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Supreme Court No. S272238

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent

v.

FREDDY ALFREDO CURIEL,
Defendant and Appellant

(Fourth District Court of Appeal - Division Three No. G058604)

APPELLANT'S SUPPLEMENTAL BRIEF (CRC 8.520(D))
(Limited to new authorities not available in time for the Answer Brief)

Appeal From Final Order Denying Penal Code Section 1172.6 Petition
Orange County Superior Court No. 02CF2160
The Honorable Julian Bailey, Presiding Judge

MICHELLE MAY PETERSON (SBN 111072)
Certified Appellate Law Specialist
State Bar of Calif. - Board of Legal Specialization
P.O. Box 387
Salem MA 01970-0487
(978) 594-1925 (may111072@gmail.com)

Counsel for Defendant-Appellant Freddy Curiel
Under Appointment by the Supreme Court

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This supplemental brief is filed under rule 8.520(d), Cal. Rules of Court, limited to new authorities that were not available in time to be included in our September 29, 2022 merits brief.

I. *People v. Ware* (Dec. 1, 2022) 14 Cal.5th 151 (*Ware*)

This Court's *Ware* opinion is on point to Argument IV of Appellant's Answer Brief on the Merits (AABM). *Ware* offers substantially the same analysis – albeit in a more extreme setting – as the Ninth Circuit's opinion in *United States v. Garcia* (9th Cir. 1998) 151 F.3d 1243 (*Garcia*), which *Ware* cited favorably. Mr. Curiel's Argument IV relied on *Garcia* as illustrative of his own analysis (AABM 67-68), and *Ware* is still more so.

In *Ware*, defendant Hoskins, a member of the Brim gang, was convicted of conspiracy to commit murder for allegedly participating in an agreement to kill members of rival gangs. There was no evidence that Hoskins committed or aided and abetted any particular violent act, but the prosecution offered evidence of his gang membership, access to guns, and social media posts celebrating violence against rivals.

This Court reversed the conviction as unsupported by sufficient evidence. Three points are especially salient here.

<u>First</u> is this Court's holding that "proof of common [gang] membership alone is not sufficient to establish participation in a criminal conspiracy. [Citation.] The effect of such a rule would be to criminalize mere association with gang members, which the law forbids. [Citations.]" (*Id*. at pp. 168-169.) *Garcia* analyzed its similar holding that "evidence of gang membership cannot itself prove that an individual has entered a criminal agreement to attack members of rival gangs." (*Id*., 151 F.3d 1243, 1246.)

Similarly here, assuming both Freddy Curiel and Abraham Hernandez were members of an O.T.H. gang,[1] that does not itself constitute evidence that Freddy agreed in advance with Hernandez that Cesar Tejada should be killed.

Second, *Ware* held that a gang expert's testimony about what gangs do in general (i.e., "gang culture") is not itself probative of what a particular gang member did on a specific occasion. Our briefing made this same point.

In *Ware*, this Court relied on *Garcia* to hold the evidence wasn't probative of Hoskins conspiring to kill: "[A] 'general agreement, implicit or explicit, to support one another in gang fights does not provide substantial proof of the specific agreement required for a conviction of conspiracy to commit assault,' much less conspiracy to commit murder. (*U.S. v. Garcia, supra,* 151 F.3d at p. 1244.). Again, without more specific evidence about the requirements of Hit Squad or Brim membership, we conclude that no reasonable jury could have inferred that membership

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[1] Though Mr. Curiel must make that assumption in the current appeal, he would reserve the right to dispute on remand (if need be) that he was a member of any gang, in light of the prosecutor's breach of the agreement that included Freddy's counsel's stipulation regarding Freddy being a gang member. In the original appeal, the Court of Appeal held the prosecutor's breach was constitutional error, but it found the error harmless under the law at that time. (*See* 2CT 230, 238-241) Nonetheless, because the prosecutor breached the agreement, Mr. Curiel should have the right to deem the agreement void against the breaching party in this posttrial proceeding. (*See, e.g., Universal Pictures Corp. v. Roy Davidge Film Laboratory* (1935) 7 Cal.App.2d 366, 370 [breach of agreement renders agreement voidable by nonbreaching party]; *Corson v. Brown Motor Investments, Inc.* (1978) 87 Cal.App.3d 422, 426 [similar].) That said, we do not see this issue as within the case in this Court, so we simply note its existence.

entailed an agreement by all of its members, including Hoskins, to kill rivals." (*Ware*, at p. 170.)

