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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE	)	Case No. _____
	)	
	)	Related Appeal Case Nos.
HECTOR MARTINEZ,	)	D066705, D058929
	)	
On Habeas Corpus.	)	Superior Court Case No.
	)	SCD224457
_____	)	

FROM THE JUDGMENT OF THE SUPERIOR COURT FOR THE COUNTY OF SAN DIEGO, THE HONORABLE ROBERT O'NEILL, JUDGE PRESIDING

PETITION FOR REVIEW

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PETITION FOR REVIEW

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Petitioner, **HECTOR MARTINEZ**, respectfully petitions this Honorable Court, pursuant to Rule 8.500 of the California Rules of Court, to grant review in the above entitled case following an order by the Court of Appeal, Second Appellate District, Division One, filed May 15, 2015, denying his Petition for Writ of Habeas Corpus. A copy of the order is attached hereto as an appendix.

QUESTION PRESENTED

Whether, pursuant to this Court's decision in *People v. Chiu* (2014) 59 Cal.4th 155, petitioner was wrongfully convicted of first degree murder under a legally erroneous natural and probable consequences alternative theory of liability.

NECESSITY FOR REVIEW[1]

Petitioner was convicted of first degree murder as an aider and abetter. In his direct appeal, case number D058929, petitioner argued that his conviction for premeditated murder should be reversed because the jury was not instructed to determine that premeditated murder was a reasonably foreseeable consequence of the target crimes of assault and battery. The Court of Appeal affirmed petitioner's conviction and on May 22, 2013, this Court denied Petitioner's Petition for Review without prejudice to relief which petitioner might be entitled to after the court decided *People v. Chiu, supra*, 59 Cal.4th 155. On June 2, 2014, this Court issued an opinion in *Chiu.* Petitioner filed a motion to recall the remittitur and reinstate his appeal, which the Court of Appeal denied on September 5, 2014. Petitioner then filed a petition for writ of habeas corpus in the Court of Appeal The Court of Appeal concludes that sufficient evidence supports Petitioner's first degree murder conviction. (Appendix at 8.) However, *Chiu* requires more than just sufficient evidence. Instead, *Chiu* mandates that a defendant's "first degree murder conviction must be reversed unless we conclude beyond a reasonable doubt that the jury based its verdict on the legally valid theory that the defendant directly aided and abetting the premeditated murder." (*People v. Chiu, supra*, 59 Cal.4th at p. 167.) While the Court of Appeal concludes that there was sufficient evidence under the direct aiding and abetting theory, this does not prove beyond a reasonable doubt that the jury based its verdict on direct aiding and abetting rather than the natural and probable cause theory. In other words, while the Court of

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[1] Petitioner also notes that in order to present the federal constitutional claims in the federal court, in the event relief is not granted in the instant court, each of the claims must be presented in a Petition for Review to this Court. (*Duncan v. Henry* (1995) 513 U.S. 364, 365-366 [115 S.Ct. 887, 130 L.Ed.2d 865].)

Appeal cites to evidence suggesting that the jury could have found petitioner guilty as, a direct aider and abettor, *Chiu* requires a conclusion beyond a reasonable doubt that the jury did base its finding upon that theory. Review is necessary in order to clarify this standard. Here, there is nothing in the record to demonstrate that the jury unanimously found petitioner guilty as, a direct aider and abettor, especially given the prosecution's argument that they did not all need to agree on a theory. Petitioner maintains that as there is nothing in the record to affirmatively indicate, beyond a reasonable doubt, which theory the jury relied upon, reversal of petitioner's first degree murder conviction is required and the prosecution must either accept a reduction of the conviction or set the matter for trial. (*People v. Chiu*, *supra*, 59 Cal.4th at pp. 159, 167-168, 176.)

PROCEDURAL STATEMENT

Petitioner and co-defendant Darren Martinez (no relation to petitioner), were charged by information filed on April 20, 2010, with the murder of Guillermo "Willie" Esparza (Pen. Code § 187, subd. (a); Count I), assault of Esparza with a semi-automatic firearm (Pen. Code § 245, subd. (b); Count II), and assault of Jimmy Parker by means likely to produce great bodily injury (Pen. Code § 245, subd. (a)(1); Count III).[2] (1 C.T. 1-6.) It was further alleged petitioner was a principal in the murder of Esparza and, during the commission of the murder, at least one principal personally used a firearm, proximately causing great bodily injury and death (Pen. Code § 12022.53, subds. (d), (e)(1)). It was also alleged, with respect to Count I, that petitioner was vicariously armed with a firearm (Pen. Code § 12022, subd. (a)(1)). (1 C.T. 1-6.) Finally, it was alleged petitioner was 16 years

[2] Additional charges were alleged against Darren Martinez.

or older when he committed Counts I through III (Welf. & Inst. Code, § 707, subd. (d)(1)) and that he committed these offenses for the benefit of a criminal street gang. (Pen. Code §186.22, subd. (b)(1)).[3] (1 C.T. 1-6.)

On November 17, 2010, a jury found petitioner and Darren Martinez guilty as charged of all counts and allegations. (11 R.T. 1787-1789, 1790-1795; 2 C.T. 360-367; 459, 462-465.)

On January 7, 2011, the court denied petitioner's motion to modify the jury's verdict of first degree murder pursuant to Penal Code section 1181, subdivision (6). (11 R.T. 1802-1803; 2 C.T. 371-379.) Petitioner was then sentenced to an indeterminate term of 50 years to life, plus six years as follows: 25 years to life for premeditated murder (Count I), a consecutive term of 25 years to life for the attendant use of gun causing great bodily injury or death, a consecutive three years for the assault on Parker (Count III), plus three years for the gang allegation. Execution of sentence on Count II was stayed.[4] (11 R.T. 1828.)

Petitioner filed his notice of appeal on January 7, 2011. (2 C.T. 396.) On July 21, 2011, petitioner filed an opening brief, in case number D058929, arguing: (1) his conviction for premeditated murder must be reversed because the court failed to adequately instruct the jury on the natural and probable consequences doctrine of liability for aiders and abettors; (2) there was insufficient evidence to support his conviction of assault of Jimmy Parker by means of force likely to produce great bodily injury in Count 3; (3) the abstract of judgment must be corrected to reflect the court's oral pronouncement of judgment; and (4) petitioner joined in his

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[3] Petitioner's date of birth is June 29, 1992. He was 17 years old at the time of the shooting. (2 C.T. 380.)

