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Supreme Court of California
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Supreme Court No. _________

In the Supreme Court of the State of California

The People,

Plaintiff and Respondent,

v.

James Leo Carney, et al.,

Defendant and Appellant.

Court of Appeal
No. C077558

Sacramento County
Superior Court
No. 11F00700

Appeal From The Superior Court Of Sacramento County

Honorable Joseph Kevin J. McCormick, Judge Presiding

Appellant Carney's Petition for Review

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Appointed by Court of Appeal,
in Conjunction with the Central
California Appellate Program
Independent Case System

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In the Supreme Court of the State of California

The People, Plaintiff and Respondent, **v.** **James Leo Carney, et al.**, Defendant and Appellant.	Court of Appeal No. C077558 Sacramento County Superior Court No. 11F00700

Petition for Review

To the Honorable Tani Cantil-Sakauye, Chief Justice, and the Honorable Associate Justices of the California Supreme Court:

Under California Rules of Court, rule 8.500,[1] defendant-appellant James Carney petitions for review of the December 10, 2019 Court of Appeal opinion affirming his judgment of voluntary manslaughter with gun use. The unpublished opinion (opn) is attached as the Appendix.

Among other issues, Carney spotlights a 90-year-old — but very much alive — state instructional standard of review that has *never* been examined in a published opinion. Which might be fine, if odd — except that the rule is as unconstitutional as it is illogical. And absent review, it will continue to work its mischief — especially against criminal appellants, by improperly tipping the scales against their instructional claims.

[1] Further unspecified rule citations are to the California Rules of Court.

Issues Presented for Review

Re the Court of Appeal's judgment-favoring standard for interpreting jury instructions ("if reasonably possible, we interpret jury instructions to support rather than defeat the judgment") (see arg. I, *post*):

1. Does this rule violate federal and state due process by directly conflicting with the constitutional "reasonable likelihood" standard adopted by this court and the United States Supreme Court?

2. More broadly, is such an appellate standard of review invalid, where:

    a. throughout 90 years of the standard's appearance in Court of Appeal opinions, not one has explained it?

    b. although it was originally announced only as a standard of prejudice in civil appeals, it's now used exclusively for error determination in criminal cases, with no court ever discussing or explaining that migration?

    c. it's otherwise inconsistent with California law, public policy, and logic?

Re the right to instructions on self-defense and defense of others (see arg. II, *post*):

3. Where a homicide defendant's theory is defense of self and others, but the court's corresponding instruction identifies the theory as applicable only to murder and not to manslaughter, should the resulting manslaughter judgment be reversed?

4. Where — consistent with *People v. Trevino* (1988) 200 Cal.App.3d 874 as approved in *People v. Nguyen* (2015) 61 Cal.4th 1015, 1045 — the defendant seeks a multiple-states-of-mind jury instruction, is its denial reversible error?
5. As applied to issues 3 and 4, what is the standard of reversal — state or federal — for instructional error as to a complete defense?

Re the spontaneous statement hearsay exception (Evid. Code, § 1240) (see arg. III, *post*):

6. Where the defendant seeks to introduce, as a spontaneous statement, a shooting victim's hearsay in the incident's immediate aftermath, is the evidence properly excluded because of the declarant's "possible motivation" to lie?

Re cumulative error and its impact on a trial's fundamental fairness (see arg. IV, *post*):

7. Did the cumulative impact of the errors at Carney's trial deny him the federal due process right to a fundamentally fair trial?

Brief in Support of Review

Statement of Case and Facts[2]

I. Introduction

Gunfire erupted at a Sacramento strip mall; within moments, bullets flew in different directions. Two people — one an unarmed bystander — died; more suffered injuries. Theorizing the incident was a gang-related shootout, the prosecutor brought four defendants — two from each "side" — to trial for murder, firearm assaults, and related charges. All four admitted having fired guns but argued they'd acted in self-defense or defense of others. More specifically, James Carney and Larry Jones relied on defense against an attack by codefendants Lonnie and Louis Mitchell, who claimed they were attacked by gangsters including Jones and Carney. (Opn 1-7.)

After sorting through 22 days of evidence (1CT 215-275, 282-285, 292-300; 2CT 319-322, 329-332, 338-341, 356-359, 415-424, 427-437, 444-447; 1ACT 60-62)[3] and deliberating another five (1ACT 61-62; 2CT 556-558, 560-562, 565), the jury reached verdicts: the Mitchells, guilty of first-degree murder, multiple firearm assaults, and weapons possession; Jones, not guilty; Carney — who fired the fatal shot — acquitted of murder and firearm assaults, but guilty of

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[2] Carney adopts the opinion's review of case and facts (opn 1-9), except where noted.

[3] Carney cites the record to include the following: 1CT – 3CT, *People v. Carney*, Clerk's Transcript; 1ACT – 3ACT, first and third Clerk's Augmented Transcripts. (For a more detailed "Record Citation Key" to the complex record, see AOB p. 16.)

voluntary manslaughter as a lesser offense[4] and gun possession, with the gang enhancement not true. (Opn 5-6.)

Sentenced to 21 years in prison, Carney appealed, as did the Mitchells. Carney argued he was unfairly convicted of manslaughter where the trial court modified the pattern jury instruction so as to effectively remove defense of self/other as a complete defense to manslaughter; the court refused a non-duplicative clarifying instruction on the defense, despite evidentiary support; the court erroneously excluded evidence corroborating the defense theory; and these errors combined to deny a fair trial. (Opn 6-7.)

II. Key evidence re defense theories

For this petition —primarily raising defense instructional claims — Carney leaves the underlying story to the opinion (opn 2-5), while briefly highlighting evidence supporting his defense (*People v. King* (1978) 22 Cal.3d 12, 15-16 ["Because the right to instructions on self-defense is the central issue in this appeal, our recital of the evidence introduced at trial is necessarily one emphasizing matters which would justify such instructions, rather than the customary summary of evidence supporting the judgment"], citations & fn. omitted):

- Ernest Stoute testified Carney "returned fire," i.e., "shot back" after Louis Mitchell suddenly began shooting in their direction. (5RT 1486-1487; 6RT 1542-1543, 1568, 1727, 1793, 1795; 7RT 1801, 1827; opn 3.)

[4] The jury was instructed on both imperfect defense and passion/quarrel theories. (Opn 7.)

- Stoute (5RT 1486, 1488-1489; 6RT 1542-1544, 1567-1568, 1666-1668, 1793; 7RT 1825-1826), Dominique Lott (7RT 1890-1892, 1898, 1922-1925, 1937, 1941, 1963, 2059-2060), Johnny Escoto (4RT 1098-1103, 1184-1186), Jorge Villet (5RT 1221-1225, 1234-1237, 1245-1247, 1252), and Mitzi Carrillo (8RT 2114-2116) recalled one or more Mitchells or other shooters firing at other people in other directions. (Opn 3.)
- One such direction appeared to be into the barbershop (5RT 1221-1225, 1235, 1245-1247, 1252), where Carney understood his longtime friend Jones felt trapped (opn 2; see also opn 3-4 [Mitchells also shot inside the barbershop, injuring four bystanders].)

Argument: Necessity for Review

I. Review is necessary in order to — finally — determine the validity of the Court of Appeals' 90-year-old judgment-favoring standard for interpreting jury instructions.

A. Introduction

This petition tells an unusual story, one that began in Sacramento almost a century ago and — Carney hopes — will end with this court's review. It's a story, because it traces a central character's life. And it's unusual, not just because that character is a legal principle — this is a petition for review, after all — but because all 43 published (and countless unpublished) opinions to have stated the rule have done *only* that. None has actually discussed it, let alone explained why it makes sense. As Carney will explain, it doesn't.

The principle is a review standard for determining whether instructional error occurred. From the opinion below:

> [I]f reasonably possible, we interpret jury instructions to support rather than defeat the judgment. [Citations.]

(Opn 12.)

As "the compass that guides the appellate court to its decision" (*People v. Jackson* (2005) 128 Cal.App.4th 1009, 1018) a standard of review is undeniably "an important question of law" that must be "settle[d]." (Rule 8.500(b)(1); see, e.g., *People v. Lindberg* (2008) 45 Cal.4th 1, 36, fn. 12 ["'the threshold matter to be determined[, …] the prism through which we view the issues'"]; *Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711 [review granted in part to determine review standard]; *In re Rosenkrantz* (2002) 29 Cal.4th 616, 625 [same]; *Johnson v. California* (2005) 543 U.S. 499, 502, 505 [same, re certiorari]; *In re Ramirez* (2001) 94 Cal.App.4th 549, 562, disapproved on another point in *In re Dannenberg* (2005) 34 Cal.4th 1061, 1100 ["the question of the proper standard of review raises important legal and public policy issues"].)

So the judgment-favoring instructional rule is inherently review-worthy. But there's much more: It also suffers from a fundamental defect, in that it contradicts a well-established due process standard. Again, quoting the opinion:

> [E]rror occurred if there is a "reasonable likelihood" the jury misapplied the instruction, even if the jury might have construed the instruction properly.

(Opn 12; see also, e.g., *People v. Covarrubias* (2016) 1 Cal.5th 838, 906 ["In reviewing an ambiguous instruction, we inquire whether there is a reasonable likelihood that the jury misunderstood or misapplied

the instruction in a manner that violates the Constitution"], internal quotations and citation omitted]; *Estelle v. McGuire* (1991) 502 U.S. 62, 72.)[5]

As Carney will explain, these two standards, designed to serve the exact same purpose — testing instructional ambiguity for error — can't be reconciled. Essentially: in reasonably construing ambiguity for its impact on jurors, we can resolve any doubts by finding error (reasonable likelihood standard) or by finding none (judgment-favoring standard). And as this case demonstrates, many

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[5] Carney relies on the opinion for its spot-on statement of the issue: "Carney complains that many appellate court opinions, including opinions of this court, unthinkingly and incorrectly apply a 'judgment-favoring' 'standard of review' to jury instructions instead of the more appropriate standard of review pursuant to which error occurred if there is a 'reasonable likelihood' the jury misapplied the instruction, even if the jury might have construed the instruction properly. Carney clams there should be no 'judgment-favoring' rule of interpretation as to jury instructions, and such a rule cannot be reconciled with the 'reasonable likelihood' standard of review. Carney asks us to overrule various cases in which we stated the general principle that, if reasonably possible, we interpret jury instructions to support rather than defeat the judgment. [Citations.]" (Opn 12.)

Unfortunately, the opinion's accuracy in identifying the issue didn't inform the ensuing analysis. Carney offered twelve pages of headnoted, sub-headnoted, and authority-supported argument, identifying three "Problem[s]" with the judgment-favoring standard. (AOB arg. I-D, pp. 59-71.) When respondent argued there was no conflict (see opn 12), Carney replied with another three-part argument, "Standards of review: Should this court affirm or discard a 'judgment-favoring rule of instructional interpretation?" (ARB arg. I-B, pp. 11-13.) Inexplicably, the opinion asserts that Carney "*fails to explain* why any of the cited cases should be overruled" (opn 12, italics added), then addresses only a hypothetical explanation (opn 12-14).

Carney assures this court: There was no such failure in his briefing. He didn't petition for rehearing, because, again, the opinion correctly stated the issue. (Rule 8.500(c)(2).)

Courts of Appeal repeat and rely on the latter standard without exploring the contradiction. Accordingly, review is necessary "to secure uniformity of decision[.]" (Rule 8.500(b)(1).)

B. Background: the history of the judgment-favoring standard for reviewing instructional ambiguity

1. 1929-1945: Third District, civil appeals, prejudice focus

As nearly as Carney can determine, the standard first appeared in a Third District civil appeal: "Instructions should receive such reasonable construction as will uphold, rather than defeat, a judgment." (*Bogue v. Roeth* (1929) 98 Cal.App. 257, 266.) No authority was cited; and although the opinion applied the rule in finding "no prejudicial error," there was no discussion of the standard beyond the quoted statement. Over the next 16 years, four more Third District opinions took the same approach:

(2) *Huber v. Scott* (1932) 122 Cal.App. 334, 343;

(3) *Reuter v. Hill* (1933) 136 Cal.App. 67, 76;

(4) *Megee v. Fasulis* (1944) 65 Cal.App.2d 94, 101 [citing *Reuter*];

(5) *Mullanix v. Basich* (1945) 67 Cal.App.2d 675, 681 [same].

2. 1948-1985: other Courts of Appeal, focus includes error determination

During this period, the judgment-favoring standard appeared in an additional dozen decisions — again, all civil appeals — and now including the First, Second, and Fourth Districts:

(6) *Perbost v. San Marino Hall-School* (1948) 88 Cal.App.2d 796, 801 [citing *Mullanix*];

(7) *Smith v. Southern Pac. Co.* (1956) 138 Cal.App.2d 459, 466 [quoting *Mullanix*];

(8) *Aspen Pictures, Inc. v. Oceanic S.S. Co.* (1957) 148 Cal.App.2d 238, 253 [same];

(9) *Rupp v. Summerfield* (1958) 161 Cal.App.2d 657, 667 [same, also citing *Smith*];

(10) *Pandell v. Hischier* (1959) 166 Cal.App.2d 693, 697 [quoting *Mullanix* and citing *Reuter*];

(11) *Lerner v. Glickfield* (1960) 187 Cal.App.2d 514, 523 [citing *Rupp* and *Smith*];

(12) *Miller v. Western Pac. R. Co.* (1962) 207 Cal.App.2d 581, 601 [citing *Pandell*];[6]

(13) *Merlo v. Standard Life & Acc. Ins. Co*. (1976) 59 Cal.App.3d 5, 14 [quoting *Rupp*];

(14) *Little v. Stuyvesant Life Ins. Co.* (1977) 67 Cal.App.3d 451, 465 [citing *Merlo* and *Rupp*];

(15) *Kostecky v. Henry* (1980) 113 Cal.App.3d 362, 375 [citing *Merlo, Lerner,* and *Rupp*];

(16) *Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 817 [citing *Kostecky*, *Merlo*, and *Rupp*];

(17) *Tele-Count Engineers, Inc. v. Pacific Tel. & Tel. Co.* (1985) 168 Cal.App.3d 455, 463 [quoting *Merlo*].

