In the Supreme Court of the State of California

In re

HECTOR MARTINEZ,

On Habeas Corpus

Case No. S226596

SUPREME COURT
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Fourth Appellate District, Division One, Case No. D066705
San Diego County Superior Court, Case No. SCD224457
The Honorable Robert F. O'Neill, Judge

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STATEMENT[1]

1. On the evening of August 20, 2009, petitioner Martinez and co-defendant Darren Martinez[2] were at the home of Stella Revelez. (4 RT 671.) Revelez noticed that Darren had a gun, objected to it, and asked him to take it away. Petitioner and Darren left Revelez's home, with Darren indicating that he was going to dispose of the gun. Darren, however, kept the gun. (4 RT 783-785; 5 RT 791-792.)

Several hours later, Revelez drove petitioner, Darren, and Revelez's son to a restaurant. Revelez saw that Darren still had the gun in his lap. (5 RT 796-797.) As they were driving home from the restaurant, Darren told her to stop the car. (5 RT 798.)

Revelez stopped, and Darren and petitioner got out of the car. (3 RT 538-539, 542-543; 5 RT 798, 800, 802.) They ran up to Jimmy Parker and Guillermo Esparza, who were walking down the street after having spent the evening at a friend's house. Petitioner asked them, "Where are you from?"—a form of "gang challenge." (2 RT 228, 241-242.) Parker told petitioner that he was with "S.F.A." Petitioner began to punch Parker, and the two fought for approximately four minutes. (2 RT 228, 240.)

During the struggle with petitioner, Parker heard Darren say, "This is Lomas," followed by a gunshot. (2 RT 229, 236, 250.) Petitioner and Parker stopped fighting and looked in the direction of Darren and Esparza. (2 RT 229, 236.) Parker saw Darren standing over Esparza with a gun in his hand. Petitioner punched Parker in the head again. (2 RT 244, 286.)

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[1] In his petition for writ of habeas corpus below, petitioner requested judicial notice of the court file of his appeal in *People v. Martinez et al.* (March 5, 2013, D058929). Record citations in this brief, therefore, refer to the record in that case.

[2] Because petitioner and his codefendant share a last name, respondent will refer to codefendant Darren Martinez as Darren for clarity.

Darren fired two more shots at Esparza. Then petitioner and Darren fled. (2 RT 229, 244, 253.)

2. The San Diego District Attorney charged petitioner and Darren with first degree murder (Pen. Code, § 187, subd. (a); count 1), assault with a semi-automatic firearm (§ 245, subd. (b); count 2), and assault with force likely to cause great bodily injury (§ 245, subd. (a)(1); count 3). The information further alleged (a) that petitioner was a principal in the commission of the murder, and that a principal used a firearm and proximately caused great bodily injury or death (§ 12022.53, subds. (d), (e)(1)); (b) that petitioner was vicariously armed with a firearm in the course of the murder (§ 12022, subd. (a)); and (c) that petitioner committed each offense for the benefit of a criminal street gang (§ 186.22, subd. (b)). (1 CT 1-6.)

At petitioner's trial, the prosecution produced testimony from surviving victim Parker and others setting out the circumstances, mentioned above, of the attack against Esparza and Parker. In addition, San Diego Police Detective Nester Hernandez, an expert on the Lomas criminal street gang, testified that both petitioner and Darren were documented members of that gang. (8 RT 1374-1384; 9 RT 1461-1467, 1474-1482.) The detective also explained that Lomas gang members regularly carried weapons, including firearms, when traveling to or through rival gang territory, and that they were expected to use those weapons during fights. (8 RT 1355, 1361.) Being armed with a weapon provides a gang member with an enhanced reputation among fellow gang members, the detective further testified, as it shows that the gang member is willing to commit violence to defend himself and the gang. (8 RT 1355; 9 RT 1489.) Detective Hernandez also explained that gang members are expected to back up their fellow gang members when challenging or when being challenged by rival gang members:

> 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.

(8 RT 1359-1360.) If a Lomas gang member were to simply walk away after challenging someone, the detective said, rival gangs and tagging crews would perceive Lomas and the individual gang members as weak. (8 RT 1361.)

At the conclusion of the evidence, the judge instructed[3] the jury on two theories of petitioner's guilt of first-degree murder: murder by directly

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[3] The trial court instructed, using the CALCRIM series 400 pattern instructions, as follows:

> A person may be guilty of the crime in two ways: one, he or she may have directly committed the crime. I will call that person "the perpetrator." Two, he or she may have aided and abetted the perpetrator who directly committed the crime.
>
> A person is guilty of a crime whether he or she committed it personally or aided and abetted the perpetrator. Under some specific circumstances, if the evidence establishes aiding and abetting of one crime, a person may also be found guilty of other crimes that occurred during the commission of the first crime.
>
> CALCRIM 401, "Aiding and abetting intended crimes." To prove that a defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that: one, the perpetrator committed the crime; two, the defendant knew that the perpetrator intended to commit the crime; three, before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime; and, four, the defendant's words or conduct did, in fact, aid and abet the perpetrator's commission of the crime.
>
> Someone aids or abets a crime if he or she knows of the perpetrator's unlawful purpose and he or she specifically intends

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to and does, in fact, aid, facilitate, promote, encourage or instigate the perpetrator's commission of that crime. If all of these requirements are proved, the defendant does not need to actually have been present when the crime was committed to be guilty as an aider and abettor.