[4] Darren Martinez was sentenced to an aggregate sentence of 50 years to life, plus 14 years. (11RT 1820-1822.)

co-defendant's arguments. On March 5, 2013, the court of appeal issued an opinion affirming petitioner's convictions with directions to correct the abstract of judgment. Petitioner filed a petition for review, in case number S209709, on April 17, 2013, requesting that the Court review: (1) whether petitioner's conviction for premeditated murder should be reversed because the jury was not instructed to determine that premeditated murder (as opposed to second degree murder) was a reasonably foreseeable consequence of the target crimes of assault and battery; and (2) whether there was insufficient evidence to support petitioner's conviction for the assault in Count III. On May 22, 2013, the this Court denied the petition for review without prejudice to relief which petitioner might be entitled to after the court decided *People v. Chiu*. On May 23, 2013, a remittitur was issued. On July 28, 2014, petitioner filed a motion to recall the remittitur and reinstate the appeal in the Court of Appeal arguing that his conviction for first degree murder was abrogated by this Court in *Chiu*. The attorney general filed an opposition arguing that petitioner had not set forth good cause for extraordinary relief and that motions based on claims of judicial error cannot be the basis for recalling the remittitur. On September 5, 2014, the Court of Appeal denied the motion to recall the remittitur. On August 12, 2014, petitioner filed a petition for writ of habeas corpus in the United States District Court, Southern District, case number 3:14-cv-01890-DMS-KSC, arguing: (1) the jury was not instructed it had to determine that premeditated murder was a reasonably foreseeable consequence of the target crimes of assault and battery and the instructional error removed an element required to convict petitioner of first degree murder in violation of his Fifth Amendment right to due process and his Sixth Amendment right to a jury trial; (2) the evidence was insufficient to support a conviction for assault by means of force likely to cause great

bodily injury; and (3) Penal Code section 31 does not permit the conviction of an aider and abettor for first degree premeditated murder under the natural and probable consequence doctrine and such a conviction violated his Fourteenth Amendment right to due process and his Sixth Amendment right to a jury trial on the element of premeditation. On the same day, petitioner also filed a notice of an unexhausted claim and request to hold proceeding in abeyance, noting that Ground Three had not been analyzed under *Chiu*. Petitioner's request for a stay is currently pending.

FACTUAL STATEMENT

A. Prosecution Evidence

1. Shooting Incident on August 21, 2009

On August 20, 2009, Guillermo "Willie" Esparza (18 years old) and Jimmy Parker (17 years old) were hanging out at David and Chelly Elias's house watching movies and playing beer games. The Elias residence was located in the Paradise Hills neighborhood. (2 R.T. 155-157, 218-220.) Around 1:30 a.m., Parker had to leave and Esparza offered to walk home with him. (2 R.T. 157, 221.) The two boys started out on back residential streets because Parker was on probation and it was past curfew. (2 R.T. 223.) At the intersection of Woodman and Paradise Valley Road, they cut behind the McDonald's and continued east on Paradise Valley towards Briarwood. (2 R.T. 224.)

About 2:00 a.m., Stella Revelez Garcia ("Revelez") was driving her son David Garcia (14 yrs. old), co-defendant Darren Martinez (known as "Boo"), Darren's cousin Janie Sierra, and petitioner (known as "Kicks") from her house in the Paradise Hills area to Jack in the Box, which was about two miles away. There was no food in the house and everyone was hungry after an evening at the beach. (3 R.T. 530, 532-533; 536-536, 4 R.T. 666, 669, 673; 5 R.T. 795.) Darren, who was just short of his 21st

birthday and had recently begun a romantic relationship with the older Revelez, was riding in the front passenger seat of the Tahoe. Petitioner was in the right rear passenger seat, David was in the middle, and Janie was behind Revelez. (3 R.T. 534, 537-538, 4 R.T. 668-669.) At the time, petitioner was wearing a white "slingshot" or tank top. Darren was dressed in a baggy shirt. One of them was wearing a light-colored Chargers hat. (5 R.T. 814-815.)

After they ordered food in the drive-thru at Jack in the Box, Revelez saw the gun sitting in Darren's lap, although she didn't recall talking to Darren about it at that point. (5 R.T. 797, 874.) Earlier, Revelez had seen Darren with a revolver in her bedroom and told him to get it out of the house. Petitioner may or may not have been in Revelez's room at the time, but she never saw him with that gun. (4 R.T. 784-785, 786; 5 R.T. 867.) Darren asked to borrow her truck so that he could "take it back" and, at some point, Darren and petitioner took the Tahoe and left the house for a while. (4 R.T. 673, 782-783, 785.) According to David, Darren left the house at around 11:00 p.m. or midnight, but it was to go pick up petitioner. (4 R.T. 610,641.) David testified he never saw Darren or petitioner with a gun at his house or in the car. (4 R.T. 552, 611, 616.)

As Revelez was driving back home from Jack in the Box (westbound on Paradise Valley Road), Darren told Revelez he forgot something and asked her to turn around and go back to the store. (3 R.T. 538, 617; 5 R.T. 798.) Revelez made a u-turn near Woodman and started driving back east. (5 R.T. 800.) It was dark on Paradise Valley Road and neither Revelez nor David saw any pedestrians. (4 R.T. 624; 5 R.T. 801.) When Revelez came up to the traffic light at Briarwood, Darren said he needed to go to the bathroom. (4 R.T. 539, 622.) David testified he saw Darren and petitioner get out of the truck and go pee, but then acknowledged that he did not

actually see where they went. He just assumed that's what they did. (4 R.T. 649-650, 662.) According to Revelez, she saw Darren run westbound down Paradise Valley and petitioner followed. Neither Darren nor petitioner said anything before they jumped out. (3 R.T. 539, 542, 545; 5 R.T. 802-803.)

Meanwhile, Esparza and Parker had crossed over to the sidewalk on the north side of Paradise Valley Road (2 R.T. 226) and were approaching Briarwood when two Hispanic males[5] came running towards them from the corner (2 R.T. 228, 230, 232). One male was 18-22 years old, 5'9", stocky, and dressed in a grey tank top and dark jeans. The other male was younger – 16 to 20 years old – smaller, and wearing a sweater and a Charger's hat. (2 R.T. 235-236, 283.) Parker and Esparza initially stopped when they saw the two approaching – they were about 30 feet away – and they waited to see what the two were going to do. Parker then started walking forward. (2 R.T. 234, 237.) The guy in the tank top spoke up and asked, "where are you from?" Esparza didn't respond, but Parker recognized this guy was "looking for trouble." He replied that he was from S.F.A.[6] and did not "bang." (2 R.T. 228, 241-242, 249, 268.) The guy in the tank top then swung at Parker who swung back as he sidestepped into the street. Meanwhile, Parker heard the guy in the Charger's hat say "this is Lomas" and gunshots followed. (2 R.T. 228-229, 240, 244, 249, 269.) Parker and the guy in the tank top froze at that sound. (2 R.T. 244, 275.) Parker looked over his left shoulder and saw Esparza on the street, about 20 feet

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[5] Parker was unable to identify petitioner or Darren Martinez at trial but distinguished between the two by describing them as the "tank top" guy and the "shooter." (2 R.T. 258, 289-290.)

