

Victor J. Morse
Attorney at Law
3145 Geary Boulevard, PMB # 232
San Francisco, CA 94118-3316

phone 415-387-5828
email victormorse@comcast.net

January 20, 2022

Jorge E. Navarrete,
Clerk and Executive Officer
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-3600
(by *TrueFiling*)

Re: In re Rico Ricardo Lopez
California Supreme Court No. S258912
California Court of Appeal No. A152748
Sonoma County Superior Court No. SCR 32760

Dear Mr. Navarrete:

I am counsel for petitioner Rico Ricardo Lopez in the above-captioned appeal.

Petitioner files this supplemental letter brief in response to this Court's order dated December 22, 2021, directing the parties to address the question, "What effect, if any, does Assembly Bill No. 333 (Stats. 2021, ch. 699) have on the issues presented in this case?"

In this letter brief, petitioner sets forth the concerns for equity and racial justice that compelled the Legislature to enact Assembly Bill No. 333, the STEP Forward Act, which overhauled

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the statutory requirements for proof of the substantive gang offense and gang enhancement, as well as the gang-murder special circumstance at issue in this case. Petitioner also explains how the statutory revisions enacted by Assembly Bill No. 333 would have precluded the prosecution from proving the gang-murder special circumstance with the evidence presented at his 2005 trial. Based on this analysis, petitioner submits that the wholesale reform enacted by Assembly Bill No. 333 weighs against this Court relying on the gang-murder special circumstance to find the alternative-theory error in petitioner's case harmless beyond a reasonable doubt.

A. Assembly Bill No. 333 Was Enacted As a Result of the Legislature's Recognition That the Existing Statutory Framework for Penalizing Criminal Gang Activity Was Misguided and Harmful and Had a Disparate Racial Impact

On October 8, 2021, the Governor signed Assembly Bill No. 333 (Assem. Bill No. 333 (2021-2022 Reg. Sess.) ("AB 333"), which amends section 186.22¹ in several significant ways. Among other alterations to the statutory elements, AB 333 raises the bar to prove that a defendant's gang is a "criminal street gang," an essential element of the substantive gang offense (§ 186.22, subd. (a)), the gang enhancement (§ 186.22, subd. (b)), and the gang-murder special circumstance (§ 190.2, subd. (a)(2)).

The Legislature explained the compelling reasons that led it to amend the statutory framework governing punishment for

1. Section references are to the Penal Code.

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criminal gang activity, by identifying the numerous damaging effects of the misguided gang statute. When it enacted AB 333, the Legislature found and declared, “Current gang enhancement statutes criminalize entire neighborhoods historically impacted by poverty, racial inequality, and mass incarceration as they punish people based on their cultural identity, who they know, and where they live.” (Stats. 2021, ch. 669, § 2, subd. (a).) Among other effects, the Legislature found that “[b]eing designated a gang member or associate negatively impacts a person’s criminal legal system contact from start to finish by hindering pretrial release, influencing sentencing, incarceration, parole, and reentry, and can lead to deportation.” (*Id.*, subd. (b).)

The Legislature cited the Committee on Revision of the Penal Code’s 2020 report finding that “[t]he gang enhancement statute is applied inconsistently against people of color, creating a racial disparity” (*id.*, subd. (d)(1)) and that “[t]he current statute disproportionately impacts communities of color, making the statute one of the largest disparate racial impact statutes that imposes criminal punishments” (*id.*, subd. (d)(2)). In addition, the Legislature cited the report’s finding that “[p]eople frequently receive gang enhancements based on the conduct of other people whom they have never even met.” (*Id.*, subd. (d)(7).) The Committee’s report noted that “[p]eople are . . . frequently automatically lumped into a gang social network simply because of their family members or their neighborhood.” (*Id.*, subd. (d)(9).) The report further observed, “The social networks of residents in neighborhoods targeted for gang suppression are often mischaracterized as gangs despite their lack of basic organizational structure such as leadership, meetings, hierarchical decisionmaking, and a clear distinction between

members and nonmembers.” (*Id.*, subd. (d)(10).)

The Legislature also cited a report by the Attorney General that emphasized the gang statute’s disparate impact on persons and communities of color. The report found “the demographics of those in the [CalGang] database were 65 percent Latinx, 24 percent Black, and 6 percent White.” (*Id.*, subd. (d)(10).)