If you conclude that the defendant was present at the scene of the crime, or failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider and abettor. However, the fact that a person is present at the scene of a crime or fails to prevent the crime does not by itself make him or her an aider and abettor.

403, "Natural and probable consequences, only nontarget offenses charged." Before you may decide whether a defendant is guilty of murder, you must decide whether he is guilty of an assault and/or battery. To prove the defendant is guilty of murder, you must decide whether he is guilty of assault and/or battery. To prove the defendant is guilty of murder, the People must prove that: one, the defendant is guilty of assault and/or battery; two, during the commission of assault and/or battery, a coparticipant in the assault and/or battery committed the crime of murder; and, three, under all of the circumstances, a reasonable person in the defendant's position would have known that a murder was the natural and probable consequence of the commission of the assault and/or battery.

A coparticipant in a crime is the perpetrator or anyone who aided and abetted the perpetrator. It does not include a victim or innocent bystander. A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. The consequence need not be a strong possibility. A possible consequence that might reasonably have been contemplated is enough. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence. If the murder was committed for a reason independent of the common plan to commit the assault and/or battery, then the commission of the murder was not a natural, probable consequence of assault and/or battery.

(continued...)

aiding and abetting an intended killing as the target crime; and murder as a non-target "natural and probable consequence" of aiding and abetting the target crime of assault. (CALCRIM Nos. 400, 401, 403; 9 RT 1564-1569.)[4]

(...continued)

> To decide whether the crime of murder was committed, please refer to the separate instructions that I will give you on that crime.
>
> The People are alleging that the defendants originally intended to aid and abet an assault and/or battery. If you decide that the defendant aided and abetted this crime of assault and/or battery, and that the murder was a natural and probable consequence of that crime, the defendant is guilty of murder. You need not – you do not need to agree about which of these crimes the defendant aided and abetted.

(4 RT 1564-1567.) The trial court then instructed the jury with definitions of assault, battery and murder. (4 RT 1567-1572.)

[4] During its deliberations, the jury submitted a multiple-part question seeking "[c]larification" of the instruction on aiding and abetting intended target crimes:

> Clarification request on description of #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 (for Count #1)?
>
> Or does it mean *any* crime?

(2 CT 353, emphasis in original.)

> The trial court provided responses as follows:
>
> Answer: [¶] "the crime" refers to any crime the defendant(s) are on trial for.

(continued...)

The jury found petitioner guilty on all three counts and found all special allegations true. (2 CT 459, 462-466.) The judge sentenced petitioner to an aggregate term of 56 years to life in state prison: a determinate term of three years for assault with force likely to produce great bodily injury, a three-year enhancement for gang activity, and two consecutive sentences of 25 years to life for first degree murder and for the firearm use. The court stayed, pursuant to Penal Code section 654, petitioner's sentence for assault with a semiautomatic firearm. (2 CT 393-395, 467.)

3. Petitioner and co-defendant Darren appealed, claiming that the trial judge had failed to adequately instruct the jury that, to support a verdict of first degree murder, the "natural and probable consequences" theory for accomplice liability required that the first degree nature of the murder be foreseeable. The Court of Appeal affirmed. It relied on *People v. Favor* (2012) 54 Cal.4th 868, 876-880, which held that the "natural and probable consequences" theory of aiding and abetting applies even where the judge instructs only on attempted murder as opposed to attempted *premeditated* murder. (*People v. Martinez et al.* (March 5, 2013, D058929) [nonpub. opn.].)

On May 22, 2013, this Court denied petitioner's petition for review "without prejudice to any relief to which defendant Hector Martinez might

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(...continued)

> Answer: [¶] This is what the jury has to decide. Refer to instructions 400, 401 and 403, read together.
>
> Answer: [¶] "*any* crime" means any crime the defendants are on trial for.

(2 CT 354, emphasis in original.)

be entitled after this court decides *People v. Chiu*, S202724." The Court of Appeal issued its remittitur the next day.