[6] S.F.A., which stands for "Sickest Fools Around" or "Still Fucking Around," is recognized as a tagging crew from Logan and not a criminal street gang. (2 R.T. 242-243, 251; 8 R.T. 1351-1352.)

away, with the shooter looking down at him. (2 R.T. 228-229, 240-241, 245-247, 249, 269, 285.) A split second later, the guy in the tank top took another swing, nicking Parker on the back left side of his head. (2 R.T. 244, 275, 281.) Meanwhile, there were two more gunshots. Parker was yelling "what the fuck" and ran towards Esparza. He was expecting a fist fight but never thought this would happen. (2 R.T. 250, 266-267.)

The shooter started running down Paradise Valley Road and then other guy started running. (2 R.T. 253, 257.) According to Parker, from the moment the first guy took a swing at him, things were happening simultaneously and everything happened fast. (2 R.T. 235, 246, 249-250, 253.)

When Parker got to Esparza, his eyes were rolled back, he was choking on his blood and unresponsive. Parker cradled him in his lap trying to figure out what to do. (2 R.T. 254-255.) Minutes later, Parker flagged down Sherri Zulueta who was driving west on Paradise Valley Road and asked for help. (2 R.T. 171-173, 175-176, 192.) Zulueta's friend, Lisa Buagh got out and helped Parker talk to the 911 dispatcher. (2 R.T. 192-193; 1 C.T. 62-67.) Meanwhile, Rick Masias had already stopped in his green Chevy Tahoe and his friend, Alfred Lopez, got out to tell Baugh that he had called the police. (2 R.T. 200, 209, 294, 297, 302.) Neither Zulueta, Baugh, Masias nor Lopez heard gunfire, saw anybody running from the scene, or noticed another Tahoe like his in the vicinity. (2 R.T. 188, 200, 300, 310-311, 318.)

Revelez, who had been waiting for the traffic light to turn green after Darren and petitioner jumped out of the truck, heard three or four popping noises. She turned right onto Briarwood and then made a u-turn so she could go back west on Paradise Valley Road. (3 R.T. 539-626; 5 R.T. 804-806, 807.) When the light turned green, Revelez turned left on

Paradise Valley. She started to pull over to the side of the road and saw "one kid holding another one." Darren came running up to her truck from the southbound lane on Paradise Valley, but Revelez took off because David started "spazzing" that he had "seen [a kid] shot." (3 R.T. 547; 5 R.T. 807, 809, 811-812, 921-922.) Revelez did not see petitioner anywhere in the area. (5 R.T. 811, 814.) David, who heard a "pop, pop, pop" all in a row, leaned over towards the right passenger window as his mom drove past and saw a person on his knees holding his friend. (4 R.T. 627-628, 651, 663.) David did not recall Darren coming up to the car or his mom refusing to let him in. (4 RT 630.)

Once home, Revelez ignored her ringing phones. Darren did not have a cell phone but Revelez knew Darren was trying to call her because he was using petitioner's cell phone that night and she knew petitioner's phone number. (5 R.T. 813, 816-817, 819.) She finally answered the phone when she recognized that Darren's brother, Raul, was calling. (5 R.T. 820.) Raul convinced Revelez to pick him up so they could go find Darren. Revelez and Raul located Darren waiting at the car wash behind the Navy housing, about a half-mile from the intersection of Paradise Valley Road and Briarwood. (5 R.T. 823, 924.) They drove back to Revelez's house where Darren wrapped the gun and his clothing in a towel and put them in Raul's car, which was being stored in Revelez's garage. (5 R.T. 825-827.) Around 9:00 a.m., Revelez drove Darren and Raul to Chula Vista. She did not see Darren for a couple days. (5 R.T. 829.)

At the scene of the shooting, responding San Diego police recovered four cartridge casings and three bullets from around Esparza's body. A fourth bullet was recovered later at the autopsy. (3 R.T. 424-425, 427.) Three divots, consistent with bullet impact, were found in the street under and around Eparza's body. (3 R.T. 390-391; 472-473.) Bloody footprints

leading from Esparza's body were found to match the bottom of Parker's sneakers. (3 R.T. 385-387.)

Bill Loznycky, the police department's forensics analyst, determined the recovered cartridge casings were fired from the same semiautomatic .380 caliber firearm. (3 R.T. 439, 443.) It could not be determined if the bullets, which were .380 caliber, were all shot from the same weapon but they reflected severe impact damage consistent with having hit a firm or hard surface such as asphalt or bone. (3 R.T. 444, 448.) Loznycky explained that a .380 caliber bullet would leave a divot if it hit asphalt. The particular size of the resulting divot would depend on the type of asphalt and the angle of the shot. (3 R.T. 445.) Evidence of a divot did not necessarily mean a shooting victim was lying down when shot. (3 R.T. 451.)

Deputy Medical Examiner Steven Campman identified the cause of death as multiple gunshot wounds and the manner of death as homicide. (3 R.T. 473, 475.) Campman described two wounds to the right thigh, one to the right shoulder and one to the left shoulder. (3 R.T. 470.) The shot to the left shoulder was identified as the most critical because it went into the chest, through the left lung, aorta, and right lung, before ending in the right arm. (3 R.T. 498-499, 504, 517.) According to Campbell, Esparza would have died from this particular injury within minutes. (3 R.T. 504.) The other three shots, which all entered on the back right side of the body, followed in some undetermined order and were consistent with a person having turned his body in a defensive way. (3 R.T. 508-509, 517-518, 521.)

2. Huberto Taco Shop Assaults

On September 1, 2009, Revelez drove Darren and a few others to and from Herberto's Taco Shop at 25th and Broadway. (4 R.T. 571-574.) Jose Juarez and two friends were eating there when Darren and the others

walked in, started swearing and arguing, and attempted to goad Juarez and his friends into a fight. (4 R.T. 711-713; 6 R.T. 1031, 1035-1036; 8 R.T. 1303-1304.) Darren Martinez was subsequently identified as the person who pulled out a knife during the ensuing fight, stabbed Juarez in the arm, and exclaimed, "that's why I killed your homie." (6 R.T. 1007-1008, 1045, 1126.)