Ware so held over evidence "that Brim members, like gang members generally, were expected to support the goals of the gang, including by backing each other up in fights." (*Id*. at pp. 169-170.) *Garcia* had similar evidence, "that generally gang members have a 'basic agreement' to back one another up in fights." (*See id*., 151 F.3d 1243, 1245) Similarly here, Detective Lodge testified that in "gang culture," gang members were expected to "back up" each other, which meant "[t]hey are there to help you out in any situation that comes up" (4RT 480); though here, akin to *Garcia* (but unlike *Ware*), there was no such testimony as to the defendant's particular alleged gang ("O.T.H.") or its members.

Just as this Court in *Ware* held that 'homies back each other up' isn't evidence of conspiracy to commit any particular premeditated murder, and *Garcia* held that 'homies back each other up' isn't evidence of conspiracy to commit any particular assault, so too here, "homies back each other up" wasn't evidence of Freddy aiding and abetting any particular murder; e.g., Hernandez's murder of Cesar Tejada. It "establishes one of the characteristics of gangs but not a specific objective of a particular gang – let alone a specific agreement on the part of its members to accomplish an illegal objective." (*Garcia*, at pp.1245-1246.)

Thus, assuming *arguendo* that members of "O.T.H." acted according to "gang culture backup,"[2] *Ware*'s reasoning also applies here: Assuming Freddy Curiel would have "backed up" another

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[2] We disputed the admissibility of Det. Lodge's testimony on the subject in other portions of our briefing.

O.T.H. member if he saw them in a fight, that isn't evidence he had advance knowledge that Abraham Hernandez intended to kill Cesar Tejada (or that such advance knowledge was possible), or intended to facilitate or encourage Hernandez's murder of Cesar.

We made this point based on *Garcia* at AABM 67-68. *Ware* reinforces it.

Third, there was evidence in *Ware* that Hoskins was previously arrested with a concealed gun, and had another police encounter involving a concealed gun. The Attorney General argued this was evidence that Hoskins was "ready, willing and able to kill" if the opportunity arose. This Court held that too was not evidence of conspiracy to commit murder:

> Though it may be reasonable to infer that Hoskins "could easily be armed" if the opportunity arose, it is not reasonable to infer that Hoskins therefore intended to commit first degree murder. Individuals — gang members included — frequently possess guns without harboring any intent to use the guns to commit premeditated, deliberate killings. Again, nothing in the record links Hoskins's possession or proximity to the guns described above to any shootings or any broader criminal design to murder rivals.

(*Ware*, 14 Cal.5th 151, 171 [emphasis added].)

In Freddy Curiel's trial, Det. Lodge opined over objection that in "gang culture," "it is expected that everybody knows if there a gun and who has it." (4RT 489) Elsewhere we contended that opinion is inadmissible in this section 1172.6 proceeding, but for this point, it doesn't matter: Theorizing that Freddy knew Hernandez had a gun, the above quote from *Ware* shows it isn't evidence of foreknowledge that Hernandez intended to kill Cesar Tejada, or of committing an *actus reus* of aiding and abetting with the intent of facilitating the killing of Cesar. *Ware* thus further supports our Argument IV, and there is no issue preclusion.

II. *In re Lopez* (2023) 14 Cal.5th 562 (*Lopez*)

This Court's *Lopez* opinion is on point to Arguments IV and V of our Answer Brief. It shows that a verdict of first-degree murder which may have been based on "natural and probable consequences," plus a gang special circumstance verdict on instructions more comprehensive than those here, doesn't establish the elements of aiding and abetting murder. In other words, that combination of verdicts doesn't mean all of the elements of murder under current law were "necessarily decided" by the jury, so an essential element of issue preclusion isn't satisfied.