4. On June 2, 2014, this Court rendered its opinion in *People v. Chiu* (2014) 59 Cal.4th 155 (*Chiu*). It held that a conviction of first degree premeditated murder may not be based on a theory that a homicide was the "natural and probable consequence" of aiding and abetting a different "non-target" crime. *Chiu* said that first degree premeditated murder contains a mental state that "is uniquely subjective and personal . . . [that] 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." (*Id.* at p. 166.) It thus concluded that only the lesser "punishment 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." (*Ibid.*) *Chiu* made it clear, however, that "[a]iders and abettors may still be convicted of first degree premeditated murder based on direct aiding and abetting principles." (*Ibid.*)[5] In such cases, "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.)

Finding error in instructing Chiu's jury on the incorrect "natural and probable consequences" theory rather than just on the correct theory of direct aiding and abetting, this Court inquired whether the error was

[5] The court also made clear that such liability under the natural and probable consequences doctrine "operates independently of the felony-murder rule." (*Ibid.*)

harmless "beyond a reasonable doubt." (*Chiu*, *supra*, 59 Cal.4th at p. 167.) It noted that the jury had found Chiu guilty of first degree murder only after the trial judge had dismissed a "holdout juror" who agreed that Chiu was guilty of second degree murder but who would not find him guilty of first degree murder because she was "bothered by the principle of aiding and abetting and putting the aider and abettor in the shoes of a perpetrator." (*Chiu*, *supra*, at p. 168.) This Court then found the instructions prejudicial, explaining that "the jury may have been focusing on the natural and probable consequences theory of aiding and abetting and that the holdout juror prevented a unanimous verdict on first degree premeditated murder based on that theory." (*Id.* at pp. 167-168.)

5. Based on *Chiu*, petitioner sought to recall the remittitur in his appeal. Respondent filed an opposition, arguing that the request did not meet the classic requirements for recall and that petitioner was relegated to seeking habeas corpus relief under *People v. Mutch* (1971) 4 Cal.3d 389. The Court of Appeal denied the request.

Petitioner next filed a petition for writ of habeas corpus in the Court of Appeal. The Court of Appeal denied the petition. It concluded that, while the trial judge had erred in instructing the jury on natural and probable consequences under *Chiu*, the error was harmless even under the high standard—i.e., that the error was harmless beyond a reasonable doubt—set forth in *Chapman v. California* (1967) 386 U.S. 18, 22–24 [87 S.Ct. 824, 17 L.Ed.2d 705]. (*In re Martinez* (May 15, 2015, D066705), slip opn. at p. 9 [nonpub. opn.].) As the Court of Appeal explained, sufficient evidence supported a conviction for first degree murder as a direct aider and abettor. The court pointed to evidence that petitioner had initiated the attack on Parker and Esparza when he challenged them and immediately thereafter swung and physically fought Parker. It also noted that, after four minutes of petitioner fighting but not being able to overcome Parker's

resistance, Darren had fired one shot at Esparza; and that, subsequently, petitioner hit Parker again, Darren fired two more shots at Esparza, and petitioner and Darren then fled. As the court explained, "[i]t was not until Darren fired two more shots that [petitioner and Darren] ran away." (*Id.* at p. 8.)

The Court of Appeal further relied on the "expert testimony relating to the jury's true finding that Martinez had committed the murder for the benefit of, at the direction of, and in association with a criminal street gang." (*In re Martinez*, *supra*, at p. 8.) In addition to evidence that petitioner would have known that Darren had a gun, testimony from the gang expert, Detective Hernandez, provided a basis for the jury to conclude "that [petitioner] likely was emboldened to challenge Parker and Esparza—by asking them where they were from—precisely because [petitioner] knew [Darren] was carrying a gun and [petitioner] relied on [Darren's] support as he attacked the others." (*Id.* at pp. 8-9.) As Detective Hernandez testified, use of violence increased not only petitioner's reputation within his gang but also the gang's reputation amongst rival gangs.

The Court of Appeal concluded its harmless-error analysis by noting:

> 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.

(*Id.* at p. 9.)

ARGUMENT

PETITIONER HAS FAILED TO MAKE OUT A PRIMA FACIE CASE FOR HABEAS CORPUS RELIEF

Petitioner is not entitled to habeas corpus relief because he has failed to plead and prove a prima facie case that the trial court exceeded its jurisdiction. In the alternative, his claim fails under the appropriate

prejudice standard for *Chiu* error on habeas corpus, for petitioner cannot establish that the error in his trial was prejudicial.