One difference: Some courts applied the rule not to determine whether arguable instructional error may have been prejudicial, but to determine whether the instructions were erroneous in the first

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[6] Also cited in *Miller*: *Stout v. Southern Pacific R.R. Co.* (1954) 127 Cal.App.2d 491, 497. But *Stout* didn't note the standard at issue here.

place. (See cases (7), (9), (10), (11), (17).) And a consistency: As before, no opinions actually discussed the rule.

3. 1986-2006: another district, both civil and criminal appeals

The judgment-favoring standard found its way into an additional six opinions, and into the Fifth District:

(18) *People v. Laskiewicz* (1986) 176 Cal.App.3d 1254, 1258 [citing *Kostecky*];[7]

(19) *Travelers Ins. Co. v. Lesher* (1986) 187 Cal.App.3d 169, 189 [quoting *Little*];

(20) *People v. St. Joseph* (1990) 226 Cal.App.3d 289, 296-297 [quoting *Laskiewicz*];

(21) *Liberty Transport, Inc. v. Harry W. Gorst Co.* (1991) 229 Cal.App.3d 417, 439 [quoting *Little*];

(22) *People v. Martin* (2000) 78 Cal.App.4th 1107, 1111-1112 [quoting *Laskiewicz*];

(23) *Thompson v. County of Los Angeles* (2006) 142 Cal.App.4th 154, 163 [quoting *Martin* and citing *Kostecky*].[8]

Albeit with only six reported opinions, this was a significant period in the standard's development. Not that the rule was fleshed out in any way; on the contrary, and once again, these courts didn't discuss it. The difference: *Laskiewicz* marked its first appearance in a

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[7] Also cited: *People v. Salas* (1975) 51 Cal.App.3d 151, 155-158; *People v. Smith* (1973) 33 Cal.App.3d 51, 67-68; *People v. Rhodes* (1971) 21 Cal.App.3d 10, 21-22. But those decisions didn't mention the standard.

[8] Also cited in *Thompson*, with an "accord" signal: *People v. Clair* (1992) 2 Cal.4th 629, 663. Far from being in accord, *Clair* embraced the "reasonable likelihood" standard as the then-"new test … for examining instructions under California law."

criminal case; and *Thompson* was the last such civil opinion. Since 2006 the rule has been applied exclusively in criminal appeals.

Also significant: Both *People v. St. Joseph* and *People v. Martin* quoted *Laskiewicz* as sole authority; and both cited the standard not as a prejudice test, but as a threshold rule in analyzing instructional issues. So in the modern world of criminal appellate law — and still without explanation — the same review standard, unaltered since 1929, is somehow within the requisite analysis in "judging the *adequacy* of instructions[.]" (*People v. Martin*, *supra*, 78 Cal.App.4th 1107, 1111-1112, italics added.)

4. 2008-present: all Courts of Appeal, only criminal cases, threshold standard of review for error determination

In relative terms, the current period represents something of an explosion: Now a criminal-only, threshold-only, judgment-favoring standard of instructional review, it has become fully normalized. Over the past twelve years, *twenty* published opinions — four in 2019 alone — announced the rule in that context:

(24) *People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088 [quoting *Laskiewicz*];

(25) *People v. Vang* (2009) 171 Cal.App.4th 1120, 1129 [citing *Martin*];[9]

(26) *People v. Johnson* (2009) 180 Cal.App.4th 702, 707 [quoting *Martin*];

[9] Also cited in *Vang*: *People v. Guerra* (2006) 37 Cal.4th 1067, 1148 — but only for the principle that jurors presumably understand and correlate instructions.

(27) *People v. Franco* (2009) 180 Cal.App.4th 713, 720 [citing *Ramos*];

(28) *People v. Riley* (2010) 185 Cal.App.4th 754, 767 [quoting *Ramos*, in turn quoting *Laskiewicz*];

(29) *People v. Jackson* (2010) 190 Cal.App.4th 918, 923 [quoting *Franco*];

(30) *People v. Lopez* (2011) 198 Cal.App.4th 698, 708 [citing *Ramos*];

(31) *People v. Mathson* (2012) 210 Cal.App.4th 1297, 1312 [quoting *Martin*];

(32) *People v. McPheeters* (2013) 218 Cal.App.4th 124, 132 [citing *Franco*];

(33) *People v. Mason* (2013) 218 Cal.App.4th 818, 825 [quoting *Franco*];

(34) *People v. Sy* (2014) 223 Cal.App.4th 44, 59 [quoting *Mathson*];

(35) *People v. Martinez* (2017) 10 Cal.App.5th 686, 708 [quoting *Mason*];

(36) *People v. Lua* (2017) 10 Cal.App.5th 1004, 1013 [quoting *Ramos*, in turn quoting *Laskiewicz*];

(37) *People v. Spaccia* (2017) 12 Cal.App.5th 1278, 1287 [same];

(38) *People v. Jo* (2017) 15 Cal.App.5th 1128, 1152 [citing *Ramos*];

(39) *People v. Webb* (2018) 25 Cal.App.5th 901, 906 [quoting *Ramos*, in turn quoting *Laskiewicz*];

(40) *People v. Martinez* (2019) 34 Cal.App.5th 721, 728 [citing *Laskiewicz*];

(41) *People v. Bates* (2019) 35 Cal.App.5th 1, 9 [citing *Ramos*];

(42) *People v. Kopp* (2019) 38 Cal.App.5th 47, 67-68, review granted Nov. 13, 2019 on another point, S257844 (rule 8.1115(e)(1)) [quoting *Ramos*, in turn quoting *Laskiewicz*];

(43) *People v. Wetle* (Dec. 13, 2019) __ Cal.App.5th __, No. H046762, part II-A-1 [same].

Of these twenty opinions *repeating* the judgment-favoring standard, the total *discussion* — examination, explanation, analysis (critical or otherwise) — of that standard consisted of … nothing.

5. Other courts

Despite almost a century of Court of Appeal reliance on the judgment-favoring instructional standard, not a single Supreme Court opinion mentions it. Nor, for that matter, has Carney found one from another jurisdiction. The standard was noted in *Doherty v. St. Louis Butter Co.* (Mo. 1936) 339 Mo. 996 [98 S.W.2d 742]. But that notation appeared only in the losing party's briefing, before the opinion began, and citing as authority California decisions including *Bogue* and *Huber* (cases (1) and (2), *ante*).

C. The unsettled issue's importance

Ninety years into the standard's life, a critical examination is long overdue. After all, "multiple repetitions over time may tend to obscure the original purpose of the rule." (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1370, internal quotations and citations omitted; *Powers v. City of Richmond* (1995) 10 Cal.4th 85, 168 (dis. opn. of Lucas, C.J.) ["courts should avoid … mechanical incantations of a so-called 'rule' without bothering to consider whether it is supported by

anything other than a prior opinion that said the same thing"].) And in any appeal presenting an instructional issue, this "rule" is as material as it gets: If incorrect, judgments may be erroneously affirmed.

D. The need to secure uniformity of decision

The problem here concerns two parallel rules designed to achieve the same purpose: *Where jury instructions viewed as a whole are ambiguous on the point at issue, are they erroneous; i.e., how should they be construed by the reviewing court, particularly where there are two or more reasonable constructions, both proper and improper?* Under the judgment-favoring standard, of course, the court should go with the interpretation that "support[s] rather than defeat[s] the judgment. [Citations.]" (Opn 12.) In other words: **no instructional error**.

But between 1990 and 1992 the United States Supreme Court and this court "settle[d] upon a single formulation" of the standard for testing ambiguous instructions: Determine "whether there is a *reasonable likelihood* that the jury has applied the challenged instruction" *improperly*. (*Boyde v. California* (1990) 494 U.S. 370, 380, italics added [re 8th Amendment issue]; *Estelle v. McGuire* (1991) 502 U.S. 62, 72 [broadened to due process challenge]; *People v. Kelly* (1992) 1 Cal.4th 495, 525 [following *Estelle*]; *People v. Clair*, *supra*, 2 Cal.4th 629, 663 [adopting standard re state law claims]; see also *Calderon v. Coleman* (1998) 525 U.S. 141, 147: if the "possibility" of an unconstitutional interpretation is "a reasonable one," error is shown.) In other words: **instructional error**.

In short, where there are conflicting reasonable interpretations — one erroneous, one proper — the reasonable likelihood standard

dictates a finding of error; the judgment-favoring rule demands the opposite. So the two doctrines are irreconcilable; and it should be clear which survives: Where the United States Supreme Court has announced a standard "for scrutinizing ambiguous (or assertedly ambiguous) instructions under the United States Constitution," state courts must apply it. (*People v. Clair, supra,* 2 Cal.4th 629, 662, citing the Supremacy Clause.) And as a matter of state law, this court's unwavering allegiance to the reasonable likelihood standard similarly binds the Courts of Appeal. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) But thirty years into this conflict, no authority has addressed it.

E. Additional problems that should be addressed on review

Beyond the constitutional conflict noted above, the judgment-favoring instructional standard begs for a critical examination:

1. *Common law history*. Even if the rule were otherwise valid when originally announced, it must be understood in that context. (*People v. Knoller* (2007) 41 Cal.4th 139, 155 [opinion isn't authority for unconsidered proposition].) As Carney has shown, that involved analyzing the prejudicial effect of error — not determining whether instructions were erroneous in the first place. So when a modern court responds to a claim of error by interpreting instructions so as to favor the judgment, that approach is simply wrong.

For that matter, the rule fails even as a state prejudice standard. An error requires reversal where it's reasonably probable that it affected the verdict. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) And "a 'probability' in this context does not mean more likely than not,

but merely a *reasonable chance*, more than an *abstract possibility*. [Citations.]" (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715, original italics.)

2. *Public policy*. "'The purpose of instructions is to present and explain to a jury the law of a case.'" (*Haft v. Lone Palm Hotel* (1970) 3 Cal.3d 756, 766, fn. 10.) Of course, the explanation may be correct or incorrect; but it's the *court*'s job to ensure the former, with de novo review of the point — i.e., "without deference" to the trial court. (*People v. Waidla* (2000) 22 Cal.4th 690, 733.) For the appellate court to defer to the *jury's* likely take on the instructions is effectively to surrender to lay jurors the most significant role played by the third branch of government: "It is emphatically the province and duty of the judicial department to say what the law is." (*Marbury v. Madison* (1803) 5 U.S. 137, 177; see also *People v. Ngo* (2014) 225 Cal.App.4th 126, 155: "A jury's verdict, as 'the collective judgment of the community,' deserves deference. [Citation.] But this presumes the verdict comes from a jury that is properly instructed ….")

3. *Logic*. In analyzing an instructional claim, "the customary rule of appellate review" "assume[s] the jury might have believed the evidence and drawn all inferences most favorable to" the *appellant*, not the judgment. (*Freeze v. Lost Isle Partners* (2002) 96 Cal.App.4th 45, 49, internal quotations and citations omitted; *Henderson v. Harnischfeger Corp.* (1974) 12 Cal.3d 663, 674.) As a matter of logic in analyzing instructional issues, it's impossible to square this appellant-favoring view of the *evidence* with the exact opposite view of the *instructions*. Just as statutes should be construed in harmony so as to avoid absurd results (*People v. Pieters* (1999) 52 Cal.3d 894,

898-899), so common law principles shouldn't develop in such a way that they inexplicably contradict each other. "[T]he body of the law should make sense, and … it is the responsibility of the courts … to make it so." (Scalia & Garner, Reading Law: The Interpretation of Legal Texts (2012), p. 252.)

F. This case is an ideal vehicle to address the issue.

Through ninety years and 43 published opinions, Courts of Appeal have yet to critically examine the judgment-favoring instructional standard — or examine it at all. So this isn't an issue likely to percolate through those courts until, say, contradictory holdings grab this court's attention. (Rule 8.500(b)(1) [review appropriate "[w]hen necessary to secure uniformity of decision"].)[10] Even in the unpublished opinion below — where the issue was quite thoroughly briefed (AOB 59-71; RB 40-41; ARB 11-13) and correctly identified by the Court of Appeal (opn 12) — that same court inexplicably ignores the specifics of Carney's position. (See fn. 5 at arg. I-A, *ante*.)

Instead, the court somehow discerns that "Carney's argument about not viewing the evidence [*sic*; presumably 'instructions'] in favor of the judgment *appears to derive* from the rule applicable to the specific situation where erroneous instructions preclude the jury from considering a defense theory on a question that is one of fact

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[10] The undersigned counsel has petitioned for review on this issue once before, also in a Third District appeal: *People v. Her*, No. S180834 (rev. den. May 12, 2010); issue 4: "Does a judgment-favoring standard announced by some Courts of Appeal — that instructions should be interpreted 'so as to support the judgment' if reasonable to do so — contravene the reasonable likelihood standard?"

on conflicting evidence. Such a contention is not at issue in this appeal …." (Opn 12-13, italics added.)

Only the last point is correct: The imagined "contention" is unquestionably "not at issue in this appeal" — because Carney didn't raise it, and because there's no logical connection between it and the *actual* issue of whether the judgment-favoring instructional standard is valid. So the opinion's following discussion of "*People v. Young* (1963) 214 Cal.App.2d 641 (not cited by the parties)" (opn 13-14) is irrelevant — presumably why the parties didn't cite it. The court's conclusion: "Here, there is no issue about instructions erroneously precluding the jury from considering the defendant's factual theory." (Opn 14.) Carney agrees: In criticizing the judgment-favoring standard, he raised no such issue. But his actual, authority-supported criticism merits a genuine response, so he turns to this court.

