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Supreme Court of California
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Supreme Court of the State of California

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff-Respondent,

vs.

LOUIS MITCHELL, *et al*.

Defendants-Petitioners.

No. S260063
Appeal No. C077558
Sacramento County
Superior Court No.
11F00700

PETITIONER LOUIS MITCHELL'S REPLY BRIEF ON THE MERITS

Honorable Kevin McCormick, Judge

PETITIONER LOUIS MITCHELL'S REPLY BRIEF ON THE MERITS

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PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff-Respondent*, vs. LOUIS MITCHELL, et al., *Defendant-Petitioner*.	No. S260063 Appeal No. C077558 Sacramento County Superior Court No. 11F00700 PETITIONER LOUIS MITCHELL'S REPLY BRIEF ON THE MERITS

PETITIONER LOUIS MITCHELL'S REPLY BRIEF ON THE MERITS

1. Statement of issues.

This court has granted review limited to the following issues:

1. Does the "substantial concurrent causation" theory of liability of *People v. Sanchez* (2001) 26 Cal.4th 834 permit a conviction for first degree murder if the defendants did not fire the shot that killed the victim?

2. What impact, if any, do *People v. Chiu* (2014) 59 Cal.4th 155 and Senate Bill No. 1437 (Stats. 2018, ch. 1015, § 1, subd. (f)) have on the rule of *Sanchez*?

2. *Sanchez's* substantial current causation theory does not apply, and has never been extended, to a situation in which the actual killer is known.

In *Sanchez*, during a gun battle between two people, a single bullet hit a bystander and was fatal. The bullet couldn't be traced to either the defendant or the codefendant. This court found both defendant's liable

based on a “substantial concurrent causation” theory.

In this case, during a gun battle between two sides, a single bullet also hit a bystander and was fatal. This time, however, evidence showed that the fatal bullet was fired by a specific person, co-defendant Carney, and not the Mitchells. Although the Mitchells didn’t fire the shot that killed the bystander, they were convicted of first degree murder based on the “substantial concurrent causation” theory.

In asking the parties to address issue 1, this court presumably wanted discussion that went beyond *People v. Sanchez* because *Sanchez* only addresses the situation in which the actual killer is unknown. If this court had believed that *Sanchez* resolved the issue where the actual killer was known, it would not have asked the parties to discuss issue 1.

In response to issue 1, petitioner discussed both later cases based on *Sanchez*, and cases that *Sanchez* relied on in arriving at its “substantial concurrent causation” theory of liability for first degree murder. Petitioner could not find any cases that relied on the “substantial concurrent causation” theory, or any theory like it, that imposed first degree murder liability on a defendant who had not fired a fatal shot, or any shot that hit the victim. At most, *Sanchez* had relied on cases that imposed murder liability where a defendant had fired a shot that also hit

the victim but might not have been the fatal one. *People v. Sanchez*, 26 Cal.4th at 848, citing *People v. Fabian* (NY 1992) 154 Misc. 2d 957, 958, 586 N.Y.S.2d 468.

In discussing issue 1, petitioner also mentioned that this court's later case of *People v. Jennings* (2010) 50 Cal. 4th 616, 643-644 implied that the "substantial concurrent causation" theory would be limited to cases in which the actual shooter was unknown, since *Jennings* found that the purpose of the theory was to allow for liability in situations where ordinary theories of causation would result in all defendants escaping responsibility. (Unlike the present case, however, *Jennings* involved two different people directly inflicting substantial physical injuries on the victim.)

Respondent argues that the "substantial concurrent causation" theory of liability of *Sanchez* "permits a first degree murder conviction even when it is known the defendant did not fire the fatal shot." Respondent, however, relies on the ***concurring*** opinion of Justice Kennard for this assertion, essentially substituting Justice Kennard's concurrence for the opinion itself. (Respondent's brief, p. 21-22, 28, citing the Kennard concurring opinion *seven times*.)

Justice Kennard's concurring opinion is not the holding of *Sanchez*.

Statements in a concurring opinion of an individual justice that do not have the concurrence of a majority of the justices are not precedent, and constitute only the personal views of the writer. *People v. Superior Court (Persons)* (1976) 56 Cal.App.3d 191, 194, *People v. Stewart* (1985) 171 Cal. App. 3d 59, 65, *People v. Byrd* (2001) 89 Cal.App.4th 1373, 1383, *People v. Tirey* (2014) 225 Cal.App.4th 1150, 1165. If a majority of the justices join in a concurring opinion, it has "persuasive authority" (which is still not precedential.) *People v. Retanan* (2007) 154 Cal.App.4th 1219, 1231, *People v. Barba* (2013) 215 Cal.App.4th 712, 734, fn. 7. And, in any case, unless the statement in the concurring opinion is necessary to the court's decision, it is only dictum, not precedent. *People v. Tirey, id* at 1165, citing *People v. Lucatero* (2008) 166 Cal.App.4th 1110, 1116.