A. Petitioner Has Not Made Out a Prima Facie Case That the Trial Court Acted in Excess of Its Jurisdiction

A final judgment of conviction is presumed valid. A collateral attack on such a presumptively-valid judgment, therefore, is limited to challenges based on newly discovered evidence, claims going to the jurisdiction of the court, and claims of constitutional dimension. (*In re Clark* (1993) 5 Cal.4th 750, 764.) "'For purposes of collateral attack, all presumptions favor the truth, accuracy, and fairness of the conviction and sentence; *defendant* thus must undertake the burden of overturning them. Society's interest in the finality of criminal proceedings so demands, and due process is not thereby offended.'" (*Ibid.*, quoting *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1260, emphasis in original.) To overturn those presumptions, a petitioner must plead a prima facie case for relief—that is, the petition must plead, with particularity, "the facts on which relief is sought," and must provide evidence supporting the claim, whether in the form of declarations, affidavits or relevant excerpts of the trial transcript. (*Ibid.*)

Where this Court has issued a decision newly recognizing a narrowed scope of a penal statute—as it did in *Chiu*—a habeas corpus petitioner seeking relief under the new interpretation bears the burden of pleading and proving that his conviction under the earlier interpretation of the crime had been obtained in excess of jurisdiction. (*People v. Mutch* (1971) 4 Cal.3d 389, 396; *In re Zerbe* (1964) 60 Cal.2d 666, 668.) To make out an excess of jurisdiction based on a subsequent interpretation of the law that narrows the bases for criminal liability, a habeas petitioner must plead and prove that, "as a matter of law," his conduct did not violate the statute under which he was convicted. (*In re Earley* (1975) 14 Cal.3d 122, 125; accord *People v. Mutch*, *supra*, 4 Cal.3d at p. 396 [habeas relief available where

"there is no material dispute as to the facts relating to his conviction and [where] it appears the statute under which he is convicted did not prohibit his conduct"]; *In re Zerbe*, *supra*, 60 Cal.2d at p. 668 [same].) Similarly, when collaterally attacking a conviction on the ground that the jury was presented with both valid and invalid theories of liability, the petitioner must prove "that he was not tried and convicted for violating" a statute under a valid theory. (*In re Bell* (1942) 19 Cal.2d 488, 504, cited with approval in *People v. Duvall* (1995) 9 Cal.4th 464, 474; accord *In re Klor* (1966) 64 Cal.2d 816, 822; cf. *In re Bushman* (1970) 1 Cal.3d 767, 774, disapproved on other grounds in *People v. Lent* (1975) 15 Cal.3d 481; *In re Brown* (1973) 9 Cal.3d 612, 625.)

Accordingly, a habeas corpus petitioner relying on *Chiu* must allege more than that his or her jury was instructed on first degree murder under the impermissible "natural and probable consequences" theory of aiding and abetting. The petitioner also must plead facts establishing that he or she was not otherwise guilty of first degree murder under a correct theory, such as that of directly aiding the perpetrator in the killing with the specific intent to do so. (See *Chiu*, *supra*, 59 Cal.4th at p. 166 [recognizing continued validity of direct-aiding theory].)

Petitioner cannot meet that burden here. His conduct was not, as a matter of law, outside the scope of liability of first degree premeditated murder as that offense is defined by *Chiu*. *Chiu* specifically limited its holding to the application of the "natural and probable consequences" theory of aiding and abetting, and explicitly excepted the direct aiding and abetting theory and the felony-murder theory from its holding. That exception is important in petitioner's case because, as he acknowledges, his jury was instructed on the legally-valid theory of direct aiding and abetting. And his conduct—most obviously, that of punching Parker in the head even *after* Darren had fired shots at Esparza—shows petitioner's intent to aid

and abet the murder of Esparza. Given these facts, petitioner cannot show an excess of jurisdiction as a matter of law.

In contrast, a petitioner relying on *Chiu* might succeed in pleading a prima facie case for relief if, for example, his or her jury was instructed on first degree murder based only on a natural and probable consequence theory of accomplice liability. However, because petitioner's jury was instructed with a proper theory for first degree murder, and because the evidence did not preclude a finding that he was guilty under that theory, he cannot meet his burden of pleading and proving a case for relief.

B. Petitioner Has Not Made Out a Prima Facie Case That the *Chiu* Error Was Prejudicial

Regardless whether petitioner could make a cognizable claim of an excess of jurisdiction, habeas corpus relief should be denied because he cannot establish that the *Chiu* error amounted to a miscarriage of justice. As the Court of Appeal properly determined, and as discussed in more detail below, the error did not prejudice petitioner.

1. Petitioner Must Show That the *Chiu* Error in His Trial Caused a Miscarriage of Justice

A *Chiu* claim is one of instructional error. Such an error rises to the level of a federal constitutional violation, potentially remediable in state habeas corpus, only if, in view of the instructions as a whole, it was "reasonably likely" that the jurors in his case misapplied the jury instructions on the incorrect theory of guilt in a unconstitutional way. (*Victor v. Nebraska* (1994) 511 U.S. 1, 17-21 [114 S.Ct. 1239, 127 L.Ed.2d 583]; *Estelle v. McGuire* (1991) 502 U.S. 62, 72 [112 S.Ct. 475, 116 L.Ed.2d 385].) Otherwise, the error is one of only state-law dimension.