Moreover, it's at least reasonably likely that resolution of the issue would lead to a different result in Carney's appeal. His first briefed issue challenged the homicide instructions in this self-defense case: There's a reasonable likelihood jurors found him guilty of manslaughter without understanding the defense was applicable to that crime. (AOB arg. I; see arg. II, *post*.) But his argument was dependent on identifying and resolving ambiguity in the instructions as a whole. And in briefly rejecting that claim, the Court of Appeal implicitly acknowledges the ambiguity. (Opn 14-15 [self-defense instruction failed to include manslaughter; but self-defense concepts

appeared elsewhere].) Had the court not affirmed the judgment-favoring standard (opn 12-14), the result may have been different.[11]

II. Review is necessary to resolve self/other-defense instructional issues.

As his first two appellate issues, Carney raised instructional claims going to his sole defense theory: self-defense and / or defense of others. (AOB args. I-II, pp. 55-104; opn 10-20.) In this argument he'll explain the importance of those issues and urge this court to resolve an unsettled question: Does self-defense instructional error impact defendants' federal constitutional rights?[12]

A. As erroneously given by the trial court, the pattern self-defense instruction removed complete self-defense and defense of another as a defense to manslaughter.

Carney argued that, as presented to his jury, CALCRIM No. 505 was materially erroneous where it identified only murder — and not manslaughter, the crime he was convicted of — as subject to the defense. (AOB arg. I; pp. 71-73, 76-77.) Assuming the claim wasn't forfeited (opn 12, noting Carney's reliance on Pen. Code, § 1259), the Court of Appeal agrees that although the instruction is designed to apply to both murder and manslaughter, the trial court omitted manslaughter references. That is, the court "instructed the jury *only as to murder*: 'The defendants are *not guilty of murder* if they were

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[11] In the instructional issue discussion (opn 14-15), the opinion identifies additional review standards but doesn't return to the judgment-favoring rule — having already held that it doesn't conflict with the reasonable likelihood standard (opn 12-14).

[12] Carney refers to "self-defense" for convenience; the theory also includes defense of another. (CALCRIM No. 505.)

justified in killing someone in self-defense or defense of another.'" (Opn 11, italics added; 18RT 5037; see also 5039, concluding same instruction: "The People have the burden of proving beyond a reasonable doubt that the killing was not justified. If the People have not met this burden, you must find the defendant *not guilty of murder*." (Italics added.) And see opn 14 ["the trial court's version of CALCRIM No. 505 did not say that self-defense could justify manslaughter as well as murder"].)

But — as Carney acknowledged in leading this petition with instructional ambiguity standards — the CALCRIM No. 505 omissions don't end this story. So he also argued: (1) Although self-defense-manslaughter connections appeared elsewhere, the instructions *as a whole* remained ambiguous, with a reasonable likelihood of being erroneously understood. (AOB 72-79, 82-85.) (2) Such a likelihood was all the more reasonable where closing arguments didn't address and clarify the specific ambiguity. (AOB 80-82.) (Opn 10-11.)

The opinion follows suit, identifying two instructions as correct in this context: (1) In telling jurors "that *imperfect* self-defense would reduce murder to voluntary manslaughter[,]" CALCRIM No. 571 "also instructed the jury 'If you conclude the defendant acted in *complete* self-defense or defense of another, their [*sic*] action was lawful and you must find him not guilty of any crime.'" (Opn 14-15, italics in opinion.) (2) From CALCRIM No. 500 jurors learned "general principles of homicide," among them: "'If a person kills with a legally valid excuse or justification, the killing is lawful and he's … not committed a crime. If there is no legally valid excuse or justification, the killing is unlawful and, depending on the circumstances,

the person is guilty of either murder or manslaughter.'" (Opn 15; 18RT 5033-5034.)

That's it from the opinion — but not from the relevant instructions. So, for example, while the trial court properly introduced the general topic of justification in CALCRIM No. 500, that instruction said specifics were yet to come: "I'll now instruct you in more detail on what is a legally permissible excuse or justification for homicide and also on the different types of murder." (18RT 5034.) As it happens, those details included the omissions at issue here: The self-defense instructions identified *only* murder — and firearm assault — as subject to the defense. (CALCRIM No. 505; CALCRIM No. 3470; 18RT 5037-5039, 5052-5053.) As between the broad introductory instruction and the ones actually defining, discussing, and applying the defense, it's at least reasonably likely jurors would follow the latter. (*People v. Orellano* (2000) 79 Cal.App.4th 179, 186, citing *Francis v. Franklin* (1985) 471 U.S. 307, 319-320, 322-323.)

Similarly, although the court prefaced the self-defense instruction by promising "more detail on what is a legally permissible … justification *for homicide*" (18RT 5034, italics added), the actual "detail" spoke only to justification *for murder*. (18RT 5037-5039.)

Carney will address the only other instruction cited in the opinion: CALCRIM No. 571, covering the imperfect defense theory of manslaughter.[13] But first, he highlights a material omission from

[13] After discussing that instruction, the opinion adds, "*Other instructions* fully explained the differences between complete self-defense and imperfect self-defense, and that the difference 'depends on whether the defendant's belief in the need to use deadly force was reasonable.'" (Opn 15, italics added.) But the "other instructions"

the opinion: The jury was *also* instructed on the passion/quarrel theory of manslaughter. (CALCRIM No. 570; 18RT 5040-5041.) And even if the imperfect defense instruction is viewed as curing the defect in CALCRIM No. 505, another problem emerges: Of the two alternative manslaughter instructions, *only* CALCRIM No. 571 talked about the concept of "complete self-defense or defense of another" and its mandated acquittal "of any crime."

So as far as jurors knew, there was no reason to consider the justification concept in mulling over passion/quarrel manslaughter — just as, under No. 505, there was no reason to consider that concept in connection to manslaughter at all. Beyond the initial introduction to homicide (No. 500), as the instructions got into the details of the primary defense to the charged and lesser crimes, nothing else suggested passion/quarrel manslaughter was subject to it. (See *People v. Dewberry* (1959) 51 Cal.2d 548, 557 [jurors would reasonably view parallel instructional omission as meaningful]; *People v. Castillo* (1997) 16 Cal.4th 1009, 1020 (conc. opn. of Brown, J.).)

Back to CALCRIM No. 571: Yes, in the limited context of explaining imperfect defense it instructed jurors that "complete self-defense or defense of another" means a defendant is "not guilty of any crime." (18RT 5041.) But to the extent this created a conflict with

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reference appears to be inaccurate. The internal quotation is from CALCRIM No. 571 (18RT 5041) and appears nowhere else in the instructions as given. (18RT 4901-4917, 5021-5056, 5096-5097; 19RT 5412-5417.) CALCRIM No. 562 mentioned "imperfect" defense in the context of transferred intent and its applicability to defenses, including those that "decrease the level of homicide, such as heat of passion or imperfect self-defense" as well as "self-defense or defense to others [*sic*]." (18RT 5037.)

CALCRIM No. 505's omission of manslaughter, there's no basis for presuming jurors got it right. (*Francis v. Franklin, supra*, 471 U.S. 307, 322.) And under the reasonable likelihood test (see arg. I-D, *ante*), the instructions may be deemed correct only if there's no reasonable possibility jurors continued to follow No. 505's erroneous limitation.

But such a possibility exists. Following the instructions as a whole, jurors were free to (1) rely on CALCRIM No. 505 to find Carney not guilty of murder, based on reasonable doubt about whether the killing was unjustified; then (2) turn to manslaughter, and *reconsider* the justification issue in the CALCRIM No. 571 context, by analyzing "[t]he difference between complete self-defense or defense of another and imperfect self-defense or imperfect defense of another [as] depend[ing] on whether the defendant's belief in the need to use deadly force was reasonable." (18RT 5041.) True, the same instruction directed a full acquittal if "defendant acted in complete self-defense or defense of another[.]" (18RT 5041.) But had CALCRIM No. 505 been given correctly, such a finding should have immediately resulted in acquittal of *both* murder and manslaughter. Instead, the instruction implicitly invited jurors to consider manslaughter anew. And — as to the imperfect defense theory in CALCRIM No. 571 — with the complete defense issue back on the table, albeit it in a different context.

There would have been nothing illogical — or unreasonable — about such an approach, as an initial justification finding would have been limited to the charged murder; and nothing in the instructions prevented the jury from reconsidering justification in light of

the decision whether Carney committed manslaughter.[14] Although such an analysis would mean the count 1 verdicts as to Carney were inconsistent, the legal system tolerates inconsistent verdicts. (*People v. Carbajal* (2013) 56 Cal.4th 521, 532.)

Moreover, to the extent instructions were inconsistent about self-defense as a complete defense to manslaughter, counsels' six closing arguments didn't clear things up. (*Middleton v McNeil* (2004) 541 U.S. 433, 438 [arguments may help clarify instructional ambiguity, "particularly … when it is the *prosecutor's* argument that resolves an ambiguity in favor of the *defendant*"; original italics].) Here, too, while the jury heard a broadly accurate introduction, the detailed arguments failed to explore the specific relationship between complete self-defense and manslaughter.

The Court of Appeal highlights a single point argued by Carney's counsel: "that, because Carney was acting in self-defense, he was not guilty of murder 'or even voluntary manslaughter.'" (Opn 15; 19RT 5208.) As for developing this argument vis-à-vis the ambiguous instructions, though, nothing more was forthcoming. Counsel discussed the defense's principles (18RT 5254-5258), but only in the murder context: the "murder, in the eyes of the law, falls on the guys who started the shooting, not on the people who are defending themselves." (19RT 5257.)

[14] Jurors learned they could "consider these different kinds of homicides in whatever order" they wished (18RT 5042), but not how to approach (or re-approach) such considerations.

B. Where the pattern self-defense instruction limited the defense to one who acts "only because of" belief in imminent danger, the trial court erroneously refused to give a correct, non-duplicative instruction on multiple states of mind as not precluding the defense.

Through CALCRIM No. 505, jurors learned that for self-defense to justify Carney's action "he must have acted *only because of* [his] belief in "an imminent danger of death or great bodily injury to himself or someone else." (18RT 5037-5038, italics added.) Carney didn't and doesn't attack that language, which "is a correct statement of the law. [Citations.]" (*People v. Trevino*, *supra*, 200 Cal.App.3d 874, 879; *People v. Nguyen*, *supra*, 61 Cal.4th 1015, 1044-1045.)

But the limitation is itself limited — to *acting* solely because of fear, even if the defendant happens to be *experiencing* other emotions or mental states at the same time. *Trevino* recognized this distinction (200 Cal.App.3d 874, 879-880) in a discussion this court has endorsed as a proper "clarifi[cation]" of the principle. (*People v. Nguyen, supra*, 61 Cal.4th 1015, 1045.)

And that clarification is precisely what Carney sought at trial. Essentially: where the defendant may have felt more than just fear when acting, he's still entitled to self-defense — as long as his action was *motivated* only by fear. His proposed instruction, citing *Trevino* as authority, would have told jurors that even if a defendant may have felt more than just fear, he's still entitled to self-defense — again, as long as his action was *motivated* only by fear: "A state of mind may be mixed, that is, anger and fear may coexist at the same time. [¶] One … may feel anger or other emotions and still not lose

the right to self-defense. [¶] …. [I]f the causation of use of deadly force was the reasonable fear that there was imminent danger of death or great bodily injury, then the use of force in self-defense is proper regardless of what other emotions the party who acts may have been feeling, but not acting upon." (3ACT 42; opn 16 [quoting entire proposed instruction].)

Pattern instructions are designed to be "properly neutral and objective," but trial courts must be alert to circumstances requiring modification for "clarity['s]" sake. (*People v. Rollo* (1977) 20 Cal.3d 109, 123, fn. 6.) And this court has recognized *Trevino*'s mixed-state-of-mind self-defense "clarifi[cation]" — while not deciding whether such an instruction was required sua sponte. (*People v. Nguyen, supra*, 61 Cal.4th 1015, 1045-1046.)

Here, of course, Carney properly *requested* a *Trevino* instruction as "an appropriate clarifying instruction"(*People v. Hawthorne* (1992) 4 Cal.4th 43, 75, fn. 23) — but didn't get it. (See, e.g., *People v. Fudge* (1994) 7 Cal.4th 1075, 1109-1110; Pen. Code, § 1093, subd. (f).) Review would allow this court to take the *Trevino* analysis an important step further, by analyzing the issue as fully preserved in the trial and appellate court. (Cf. *People v. Trevino, supra*, 200 Cal.App.3d 874, 880 ["Trevino *could have requested additional instructions* with regard to his feeling anger toward Blanton as well as fear, or with regard to a situation where anger and fear were both causal factors. He did not do so."]; italics added.)

Moreover, this case demonstrates the issue's importance. In the real world, people may experience multiple strong emotions or states of mind simultaneously; how are jurors to sort that out? Do

they even need to bother? If, say, a defendant was both angry *and* afraid when she acted, the simplest analysis under CALCRIM No. 505 would suggest self-defense wasn't available, because fear wasn't the only possible motivator. But reality — and self-defense law under *Trevino-Nguyen* — is more complex, and a defendant is entitled to have the jury so instructed.

Here, there was strong evidence that Carney shot back after he and others were fired upon. (See Statement of Case and Facts, part II, *ante*.) So reasonable jurors could doubt his actions weren't fear-driven; i.e., they were justified. But ample evidence also suggested at least one additional state of mind: According to the prosecutor's and Mitchells' theory, Carney was a gang-affiliated participant in a group effort to take violent revenge against the Mitchells. (See, e.g., 18RT 5062, 5066, 5072-5073, 5077-5078, 5089, 5112-5113, 5117, 5121-5123, 5126-5127, 5129-5130; 18RT 5396-5398, 5403-5407, 5409-5410 [prosecutor's closing arguments]; 19RT 5275, 5293-5294, 5296-5297, 5300-5307, 5311, 5313-5315, 5317-5318, 5322 [Lonnie Mitchell's closing]; 19RT 5327, 5335-5338, 5342-5346, 5352, 5354-5358, 5360, 5364-5367, 5369-5374, 5376-5380, 5383-5386, 5390-5391, 5393 [Louis Mitchell's closing]; see also, e.g., 9RT 2518, 2648 [Det. Luke as gang expert].)

