLUSION

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

Dated: December 22, 2020

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
LANCE E. WINTERS
Chief Assistant Attorney General
JEFFREY M. LAURENCE
Senior Assistant Attorney General
DONNA M. PROVENZANO
Supervising Deputy Attorney General

/S/ ***AMIT KURLEKAR***
AMIT KURLEKAR
Deputy Attorney General
Attorneys for Respondent

SF2020200114

CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S ANSWER TO AMICUS CURIAE BRIEF** uses a 13 point Century Schoolbook font and contains 3,699 words.

Dated: December 22, 2020

XAVIER BECERRA
Attorney General of California

/S/ ***AMIT KURLEKAR***
AMIT KURLEKAR
Deputy Attorney General
Attorneys for Respondent

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

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

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

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Victor J. Morse Law Office of Victor J. Morse 3145 Geary Blvd., PMB 232 San Francisco, CA 94118-3316 victormorse@comcast.net – **TrueFiled**	First District Appellate Project Attn: Executive Director 475 Fourteenth Street, Suite 650 Oakland, CA 94612 – **TrueFiled**
Sonoma County Superior Court Hall of Justice 600 Administration Drive, #107-J Santa Rosa, CA 95403-2818 - **By Mail**	California Court of Appeal First Appellate District, Division One 350 McAllister Street San Francisco, CA 94102 eservice@fdap.org – **TrueFiled**
The Honorable Jill Ravitch District Attorney Sonoma District Attorney's Office 600 Administration Drive, Room 212J Santa Rosa, CA 95403 DA-Appeals@sonoma-county.org – **TrueFiled**	Nerissa Huertas State Public Defender Office of the State Public Defender 1111 Broadway, Suite 1000 Oakland, CA 95607 nerissa.huerta@ospd.ca.gov

Samuel Weiscovitz State Public Defender Office of the State Public Defender 1111 Broadway, Suite 1000 Oakland, CA 95607 – **By Mail**	

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on December 22, 2020, at San Francisco, California.

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

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STATE OF CALIFORNIA
Supreme Court of California

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Last Name, First Name (PNum)

California Dept of Justice, Office of the Attorney General

Law Firm