3. Defendants' Arrests

Petitioner was taken into custody by Officer James Dickinson of the San Diego Police Department on September 18, 2009, at the Calexico border from Customs and Border Protection, an intermediary between Mexican and U.S. authorities. (6 R.T. 1156; 3 R.T. 457-458; 2 C.T. 386.) At processing, petitioner's height was recorded as 5'5" and his weight at 115 pounds. (6 R.T. 1157-1159.) The words, "FUCK" and "GSU" were tattooed on his wrists and the Roman numerals X, X, V, and I – which appeared to be still healing – were on his fingers. Charger bolts were tattooed on his shoulders and the word "Lomas" was across his stomach. (6 R.T. 1161-1162, 1165, 1168; 9 R.T. 1491-1492.)

Darren Martinez (5'6" and 190 lbs.) was arrested after police were led to question Revelez regarding her knowledge of the Taco Shop incident. (5 R.T. 844, 851.) At trial, Revelez admitted to receiving a total of $33,000 in California witness relocation expenses in exchange for testifying in this case. (5 R.T. 846.) She also admitted having made false statements on an application for benefits in 1992. (5 R.T. 847.)

4. Gang Evidence

San Diego Police Detective Nestor Hernandez, the prosecution's gang expert, testified Lomas has been a documented criminal street gang since 1994 although it dates back to the mid 1970's. (8 R.T. 1331, 1335.) At the time of the Paradise Valley Road shooting, Lomas had thirty-plus

members. (8 R.T. 1335.) A turf-oriented gang, Lomas claims the geo-graphical community of Golden Hills. (8 R.T .1337, 1352.) Huberto's Taco Shop is in Lomas gang territory. The area of Briarwood and Paradise Valley Road is in the rival Locos' territory. (8 R.T. 1348-1349.) S.F.A. is a tagging crew, rather than a gang, that limits its criminal activity to vandalism. (8 R.T. 1351.)

Hernandez discussed Lomas's common signs and symbols, the significance of graffiti, the numbers 12, 13, and 26 (8 R.T. 1338-1339), the use of monikers (8 R.T. 1340-1341), and the manner in which individuals become Lomas members, either by being jumped in, crimed in, or familied in (8 R.T. 1342-1343). Hernandez discussed the expectation for Lomas members to put in work by committing crime, which can go from tagging to violent acts (8 R.T. 1345), and how members are expected to earn respect (i.e., fear) from within the gang structure, and from community members and rivals (8 R.T. 1346-1347).

Hernandez listed attempted robbery, robbery, carjacking, assault with a deadly weapon, carrying a concealed weapon, attempted murder, and murder as among the primary activities of Lomas. (8 R.T. 1363.) Lomas's pattern of criminal activity included a 2006 conviction for assaulting rival gang members (8 R.T. 1365), 2004 convictions for carrying a concealed weapon and attempted robbery (8 R.T. 1368), and 2010 convictions for assault with a deadly weapon with a great bodily injury allegation (8 R.T. 1370-1371).

Hernandez testified that Lomas members generally value weapons and commonly carry weapons to demonstrate their willingness to participate in violent crime and defend themselves and their turf. (8 R.T. 1355-1356.) Lomas members are expected to commit walk up – not drive by – shootings. (8 R.T. 1357.) Further, it's common to state your gang's name before

assaulting another group. (8 R.T. 1363.) Hernandez testified that in gang culture, the question, "where are you from," is considered an immediate challenge. (8 R.T. 1357.) There is no good way for a recipient to answer and any reply is seen as disrespectful. (8 R.T. 1357-1358.) According to Hernandez, a member is expected to follow through with an act of violence and a failure to do so is perceived as weak. A probable consequence of the issuance of a gang challenge is assault, up to and including murder. (8 R.T. 1358.) Members are expected to back up their fellow gang members or risk retaliation. A member with a weapon would be expected to use it in the confrontation. (8 R.T. 1359-1360.) Hernandez acknowledged most gang crime goes unreported unless someone is seriously injured or an independent person calls the police. (9 R.T. 1497.)

In Hernandez's opinion, Darren Martinez was a documented Lomas member based on factors including the number of field interviews, tattoos, self-admission of Lomas membership, his moniker ("Boo"), and the facts of the current two incidents. (8 R.T. 1373-1374, 1376; 9 R.T. 1466-1469.) It was Hernandez's opinion petitioner was a documented Lomas gang member based on evidence of his previous associations with other Lomas members, his moniker ("Kicks"), tattoos, photos showing petitioner throwing the Lomas hand sign, and his letters signed with Lomas references. (9 R.T. 1479, 1481-1482.) Hernandez also opined, in response to a hypothetical set of facts mirroring the shooting and taco shop assault, that both incidents were committed for the benefit of or in association with in a criminal street gang and promoted, further, and assisted the gang in its criminal conduct. (9 R.T. 1488-1491.)

B. Defense Evidence

San Diego Police officer Greg Pinarelli interviewed Jimmy Parker about 6:00 a.m. on August 21, 2009 at the shooting scene. Parker identified

one of the attackers as skinny and wearing a gray "wife beater." The other attacker (the shooter) was taller, chubbier, and wore a white shirt and baby blue charger's hat. (9 R.T. 1533, 1534, 1535.) The guy in the wife beater walked up to them and asked Parker where he was from. Parker answered that he did not bang, then the guy threw a swing at him. He backed up and they went into the street. Parker heard three shots in quick succession. He looked and saw Esparza fall to the street. Parker never said Esparza was shot while he was on the ground. (9 R.T. 1533.) Rather, the shooter looked down at Esparza, Parker yelled at him, and the shooter took off. (9 R.T. 1534.)

In an interview with David Garcia on October 13, 2009, Garcia told Pinarelli that petitioner and Darren Martinez went over to pee in the bushes by the fire station. (9 R.T. 1535, 1536.)

Petitioner did not testify in his defense at trial.