So as of when he fired his gun, was Carney feeling gang-related anger, or fear that he and others were about to be shot … or both? After all, jurors "are not required to make a binary choice between the prosecution evidence and the defense evidence; if the evidence as a whole would support a third scenario, the trial court may be required to give instructions on that scenario. [Citation.]" (*People*

v. Hernandez (2003) 111 Cal.App.4th 582, 589-590.) For that matter, jurors didn't have to accept or reject any testimony as a whole, let alone any party's factual theory. (*People v. Wilkins* (2013) 56 Cal.4th 333, 350.)

In other words, the evidence was such that jurors could believe Carney was there at the scene, armed, because he was sticking up for gangsters; but when he shot, he did so because he saw and heard an imminent peril. And the requested instruction went *directly* to that scenario — as no other instruction did. Its denial was error.

The Court of Appeal disagrees, primarily because the requested instruction didn't use the word "only" to link fear and causation. (Opn 17-19.) But that wasn't necessary, because the word "the" couldn't have been clearer:[15] If one "acts in self-defense on *the basis of reasonable fear*," then fear is the only cause of that action. Similarly, according to the proposed instruction self-defense required that "*the causation* of use of deadly force *was … reasonable fear* …." And as to "other emotions the party who acts may have been feeling, *but not acting upon*," they didn't interfere with self-defense. (All quotations from 3ACT 42, italics added.)

If anything, the opinion confirms the importance of the requested instruction in this case — and any case where jurors are presented with mixed-emotion theories: Carney "claimed he acted out of fear alone"; while "the theory of the prosecution and the

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[15] As a "definite article," "the" is "used, especially before a noun, with a *specifying or particularizing effect*, as opposed to the indefinite or generalizing force of the indefinite article *a* or *an*[.]" (Dictionary.com, https://www.dictionary.com/browse/the?s=t, accessed Jan. 3, 2020 italics added.)

Mitchells" was that Carney acted out of gang-related vengefulness; but "section 198 expressly requires *sole causation* in order for self-defense to apply." (Opn 19, italics added.) All of that is true — which is precisely why the *Trevino* instruction should have been given.

C. Review is necessary to determine whether self-defense instructional error is of federal constitutional dimension.

This court has "not yet determined what test of prejudice applies" where instructional error goes to an affirmative defense. (*People v. Gonzalez* (2018) 5 Cal.5th 186, 199 [failure to instruct per request].) But such a determination needs to be made. In its absence, California courts have treated such issues as involving only state error, subject to *Watson* "reasonable probability" prejudice review. (*People v. Watt* (2014) 229 Cal.App.4th 1215, 1219-1220.) "But the reasonable probability test is different and more lenient than the reasonable doubt test" for federal constitutional error. (*People v. Aledamat* (2019) 8 Cal.5th 1, 9, fn. 4; *Chapman v. California* (1967) 386 U.S. 18, 24.) Accordingly, review is necessary to decide the point.

In several ways, the errors here violated Carney's federal rights. As CALCRIM No. 505 and No. 520 together instructed, justification — the absence of self-defense — was an *element* of murder. (18RT 5034, 5039.) But because of error in the instructions as a whole, the jury didn't learn of that same element in the context of manslaughter, or at least passion/quarrel manslaughter. (Arg. II-A, *ante*.) And failure to properly instruct on an element of a crime — here, the crime Carney was convicted of — is a denial of his Sixth Amendment right to jury trial and Fourteenth Amendment right to due process. (*Neder*

v. United States (1999) 527 U.S. 1, 12; *Carella v. California* (1989) 491 U.S. 263, 265; *People v. Flood* (1998) 18 Cal.4th 470, 491.)

Alternatively, the errors effectively deprived Carney of a complete defense to manslaughter (or passion/quarrel manslaughter). (See *Crane v. Kentucky* (1986) 476 U.S. 683, 690 [Due Process Clause and Sixth Amendment "guarantee[] criminal defendants 'a meaningful opportunity to present a complete defense[,]'" citations omitted].) Federal courts have upheld a due process right of "instruction as to any recognized defense for which there exists evidence sufficient to find in [defendant's] favor. [Citations.]" (*Mathews v. United States* (1988) 485 U.S. 58, 63; *Bradley v. Duncan* (9th Cir. 2002) 315 F.3d 1091, 1098-1099, following *Mathews* ["the right to present a defense 'would be empty if it did not entail the further right to an instruction that allowed the jury to consider the defense'"]; *Barker v. Yukins* (6th Cir. 1999) 199 F.3d 867, 875 [general self-defense instruction erroneous in context of specific case, conviction reversed on federal habeas].)

Additionally, the errors effectively deprived Carney of self-defense — itself "a basic right, recognized by many legal systems from ancient times to the present day," one "'deeply rooted in this Nation's history and tradition,'" and "'the *central component*' of the Second Amendment right" to keep and bear arms. (*McDonald v. City of Chicago* (2010) 561 U.S. 742, 767-768, original italics.)

D. The errors require reversal.

Under any standard, the instructional errors require reversal in this close case as to Carney's level of culpability. Where jurors are

offered both valid and invalid routes to a guilty verdict, and nothing else in the record makes it clear they chose the former, the latter dictates reversal. It must be so, because the presumption that jurors follow instructions applies equally, and unfortunately, to erroneous ones. (*People v. Harris* (1994) 9 Cal.4th 407, 426, following *Yates v. Evatt* (1991) 500 U.S. 391, 403, disapproved on another point in *Estelle v. McGuire*, *supra*, 502 U.S. 62, 72, fn. 4.) Even under the *Watson* test, it's not enough that "[t]he actual verdict" of voluntary manslaughter was "reasonable," where "so too would have been a different one" — i.e., acquittal based on self-defense. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1090.)[16]

III. Review is necessary to determine whether a shooting victim's "possible motivation" to lie justifies exclusion of spontaneous-statement evidence as to who started shooting.

Reviewing the well-settled analytical framework for Evidence Code section 1240 (spontaneous statement) issues, Carney explained how the trial court abused its discretion in excluding evidence of Dominique Lott's and/or Marvion Barksdale's statements — just seconds after being shot — about that very incident: It was the Mitchells who first began shooting. (AOB arg. III; opn 8-10.)

[16] In finding harmless error as to the rejected *Trevino* instruction, the Court of Appeal notes that Carney's theory was self/other-defense; his attorney "did not argue that Carney harbored gang-related anger …." (Opn 20.) While that's true, it merely restates the problem: Three other attorneys *did* argue that anger (arg. II-B, *ante*); and the *Trevino* instruction would have guided jurors in sorting out motivation from mixed emotions.

Essentially, there are three prerequisites to admissibility: an objectively startling occurrence; a statement made promptly, without time to fabricate; and one that relates to the occurrence itself. (*People v. Merriman* (2014) 60 Cal.4th 1, 64.) The most "crucial element" in making the determination is "the mental state of the speaker. [Citation.]" (*People v. Gutierrez* (2009) 45 Cal.4th 789, 811.) And among the recognized factors in determining the overall question of the declarant's mental state are timing, blurting vs. responding to questions, emotional and physical condition, and whether the statement's content suggested it was reflected upon and fabricated. (*People v. Merriman*, *supra*, 60 Cal.4th 1, 64.)

Here, *all* recognized factors pointed to admissibility. But as the opinion notes, the trial court found "insufficient evidence that [Lott and Barksdale] felt 'any nervous excitement.'" (Opn 9.) The court was wrong, as the only pertinent evidence showed the exact opposite — directly as to Lott ("I was kind of like in shock" after being shot and running to escape; 7RT 1929-1930); and circumstantially as to both. (*People v. Rincon* (2005) 129 Cal.App.4th 738, 753 ["the [gunshot] wound having only been recently inflicted, it may reasonably be inferred that [the declarant] was still experiencing its effects"].)

So something more is needed to find the evidence properly excluded. And the Court of Appeal finds it — but only in an erroneously creative way that merits review. According to the opinion, even though the trial court was arguably wrong about the shooting victims' nervous excitement ("we may assume [Lott] was experiencing excitement and perhaps physical pain from being shot"), "the

trustworthiness of his statements depended on the circumstances under which they were made and his possible motivation for making them." And Lott had such a "possible motivation": "a clear and immediate motive of self-preservation to position himself as the victim rather than the aggressor." (Opn 10.)

The court's sole authority for this analysis: *People v. Cudjo* (1993) 6 Cal.4th 585, 608, which according to the opinion held that when a statement "is offered under *a hearsay exception*, the trial court must determine, as a preliminary fact, that it meets certain standards of trustworthiness," including as a factor "the possible motivation of the declarant …. [Citation.]" (Opn 9.) But the cited portion of *Cudjo* had nothing to do with spontaneous-statement hearsay, nor with any generic hearsay exception; instead, this court was examining only *declaration against penal interest*. (*Id.* at 606-607.) Review is necessary to clarify that *Cudjo*'s test for that exception doesn't supersede the proper test for spontaneous statements.

The opinion adds that any error was harmless, where Lott testified consistently with his hearsay declaration. (Opn 10.) But while other parties could — and did — challenge Lott's testimonial version as false (see, e.g., 19RT 5378-5379), the point of the spontaneous exception is to allow evidence of contemporaneous statements that carry their own degree of trustworthiness. (*People v. Poggi* (1988) 45 Cal.3d 306, 318.)

IV. The cumulative impact of the errors denied Carney due process and a fair trial.

Even if the individual trial errors discussed above don't require reversal when considered separately, Carney seeks consideration of their cumulative impact on the fairness of his trial. (AOB arg. IV; *People v. Hill* (19980 17 Cal.4th 800, 844-845; *Taylor v. Kentucky* (1978) 436 U.S. 478, 487-488 [cumulative errors as violation of federal due process right to fair trial].) The Court of Appeal acknowledges and rejects this claim (opn 21); he urges this court to consider it.

Conclusion

For the reasons explained above, Carney urges this court to grant review, determine the validity of the almost-century-old "judgment-favoring" instructional standard of review, and resolve his trial error claims.

Dated: January 10, 2020 Respectfully submitted,

/s/ Stephen Greenberg
Stephen Greenberg
Attorney for Appellant
James Leo Carney

Certificate of Length

I, Stephen Greenberg, counsel for appellant, certify pursuant to rule 8.504(d)(1) that the word count for this document is 8,399 words, excluding the tables and this certificate.

Dated: January 10, 2020

/s/ Stephen Greenberg
Stephen Greenberg

Appendix: Court of Appeal opinion, C077558

Court of Appeal, Third Appellate District
Andrea K. Wallin-Rohmann, Clerk
Electronically FILED on 12/10/2019 by G. Williams, Deputy Clerk

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. JAMES LEO CARNEY et al., Defendants and Appellants.	C077558 (Super. Ct. No. 11F00700)

THE APPEAL

With defendants James Leo Carney and others on one side and defendants Louis James Mitchell and Lonnie Orlando Mitchell (brothers) on the other, the two sides, obviously without any concern for people nearby, engaged in a gun battle at a barbershop in South Sacramento. This exchange of gunfire resulted in the death of Monique N., an innocent bystander, who was trying to shield her two-year-old son from the gunfire at the time she was killed. Each side claimed the other side fired first.

Defendants Carney (Carney), Louis Mitchell (Louis Mitchell) and Lonnie Mitchell (Lonnie Mitchell) were each convicted by a jury of various crimes relating to the gun fight, convictions which we will detail below. Each defendant advances various claims of error occurring during the course of his trial.

In a supplemental brief, Carney argues he should have the benefit of recently enacted Senate Bill No. 620 and his matter should be remanded to the trial court so that it may consider striking or dismissing his firearm enhancement.

As to Carney, we will remand for the trial court to exercise its discretion to strike or dismiss the firearm enhancement, to consider joint and several liability for direct victim restitution and to amend the abstract of judgment as appropriate and otherwise affirm the judgment.

As to the Mitchell brothers, we affirm the judgments in their entirety.

FACTS

Distilled to its essence, the evidence showed that, shortly after noon on December 14, 2010, the Mitchells went to a barbershop, which was a legitimate business frequented by members of a street gang to which the Mitchells did not belong. Lonnie Mitchell wore a TEC-9 assault weapon tied around his neck, the imprint of which was visible under his hoodie. Lonnie paced back and forth and spoke on his phone about "clapping" (shooting) the place up. Louis Mitchell, who also appeared to be carrying a gun, put on a barbershop cape and sat in a chair.

Carney's friends -- Larry Jones and Ernest S. -- were inside the barbershop. Ernest was in a barber's chair wearing a cape, and his son was getting a haircut. Concerned about the Mitchells' hostile armed presence, Jones phoned Carney and asked him to drop everything and come pick up Jones and Ernest. Jones tried to convey urgency without mentioning the Mitchells.

Carney phoned Marvion Barksdale (Barksdale), whom Lonnie Mitchell had recently threatened to kill after Barksdale and Lonnie Mitchell fought over Louis Mitchell having robbed Barksdale's half-brother (Marquelle J.) The Barksdale and Mitchell families had known each other for years but were no longer friendly.

Carney, armed with a revolver, drove to the barbershop in his gray Ford Taurus. He parked across the street and stood outside his car. Ernest quickly left the shop and put his son in Carney's car.

Barksdale separately drove to the barbershop with his brother Charles Edward Barksdale (Charles Barksdale) and Dominique Marcell Lott (Lott) and a woman, K.H.

We note that Lott and Charles were named as defendants but before trial pleaded to voluntary manslaughter, with a firearm enhancement for Lott and a gang enhancement for Barksdale, and each was sentenced to 21 years in prison.

Barksdale and Lott went toward the barbershop. The Mitchells stood outside the shop. Gunfire erupted. There was conflicting evidence as to who shot first. Outside the shop, Louis, still wearing the cape, fired a couple of shots towards Carney and Ernest, while Lonnie fired the TEC-9 randomly.