Even if the *Chiu* error in this case rose to the level of a federal constitutional violation, it still would be subject to appropriate review for harmlessness. (*Chiu*, *supra*, 59 Cal.4th at p. 167 ["we must determine

whether giving the instructions here allowing the jury to so convict defendant was harmless error"]; see *Hedgpeth v. Pulido* (2008) 555 U.S. 57, 61-62 (per curiam).) On direct appeal, federal constitutional error is reviewed for harmlessness under a standard inquiring whether the error was "harmless beyond a reasonable doubt." (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) A criminal judgment may not be set aside on appeal for state-law error, however, unless it resulted in a "miscarriage of justice" (Cal. Const., art. VI, § 13)—that is, unless it is reasonably probable that the defendant would have obtained a more favorable result in the absence of the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Further, unless the federal Constitution requires more exacting harmless-error inquiry, California courts must apply the state constitution's *Watson* standard. (Cal. Const., art. VI, § 13; see *People v. Breverman* (1998) 19 Cal.4th 142, 172.)

It appears that neither this Court nor the United States Supreme Court has squarely resolved whether the federal Constitution requires application of the less-forgiving *Chapman* harmless-error standard to assess the effect of federal constitutional error for a claim raised only in state collateral review of a final criminal judgment. Respondent notes, as an initial matter, that the federal Constitution does not appear to require states to afford collateral attacks on final criminal judgments at all. (See *Murray v. Giarratano* (1989) 492 U.S. 1, 8 [109 S.Ct. 2765, 106 L.Ed.2d 1]; *Pennsylvania v. Finley* (1987) 481 U.S. 551, 557 [107 S.Ct. 1990, 95 L.Ed.2d 539]; see also *Douglas v. California* (1963) 372 U.S. 353, 356-357 [83 S.Ct. 814, 9 L.Ed.2d 811].) Moreover, in *Hedgpeth v. Pulido, supra,* 555 U.S. 57, a habeas corpus case involving the very kind of error alleged here—that is, submitting both a legally-correct theory and a legally-incorrect theory for the jury's consideration—the United States Supreme Court endorsed applying the more-forgiving *Brecht v. Abrahamson* test for harmlessness, i.e., "whether the flaw in the instructions 'had substantial and

injurious effect or influence in determining the jury's verdict." (555 U.S. at p. 58; *Brecht v. Abrahamson* (1993) 507 U.S. 619, 623 [113 S.Ct. 1710, 123 L.Ed.2d 353].) In *Pulido*, the Ninth Circuit had held such an error to be structural and therefore reversible per se. But the Supreme Court reversed, and remanded the case to the Ninth Circuit for re-assessment under the *Brecht* standard. (*Id.* at pp. 58, 61-62.)

Justice Benke has written on this subject in *In re Hansen* (2014) 227 Cal.App.4th 906. In that case, also involving instructional error, her dissenting opinion explained that state courts should apply the "more deferential 'grave doubt' harmless error standard of review, which governs consideration of similar trial errors when found in federal habeas corpus proceedings." (*Hansen, supra*, 227 Cal.App.4th at p. 929 (dis. opn. of Benke, J.).)

An actual prejudice test, such as set out in *Watson* and *Brecht,* is appropriate here. The Ninth Circuit has explained that the state-law *Watson* test for harmlessness and the federal-law *Brecht* test are "equivalent." (*Bains v. Cambra* (9th Cir. 2000) 204 F.3d 964, 971, n.2.) And the *Watson* and *Brecht* approach is especially tailored to protect the interest in finality of judgments on habeas corpus, to vindicate the state constitutional mandate against reversals of criminal judgments in the absence of a miscarriage of justice, and to avoid windfalls to defendants who assert their claims for the first time long after finality and might undeservedly benefit from the loss of evidence or the fading of witnesses' memories over time. (See *Brecht, supra,* 527 U.S. at p. 623; *Clark*, *supra*, 5 Cal.4th at pp. 764-765.) Adoption of the *Watson* harmless-error test in California habeas cases has the further benefit of familiarity, just as the familiarity of the federal judiciary with the *Brecht* test served as a recommendation for its adoption by the Supreme Court for federal habeas cases. (See *Brecht, supra,* at pp. 637-638.)

It is true that this Court applied a *Chapman*-like standard in *Chiu* when it assessed whether the instructional errors in those cases were "harmless beyond a reasonable doubt." (*Chiu*, *supra*, 59 Cal.4th at p. 167.) *Chiu* also relied on *People v. Guiton* (1993) 4 Cal.4th 1116, 1130-1131 (*Guiton*), which held that, where a jury is erroneously instructed with both a legally-valid theory and a legally-invalid theory of guilt, the error is prejudicial unless the court can determine that the jury in fact relied on the legally valid theory in rendering its verdict—a standard that appears even more stringent than that of *Chapman.* (*Chiu*, *supra*, at p. 167; *Guiton*, *supra*, 4 Cal.4th at pp. 1130-1131.)