In *Lopez*, the Sureño victim Gomez was chased by Norteño gang members, was stabbed 40 times, and died. Lopez was part of the chasing group, but it was unclear who committed the stabbing(s). The prosecutor relied on theories of actual killer, aider and abettor, and natural and probable consequences (NPC). The court gave an instruction that permitted conviction of first-degree murder on an NPC theory (*Lopez*, at p. 576), and the prosecutor touched on that theory in argument. (*Id.* at p. 575.)

Lopez and his co-defendants were convicted of first-degree murder of Gomez with a gang special circumstance. The gang special circumstance instruction was CALJIC No. 8.81.22, which stated as elements:

1. The defendant intentionally killed the victim;

2. At the time of the killing, the defendant was an active participant in a criminal street gang;

3. The members of that gang engaged in or have engaged in a pattern of criminal gang activity;

4. The defendant knew that the gang members engaged in or have engaged in a pattern of criminal gang activity; and

5. The murder was carried out to further the activities of the criminal street gang.

This was a more thorough gang special circumstance instruction than was given in Freddy Curiel's case, which was:

"1. The defendant intended to kill;

2. At the time of the killing, the defendant was a member in a criminal street gang; and

3. The murder was carried out to further the activities of the criminal street gang." (7RT 1153-1154)

Thus, the gang special circumstance elements found true in *Lopez* included every element in Freddy's trial, and more.

In *Lopez*, the Attorney General <u>conceded</u> that "the [gang murder] special circumstance does not itself establish the elements of first degree premeditated murder under either a direct perpetrator or an aiding and abetting theory." (*Id*. at p. 586.) This Court accepted the concession.

Since it was far more likely the jury believed Lopez was an aider and abettor, a gang special circumstance finding required that Lopez " 'with the intent to kill aided, abetted, counseled, commanded, induced, solicited, requested, or assisted any actor in the commission of the murder in the first degree.' (See CALJIC No. 8.80.1.)" (*Ibid*.) However, this Court held "<u>intent to kill</u> is only one of the elements required to prove direct aiding and abetting. It <u>does not, itself, show the jury necessarily found Lopez guilty [of first-degree murder] on a proper theory</u>." (*Id*. at p. 587 [emphasis added].) That is true in Freddy's case too.

The Attorney General argued in *Lopez*, however, that the gang special circumstance verdict "still demonstrates harmlessness because, in addition to intent to kill, it shows the jury made all of the remaining findings necessary to support the valid theory of direct aiding and abetting first degree murder." (*Ibid*.) This Court rejected the argument as "unpersuasive. While the relevant language [of the special circumstance instruction] evokes similar concepts, it does not cover all of the elements of direct aiding and abetting." (*Ibid*. [emphasis added)

This Court reiterated the law that for aiding and abetting first-degree murder, "the prosecution must show that the defendant aided or encouraged the commission of the murder with knowledge of the unlawful purpose of the perpetrator and with the intent or purpose of committing, encouraging, or facilitating its commission. [Citation.] The jury here was likewise instructed .... Moreover, 'an aider and abettor who knowingly and intentionally assists a confederate to kill someone could be found to have acted willfully, deliberately, and with premeditation, having formed his own culpable intent. Such an aider and abettor, then, acts with the mens rea required for first degree murder.' [Citation.]" (*Lopez*, at pp. 587-588.)

However, this Court held, "[t]he gang-murder special-circumstance instruction falls far short of explaining these principles to the jury.... [T]he gang-murder special circumstance instruction does not necessarily establish all of the elements of directly aiding and abetting first degree murder. Thus, it does not in and of itself show the jury made the necessary findings for a valid theory [of first-degree murder]." (*Lopez*, at p. 588 [emphasis added].)

If the more detailed gang-murder special circumstance instruction in *Lopez* didn't show the jury made the necessary findings for aiding and abetting first-degree murder, then the less detailed instruction in Freddy's case didn't show that either.