Carney told Ernest to get down and returned fire with a small revolver. A bullet from Carney's gun struck and killed innocent bystander Monique N., who was on the street leaning into the backseat of her SUV to cover and protect her two-year-old son in his car seat. (The Mitchells' appellate brief incorrectly states she was killed inside the barbershop.) The child had just had his hair cut at the barbershop, and mother and child had just had their Christmas photograph taken at a photo shop next to the barbershop. Mother was pronounced dead at the scene.

The participants in the shootout got into their separate cars and ran away.

Before leaving the barbershop, the Mitchells fired gunshots inside the barbershop, hitting and injuring four innocent bystanders inside the shop. Customer John E. was shot twice in the leg as he was getting a haircut. Adam W., who was waiting for a haircut,

suffered a gunshot wound to the liver from a bullet which the prosecution argued was fired by Lonnie Mitchell. Joshua B. was shot twice, but the bullets exited his body, so it was not clear who shot him. One of the barbers, Gralin M., was shot in the ankle as he tried to flee.

Victim John E., a military veteran familiar with firearms, testified "some guy" came in, fired shots that sounded like .45 until the gun jammed, dropped the gun, then fired numerous quick shots that sounded like an "UZI-style" 9 mm. A criminalist testified a TEC-9 is similar to an UZI. John E. said a second shooter returned fire. The second shooter (likely Larry Jones) was one of two African-American men with dreadlocks wearing pea coats who appeared to be together. On that date, both Jones and Ernest S. had long dreadlocks, as did Lott.

Lott, who pleaded guilty to voluntary manslaughter and gun use, testified under use immunity. He was in a white car with Barksdale, Charles, and a woman (K.H.). Barksdale said he needed to stop at the barbershop. Charles drove there, parked across the street, and waited in the car with K.H., while Barksdale walked toward the barbershop with Lott, who was armed with a 9 mm semiautomatic gun. Someone in a black barbershop smock jumped out of the shop and began shooting at them. Lott returned fire from the nearby auto repair shop and then he and Barksdale ran back to the car. Both had been shot, Lott in the right hip. They drove to a hospital and dropped off Barksdale, who later died from a bullet that hit him as he faced the shooter. Lott threw away his gun as they drove. They then went to a different hospital, where Lott falsely identified himself and gave a false location of the shooting.

K.H. testified she overheard the men in the car saying they had to stop at the barbershop because "somebody needed help," was "stuck," and "they were going to fight." While she waited in the car, she heard gunshots and ducked down.

Larry Jones (who was acquitted) was the only defendant who testified at trial. That day, he was carrying a .40 caliber gun, which he bought a few days earlier to protect

himself because his “baby mama” was threatening him, and she was a scorned woman capable of having someone harm him. After Ernest and his son left the shop, Larry who was still in the shop heard someone outside yell “fuck [something]” and heard gunshots fired by the front of the shop. People took cover or ran toward the back of the shop. Then shots were fired inside the shop, and some people were hit. Larry ran towards the back of the shop, turned and fired his gun two or three times. Larry fled the shop and ran to a friend’s home, where he discovered a bullet hole in his jacket, shot back to front. He had associated with Ridezilla and Oak Park gangs but phased out after he got out of prison in February 2009. Now in his 30’s, he was trying to turn his life around and take care of his son. He kept in contact with old friends who happened to be gang members but did not participate in gang activity. He sells marijuana on the street but still thinks he is on the straight and narrow. He was convicted of illegal possession of a gun in 2005 and had a misdemeanor conviction for domestic violence in 2002 and for a bad check in 2001. He had no idea who the Mitchells were before December 14, 2010.

LEGAL PROCEEDINGS

A jury found Carney, who fired the fatal shot, guilty of voluntary manslaughter (Pen. Code, § 192, subd. (a); unless otherwise stated, statutory section references that follow are to the Penal Code) as a lesser offense of murder and found true that he personally used a firearm (§ 12022.5, subd. (a)), but the jury found not true an allegation that he committed the offense for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)). The jury also found Carney guilty of possession of a firearm by a felon (former § 12021, subd. (a)(1) [repealed by Stats. 2010, ch. 711, § 4], now § 29800 [enacted Stats. 2010, ch. 711, § 6]), but not guilty of assault with a firearm on four other victims who were injured but not killed inside the barbershop.

The same jury acquitted Carney’s friend, codefendant Larry Dean Jones, on all counts.

The same jury found each Mitchell brother guilty of first-degree murder of Monique N. (§ 187) with personal and intentional discharge of a firearm (§ 12022.53, subds. (b)(c)), and guilty of assault with a firearm on the four other victims (§ 245, subd. (a)(2)), and guilty of possession of a firearm by a felon. The jury also found Lonnie Mitchell guilty of possession of an AK-47 assault weapon. (Former § 12280, subd. (b) [repealed by Stats. 2010, ch. 711, § 4], now §§ 30605, 30680 [Stats. 2010, ch. 711, § 6].)

The trial court sentenced Carney to 21 years in prison: The upper term of 11 years for manslaughter, a consecutive term of 10 years for the firearm enhancement, and a concurrent three-year term for the gun possession. The court ordered Carney to pay a restitution fine of $4,200 to specified victims, the same amount stayed unless parole is revoked, and $7,500 restitution to the Victims of Violent Crime Fund.

The court sentenced Lonnie Mitchell to a total of 53 years four months to life as follows: A term of 25 years to life in prison for murder, plus a consecutive term of 20 years to life for the firearm enhancement, plus a consecutive high term of four years for assault with a firearm on one victim, plus consecutive terms of one year (one-third the midterm of three years) for each of the other three assault victims, plus a consecutive term of eight months (one-third the midterm) for possession of a gun by a felon, plus a consecutive term of eight months (one-third the midterm) for possession of the assault weapon.

The court sentenced Louis Mitchell to the same term as Lonnie, minus the eight-month term for possession of an assault weapon, resulting in a total term of 52 years and eight months to life.

The court ordered each Mitchell brother to pay a restitution fine of $2,500, plus the same amount, suspended, as a parole revocation restitution fine, plus $7,500 to the Victims' Compensation Government Claims Board. The court also ordered direct restitution to these victims as set forth in the probation reports, "joint and several as to any other defendant with similar restitution orders."

On appeal, Carney contends (1) the trial court improperly excluded spontaneous-statement evidence as to who started shooting; (2) the jury instruction improperly omitted self-defense and defense-of-another as a defense to manslaughter; (3) where the pattern instruction limited self-defense to one who acts "only because of" belief in imminent danger, the court erroneously refused to instruct that multiple states of mind do not preclude the defense; (4) cumulative impact of these errors denied due process and a fair trial; (5) the trial court improperly imposed on Carney a restitution fine and parole revocation fine 68 percent higher than the fines imposed on the Mitchells; and (6) the abstract of judgment must be amended to reflect the trial court's intent that his liability for direct victim restitution be joint and several with his codefendants.

In a supplemental brief, Carney seeks remand for the trial court to exercise discretion to strike or dismiss the firearm enhancement, as authorized by legislation (Sen. Bill No. 620) enacted while this appeal was pending. (§ 12022.5, subd. (c); Stats. 2017, ch. 682, § 2.)

The Mitchell brothers jointly filed a separate appellate brief, contending (1) the prosecutor's aiding and abetting theory was invalid and there was no other theory under which the Mitchells could be found criminally culpable for Carney's shooting of Monique N.; and (2) the trial court erroneously instructed the jury that only the defendant who fired the fatal shot (Carney) could raise the defenses of self-defense, imperfect self-defense, or heat of passion. The Mitchells also join in Carney's argument that the jury instruction erroneously limited self-defense to a person who acts only because of belief in imminent danger, and they argue the cumulative impact of errors denied due process and a fair trial. In a supplemental brief, the Mitchells argue they could not have been found guilty of first-degree murder under a natural and probable consequence theory.

DISCUSSION

I

Carney's Appeal

A. Exclusion of Evidence

Carney contends the trial court improperly excluded spontaneous-statement evidence from Dominique Lott that it was one of the Mitchells who started shooting first.

At trial, Lott testified that as he walked behind Barksdale toward the barbershop, someone in a barbershop cape emerged from the open door and started shooting at them. Lott fled toward the street, fired back and was shot in the hip before reaching the car where Charles Barksdale and K.H. were waiting. When asked on cross-examination if Lott remembered telling Charles and K.H. that the other guy fired first, the trial court sustained a hearsay objection by the Mitchells. Carney's attorney elicited from Lott that only about a minute had passed, and he was "kind of like in shock because something crazy just happened" that he did not expect. But when he again tried to testify what he told the car's occupants, the trial court again sustained the Mitchells' hearsay objection.

Outside the jury's presence, Carney's counsel argued he had established a foundation for Lott's reply to be admitted as an excited utterance or spontaneous statement under Evidence Code section 1240. The Mitchells objected the statement was not reliable because Lott had the opportunity to fabricate it. The trial court instead ruled the statement was properly excluded as cumulative under Evidence Code section 352 because Lott had already recounted the same fact in his testimony.

On cross-examination by Carney's counsel, witness K.H. said she did not remember Lott or Barksdale saying what happened. Counsel asked, "Do you remember the guy in the back seat [Lott] saying, as soon as we hit the sidewalk"-- but the court sustained hearsay objections and noted the witness had answered "no." Counsel tried to refresh her memory with what she had told detectives, and she recalled that Barksdale

said, “[t]hat he dropped the gun” but that was all she remembered, and the court sustained another hearsay objection.

Outside the jury’s presence, the court stated it excluded Lott’s and Barksdale’s statements in the car because they were exculpatory and without adequate foundation and there was insufficient evidence that they felt “any nervous excitement.” Instead, both Lott and Barksdale left the car armed with guns and approached the location where the shooting took place, and other evidence suggested Barksdale was the type of person one would want to bring to a gunfight. Carney’s attorney also tried to elicit from a police detective that Lott told the detective the Mitchells fired first, but the court ruled it was inadmissible as a spontaneous statement because it was self-serving and untrustworthy, since Lott had a motive to lie.

When an out-of-court statement is offered under a hearsay exception, the trial court must determine, as a preliminary fact, that it meets certain standards of trustworthiness, taking into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant’s relationship to the defendant. (*People v. Cudjo* (1993) 6 Cal.4th 585, 608.) On appeal, we will not disturb the trial court’s ruling to exclude the evidence unless the appellant shows the court abused its discretion. (*People v. Brown* (2003) 31 Cal.4th 518, 534.)

Under Evidence Code section 1240, evidence of a statement is not made inadmissible by the hearsay rule if the statement “(a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception.” A statement is “spontaneous” if it was undertaken without deliberation or reflection. (*People v. Farmer* (1989) 47 Cal.3d 888, 903.) “[T]he basis for the circumstantial trustworthiness of spontaneous utterances is that in the stress of nervous excitement, the reflective faculties may be stilled and the utterance may become the

instinctive and uninhibited expression of the speaker's actual impressions and belief." (*Ibid*.)

Carney argues Lott's utterance that it was a Mitchell who fired first was spontaneous because it was made while Lott was under the stress and excitement of being shot. However, although we may assume he was experiencing excitement and perhaps physical pain from being shot, the trustworthiness of his statements depended on the circumstances under which they were made and his possible motivation for making them. Because Lott himself brought a gun to a gunfight and brought a companion who would be good in a gunfight, and because Lott knew police would be called when he sought medical attention for his own gunshot wound, he had a clear and immediate motive of self-preservation to position himself as the victim rather than the aggressor. The trial court could reasonably find that Lott's utterance was a self-serving attempt to minimize or excuse his criminal conduct, made with deliberation and reflection.

In any event, even assuming for the sake of argument that the trial court should have allowed evidence that Lott said a Mitchell fired first, any error was clearly harmless. Generally, application of the ordinary rules of evidence does not impermissibly infringe on a defendant's right to present a defense. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103.) It is not reasonably probable that Carney would have obtained a more favorable result (*People v. Watson* (1956) 46 Cal.2d 818, 836) if the jury had been allowed to hear that, *at the crime scene*, Lott made a statement that was consistent with *his trial testimony* that the Mitchells fired first. And the jury verdicts indicate the jurors believed the Mitchells fired first in any event.

B. Self-Defense Jury Instruction

Carney argues the trial court erred in failing to instruct the jury that self-defense or defense of others (collectively, "self-defense") could excuse not only murder, but also manslaughter. Defendant argues omission of reference to "manslaughter" removed self-

defense as a defense to manslaughter, violating his federal constitutional rights. Carney describes his argument "in a nutshell" --"Error occurred where (1) in defining self-defense for the jury (CALCRIM No. 505), the court mistakenly omitted manslaughter from the crimes subject to the defense [citation]; and (2) although such applicability appeared elsewhere, the instructions as a whole remained ambiguous, with a reasonable likelihood of being erroneously understood [citation], particularly where (3) closing arguments didn't address and clarify the specific ambiguity [citation]." In their separate appellate brief, the Mitchells agree (without analysis) and support Carney's request for reversal. We conclude there is no reversible error.

The pattern jury instruction, CALCRIM No. 505, states in part: "The defendant is not guilty of (murder/ [or] manslaughter . . .) if (he/she) was justified in (killing . . .) someone in (self-defense/ [or] defense of another.) . . . ." (Orig. brackets.)

The trial court instructed the jury only as to murder: "The defendants are not guilty of murder if they were justified in killing someone in self-defense or defense of another."

However, the court also instructed the jury with CALCRIM No. 571 that imperfect self-defense would reduce murder to voluntary manslaughter, but "If you conclude the defendant acted in *complete* self-defense or defense of another, their action was lawful and you must find him not guilty of any crime." (Italics added.) The instructions fully explained the differences between complete self-defense and imperfect self-defense, and that the difference "depends on whether the defendant's belief in the need to use deadly force was reasonable." The instructions also stated, pursuant to CALCRIM No. 500 (general principles of homicide) that "If a person kills with a legally valid excuse or justification, the killing is lawful and he's not committed a crime. If there is no legally valid excuse or justification, the killing is unlawful and, depending on the circumstances, the person is guilty of either murder or manslaughter."