Thus the Legislature made it clear that it felt compelled to enact AB 333 not merely to make technical changes to provisions of the gang statute but to remediate the unjust and harmful effects of the statutory framework. This was the same statutory framework that made possible the gang-murder special circumstance at issue in petitioner’s case before this Court.

B. Had Newly Enacted Assembly Bill 333 Been in Effect at Petitioner’s Trial, the Evidence Would Have Failed to Prove the Gang-Murder Special Circumstance at Issue in This Case

When petitioner was tried in 2005, the prosecution presented evidence to prove not only the gang enhancement (§ 186.22, subd. (b)), but the gang-murder special circumstance as well (§ 190.2, subd. (a)(22)). However, had petitioner’s 2005 trial been governed by the gang statute as amended by AB 333, the prosecution’s evidence would have failed to prove the gang-murder special circumstance at issue in this case.²

2. In this letter brief, petitioner does not address proof of the gang enhancement in his case, because only the gang-murder special circumstance is at issue in this appeal.

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The gang-murder special circumstance requires proof of three elements: (1) the defendant intentionally killed the victim to further the activities of *a criminal street gang as defined in section 186.22, subdivision (f)*; (2) at the time of the killing, the defendant was an active participant in the gang; and (3) the defendant knew that members of the gang engage in or have engaged in a pattern of criminal activity. (§ 190.2, subd. (a)(22); *People v. Carr* (2010) 190 Cal.App.4th 475, 487-488; CALCRIM No. 736; CALJIC No. 8.81.22; see 1 CT 156 [A152748].)

Proof of the gang-murder special circumstance therefore requires proof that the defendant's gang meets the statute's requirements for proof of a criminal street gang. The statute requires proof that the criminal street gang's members engage in a pattern of criminal gang activity (§ 186.22, subd. (f)), which is defined in the statute. (§ 186.22, subd. (e)(1).)

AB 333 alters the requirements for proof that a gang is a "criminal street gang" whose members engage in a "pattern of criminal gang activity," in ways that would have undermined the prosecution's ability to prove the gang-murder special circumstance in petitioner's case at his 2005 trial.

One such change is AB 333's amendment to prohibit the prosecution from relying on currently charged offenses to prove the requisite predicate offenses for proof of a gang's pattern of criminal gang activity. (§ 186.22, subd. (e)(2).) Prior to AB 333, the charged crime could be relied upon for proof of predicate offenses. (See, e.g., *People v. Loewen* (1997) 17 Cal.4th 1, 14.) Proving a pattern of criminal gang activity with charged crimes is no longer permitted.

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Thus if petitioner's case were tried today, the prosecution could no longer rely on the charged offense to prove a pattern of criminal gang activity. The prosecution would have to rely *only* on the predicate offenses cited at trial by the gang expert, Detective Robert Scott. Those offenses consisted of a manslaughter committed by William Dominguez (20 RT 4913-4914 [A113655]), an attempted murder committed by Misael Montero and Danny Reyes (20 RT 4915-4916, 4919 [A113655]), a murder, attempted murder, assault with a deadly weapon, active gang participation, and burglary with a gang enhancement committed by Ivan Gonzalez with Ronald Bray and David Tamez (20 RT 4917-4919 [A113655]), and an assault and battery committed by Sesar Alvarez (20 RT 4920-4921 [A113655]).

However, the law as amended by AB 333 now requires proof that the gang's members "*collectively* engage in, or have engaged in, a pattern of criminal gang activity." (§ 186.22, subd. (f), italics added.) Offenses committed solely by individual gang members no longer suffice.

Nothing in Detective Scott's testimony suggested that either Dominguez's offense or Alvarez's offense was "collectively" committed with other gang members. (20 RT 4913-4914, 4920-4921 [A113655].) Thus those two predicate offenses would have been incapable of establishing the requisite pattern of criminal gang activity under AB 333's amendments.

Moreover, the law as amended by AB 333 now requires proof that predicate offenses committed by gang members "commonly benefited a criminal street gang, and the common benefit [must be] more than reputational." (§ 186.22, subd. (e)(1).)