But *Chiu* and *Guiton* were direct-appeal cases. Petitioner's case, in contrast, is a collateral attack on a final criminal judgment. Given the strong interest in finality, the *Hedgpeth v. Pulido* endorsement of an actual prejudice kind of test for this kind of error, and the state constitution's default miscarriage-of-justice standard for reversal, the appropriate harmless-error test here should be the *Watson* test.

2. The *Chiu* Error in Petitioner's Case Was Harmless

A review of the entire record is necessary to assess prejudice, whether under *Watson, Brecht,* or *Chapman.* (Cal. Const., art. VI, § 13; *People v. Chun* (2009) 45 Cal.4th 1172, 1201, 1203-1205; *Guiton*, *supra*, 4 Cal.4th at pp. 1130-1131; *People v. Green* (1980) 27 Cal.3d 1, 69-71; accord *Neder v. United States* (1999) 527 U.S. 1, 16-17.) Here, such a review reveals no reasonable probability that the outcome would have been any different had the jury not been instructed with the "natural and probable consequences" theory of aiding and abetting premeditated first degree murder.

a. The Court Must Review the Entire Record to Determine Prejudice, Not Just the Jury's Verdicts

Harmless-error review requires an examination of the entire record to determine prejudice. Indeed, the California Constitution specifically mandates review of "the entire cause." (Cal. Const., art. VI, § 13.) And the trend of this Court's precedents reinforce this point.

Guiton, *supra*, 4 Cal.4th at pp. 1128-1129, at the least, left open the question of full-record analysis. *Guiton* examined the prejudicial effect of a trial court's instructions to the jury on a legal theory that found no factual support in the record. It distinguished between those situations in which the jury is presented with two theories but only one is *factually* valid versus those in which the jury considers two theories but only one is *legally* valid. *Guiton* made the assumption that the former instances would most likely require affirmance, while the latter would most likely require reversal. Even so, *Guiton* went on to explain that it might be clear in some cases "from other portions of the verdict that the jury necessarily found the defendant guilty on the proper theory." (*Guiton*, *supra*, at p. 1130.) But *Guiton* did not foreclose other methods of determining harmlessness. It left that "question to future cases." (*Id.* at p. 1131 ["There may be additional ways by which a court can determine that error in the *Green* situation is harmless. We leave the question to future cases."].)

In post-*Guiton* decisions involving instructional error in other contexts, this Court has reemphasized the need to examine, not just the jury's verdicts, but the entire record in assessing prejudice. *People v. Breverman*, *supra*, 19 Cal.4th at p. 165, abrogated the "near-automatic reversal for this form of error" earlier articulated in both *People v. Sedeño* (1974) 10 Cal.3d 703 and *Guiton*, *supra*, at p. 1130; and *Breverman* further explained that "misdirection of the jury is not subject to reversal unless an

examination of the entire record establishes a reasonable probability that the error affected the outcome."

This requirement is also reflected in *People v. Chun*—a case on which *Chiu* relied. (*Chiu*, *supra*, 59 Cal.4th at p. 167, citing *Chun*, *supra*, 45 Cal.4th at pp. 1201, 1203-1205.) In *Chun*, the trial court instructed the jury on the felony-murder rule despite the fact that the evidence did not support the instruction. (*Chun*, *supra*, 45 Cal.4th at p. 1179.) The jury found the defendant guilty of second degree murder. (*Ibid.*) This Court found the alleged error harmless—despite the Court of Appeal's belief "that it could not do so" under *Guiton*, *supra*, 4 Cal.4th 1116. (*Id.* at p. 1203.) In finding harmless error, *Chun* highlighted the limits of *Guiton*. As it explained, "*Guiton* does not dispose of this issue [whether a jury based its decision on a legally valid theory]." (*Ibid.*) Relying on Justice Baxter's concurring opinion in *People v. Cross* (2008) 45 Cal.4th 58, 69-71, this Court held that a prejudice review allows a reviewing court to examine more than just the other verdicts rendered by a jury. (*Ibid.*) It stated:

> "Although *Guiton* observed that reliance on other portions of the verdict is '[o]ne way' of finding an instructional error harmless [citation], we have never intimated that this was the *only* way to do so. Indeed, *Guiton* noted that we were not then presented with the situation of a jury having been instructed with a legally adequate and a legally inadequate theory and that we therefore 'need not decide the exact standard of review' in such circumstances—although we acknowledged that '[t]here may be additional ways by which a court can determine that error in [this] situation is harmless. We leave the question to future cases.' [Citation.] Because this case only now presents that issue, *Guiton* does not provide a dispositive answer to the question."

(*Ibid.*, quoting *People v. Cross*, *supra*, 45 Cal.4th at p. 70 (conc. opn. of Baxter, J.), emphasis in original.)