Carney argues he requested the form instruction CALCRIM No. 505 but was unsuccessful in making it a part of the record on appeal, and in any event he did not forfeit his challenge by failing to object to omission of the word "manslaughter" in the trial court, because the issue goes to his "substantial rights." (§ 1259; *People v. Lewis* (2009) 46 Cal.4th 1255, 1294, fn. 28.) His backup argument is ineffective assistance of counsel.

We will assume for purposes of this appeal that Carney did not forfeit this contention.

Carney complains that many appellate court opinions, including opinions of this court, unthinkingly and incorrectly apply a "judgment-favoring" "standard of review" to jury instructions instead of the more appropriate standard of review pursuant to which error occurred if there is a "reasonable likelihood" the jury misapplied the instruction, even if the jury might have construed the instruction properly. Carney clams there should be no "judgment-favoring" rule of interpretation as to jury instructions, and such a rule cannot be reconciled with the "reasonable likelihood" standard of review. Carney asks us to overrule various cases in which we stated the general principle that, if reasonably possible, we interpret jury instructions to support rather than defeat the judgment. (E.g., *People v. McPheeters* (2013) 218 Cal.App.4th 124, 132; *People v. Mathson* (2012) 210 Cal.App.4th 1297, 1312; *People v. Vang* (2009) 171 Cal.App.4th 1120, 1129; *Mullanix v. Basich* (1945) 67 Cal.App.2d 675, 681.) The People respond the judgment-favoring rule does not conflict with the reasonable-likelihood rule, because the former is a rule of construction while the latter presents the ultimate question for a due process claim.

Carney fails to explain why any of the cited cases should be overruled. Carney's argument about not viewing the evidence in favor of the judgment appears to derive from the rule applicable to the specific situation where erroneous instructions preclude the jury from considering a defense theory on a question that is one of fact on conflicting

evidence. Such a contention is not at issue in this appeal and not in conflict with the familiar constitutional principle of prejudicial error -- that in determining whether error requires reversal of a judgment, the appellate court construes the evidence in support of the judgment. (Cal. Const., art. VI, § 13 ["No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury . . . unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice"]; *People v. Giordano* (2007) 42 Cal.4th 644, 666.)

People v. Young (1963) 214 Cal.App.2d 641 (not cited by the parties) explained the difference. *Young* reversed a voluntary manslaughter conviction due to the trial court's failure to instruct on self-defense to prevent commission of a felony, even though the appellate court said it was "difficult to envisage" that the jury might have believed the defendant's testimony (that the victim inflicted the fatal wound on himself by impaling himself upon the defendant's knife) or found the defendant did not use excessive force that would negate self-defense (questions of fact for the jury). (*Id*. at pp. 643, 650.)

Young explained: "In examining the question of error in refusing to instruct upon defendant's theory the reviewing court must assume that the jury might have believed appellant's story and found according to his theory had appropriate instruction thereon been given. [Citation to civil case.] '[Respondents] rely on the rule that a judgment will not be reversed on appeal if there is substantial evidence to support the verdict on any theory on which it might have been reached. . . . . It is not applicable, however, to a case such as this, in which the jury has been *precluded by erroneous instructions* [italics added] from considering a valid theory upon which a result different from that actually reached might have been supported. The error in such a case is not cancelled by the fact that the jury might have found for the prevailing party on some other ground. " 'It is true that in determining whether a verdict is supported by the evidence, we must assume that the jury accepted the view most favorable to the respondent. However, in determining

whether or not the instructions given are correct, we must assume that the jury might have believed the evidence upon which the [defense of the] losing party was predicated, and that if the correct instruction had been given upon that subject the jury might have rendered a verdict in favor of the losing party.' " [Citations.] Where, as here, the error consisted in instructing the jury as a matter of law on a question that is one of fact on conflicting evidence, and a determination favorable to the losing party might have been made if the error had not been committed, that error is prejudicial. [Citations.]' " (*Young, supra*, 214 Cal.App.2d at pp. 644-645.) "[A] defendant is entitled to instructions on his theory of the case as disclosed by the evidence, no matter how weak." (*Id*. at pp. 645, 650; accord, *People v. Salas* (2006) 37 Cal.4th 967, 982-983 [in determining whether evidence is sufficient to warrant a jury instruction, the trial court does not determine the credibility of the defense evidence, but only whether there was evidence which, if believed by the jury, sufficed to raise a reasonable doubt].)

Here, there is no issue about instructions erroneously precluding the jury from considering the defendant's factual theory.

On appeal, we determine de novo whether the trial court fully and fairly instructed the jury on the applicable law, based on the instructions as a whole. (*People v. Carrington* (2009) 47 Cal.4th 145, 192.) The absence of a point in one instruction may be supplied by another instruction or cured in light of the instructions as a whole. (*People v. Holt* (1997) 15 Cal.4th 619, 677.) We presume the jurors are intelligent persons, capable of understanding and correlating the instructions given. (*People v. O'Malley* (2016) 62 Cal.4th 944, 991.) We also consider closing arguments of counsel in assessing the probable impact of the challenged instruction on the jury. (*People v. Young* (2005) 34 Cal.4th 1149, 1202.)

Here, as indicated, although the trial court's version of CALCRIM No. 505 did not say that self-defense could justify manslaughter as well as murder, the court also instructed the jury "If you conclude the defendant acted in *complete* self-defense or

defense of another, their [*sic*] action was lawful and you must find him not guilty of any crime." (Italics added.) This language was part of CALCRIM No. 571 that *imperfect* self-defense would reduce murder to voluntary manslaughter. Other instructions fully explained the differences between complete self-defense and imperfect self-defense, and that the difference "depends on whether the defendant's belief in the need to use deadly force was reasonable." The instructions also stated, pursuant to CALCRIM No. 500 (general principles of homicide) that "If a person kills with a legally valid excuse or justification, the killing is lawful and he's has not committed a crime. If there is no legally valid excuse or justification, the killing is unlawful and, depending on the circumstances, the person is guilty of either murder or manslaughter."

Carney's counsel argued to the jury that, because Carney was acting in self-defense, he was not guilty of murder "or even voluntary manslaughter." He committed no crime. The prosecutor's rebuttal argument did not disagree.

We conclude the instructions as a whole and counsels' arguments adequately directed the jurors to consider self-defense with respect to manslaughter as well as murder.

C. <u>Mixed Emotions for Self-Defense Jury Instruction</u>

Carney next contends that, because the pattern self-defense jury instruction (CALCRIM No. 505) limited the defense to one who "*act[s] only because of*" fear of imminent danger, the trial court erred in refusing an instruction -- proposed by Louis Mitchell and "seconded" by Carney -- that mixed emotions do not preclude self-defense. The Mitchells join in this argument with no independent analysis. We conclude the trial court did not err, because the pattern instruction was a correct statement of law, which Carney through his proposed instruction hoped to distort.

The trial court instructed the jury, pursuant to CALCRIM No. 505, that for self-defense, "The defendant must have believed there was an imminent danger of death or

great bodily injury to himself or someone else. The defendant's belief must have been reasonable and he *must have acted only because of that belief*." (Italics added.)

Proposed Instruction No. 13 would have told the jury: "A state of mind may be mixed, that is, anger and fear may coexist at the same time. [¶] One who acts in self-defense on the basis of reasonable fear may feel anger or other emotions and still not lose the right to kill in self-defense. [¶] It would be unreasonable to require an absence of any feeling other than fear before the use of deadly force could be considered justifiable. Such a requirement is not a part of the law. The party is not precluded from feeling anger or other emotions save and except fear. But if the causation of use of deadly force was the reasonable fear that there was imminent danger of death or great bodily injury, then the use of force in self-defense is proper regardless of what other emotions the party who acts may have been feeling, but not acting upon."

The trial court declined to give the proposed instruction because the pattern instruction adequately covered the issue.

We review de novo the trial court's refusal to give the instruction requested by the defense. (*People v. Manriquez* (2005) 37 Cal.4th 547, 581.) A criminal defendant has a right to instructions that pinpoint the defense theory of the case. (*People v. Gurule* (2002) 28 Cal.4th 557, 660.) But a proposed instruction may be properly rejected if it incorrectly states the law, is argumentative, duplicative, or potentially confusing, or if it is not supported by substantial evidence. (*People v. Moon* (2005) 37 Cal.4th 1, 30.)

In the pattern jury instruction, the "acted only because of" language is based on section 198, which provides: "A bare fear of the commission of any of the offenses . . . to prevent which homicide may be lawfully committed, is not sufficient to justify it. But the circumstances must be sufficient to excite the fears of a reasonable person, and the party killing *must have acted* under the influence of such fears *alone*." (Italics added.) Thus, the instruction as given by the trial court was a correct statement of the law.

(*People v. Nguyen* (2015) 61 Cal.4th 1015, 1044-1045; *People v. Trevino* (1988) 200 Cal.App.3d 874, 879.)

Trevino said that mixed emotions (e.g., anger and fear) will not negate self-defense, as long as the defendant *acted only* because of the fear. "[W]e do not mean to imply that a person who feels anger or even hatred toward the person killed, may never justifiable use deadly force in self-defense . . . [¶] [I]t would be unreasonable to require an absence of any feeling other than fear, before the homicide could be considered justifiably. Such a requirement is not a part of the law, nor is it a part of [the pattern jury instruction]. Instead, the law requires that the party killing *act* out of fear alone. . . . The party killing is not precluded from feeling anger or other emotions save and except fear; however, those other emotions cannot be causal factors in his decision to use deadly force. If they are, the homicide cannot be justified on a theory of self-defense. But if the only causation of the killing was the reasonable fear that there was imminent danger of death or great bodily injury, then the use of deadly force in self-defense is proper, regardless of what other emotions the party who kills may have been feeling but not acting upon. [¶] [The pattern jury instruction] properly instructs the jury that the party killing must have *acted* under the influence of reasonable fears alone. It does not eliminate a feeling of anger or any other emotion so long as that emotion was not part of the cause of the use of deadly force. It is, therefore, a correct statement of the law of self-defense." (*Trevino, supra*, 200 Cal.App.3d at pp. 879-880, orig. italics.)

The defense's Proposed Instruction No. 13 tracked *Trevino*'s language but omitted the word "only." Whereas *Trevino* said "But if the *only* causation of the killing" was reasonable fear (*id*., 200 Cal.App.3d at p. 879, italics added), the proposed instruction said, "But if the causation of use of deadly force was the reasonable fear that there was imminent danger of death or great bodily injury, then the use of force in self-defense is proper regardless of what other emotions the party who acts may have been feeling, but not acting upon."

In effect, it appears that Carney wanted to argue that his fear was a but-for cause of the killing, justifying the killing, regardless whether or not the jury believed the prosecution's theory that Carney acted out of anger with his rivals. *Trevino* said the pattern instruction properly instructed the jury that the killer "must have acted under the influence of reasonable fears alone. It does not eliminate a feeling of anger or any other emotion so long as that emotion was not part of the cause of the use of deadly force. It is, therefore, a correct statement of the law of self-defense. In the case at bench, Trevino could have requested additional instructions with regard to his feeling anger toward [the victim] as well as fear, or with regard to a situation where anger and fear were *both causal factors*. [Italics added.] He did not do so. Nor did he argue to the jury the presence of such dual motivation or feeling. Under such circumstances, his argument on appeal must fail." (*Id*. 200 Cal.App.3d at pp. 879-880.) *Nguyen, supra*, 61 Cal.4th 1015, which was decided after Carney's trial and which cited *Trevino* with approval, said, "We note that defendant did not argue in the trial court, nor has he argued on appeal, that the jury should have been instructed that acting based on mixed *motives* [italics added] is permissible so long as reasonable fear was the but-for cause of his decision to kill. We therefore have no occasion to consider whether such a rule would be consistent with section 198 as interpreted in *Trevino* or other cases." (*Nguyen,* at pp. 1045-1046.)

Here too, Carney did not argue in the trial court that the jury had to decide on but-for causation between mixed *motives*. Rather, he simply wanted to argue that mixed *emotions* would not negate self-defense.

Insofar as Carney on appeal invites us to interpret section 198 or *Nguyen* as permitting a defendant to claim self-defense despite having mixed *motives*, we decline to do so. The flaw in Carney's appellate position is apparent from his confusion between "motive" and "emotion." He cites civil case law (e.g., employment termination) that where a person (such as an employer) acts with both a proper "motive" and an improper "motive," determining which "motive" was the "but for" cause of the action can be

complicated. Carney claims the jury here should have been instructed to determine which "motive" (gang-related revenge or fear) was the "but for" cause of his action. However, the lay definition of "motive" is "something (as a need or desire) that *causes a person to act*." (Merriam-Webster's Collegiate Dictionary (11th ed. 2006) p. 810, italics added.) Section 198 requires self-defense to be based on a reasonable fear *alone*. (*Nguyen, supra*, 61 Cal.4th at pp. 1044-1045.)

Here, Carney did not claim there were two *causes* for his action. He claimed he acted out of fear alone. Had he claimed two causes for his action, that alone would have negated self-defense.

Carney nevertheless argues the proposed instruction was needed here, because the theory of the prosecution and the Mitchells was that Carney was a gang-affiliated participant in a group effort to take violent revenge against the Mitchells. There was evidence that Carney was an Oak Park Blood gang member who was friends with G-MOBB gang members. This does not help Carney, because section 198 expressly requires sole causation in order for self-defense to apply.