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Examples of non-reputational benefits include, among other things, “retaliation” and “targeting a perceived or actual gang rival.” (§ 186.22, subd. (g).) Prior to AB 333, the gang statute required no proof that the predicate offenses commonly benefitted the gang. (See *People v. Lopez* (December 29, 2021, B301050) __Cal.App.5th __, __ [2021 Cal.App. LEXIS 1095, *31].) But under AB 333, proof of predicate offenses without evidence of a non-reputational benefit to the gang is insufficient.

None of the predicate offenses offered in petitioner’s case proved a non-reputational benefit. Although Scott testified that Dominguez’s offense, Montero and Reyes’s offense, and Gonzalez, Bray, Tamez’s offenses were committed against rival gang members (20 RT 4914, 4916, 4918 [A113655]), nothing in Scott’s testimony suggested that the offenses were motivated by “retaliation” or that the perpetrators were specifically “targeting” the victims based on their status as gang rivals. Thus those offenses would have failed to establish the requisite pattern of criminal gang activity under the statute as amended by AB 333.

Finally, it is worth noting that Detective Scott’s testimony about the predicate offenses failed to show that appellant was acquainted with any of those particular offenders, and therefore does not dispel the Legislature’s concern that those offenders may well have been “people whom [petitioner had] never even met.” (See Stats. 2021, ch. 669, § 2, subd. (d)(7).)

In sum, had AB 333’s changes to the statutory framework been in effect at petitioner’s 2005 trial, the prosecution’s evidence would have been unable to prove that the members of appellant’s gang collectively engaged in a pattern of criminal gang activity or

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that his gang constituted a criminal street gang, and therefore could not have proved that the gang-murder special circumstance allegation was true.

C. The Recent Enactment of Assembly Bill No. 333 Provides Additional Support For Petitioner's Position That a Reviewing Court Should Not Rely on the Gang-Murder Special Circumstance to Hold the Error in Petitioner's Case Harmless Beyond a Reasonable Doubt

Petitioner has contended in this case that the jury's true finding on the gang-murder special circumstance cannot render the alternative-theory instructional error in his case harmless beyond a reasonable doubt, because the jury made this finding only *after* it had reached a verdict convicting petitioner 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. (Opening Brief on the Merits, pp. 60-70.)

Petitioner submits that this Court should *also* consider that the Legislature passed AB 333 to enact meaningful reform to the statutory framework that authorized the gang-murder special circumstance at issue in petitioner's case, and that the Legislature did so because it recognized the pernicious and unjust effects of the misguided prior gang law and felt the need to remedy those ill effects.

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In addition, this Court should consider that, had petitioner's trial in 2005 been governed by the gang statute as amended by AB 333, the prosecution's evidence would have failed to prove the gang-murder special circumstance at issue in this case.

Based on these considerations, the Legislature's enactment of AB 333 provides an additional and equitable reason for this Court to decline to rely on the gang-murder special circumstance, tainted as it is by the misguided and harmful prior statutory framework, to hold the alternative-theory error in petitioner's case harmless beyond a reasonable doubt. In view of the fundamental flaws in the prior gang law, it would violate the spirit of AB 333 for this Court to rely on the special circumstance to hold the error harmless in this case.

Thank you for bringing this letter brief to the attention of the Supreme Court.

Sincerely,

Victor J. Morse

Victor J. Morse
(SBN 120916)

Attorney for Petitioner
Rico Ricardo Lopez

Certificate of Word Count

Counsel for petitioner Rico Ricardo Lopez hereby certifies that this supplemental letter brief consists of 2,112 words (excluding 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: January 20, 2022

/s/ Victor J. Morse

Victor J. Morse

Attorney for Petitioner
Rico Ricardo Lopez

**Declaration of Service By Mail
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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 Supplemental Letter Brief** on the following, by placing copies thereof in envelopes addressed as follows:

Mr. Rico Ricardo Lopez # F 23451 Calipatria State Prison P.O. Box 5002 Calipatria, CA 92233-5002	District Attorney 600 Administration, # 212-K Santa Rosa, CA 95403
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Superior Court Clerk
600 Administration Drive
Santa Rosa, CA 95403
*(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 January 20, 2022, at San Francisco, California.

/s/ Victor J. Morse

Victor J. Morse

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**

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Date

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Morse, Victor (120916)

Last Name, First Name (PNum)

Law Office of Victor J. Morse

Law Firm