ARGUMENT

PURSUANT TO THIS COURT'S RECENT DECISION IN *CHIU*, PETITIONER WAS WRONGFULLY CONVICTED OF FIRST DEGREE MURDER UNDER A LEGALLY ERRONEOUS NATURAL AND PROBABLE CONSEQUENCES ALTERNATIVE THEORY OF LIABILITY AND HIS FIRST DEGREE MURDER CONVICTION SHOULD NOW BE SET ASIDE

A. Introduction

It was undisputed that the person who fired all four shots was Darren Martinez and that petitioner, who was with Darren at the time of the shooting, engaged in a brief fist fight with Parker. As the court of appeal noted in its original opinion, in case number D058929, petitioner was the aider and abettor. The prosecution advanced two theories: (1) petitioner directly aided and abetted Darren in committing the crime and (2) petitioner aided and abetted Darren in the initial assault and/or battery of Esparza and Parker and that murder was a natural and probable consequence of those

target crimes. (See 10 R.T. 1604-1607, 1618-1652 [prosecutor's closing argument]; see also 1 C..T. 95-97 and 9 R.T. 1565-1567 [instructions given].)

During closing arguments, the prosecutor referred to petitioner and Darren as the "murder team" and argued:

> So as we talk about the concepts of liability here, they are each liable. They are each liable for murder and they are equally liable under the law. Now, there are two ways or theories by which a person aided and abets another. First is the traditional way of aiding and abetting, which we have here on the screen.
>
> Now, defendant is guilty. Hector Martinez is guilty of murder if he directly committed the murder or if he aided and abetted. Under a traditional aiding and abetting theory, Hector Martinez - - or somebody in the murder team, Darren, committed the crime. And at the time the crime was committed, Hector knew that Darren was going to commit that crime, was going to commit that murder.

And he intended to aid Darren at the time. So they have a shared intent, if you will, a shared intent to kill.

> And, finally, for aiding and abetting a traditional theory, if you will, Hector's words and conduct did, in fact, aid, help, facilitate, encourage Darren in committing that murder.
>
> . . . The second way to aid and abet is through a natural and probable consequence. Now, I want to have a word of note here. In order to find the defendant Hector Martinez guilty, you all don't have to agree on the type of aiding that Hector did, meaning that four of you can think, well, you know, I think it is a natural and [probable] consequence, aiding and abetting, and eight of you can think he directly aided and abetted. As long as all of you agree he aided and abetted, you don't have to agree on how he did.
>
> Now, in order to aid and abet under a natural and probable consequence theory, basically I have to show you several

premeditated attempted murder under a legally erroneous natural and probable consequences alternative theory of liability and his conviction should now be reversed.

B. *Chiu* Holds That No One May Be Convicted Of First Degree Murder Under A Natural And Probable Consequences Theory Of Liability

Prior to the decision in *Chiu*, courts and practitioners throughout California assumed that the natural and probable consequences theory of liability applied to anyone who intended to aid and abet a target crime under circumstances where the commission of another, more serious charged crime by a co-participant was an objectively foreseeable consequence. (See, e.g., *People v. Medina* (2009) 46 Cal.4th 913; *People v. Prettyman* (1996) 14 Cal.4th 248; *People v. Beeman* (1984) 35 Cal.3d 547.)

In *Chiu*, this Court squarely held that as a matter of public policy, an aider and abettor cannot be convicted of first degree murder under a natural and probable consequences theory of liability. (*People v. Chiu, supra,* 59 Cal.4th at pp. 158-159, 166-167.)

The facts and procedural history in *Chiu* were set forth by the Court as follows:

> On September 29, 2003, McClatchy High School students Sarn Saeteurn and Mackison Sihabouth argued over two girls in an instant message exchange. Saeteurn challenged Sihabouth to an after-school fight outside a pizzeria, Famous Pizza, the next day. Saeteurn told Sihabouth that he was going to bring his 'homies' with him, and threatened to shoot Sihabouth's father if his father tried to stop the fight. Sihabouth called Simon Nim, a member of the Hop Sing gang, for help. Defendant Bobby Chiu also learned about the fight.
>
> The next day, defendant told American Legion High School student Toang Tran about the fight. Defendant asked Tran if he 'want[ed to] see someone get shot,' told Tran that

there was going to be a fight over a girl, and said his 'friend' would shoot if his 'friend feels pressured.' Sihabouth showed up for the fight but left after he saw a crowd. Saeteurn did not show up for the fight because he learned that Hop Sing members planned to be there and he believed they '"are crazy and they kill people."' Defendant and his friends, Tony Hoong and Rickie Che, went to Famous Pizza that day.

McClatchy High School student Teresa Nguyen met her boyfriend, American Legion student Antonio Gonzales, outside Famous Pizza the day of the fight. Defendant said something to Nguyen which she did not hear. Defendant snickered when Nguyen asked if he was mocking her. Nguyen told defendant to 'shut up,' and Gonzales left a conversation he was having with another friend to see what was the matter. Gonzales and defendant exchanged fighting words, and Gonzales walked toward defendant, who got off the trunk of the car on which he had been sitting with Hoong and Che. As Gonzales walked toward defendant, Gonzales's friend, Roberto Treadway, told Gonzales, 'I got your back.' Che and Hoong stood alongside defendant. After the groups exchanged more words and glared at one another, Che punched Treadway. Defendant swung at Gonzales, and Gonzales swung back. Defendant then tackled Gonzales and started hitting him while he lay on the ground. Soon, a full-scale brawl was underway, with as many as 25 people fighting. Gonzales's cousin, Angelina Hernandez, struck defendant eight or nine times in the head with her fists, allowing Gonzales to get off the ground and resume fighting defendant. Treadway's cousin, Joshua Bartholomew, also hit defendant hard in the back of the head soon after.

Bartholomew testified that after he struck defendant, he heard defendant tell Che to '[g]rab the gun.' However, Gonzales, who had been fighting in close contact with defendant, did not hear defendant mention a gun. Soon, Bartholomew and Treadway attempted to leave the scene because they feared the police officer assigned to McClatchy High School could appear at any moment. Hoong pulled out a pocket knife and stabbed Treadway in the arm. Che appeared with a gun he had retrieved from a car trunk and pointed it at Gonzales's face and said, 'Run now, bitch, run.' Gonzales

ran. Che then pointed the gun at Bartholomew and Treadway. When he hesitated rather than shoot, defendant and Hoong yelled 'shoot him, shoot him.' Che shot Treadway dead. Che, defendant, and Hoong then fled together in a car.

Defendant testified that he heard about the fight the night before the incident. He claimed that he did not know that Che had a gun. He said he mocked Nguyen in an attempt to 'hit on her.' Defendant testified that during the fight with Gonzales, he felt continuous punches into the back of his head, received a blow to the face, and bled from his nose. Defendant denied calling for anyone to get a gun, and claimed that he did not want or expect Che to shoot Treadway.