Carney suggests the proposed instruction was mandated by the state and federal constitutional rights to self-defense embodied by California Constitution, article I, section 1 (inalienable right to defend life), and the U.S. Constitution, Sixth Amendment (right to jury trial) and Fourteenth Amendment (due process), so as not to require absolute purity of motivation. While there is a constitutional right to present a defense of self-defense (*McDonald v. Chicago* (2010) 561 U.S. 742, 767; *People v. McDonnell* (1917) 32 Cal.App.694, 704), Carney cites no authority that the constitutional right to self-defense applies even when the defendant acted, in part, for reasons other than self-defense. He cites no authority compelling a construction of section 198 that would embody the right to kill an aggressor in part because of anger, ill will, or a desire to do him harm. Under federal substantive due process jurisprudence, courts must carefully describe the liberty interest that is asserted to be fundamental in a concrete and

particularized, rather than abstract and general, manner. (See, *Washington v. Glucksberg* (1997) 521 U.S. 702, 720; *In re Lira* (2014) 58 Cal.4th 573, 585.) Carefully described, we deal here not with an asserted "right to self-defense," but rather an asserted right to kill where the decision to use deadly force is motivated in part by animus or other unlawful motive as well as by a desire to defend oneself against a threat of great bodily harm or death. Carney cites no authority supporting such an asserted right. Though not binding on us, a federal appellate court rejected a federal constitutional challenge to a state-law restriction on the right to claim self-defense. (See *Taylor v. Withrow* (6th Cir. 2002) 288 F.3d 846, 853 [no precedent supported conclusion that state law limitation on right to claim self-defense where killing was not "pure self-defense" but "a mix of accident and self-defense" is unconstitutional].)

Assuming for the sake of argument that a pinpoint instruction would have been appropriate, it is not reasonably probable that Carney would have obtained a more favorable result had the court given the proposed instruction. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1144, applying harmless error test of *People v. Watson* (1956) 46 Cal.2d 818, 836-837.) Carney's defense was not that he acted with mixed emotions, but that he reluctantly showed up because of calls for help from his friend Larry Jones, and Carney fired the gun only in self-defense or defense of others because Louis Mitchell fired first, towards Carney, Ernest and Ernest's young son. Carney's attorney did not argue that Carney harbored gang-related anger, perhaps recognizing that Carney's interest was best served by portraying him as a reluctant participant who had no beef with the Mitchells and acted only out of fear. This strategy paid off, because the jury found the gang allegation to be not true.

There was no instructional error.

D. Cumulative Impact of Errors

Carney maintains the cumulative impact of errors denied him due process and a fair trial. Having reviewed the record and rejected Carney's arguments, we disagree.

E. Restitution Fines

1. Amount

The trial court imposed on Carney a restitution fine (§ 1202.4, subd. (b)) of $4,200, and imposed but stayed a parole revocation fine (§ 1202.45) of $4,200. The court presumably arrived at the $4,200 figure by using the formula suggested in the version of section 1202.4, subdivision (b)(2), in effect at the time of these offenses in December 2010. That formula was to multiply the minimum fine of $200 by the number of years of imprisonment (21). (Stats 2010, ch. 351, § 9, eff. Sept. 27, 2010; Stats. 2009, ch. 454, § 1.)

Carney argues that, because his conviction for manslaughter arose from the same shootout for which his codefendants, the Mitchells, were found guilty of murder and assaults with firearms, the trial court abused its discretion by imposing on him a restitution fine and parole revocation fine ($4,200 each) 68 percent higher than the fines imposed on each of the Mitchells ($2,500 for each fine). As Carney notes, he could not have raised this point at his sentencing hearing, because he was sentenced a month before the Mitchells. We will assume for the sake of argument that the contention may be raised for the first time on appeal.

We review a trial court's victim restitution order for abuse of discretion. (*People v. Selivanov* (2016) 5 Cal.App.5th 726, 780; *People v. Thygesen* (1999) 69 Cal.App.4th 988, 992.) The trial court has broad discretion in setting the amount of victim restitution. (*People v. Balestra* (1999) 76 Cal.App.4th 57, 63-64.) No abuse of discretion will be found when there is a factual and rational basis for the amount of victim restitution ordered. (*People v. Holmberg* (2011) 195 Cal.App.4th 1310, 1320.)

Moreover, the restitution fine "must be in accord with each defendant's individual culpability," and we held in *People v. Kunitz* (2004) 122 Cal.App.4th 652, 656 that a trial court order for joint and several liability for fines was unauthorized. Whereas direct victim restitution is akin to a civil judgment and may be joint and several, the restitution fine is punishment and must relate to the defendant's individual culpability. (*Ibid*.) The statutes for imposing fines do not authorize a fine against more than one individual. (*Id*. at p. 657.)

Carney's appellate counsel acknowledges he cannot cite any supporting authority on point but touts his purpose of advocating changes in the law on behalf of his client. He argues *Kunitz* did not address the issue he raises, i.e., that the trial court abused its discretion by *failing* to consider what Carney perceives as the "much greater culpability" of the Mitchells. He points to *Kunitz*'s comment that equal culpability between codefendants would support imposition of equal restitution fines. (*Id*. at p. 658 [each pleaded guilty to four counts of same offense and received same sentence].) Carney asks us to extrapolate from this dictum that disparate culpability should just as rationally support imposition of disparate fines, with greater culpability resulting in higher fines, which in Carney's view means a trial court abuses its discretion by imposing the higher fine on the less culpable defendant.

However, the manslaughter verdict does not make Carney "less culpable" for restitution fine purposes. In setting the amount of the fine, the court "shall consider any relevant factors," including the circumstances of the defendant's commission of the crime and pecuniary and psychological harm to the victim's dependents. (Former § 1202.4, subd. (d); Stats. 2010, ch. 351, § 9, eff. Sept. 27, 2010; Stats. 2009, ch. 454, § 1.)

Carney fails to show abuse of discretion, and there is a factual and rational basis for his fines. Carney fired the bullet that killed the innocent bystander as she draped herself over her two-year-old son to protect him. She left behind not only her son but

also parents and siblings. Her family was not involved with gangs or crime or violence. She was there that day having a Christmas photo taken of herself and her son.

That the same jury found the Mitchells guilty of murder yet found Carney guilty only of manslaughter does not render Carney's fines irrational or unsupported by evidence. Even assuming the jurors determined Carney honestly felt a need for self-defense, the verdict means they also determined his belief was unreasonable. And it was Carney's bullet that struck and killed the victim.

That the court later imposed lesser amounts ($2,500) on the Mitchells does not render Carney's fines irrational or unsupported by facts. That the trial court imposed on the Mitchells less than the $10,000 recommended by the probation officer does not render Carney's fines irrational or unsupported by facts. The trial court struck from the probation report an incorrect assertion that Lonnie Mitchell while awaiting this trial had engaged in a jailhouse fight with Barksdale -- which was clearly incorrect because Barksdale died in December 2010, shortly after the barbershop shootout.

We see no basis to disturb the fines imposed on Carney.

2. Joint and Several Liability

The trial court ordered Carney to pay *direct* victim restitution (§ 1202.4, subd. (f)) in an amount "to be determined" but did not expressly order that liability be joint and several. Carney did not ask for joint and several liability, though he could have done so. (*Kunitz, supra*, 122 Cal.App.4th at p. 657; *People v. Arnold* (1994) 27 Cal.App.4th 1096, 1100.)

On appeal, Carney asks us to order amendment of the abstract of judgment to make his liability for direct victim restitution joint and several with his codefendants. He argues the trial court in this case *intended* joint and several liability for all defendants, because at the *Mitchells*' subsequent sentencing hearing, the court said, "Restitution will

be ordered as set forth in each of the respective defendant's probation reports joint and several as to any other defendant with similar restitution orders."

Unlike restitution *fines*, the trial court has authority to order joint and several liability for direct victim restitution (§ 1202.4, subd. (f)), which is not punishment but is more akin to a civil judgment. (*Kunitz, supra*, 122 Cal.App.4th at p. 657; *People v. Arnold* (1994) 27 Cal.App.4th 1096, 1100.)

The People argue Carney forfeited the point by failing to raise it at his sentencing hearing. (*People v. Smith* (2001) 24 Cal.4th 849, 852 [claims challenging discretionary sentencing choices for the first time on appeal are not subject to review].) Carney claims he can raise it for the first time on appeal as an unauthorized sentence that could result in unjust enrichment for the victims, who should not receive a double recovery. (*People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1533-1535; *People v. Leon* (2004) 124 Cal.App.4th 620, 622.) The People maintain that, regardless what the order states, joint and several liability is achieved by operation of law which provides that if combined payments made by multiple defendants exceed the victims' losses, each defendant would be entitled to a pro rata refund of any overpayment. (§ 1202.4, subd. (j); *People v. Arnold, supra*, 27 Cal.App.4th at p. 1100.)

Because we must remand for the trial court to consider whether to strike or dismiss the firearm enhancement under recent legislation, as we discuss *post*, and because Carney's sole contention is that the trial court *intended* joint and several liability, we leave it to the trial court on remand to amend the judgment if that was its intent.

F. Supplemental Brief - Discretion Re: Enhancement (Sen. Bill No. 620)

In a supplemental brief (joined by the Mitchells), Carney asks that we remand for the trial court to exercise its new discretion to strike the firearm enhancement under 2017 amendments to sections 12022.5 and 12022.53, which provide effective January 1, 2018: "The court may, in the interest of justice pursuant to Section 1385 and at the time of

sentencing, strike or dismiss an enhancement otherwise required to be by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (Stats. 2017, ch. 682, §§ 1-2 [SB 620].) We will remand.

The People agree, as do we, that the amendments apply retroactively to Carney's case. (*People v. Woods* (2018) 19 Cal.App.5th 1080, 1090-1091.)

The People nevertheless argue remand is not necessary in this case and would be an idle act because any order striking the enhancement would be an abuse of the trial court's discretion, given the totality of circumstances. (*People v. Askey* (1996) 49 Cal.App.4th 381, 389 [defendant was a third-striker with numerous prior felony convictions and appeared to be a budding "Night Stalker"].) Nevertheless, we cannot say what the trial court would have done in this case, had it known it had discretion to strike the enhancement, nor can we say as a matter of law that striking or dismissing the enhancement would be an abuse of the trial court's discretion. (*People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110 ["Remand is required unless the record reveals a clear indication that the trial court would not have reduced the sentence even if at the time of sentencing it had the discretion to do so"].)

At the sentencing hearing, Carney said he was sorry and took "full responsibility." But when the trial court asked what that meant, Carney said, "That it's an accident. . . . [T]his was a tragic accident that happened in South Sacramento." When the court asked why Carney had a gun there, he said, "I kind of carry a gun a lot. It was the lifestyle that I was in, to protect myself from any situation, and that's the truth." Defense counsel also portrayed the killing as a tragic accident, for which the Mitchells should bear the brunt of responsibility, because they started it, and the manslaughter verdict indicated the jury found Carney less culpable than the Mitchells whom the jury convicted of murder.

The trial court took issue with the word "accident" and said Carney "played a significant and integral role" in the innocent victim's death through the series of choices he made that day, as well his choice to live a life where he felt it necessary to carry a gun

around. The court recited Carney's long criminal history as an adult (including narcotics offenses, petty theft, possession of ammunition, DUI and driving on suspended license, probation violations, etc.) and his juvenile record (including grand theft and narcotics) and involvement with gang members (despite disavowing current membership). Aggravating factors far outweighed the mitigating factors noted by defense counsel. The trial court noted it did not accept defense counsel's unsupported characterization of prior offenses (e.g., grand theft was "a playful prank") based on a claim of "true facts" that were not part of the record.

The trial court sentenced Carney to the upper term of 11 years for manslaughter, plus a consecutive term of 10 years for the gun-use enhancement. The court imposed a three-year concurrent term for gun possession and noted the gun possession was an additional justification for imposing the upper term for manslaughter. At the September 19, 2014, sentencing hearing, defense counsel asked that Carney remain in custody of the Sheriff's Department until October 17th, when he was scheduled to be married. The court ordered Carney remanded to the custody of the Sheriff's Department to be delivered to the custody of the Director of Corrections at Duel Vocational Institute.

Since we cannot conclude remand would be futile, we must remand to allow the trial court to exercise its discretion under SB 620 as to Carney.

G. Conclusion of Carney's Appeal

We remand for the trial court to consider whether or not to strike or dismiss the gun enhancement under SB 620, and to consider joint and several liability for direct victim restitution. If necessary, the court shall prepare an amended abstract of judgment. We otherwise affirm the judgment as to Carney.

II

The Mitchells' Appeal

A. Viable Theory of Liability

The Mitchells argue there was no viable theory for holding them criminally liable for the death of the innocent bystander shot by Carney, because the prosecutor's aiding and abetting theory was clearly invalid (because the Mitchells could not have aided and abetted Carney in his attempt to kill the Mitchells), and there were no other theories of liability in the instructions under which the Mitchells could be found criminally liable for her death.

In a supplemental brief, the Mitchells argue they could not have been found guilty of first-degree murder under a natural and probable consequences theory, and no other viable theory exists.

We need not address these arguments, because the Mitchells fail to negate another theory on which the court instructed the jury, first degree premeditated murder pursuant to *People v. Sanchez* (2001) 26 Cal.4th 834 (*Sanchez*), as follows:

"There may be more than one cause of death. When the conduct of two or more persons contributes concurrently as a cause of the death, the conduct of each is the cause of death if that conduct was also a substantial factor contributing to the death. [¶] A cause is a concurrent cause if it was operative at the moment of death and acted with another force to produce the death. [¶] If you find a defendant's conduct was a cause of death to another person, then it is no defense that the conduct of some other person also contributed to the death."

In *Sanchez, supra*, 26 Cal.4th 834, two opponents in an exchange of gunfire were each convicted of first degree murder of an innocent bystander hit and killed by a single bullet. It could not be established whether the fatal shot was fired by the appellant (Sanchez) or his codefendant (Gonzalez, who was not a party to the appeal). The

prosecution proceeded on two theories -- premeditated first degree murder and first degree murder perpetrated by means of intentionally discharging a firearm from a motor vehicle with specific intent to inflict death.

The Supreme Court concluded either theory supported the appellant's first degree murder conviction: "The circumstance that it cannot be determined who fired the single fatal bullet does not undermine defendant's conviction under either [theory]. . . . Defendant's act of engaging Gonzalez in a gun battle and attempting to murder him was a substantial concurrent, and hence proximate, cause of [the victim's] death through operation of the doctrine of transferred intent." (*Sanchez, supra*, 26 Cal.4th at p. 839.)