An examination of the entire record in determining prejudice is also consistent with federal jurisprudence. When the Supreme Court decides

whether a constitutional error in jury instructions is harmless, it conducts prejudice analysis by examining the entire record. (*Neder v. United States*, *supra*, 527 U.S. at pp. 16-17.) Thus, upon the United States Supreme Court's remand of *Pulido* for consideration of harmless-error under *Brecht*, the Ninth Circuit examined the entire record to determine that the instructional error was harmless. (*Pulido v. Chrones* (2010) 629 F.3d 1007, 1016, 1019 ["it is entirely appropriate to consider . . . the trial record as a whole"].)

b. The *Chiu* Error in the Instructions Did Not Result in a Miscarriage of Justice

As the Court of Appeal correctly held, and as discussed in further detail below, a review of the entire record in this case, including the evidence presented to the jury, establishes that the claimed *Chiu* error was harmless.

The evidence of petitioner's conduct, as presented to the jury, shows that petitioner "aided or encouraged [Darren] with the knowledge of [Darren's] unlawful purpose . . ., [and] with the intent . . . of committing, encouraging or facilitating" the murder of Esparza. (Cf. *Chiu*, *supra*, 59 Cal.4th at p. 167.) Not only did petitioner momentarily stop assaulting Parker when he heard the first shot after Darren said, "[t]his is Lomas," but petitioner turned, saw that Darren had shot Esparza, and then swung at Parker again, hitting Parker in the head, while Darren continued shooting Esparza. As the Court of Appeal below recognized, these actions establish premeditation and deliberation, if not from the time of the first shot, then at a minimum *after* the first shot, as petitioner prevented Parker from seeking aid for Esparza, while Darren continued shooting.

Petitioner's actions in preventing Parker from seeking aid for Esparza help establish his intent to facilitate or encourage Esparza's murder. (*People v. Koontz* (2009) 27 Cal.4th 1041, 1082.) Preventing a witness

from obtaining medical aid for a homicide victim is "indicative of a deliberate intent to kill." (*Ibid.*) And petitioner here intentionally swung and punched Parker *after* hearing a gunshot; *after* stopping for a moment to survey the scene; and *after* seeing Darren standing over Esparza with a firearm preparing to shoot again. (2 RT 229, 236, 244, 286.) Petitioner's acts of punching Parker prevented Parker from immediately seeking medical aid for Esparza, had the potential (depending on the success of the punch) to prevent Parker entirely from seeking aid, and allowed petitioner and Darren to flee the scene more easily.

In addition to the evidence of petitioner's own actions, the jury also heard testimony from a gang expert that petitioner (knowing Darren was armed with a firearm) challenged Parker and Esparza "precisely because [petitioner] knew [Darren] was carrying a gun and [petitioner] relied on [Darren's] support as he attacked the others. Further, [petitioner's] use of violence would enhance the respect he received within the gang and for the gang among rival gangs." (*In re Martinez* (May 15, 2015, D066705); 8 RT 1355, 1359-1361; 9 RT 1489.)

Detective Hernandez also testified that Lomas street gang members who possess a weapon are not only inclined to use those weapons but are expected to use them. (8 RT 1355, 1361.) And, if they back away after challenging perceived rival gang members, the gang and individual gang members would be perceived as weak, so that there is an expectation that gang members must follow through on a challenge. (8 RT 1361.) Further, the expert testimony established that gang violence escalates quickly and that firearms are a factor in that escalation, so that it is not uncommon for an assault to escalate to murder. (9 RT 1513.) And petitioner was no stranger to gang fights, as he had bragged about being involved in them previously and had bragged about attacking a rival gang member while in custody awaiting trial in this case. (9 RT 1513.)

The evidence establishes that the result would have been the same, even had the jury not been instructed with the incorrect theory. A rational jury would have found petitioner's guilt of first degree murder under the proper direct-aiding theory: i.e., that petitioner had directly aided and abetted Darren in the first degree murder of Esparza, with the knowledge that Darren intended to kill Esparza and with the intent or purpose of committing, encouraging or facilitating that murder. Any *Chiu* error, therefore, was harmless under *Watson* and *Brecht*: it is not reasonably probable that the petitioner would have received a better result in the absence of the error. Respondent submits it was harmless even under *Chapman*, because it may be said beyond a reasonable doubt that a reasonable jury would have convicted petitioner under the correct theory. (See *Neder v. United States, supra*, 527 U.S. at pp. 16-17.)