The prosecution charged defendant with murder (Pen. Code, § 187, subd. (a)), with gang enhancement and firearm use allegations. At trial, the prosecution set forth two alternate theories of liability. First, defendant was guilty of murder because he directly aided and abetted Che in the shooting death of Treadway. Second, defendant was guilty of murder because he aided and abetted Che in the target offense of assault or of disturbing the peace, the natural and probable consequence of which was murder.

Regarding the natural and probable consequences theory, the trial court instructed that before it determined whether defendant was guilty of murder, the jury had to decide (1) whether he was guilty of the target offense (either assault or disturbing the peace); (2) whether a coparticipant committed a murder during the commission of the target offense; and (3) whether a reasonable person in defendant's position would have known that the commission of the *murder* was a natural and probable consequence of the commission of either target offense. (CALCRIM No. 403.)

The trial court instructed that to find defendant guilty of murder, the People had to prove that the perpetrator committed an act that caused the death of another person, that the perpetrator acted with malice aforethought, and that he killed without lawful justification. (CALCRIM No. 520.)

The trial court further instructed that if the jury found

> defendant guilty of murder as an aider and abettor, it had to determine whether the murder was in the first or second degree. It then instructed that to find defendant guilty of first degree murder, the People had to prove that the perpetrator acted willfully, deliberately, and with premeditation, and that all other murders were of the second degree. (CALCRIM No. 521.)
>
> The jury found defendant guilty of first degree murder and the gang and firearm use allegations true.
>
> As noted, the Court of Appeal reversed the first degree murder conviction. It held that the trial court erred in failing to instruct sua sponte that the jury must determine not only that the murder was a natural and probable consequence of the target crime, but also that the perpetrator's willfulness, deliberation, and premeditation were natural and probable consequences."

(*People v. Chiu, supra,* 59 Cal.4th at pp. 159-161, emphasis in original.)

Upon granting the People's petition for review, this Court found it unnecessary to consider the instructional issue because a majority of the Court held for the first time that as a matter of public policy and appropriate sentencing considerations, an aider and abettor in California cannot be convicted of first degree murder under a natural and probable consequences theory of liability. (*People v. Chiu, supra,* 59 Cal.4th at pp. 158-159, 166-167.)

C. *Chiu* Requires Reversal Of Petitioner's Conviction

Chiu holds that where, as here, the jury was instructed on both direct aiding and abetting and natural and probable consequences theories, and there is nothing in the record to affirmatively indicate upon which theory the jury relied, reversal of the defendant's first degree murder conviction is required. (*People v. Chiu, supra,* 59 Cal.4th at pp. 159, 167-168, 176; *People v. Guiton* (1993) 4 Cal.4th 1116, 1128-1129; *People v. Green* (1970) 27 Cal.3d 1, 69-

71.) As in *Chiu*, petitioner's jury was presented with both theories, the prosecutor argued both theories, the jury returned only a general verdict form, and there is nothing in the record to demonstrate beyond a reasonable doubt upon which theory the jury relied. In fact, the prosecutor specifically told the jury they did not all have to agree on the type of aiding and abetting that petitioner did. (10 R.T. 1606.) The Court of Appeal concludes that sufficient evidence supports Petitioner's first degree murder conviction. (Appendix at 8.) However, *Chiu* requires more than just sufficient evidence. Instead, *Chiu* mandates that a defendant's "first degree murder conviction must be reversed unless we conclude beyond a reasonable doubt that the jury based its verdict on the legally valid theory that the defendant directly aided and abetting the premeditated murder." (*People v. Chiu, supra,* 59 Cal.4th at p. 167.) While the Court of Appeal concludes that there was sufficient evidence under the direct aiding and abetting theory, this does not prove beyond a reasonably doubt that the jury based its verdict on direct aiding and abetting rather than the natural and probable cause theory. In other words, while the Court of Appeal cites to evidence suggesting that the jury could have found petitioner guilty as a direct aider and abettor, *Chiu* requires a conclusion beyond a reasonable doubt that the jury did base its finding upon that theory. Here, there is nothing in the record to demonstrate that the jury unanimously found petitioner guilty as an aider and abettor, especially given the prosecution's argument that they did not all need to agree on a theory.

Petitioner additionally maintains that independent of California law, it would also violate the Fifth and Fourteenth Amendments to the United States Constitution to refuse to grant petitioner relief based on *Chiu.* (See *Fiore v. White* (2001) 531 U.S. 225, 228 [121 S.Ct. 712, 148 L.Ed.2d 629] [a conviction on an invalid legal theory violates due process even when the decision of the highest state court recognizing the invalidity of the theory

occurs after the conviction has become final]; see also *Schirro v. Summerlin* (2004) 542 U.S. 348, 351-352 [124 S.Ct. 2519, 159 L.Ed.2d 442] [as a matter of federal law, judicial decisions that narrow the scope of criminal liability apply to convictions that are already final on appeal].) Contrary to the Court of Appeal's conclusion the instructional error concerning the natural and probable consequences doctrine was not harmless under *Chapman v. California* (1967) 386 U.S. 18, 22-24 [87 S.Ct. 824, 17 L.Ed.2d 705].

CONCLUSION

For all of the foregoing reasons, petitioner requests that review be granted.

Dated: May 19, 2015

Respectfully submitted,

MARILEE MARSHALL
Attorneys for Petitioner, Hector Martinez

CERTIFICATE OF COMPLIANCE

This certifies that this brief contains 7,124 words, in 13-point font, as counted by the word processing program used to generate it.

Dated: May 19, 2015

MARILEE MARSHALL

APPENDIX

Filed 5/15/15

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re HECTOR MARTINEZ on Habeas Corpus.	D066705 (San Diego County Super. Ct. No. SCD224457)

THE COURT:

Petition for habeas corpus. Petition denied.

Marilee Marshall & Associates and Marilee Marshall for Petitioner.

Kamala D. Harris, Attorney General, William M. Wood, Deputy Attorney General, for Respondent.

This case is before us a second time. In the prior case (*People v. Martinez et al.* (March 5, 2013, D058929) [nonpub. opn.] (*Martinez I*)), Hector Martinez and his codefendant appealed, contending among other things that their first degree murder convictions should be reversed because the trial court erred by failing to adequately instruct the jury on the natural and probable consequences doctrine of liability for aiders and abettors. Specifically, they argued the instruction "failed to correctly inform the jury

that [they were] guilty of premeditated murder only if the jury found that premeditated murder, and not merely murder, was the natural and probable consequence of the target crimes." We rejected that argument based on *People v. Favor* (2012) 54 Cal.4th 868, 876-880. Martinez appealed to the California Supreme Court, which denied his petition for review without prejudice to any relief he might obtain under *People v. Chiu* (2014) 59 Cal.4th 155, 166 (*Chiu*), which holds that the natural and probable consequences rule cannot be a basis for convicting a defendant of first degree murder.