Arguments IV and V in our Answer Brief approached the *lacunae* in the special circumstance instruction from two different vantage points. Argument IV showed that for the special circumstance, the jury wasn't instructed that Freddy was required to have **knowledge** of Hernandez' s intent to kill Cesar Tejada; or that he was required to have **intended to assist** Hernandez with Hernandez's murder of Cesar, of which the jury wasn't required to find that Freddy had knowledge. (*See* AABM 67, 69) Argument V showed that for the special circumstance, the jury wasn't instructed that Freddy was required to have committed an *actus reus* of aiding <u>or</u> abetting Hernandez's murder of Cesar, let alone both. (*See* AABM 71-73)

Furthermore, the first-degree murder instruction in Freddy's trial didn't fill those *lacunae*.

There was no dispute that Freddy Curiel wasn't Cesar Tejada's killer. Since the instructions permitted the jury to find Freddy guilty of Hernandez's first-degree murder by a theory that it was a "natural and probable consequence" of misdemeanor disturbing the peace (*see* AABM 17, 45-46), the first-degree murder verdict need not have included <u>any</u> of the elements of aiding and abetting murder under current law. And as was discussed above, *Lopez* shows that for two different reasons, the special circumstance verdict did not establish the elements of aiding and abetting murder under current law. Consequently,

the two verdicts together did not establish the elements of aiding and abetting murder under current law.

Therefore, in light of *Lopez*, Arguments IV and V of the Answer Brief lead to the same result: The issue of whether Freddy was guilty of murder under current law was not "necessarily decided" by the jury. Since that is one of the essential elements of issue preclusion, *Lopez* underscores why Mr. Curiel's section 1172.6 petition is not issue-precluded.[3]

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[3] To state the concept without issue preclusion language, there was a pathway by which the jury could have found Freddy guilty of first-degree murder with a special circumstance without finding every element of aiding and abetting murder under current law. That type of scenario fails to defeat a prima facie case under authorities such as *People v. Langi* (2022) 73 Cal.App.5th 972, 976, *People v. Flores* (2022) 76 Cal.App.5th 974, 991, and other cases cited on pages 43-44 of our Answer Brief.

III. ***People v. Campbell* (June 30, 2023) 92 Cal.App.5th 1327, 310 Cal.Rptr.3d 364 (*Campbell*)**

Campbell echoed *Lopez* in holding a "jury's gang-killing special-circumstance finding of 'intent to kill' did not 'necessarily establish all of the elements of directly aiding and abetting first degree murder. Thus, it does not *in and of itself* show the jury made the necessary findings for a valid theory.' [Citation to *Lopez*]." (*Campbell*, 92 Cal.App.5th 1327, ___, 310 Cal.Rptr.3d 364, 377 [emphasis in original].)

Campbell continued: "*In re Lopez*'s holding that a finding of intent to kill is not alone sufficient to establish Lopez was guilty of first degree murder leads us to conclude that the trial court erred in ruling that the special circumstance findings of intent to kill rendered Appellants ineligible for section 1172.6 relief as a matter of law. In other words, the verdicts alone do not conclusively establish that Appellants could be convicted of first degree murder under a valid murder theory such as premeditated murder or aiding and abetting or conspiracy to commit premeditated murder." (*Campbell*, 310 Cal.Rptr.3d 364, 378 [emphasis added].)

That was the point in Arguments IV and V of our Answer Brief on the Merits.

Campbell rejected the trial court's ruling, which was the same as the Attorney General's argument in our case – "that, as a matter of law, the special circumstance findings precluded appellants from eligibility for relief under section 1172.6." (*Id*. at p. 379.) As *Campbell* held:

> Under *In re Lopez* . . . more is required, namely, evidence establishing beyond a reasonable doubt that the appellants premeditated and deliberated in deciding to kill a rival gang member or relative of such member whom they might come upon as they entered the rival gang's territory, and evidence establishing, beyond a reasonable doubt, that the Appellants who did not shoot the victim aided and abetted the Appellant who did.... [F]or the trial court to assess whether the weight of the evidence supporting the elements of aiding and abetting first degree murder is so strong as to support a conclusion that Appellants are guilty of first degree murder beyond a reasonable doubt, the statute requires it to issue an order to show cause and conduct an evidentiary hearing and allow either party to present additional evidence. (§ 1172.6, subds. (c), (d)(3).)