The Supreme Court specified that, although the trial court instructed on the provocative act murder theory (homicide committed during commission of a crime by a person who is not a perpetrator of such crime, in response to an intentional provocative act with implied malice by a defendant, is considered in law to be an unlawful killing by such defendant), the verdict reflected that the defendant's conviction was not based on the provocative act theory. (*Id*. at pp. 839, fn. 4, 843-844 & fn. 8, and 844-845.) In our case, Carney asked the trial court to instruct the jury on "provocative act," but the court declined to do so because the prosecutor stated she was not proceeding under that theory.

The trial court in the *Sanchez* case instructed on proximate causation: "A cause of death is an act that sets in motion a chain of events that produces as a direct, natural and probable consequence of the act, the death of a human being, and without which the death would not occur. [¶] There may be more than one cause of the death. [¶] When the conduct of two or more persons contributes concurrently as a cause of the death, the conduct of each is a cause of the death if that conduct was also a substantial factor contributing to the death. [¶] A cause is a concurrent cause if it was operative at the moment of death and acted with another force to produce the death. [¶] If you find that a defendant's conduct was a cause of death to another person, then it is no defense that the conduct of some other person also contributed to the death." (*Id*. 26 Cal.4th at pp. 843,

845.) We pause to observe that this instruction makes clear that "natural and probable consequence[]" is not a notion limited to aiding and abetting liability, as is sometimes assumed, as for example in the Mitchells' supplemental brief.

The trial court in *Sanchez* also instructed on transferred intent: " 'When one unlawfully attempts to kill a certain person but by mistake or inadvertence kills another person, the crime, if any, so committed is the same as though the person originally intended to be killed had in fact been killed.' " (*Sanchez, supra*, 26 Cal.4th at p. 843.)

The Court of Appeal in *Sanchez* reversed the first degree murder conviction, which the Supreme Court found to be based on the Court of Appeal's "mistaken belief that concurrent causation could not be applied in this single-fatal-bullet case." (*Id.* 26 Cal.4th at p. 845.)

The Supreme Court explained, "it is proximate causation, not direct or actual causation, which, together with the requisite culpable mens rea (malice), determines defendant's liability for murder. The Court of Appeal erred in concluding principles of concurrent causation cannot be invoked in a single-fatal-bullet case. The circumstance that it cannot be determine who fired the single fatal bullet, i.e., that direct or actual causation cannot be established, does not undermine defendant's first degree murder conviction if it was shown beyond a reasonable doubt that defendant's conduct was a substantial concurrent cause of [the victim's] death." (*Sanchez, supra*, 26 Cal.4th at p. 845.)

We again pause to observe that this liability is based on the defendant's own "culpable mens rea (malice)," not on vicarious liability for aiding and abetting someone else who bore malice. The *Sanchez* Court cited *People v. Pock* (1993) 19 Cal.App.4th 1263, where two defendants fired guns at the victim, and it could not be determined who fired the fatal bullet. "The Court of Appeal observed that if Pock did not 'actually fire[] the fatal shot,' he 'participated in all major events, *not as an aider and abettor*, but as an actual participant who, if he did not fire the fatal shot, certainly was responsible for

instigating the firing of the fatal shot.' [Citation.]" (*Sanchez, supra*, 26 Cal.4th at p. 845, italics added, citing *Pock, supra*, 19 Cal.App.4th at p. 1274.)

Sanchez, supra, 26 Cal.4th at page 846, also cited other cases, including *People v. Kemp* (1957) 150 Cal.App.2d 654, which held two actors responsible for a death directly caused by one of them, where both engaged in a car race down a public street that resulted in the death of a person struck by the car of one of the defendants. And *Sanchez* cited with approval similar cases from other jurisdictions. (*Id*. at p. 847.)

Here, the prosecutor's arguments to the jury did not always clearly separate out the aiding and abetting principle from proximate causation based on the Mitchells' own malice. The prosecutor told the jury in closing argument that the fact the victim died as a result of the bullet fired by Carney "doesn't stop the other three [Larry Jones and the Mitchells] from being just as guilty. Because they aided and abetted each other, and they are each equally guilty." "When you engage in this type of mutual combat, you are each responsible for the consequences." And in later argument: "And that brings us to the issue of how they can all be held liable for first degree murder when we know it was Mr. Carney's bullet that killed Monique. Because of this instruction, and it is in [CALCRIM] 520 [the standard first degree versus second degree murder instruction, which does not contain the following language as asserted by the prosecutor]. [¶] . . . [¶] [E]ssentially, what it is, is if you're acting together and you're all working and you're all serving as a substantial factor, it doesn't matter that one bullet was the one that killed her. It doesn't even matter if we didn't know whose bullet killed Monique. It doesn't matter, not under these circumstances. When you have four individuals who together have joined up to do battle in a public street, they are encouraging each other, they are instigating each other, they are promoting. They are aiding and abetting. And if they are each shooting and they are a substantial factor in those events, they are all guilty for that. They are all responsible for that cause of death.

"And it's kind of like . . . a street race. You have two people that join up, they get there at a stoplight. They don't know each other. They look at each other. One revs their engine, the other one revs their engine, boom, they're off. And they engage in a street race 100 miles an hour through the streets of Sacramento on a Sunday afternoon where there is a lot of traffic. One of them doesn't make the turn, ends up killing an innocent driver. They are both responsible for that. Without one, the other one wouldn't have been engaged in that behavior. They are both a substantial factor in that death.

"Here, without the Mitchells, it wouldn't have happened. Without Carney and Jones, it wouldn't have happened. They are all a substantial factor and they are all proximately -- they are all a proximate cause in her death."

In rebuttal, the prosecution reiterated: "So why is it first degree murder? [¶] It is aiding and abetting. [Louis's attorney] said well, they weren't aiding and abetting their own murder. No, they weren't. [¶] But the law is this: Although they were trying to harm each other, at the same time, they were acting in concert to create an explosive condition that resulted inevitably in Monique [N.'s] death and the injuries of the others." After the court overruled Louis's objection that this misstated the law, the prosecutor continued: "They work together to create an explosive environment. And it was inevitable that somebody was going to die. In this case, it was Monique [N]. They all had more than 25 minutes to make decisions. . . . And they made their decisions, and they need to be held accountable. They are each a substantial concurrent proximate cause of what happened that day."

We conclude the trial court properly instructed the jury consistent with *Sanchez*, and the prosecutor's arguments to the jury adequately covered this theory, and the jury instructions and arguments support the Mitchells' convictions without reliance on aiding and abetting.

The Mitchells argue *Sanchez* is inapplicable because there it could not be determined which participant fired the fatal shot, and therefore it was possible the

defendant did fire the fatal shot, which would support making him liable for first degree murder. However, that possibility was not the justification for the conviction.

We observe that, in *Sanchez*, the two participants in the gunfight were rival gang members (*id*. 26 Cal.4th at pp. 840, fn. 5, and 841-844), whereas in this appeal there was no evidence that the Mitchells were gang members. The Mitchells do not raise this point, and we do not view it as rendering *Sanchez* inapplicable. Although *Sanchez* referred to evidence that the two actors were rival gang members, the focus of its holding was not on gang activity but on the circumstance that Sanchez and Gonzalez "had equally culpable mental states and engaged in precisely the same conduct at the same time and place in exchanging shots" such that it was not unfair to hold them equally responsible for the victim's death. (*Id*. at p. 854, citing conc. opn. of Kennard, J., *id*. at p. 856.)

We reject the Mitchells' argument that no viable theory supported their convictions for first degree murder.

B. <u>Jury Instruction Re: Defenses of Accomplices</u>

The Mitchells argue the trial court erroneously instructed the jury that the *only* defendant who could raise defenses of self-defense, imperfect self-defense, or heat of passion was the defendant (Carney) who actually fired the fatal shot that killed the bystander-victim. The Mitchells maintain this "likely explains the odd verdict" -- manslaughter for the principal (Carney) and first degree murder for those vicariously liable (the Mitchells). We disagree.

The Mitchells asked the trial court to instruct the jury that any defenses applicable to the intended killing also applied to the unintended killing of the innocent bystander. The court accordingly added a second paragraph to the CALCRIM No. 562 (Transferred Intent), though the People argued it was unnecessary:

"If the defendants intended to kill one person, but by mistake or accident killed someone else, then the crime, if any, is the same for the unintended killing as it is for the intended killing.

"Defenses, if any, which apply to the intended killing also apply to an unintended killing. This includes defenses that decrease the level of homicide, such as heat of passion or imperfect self-defense." Obviously, it applies to self-defense or defense of others.

The last sentence was suggested by Larry Jones's attorney.

On appeal, the Mitchells contend the instruction, by referring to the one who "by mistake or accident killed someone else," improperly advised the jury that the defenses of self-defense, etc., applied only to Carney, since he was the only one who by mistake or accident killed someone else.

We will assume for purposes of this appeal that the Mitchells' contention is not barred by the invited error doctrine, as urged by the People.

The contention improperly focuses on that one jury instruction, whereas we determine the matter based on the instructions as a whole and counsels' arguments to the jurors, whom we presume are intelligent persons capable of understanding and correlating the instructions. (*People v. O'Malley, supra*, 62 Cal.4th at p. 991; *People v. Carrington, supra*, 47 Cal.4th at p. 192; *People v. Young, supra*, 34 Cal.4th at p. 1202.)

Here, the trial court separately instructed the jury on each of the defenses as applicable to all defendants, with no restriction to any particular defendant. Indeed, the court specifically instructed regarding self-defense by Louis Mitchell, that "If you find that [Barksdale] threatened or harmed Louis Mitchell in the past, you may consider that information in deciding whether Louis Mitchell's conduct and beliefs were reasonable. [¶] Someone who has been threatened or harmed by a person in the past is justified in acting more quickly or taking greater self-defense measures against that person." The prosecutor argued to the jury that the Mitchells were not acting in self-defense but did not

object to the Mitchells' closing arguments to the jury that self-defense excused them from liability.

We conclude the jury would not have reasonably believed that self-defense, defense of others, heat of passion, or imperfect self-defense, applied only to Carney and not to the Mitchells.

C. Mixed Emotions

The Mitchells join in Carney's argument that self-defense is available to a person who acts with mixed emotions. We have already explained why that argument fails.

D. Cumulative Impact of Errors

Having reviewed the record, we reject the Mitchells' argument that the cumulative impact of errors denied them due process and a fair trial.

E. New Discretion to Strike or Dismiss Gun Enhancements

The Mitchells filed a request to join in Carney's supplemental brief regarding the new legislation (Sen. Bill No. 620) giving the trial court discretion to strike or dismiss gun enhancements. However, the Mitchells failed to provide any independent analysis as to their particular circumstances.

Instead of filing a brief, a party may join in all or part of a brief in the same appeal. (Cal. Rules of Court, rule 8.200(a)(5).)

"Appellate counsel for the party purporting to join some or all of the claims raised by another are obligated to thoughtfully assess whether such joinder is proper as to the specific claims and, if necessary, to provide particularized argument in support of his or her client's ability to seek relief on that ground. If a party's briefs do not provide legal argument and citation to authority on each point raised, ' "the court may treat it as waived, and pass it without consideration. [Citations.]" ' (*People v. Stanley* (1995) 10 Cal.4th 764, 793.) 'Joinder may be broadly permitted [citation], but each appellant

has the burden of demonstrating error and prejudice [citations].' (*People v. Nero* (2010) 181 Cal.App.4th 504, 510, fn. 11, 104 Cal.Rptr.3d 616.)" (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 363-364.)

Thus, we consider arguments made solely by joinder only if we are satisfied they were individually preserved and sufficient to meet the individual defendant's duty to demonstrate error and prejudice as to him.

In considering a claim under Senate Bill No. 620, remand is not required if the record reveals remand would be futile. (*People v. Almanza, supra*, 24 Cal.App.5th at p. 1110; *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896.)

Neither Mitchell offers any discussion of his sentencing to show that remand would not be necessarily futile.

Because the Mitchells fail to adequately address the point in their briefs, we see no reason to remand for consideration of Senate Bill No. 620.

F. Conclusion

We conclude the Mitchells fail to show grounds for reversal.

DISPOSITION

As to Carney, that matter is remanded for the trial court to exercise its discretion to strike or dismiss that firearm enhancement under SB 620, to consider joint and several liability for direct victim restitution (§ 1202.4, subd. (f)), and to amend the abstract of judgment if appropriate and forward a copy to the Department of Corrections and Rehabilitation. The judgment as to Carney is otherwise affirmed.

As to Lonnie Mitchell, the judgment is affirmed. As to Louis Mitchell, the judgment is affirmed.

HULL, J.

We concur:

BLEASE, Acting P. J.

RENNER, J.

Declaration of Service

Case: *People v. James Leo Carney* No. S______/C077558

I'm an active member of the State Bar of California (SBN 88495), over 18, and not a party to this action. My business mailing address is PO Box 754, Nevada City, CA 95959-0754; for e-mail and e-service, sgberg1@mac.com.

On the date shown below, I served the attached Petition for Review by mailing a copy through the U.S. Postal Service in Nevada City, California, with postage prepaid, to:

Sacramento County Superior Court
Attn: Hon. Judge Kevin McCormick
720 9th St., Room 101
Sacramento, CA 95814-1380

James Leo Carney, AU8348
Folsom State Prison (FSP)
P.O. Box 715071
Represa, CA 95671

(and to Court of Appeal, 3d District per CSC-TrueFiling)

And I served the same document, in PDF format, by e-mail to:

Attorney General (for Respondent)
SacAWTTrueFiling@doj.ca.gov

Central California Appellate Program
eservice@capcentral.org

Paul McCarthy, Esq./Beles & Beles (for co-appellants Lonnie & Louis Mitchell)
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Gregory Foster, Esq.
FosterG@saccounty.net

I declare under penalty of perjury that the foregoing is true and correct. Executed January 10, 2020 at Nevada City, California.

/s/ Stephen Greenberg
Stephen Greenberg