Martinez filed this writ petition, arguing he is entitled to have his sentence reduced to second degree murder under *Chiu, supra,* 59 Cal.4th 155.[1] The People acknowledge that we have jurisdiction to resolve this writ petition under *Application of Hillery* (1962) 202 Cal.App.2d 293, 294, but they argue we should remand the matter for the trial court to resolve it in the first instance. We elect to exercise our jurisdiction to resolve the writ petition. Because sufficient evidence supported Martinez's first degree murder conviction under a direct aiding and abetting theory, we deny the petition.

FACTUAL AND PROCEDURAL BACKGROUND

We take judicial notice of our decision in *Martinez I*, which affirmed Martinez's conviction for the first degree murder of Guillermo Esparza (Pen. Code,[2] § 187, subd.

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1 The parties do not dispute that *Chiu* is retroactive and applies to this case. The decision changed the law by disapproving the use of the natural and probable consequences theory as a basis to elevate murder to first rather than second degree. (See *In re Johnson* (1970) 3 Cal.3d 404, 410-411 [retroactivity of decisions announcing a new rule of law].)

2 All statutory references are to the Penal Code.

(a)); assault of Esparza with a semi-automatic firearm (§ 245, subd. (b)(1)) and assault with force likely to cause great bodily injury to Jimmy Parker (§ 245, subd. (a)(1)). The jury found true allegations that each crime was committed for the benefit of, at the direction of, and in association with a criminal street gang (§ 186.22, subd. (b)(1)); Martinez was vicariously armed with a firearm in the commission of the murder (§ 12022, subd. (a)(1)); the codefendants were principals in the commission of the murder; and a principal used a firearm and proximately caused great bodily injury and death (§ 12022.53, subds. (d), (e)(1)). The trial court sentenced Martinez to a determinate term of six years plus an indeterminate term of 50 years to life.[3]

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3 In the trial court, Martinez moved for a modification of his sentence under section 1181, subdivision (6), arguing the evidence was insufficient to show he committed murder; rather, at the most, it showed he had assaulted Parker. The People opposed Martinez's motion, arguing sufficient evidence existed to sustain the first degree murder conviction: "This murder was a cold[-]blooded, gang[-]motivated crime in which the defendants seized the opportunity to represent themselves and their gang by committing [a] violent crime that enhanced their and their gang's reputation. Under a simple aiding and abetting theory, the People demonstrated that 1) [the codefendant] committed murder, 2) [Martinez] knew [the codefendant] intended to commit murder, 3) before or during the commission of the murder, [Martinez] intended to aid and abet [the codefendant] in committing the murder, and 4) [Martinez's] words or actions did in fact aid and abet [the codefendant's] commission of the murder. Indeed, the People argued [at trial] that [the codefendant] and [Martinez] formed a murder team—each with a specific role to play. Each defendant shared a gang, shared a motive to kill to enhance the gang's reputation, shared common experience as gang members, worked in tandem to kill and ran away from the scene together." The trial court agreed with the People: "Having heard and considered the motion, and bearing in mind I presided over the jury trial in this case, the motion is denied. And in denying the motion, I have weighed the merits of the motion and I incorporate the People's response specifically as to the following: First of all, the court is guided by a presumption in favor of the correctness of the verdict. [¶] Second of all, there is sufficient credible evidence to sustain the verdict of first degree murder, and the jury properly received and considered the evidence in this case. I find no

We summarize the facts set forth in *Martinez I*, supplementing it with expert testimony from San Diego Police Department Detective Nestor Hernandez: Late in the evening on August 20, 2009, the codefendant's girlfriend was with the codefendant and Martinez when she saw the codefendant with a gun. She objected to his having a gun at her house, and asked him to take the gun away. The codefendant, accompanied by Martinez, left the house. But the codefendant had not disposed of the gun. A few hours later, Martinez, the codefendant and his girlfriend were in her vehicle at a drive-thru restaurant. She noticed a gun in the codefendant's lap. When she was driving home, the codefendant suddenly told her to stop the vehicle. Martinez and the codefendant left the vehicle and ran up to Jimmy Parker and Guillermo Esparza, who were walking down the street. Martinez asked Parker, "Where are you from?" Parker mentioned the name of a group that was not a gang, but rather engaged in tagging. Martinez punched Parker and they fought. Parker heard the codefendant say, "This is Lomas," and the codefendant shot Esparza, who died as a result. Martinez hit Parker once more after the gunshot was fired. Immediately afterwards, Martinez and the codefendant ran from the crime scene.

Detective Hernandez testified that Martinez and his codefendant were documented Lomas gang members. According to the detective, gang members commonly carried weapons when preparing to assault someone or enter rival gang territory, and by being armed they showed their fellow gang members their willingness to commit violence to defend themselves or the gang. Detective Hernandez stated that when gang members

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basis in law or fact where I could exercise my discretion and either reduce the verdict or set aside the verdict."

approached someone and asked, "where are you from," that aggressive question set up a challenge that usually ended with the questioner attacking the other person. Detective Hernandez stated gang members were expected to support one another: "If you are a companion or your gang associate or your gang member friend hit someone up and asks where they are from, or is challenged or do the challenging, they have to back up their gang associate or gang member friend, irregardless, for not only representation for themselves . . . but the gang itself, and if they don't, then there is severe retaliation or severe repercussions on that person who doesn't participate."

The prosecutor asked Detective Hernandez: "If . . . a Lomas gang member were to issue a gang challenge and engage in an assault with other Lomas gang members and some of those others had any kind of weapon, would there be an expectation for the person who has the weapon to use it in the confrontation?" Detective Hernandez replied in the affirmative. The prosecutor posed a hypothetical based on the facts of this case, asking what would happen if two Lomas gang members approached perceived rivals, issued a gang challenge, received the reply that the perceived rival belonged to a tagging group, and the Lomas members simply walked away. Detective Hernandez responded that those individual gang members—and by extension the Lomas gang itself—would be perceived as weak in the eyes of the tagging group and rival gangs.

Detective Hernandez testified gang members value "respect," which they purport to gain by "committing more acts of violence, more crimes, being involved with more confrontations with other gang members, expressing that or relaying that to the other active gang members themselves, not only that you are trying to up the status—your own

status within the gang, but also up the status of the specific gang as to how it reflects on rival gang members."