(*Campbell*, 310 Cal.Rptr.3d 364, 378-379.)

Again, we agree. As with this Court's *Lopez* opinion that *Campbell* followed, *Campbell*'s holding and language reiterate Arguments IV and V of our Answer Brief.

Respectfully submitted this 3rd day of August, 2023.

By: *Michelle Peterson*

Michelle M. Peterson
Counsel for Appellant Freddy Curiel
Under Appointment by the Supreme Court

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As counsel for the appellant, I certify under rule 8.360(b)(1), California Rules of Court, that this brief contains 2,796 words according to the word count of the computer program used to prepare the brief.

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Respectfully submitted this 3rd day of August, 2023.

Michelle Peterson

Michelle May Peterson
Counsel for Appellant Freddy Curiel
Under Appointment by the Supreme Court

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I, MICHELLE MAY PETERSON, declare: I am an active member of the State Bar of California, over the age of 18 and not a party to this action. My address is P.O. Box 387, Salem MA 01970. On August 3, 2023, I submitted the foregoing APPELLANT'S SUPPLEMENTAL BRIEF (CRC 8.520(D)), in No. S272238, to TrueFiling for filing with this Court and e-service as stated below; and served paper copies to the other persons/ entities below by placing a copy in an envelope to the addresses below, deposited in the U.S. Mail, postage paid:

Lynne G. McGinnis, Deputy Attorney General
(e-service to ADIeservice@doj.ca.gov, and to
Lynne.McGinnis@doj.ca.gov, by TrueFiling)

Appellate Defenders, Inc.
(e-service to eservice-criminal@adi-sandiego.com
by TrueFiling)

Office of the District Attorney
(e-service to: Appellate@da.ocgov.com by TrueFiling)

Kenneth S. Morrison, Senior Deputy Associate Defender
(e-service to: kenneth.morrison@pubdef.ocgov.com by TrueFiling)

Clerk of the Superior Court (Criminal Appeals Unit) (paper service only)
f/d/t: Hon. Julian Bailey
700 Civic Center Drive West 1st Floor
Santa Ana CA 92701

Mr. Freddy Curiel F-31178 (paper service only)
Kern Valley State Prison
3000 West Cecil Avenue
Delano CA 93216

I declare under penalty of perjury of the laws of the State of California that the above is true and correct. Executed this 3rd day of August, 2023.

Michelle Peterson

Michelle May Peterson

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Michelle Peterson Attorney at Law 111072	may111072@gmail.com	e-Serve	8/3/2023 5:52:12 PM
Seth Friedman Office of the Attorney General 186239	Seth.Friedman@doj.ca.gov	e-Serve	8/3/2023 5:52:12 PM
Craig Buckser Office of the State Public Defender 194613	craig.buckser@ospd.ca.gov	e-Serve	8/3/2023 5:52:12 PM
Almeatra Morrison AG- Department of Justice	almeatra.morrison@doj.ca.gov	e-Serve	8/3/2023 5:52:12 PM
Office Office Of The State Public Defender-Sac Timothy J. Foley, Sr. Deputy State Public Defender 000000	docketing@ospd.ca.gov	e-Serve	8/3/2023 5:52:12 PM
Appellate Defenders, Inc.	eservice-criminal@adi.sandiego.com	e-Serve	8/3/2023 5:52:12 PM
Office of the District Attorney	appellate@da.ocgov.com	e-Serve	8/3/2023 5:52:12 PM
Kenneth S. Morrison, Senior Deputy Associate Defender	kenneth.morrison@pubdef.ocgov.com	e-	8/3/2023

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Peterson, Michelle (111072)

Last Name, First Name (PNum)

Michelle May Peterson

Law Firm