c. *Fiore v. White* Does Not Help Petitioner

1. Petitioner cites *Fiore v. White* (2001) 531 U.S. 225 as supporting his contention that he is entitled to relief under the federal Constitution.[6] But *Fiore* is distinguishable from the instant case. Fiore was convicted of operating a hazardous waste facility without a permit. Subsequently, in a separate appeal, the Pennsylvania Supreme Court interpreted the state penal statute for the first time "and made clear that Fiore's conduct was not within its scope." (*Fiore v. White, supra*, at p. 226.) Despite that holding, the state court denied Fiore collateral relief. After granting certiorari to determine when the federal due process clause requires application of a new interpretation of a state criminal statute retroactively to cases on collateral

[6] Petitioner also cites *Schriro v. Summerlin* (2004) 542 U.S. 348, 351-352 [124 S.Ct. 2519, 149 L.Ed.2d 442] for the proposition that decisions narrowing the scope of liability apply to convictions already final on appeal. Respondent, however, does not challenge the applicability of *Chiu's* substantive rule to petitioner's claim.

review, the United States Supreme Court certified a question to the Pennsylvania high court, asking whether the state court's interpretation of the statute represented a change in the law. (*Id.* at p. 227.) The Pennsylvania Supreme Court indicated that the interpretation was not a change in the law, so that retroactivity principles were not at issue. (*Id.* at p. 226.)

The Supreme Court then granted Fiore relief on another ground not implicated here: that, under the state court's interpretation of the elements of the penal statute, the state simply had failed to prove all of the elements of the crime. (*Id.* at pp. 228-229, citing *Jackson v. Virginia* (1979) 443 U.S. 307, 316 [99 S.Ct. 2781, 61 L.Ed.2d 560].) The criminal statute underlying his conviction prohibited operation of the facility without a permit. But Fiore had a permit. So proof of that element failed. (*Id.* at pp. 228-229.)

Here, however, the evidence was sufficient to show that petitioner was guilty of first degree murder under the direct-aider theory. The Court of Appeal correctly recognized that the evidence was sufficient to support the conclusion that petitioner directly aided and abetted Darren in Esparza's murder. So *Jackson v. Virginia*, as applied in *Fiore*, would not require reversal. It was not reasonably probable that a different outcome would have resulted, absent the instruction on natural and probable consequences.

2. It may be that the procedural posture of petitioner's case is unusual. He filed a petition for review with this Court in his direct appeal after the petition for review in *Chiu* had been granted, but before this Court issued its opinion. And, instead of granting and holding his petition for *Chiu*, this Court denied it, in effect terminating his appeal and relegating him to habeas corpus with its attendant policy restrictions on relief. But this Court's disposition of the review petition was unremarkable. Petitioner did not argue in his direct appeal that first degree murder was unavailable as a matter of law for an accomplice under the "natural and probable

consequences" theory. The issue presented here, moreover, implicates the rules to be applied to the run of habeas petitions that now might identify *Chiu* error in trials that took place, and in judgments that became final, long before the petition in *Chiu* was ever pending before this Court.

Even if petitioner were entitled to relief from generally applicable habeas corpus restrictions in light of the specific circumstances of his direct appeal, his claim still would fail under the *Chapman* test applied in *Chiu.* And finality principles would nonetheless counsel that relief on a *Chiu* claim raised in habeas corpus generally requires pleading and proof of an excess of jurisdiction in the *Mutch* sense and, in any event, a miscarriage of justice in the *Watson* sense.

CONCLUSION

The judgment of the Court of Appeal should be affirmed.

Dated: April 13, 2016

Respectfully submitted,

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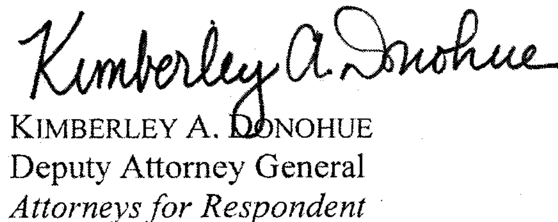

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CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWER BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 6,834 words.

Dated: April 13, 2016

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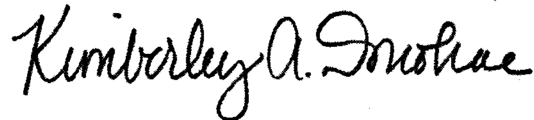

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DECLARATION OF SERVICE BY U.S. MAIL & ELECTRONIC SERVICE

Case Name: **In re Hector Martinez on Habeas Corpus**
No.: **S226596**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On April 13, 2016, I served the attached **ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 600 West Broadway, Suite 1800, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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and, furthermore I declare, in compliance with California Rules of Court, rules 2.251(i)(1)(A)-(D) and 8.71 (f)(1)(A)-(D), I electronically served a copy of the above document on April 13, 2016 to **Appellate Defenders, Inc.**'s electronic service address eservice-criminal@adi-sandiego.com and to **Marilee Marshall**, Appellant's attorney's electronic service address by 5:00 p.m. on the close of business day at marshall101046@gmail.com.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 13, 2016, at San Diego, California.

K. Armstrong
Declarant

Signature

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