The court instructed the jury with CALCRIM Nos. 400 and 401 regarding aiding and abetting, and with CALCRIM No. 403 regarding the natural and probable cause doctrine.[4]

DISCUSSION

"Both aiders and abettors and direct perpetrators are principals in the commission of a crime." (*People v. Calhoun* (2007) 40 Cal.4th 398, 402; § 31.) "[A]iding and abetting is one means under which derivative liability for the commission of a criminal offense is imposed. It is not a separate criminal offense." (*People v. Francisco* (1994) 22 Cal.App.4th 1180, 1190.) "There are two distinct forms of culpability for aiders and abettors. 'First, an aider and abettor with the necessary mental state is guilty of the intended crime. Second, under the natural and probable consequences doctrine, an aider and abettor is guilty not only of the intended crime, but also "for any other offense that was a 'natural and probable consequence' of the crime aided and abetted." ' " (*Chiu, supra,* 59 Cal.4th at p. 158.)

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4 During deliberations, the jury sent the court a note stating: "Clarification Request on description of [CALCRIM No.] 401[,] Aiding and Abetting: Point # 2 says: 'The defendant knew that the perpetrator intended to commit the crime[.]' What is meant by 'the crime?' Did aider and abettor have to know or even expect the possibility that it will be murder ([as charged in] count #1)? Or does it mean any crime?" The court replied that " 'the crime' refers to any crime the defendant(s) are on trial for." Regarding aiding and abetting, the court replied, "This is what the jury has to decide. Refer to [CALCRIM Nos.] 400, 401 and 403, read together." The court added, " '[A]ny crime' means any crime the defendants are on trial for."

Chiu holds : "[P]unishment for second degree murder is commensurate with a defendant's culpability for aiding and abetting a target crime that would naturally, probably, and foreseeably result in a murder under the natural and probable consequences doctrine. . . . [W]here the direct perpetrator is guilty of first degree premeditated murder, the legitimate public policy considerations of deterrence and culpability would not be served by allowing a defendant to be convicted of that greater offense under the natural and probable consequences doctrine." (*Chiu, supra,* 59 Cal.4th at p. 166.)

Chiu explains: "First degree murder, like second degree murder, is the unlawful killing of a human being with malice aforethought, but has the additional elements of willfulness, premeditation, and deliberation which trigger a heightened penalty. [Citation.] That mental state is uniquely subjective and personal. It requires more than a showing of intent to kill; the killer must act deliberately, carefully weighing the considerations for and against a choice to kill before he or she completes the acts that caused the death." (*Chiu, supra,* 59 Cal.4th at p. 166.)

"When a trial court instructs a jury on two theories of guilt, one of which was legally correct and one legally incorrect, reversal is required unless there is a basis in the record to find that the verdict was based on a valid ground." (*Chiu, supra,* 59 Cal.4th at p. 167.) Thus, a defendant's "first degree murder conviction must be reversed unless we conclude beyond a reasonable doubt that the jury based its verdict on the legally valid theory that defendant directly aided and abetted the premeditated murder." (*Ibid.*) Under those principles, 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. (*Id.* at p. 167.)

As noted, the jury here was instructed regarding aiding and abetting principles. Applying those principles, we conclude sufficient evidence supports Martinez's first degree murder conviction. We reiterate what we stated in *Martinez I*: "Here, [Martinez] was the aider and abettor, but he initiated the attack by asking which gang the victims belonged to, and swung and hit Parker. Even after approximately four minutes of fighting, [Martinez] did not manage to overcome Parker's resistance. Afterwards, [the codefendant] fired one shot. [Martinez], undeterred by the gunshot, subsequently took another swing at Parker. It was not until [the codefendant] fired two more shots that [Martinez and the codefendant] ran away. This evidence offers no indication that the murder was anything other than willful, deliberate and premeditated."

Chiu, supra, 59 Cal.4th 155, does not alter that conclusion, particularly as we bolster our analysis with expert testimony relating to the jury's true finding that Martinez committed the murder for the benefit of, at the direction of, and in association with a criminal street gang. The jury reasonably could conclude Martinez was aware the codefendant carried a gun in the vehicle because he was aware the codefendant had it earlier, and after the girlfriend had told the codefendant to remove it from her house, Martinez accompanied the codefendant who had promised to dispose of it. Further, the gang expert's testimony provided the jury with a basis to find that Martinez likely was emboldened to challenge Parker and Esparza—by asking them where they were from—precisely because Martinez knew the codefendant was carrying a gun and Martinez relied

on his codefendant's support as he attacked the others. Further, Martinez's use of violence would enhance the respect he received within the gang and for the gang among rival gangs. Lastly, Martinez encouraged and facilitated the first degree murder by attacking Parker, thus simultaneously preventing Parker from defending Esparza, and freeing up the codefendant to focus exclusively on Esparza, which the codefendant did by shooting and killing him. Accordingly, we conclude that on this record, any instructional error concerning the natural and probable consequences doctrine was harmless even under the higher standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 22-24.

DISPOSITION

The writ petition is denied.

O'ROURKE, J.

WE CONCUR:

NARES, Acting P. J.

McINTYRE, J.

DECLARATION OF SERVICE

I, the undersigned, declare:

I am over eighteen (18) years of age, and not a party to the within cause; my business address is 595 East Colorado Blvd, Suite 324, Pasadena, CA 91101; that on May 19, 2015, I served a copy of the within:

PETITION FOR REVIEW

on the interested parties by placing them in an envelope (or envelopes) addressed respectively as follows:

Clerk of the Superior Court
San Diego County Superior Court
Main Courthouse
220 West Broadway. Dept. SD-56
San Diego, CA 92101
For Delivery to Hon. Robert F. O' Neill

Mr. Hector Martinez, AF9134
B6-124
P.B.S.P.
P.O. Box 7500
Crescent City, CA 95531

Office of the Attorney General
P.O. Box 85266
San Diego, CA 92186-5266

Clerk of the Court of Appeal
Fourth Appellate District/ Division One
750 B. Street, #300
San Diego, CA 92101-8189

Each said envelope was then, on May 19, 2015, sealed and deposited in the United States mail at Pasadena, California, the county in which I maintain my office, with postage fully prepaid.

I, further declare that I electronically served a copy of the same above document from electronic notification address (marshall101046@gmail.com) on May 19, 2015 to the following entities electronic notification addresses:
Attorney General, adieservice@doj.ca.gov
District Attorney, DA.Appellate@sdcda.org

I additionally declare that I electronically submitted a copy of this document to the Supreme Court on its website at www.courts.ca.gov in compliance with the court's Terms of Use, as shown on the website.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 19, 2015, at Pasadena, California.

LESLIE AMAYA