The Kennard concurrence was joined in only by Justice Werdegar and was thus not a position of the majority of justices of this court. *People v. Sanchez*, 26 Cal. 4th at 853. Moreover, the portion of *People v. Antick* (1975) 15 Cal.3d 79 Justice Kennard quoted relied on *People v. Gilbert* (1965) 63 Cal. 2d 690. The *Sanchez* majority described *Gilbert* as a provocative act case, a theory distinct from the "substantial concurrent causation" theory the majority applied. *People v. Sanchez* (2001) 26 Cal.4th at 852. This is especially significant here, since the prosecutor at

trial explicitly stated she had chosen “not to proceed on the provocative act theory.” (RT. vol. 18, p. 4932.)

The majority opinion refers to Justice Kennard’s concurring opinion, but does not adopt it as part of the opinion. If the *Sanchez* majority had adopted Justice Kennard’s concurrence, obviously Justice Kennard wouldn’t have written a concurrence because her view would have been the majority opinion.

And even if the majority had adopted Justice Kennard’s opinion that the substantial concurrent causation theory would apply to a defendant who was not the actual shooter, that portion of the opinion would be unnecessary to the court’s decision and therefore dictum. *People v. Tirey*, 225 Cal.App.4th at 1165, citing *People v. Lucatero*, 166 Cal.App.4th at 1116.

Respondent argues that there was evidence that petitioner intended to kill someone. But there is no evidence that petitioner intended to kill the bystander. In a true *Sanchez* situation, in which petitioner’s bullet could have killed the bystander, the doctrine of transferred intent would arguably make petitioner guilty of the homicide even though he intended to kill someone else. See *People v. Bland* (2002) 28 Cal. 4th 313, 319, fn. 1, interpreting *Sanchez* as holding that transferred intent applies to the

actual killer. *Sanchez* merely expanded the transferred intent doctrine to a situation in which the defendant could have fired the shot that killed the bystander.

Respondent argues that it makes sense to extend *Sanchez's* "substantial concurrent causation" theory of liability to a situation where the actual shooter is known and the defendant is not the shooter. This is not correct. *Sanchez* relied on the "substantial concurrent causation" theory precisely because the Court could not determine which of the two defendants fired the shot that hit and killed the bystander. The appellate court had found that because of this, the defendants couldn't both be convicted of first degree murder under a combination of direct murder liability and the "provocative act" doctrine because the two doctrines were mutually exclusive. If a defendant had fired the fatal shot, his "act of premeditating his (defendant's) murder in the role of the actual shooter precluded or cut off defendant's liability for murder as the provocateur." *People v. Sanchez*, 26 Cal.4th at 844, discussing the appellate court's opinion. The appellate court had considered what it called the "concurrent causation" doctrine, but had held that this could not support first degree murder convictions for both defendants since "concurrent causation . . . requires two independent acts [i.e., two

distinct direct or actual causes] that converge and concurrently cause death." *Sanchez, id.* at 844.(This is the *Jennings* situation, where two defendants both injure the victim and the injuries could have combined to result in the victim's death.)

The situation was further complicated by the state of the law at the time, which held that only a "premeditated intentional killing" (i.e., a direct killing) could have supported a first degree murder conviction, making the conviction of both defendants for first degree murder defective. *People v. Sanchez*, 26 Cal.4th at 844. (This court later held that the provocative act doctrine could support a first degree murder conviction, see *People v. Concha* (2009) 47 Cal.4th 653, 662.)

In response to this dilemma, *Sanchez* expanded that "concurrent causation" theory by incorporating tort principles of "substantial" causation. In the situation presented in *Sanchez*, where the actual killer was unknown and thus the provoker was unknown as well, *Sanchez* found that the provocative act doctrine had "little significance in this appeal" *People v. Sanchez*, 26 Cal.4th at 845.

Sanchez's "substantial concurrent causation" theory, accordingly, only makes sense where the actual killer is unknown. Where the facts show that either defendant's bullet could have killed the bystander,

Sanchez treats each defendant's act in shooting as a "substantial" cause of the bystander's death, applying a lesser standard than that of actual or "but for" cause to find each defendant guilty of the bystander's murder. (As *People v. Jennings*. 50 Cal. 4th at 643-644 suggests, had the *Sanchez* court acted otherwise, either or both defendants could have escaped first degree murder liability for the death of the bystander, even though that defendant could have directly killed him.)

But here, where only one bullet hit and killed the bystander, *Sanchez's* "substantial concurrent causation theory" can't apply. While a bullet that could have hit the bystander could have been a cause of the bystander's death under a reduced ("substantial") standard of causation, a bullet that was proved not to hit the bystander couldn't be a cause of the bystander's death at all, substantial or otherwise. Applying the "substantial concurrent causation" here renders actual "causation" a legal fiction. At most, bullets fired by the Mitchells provoked Carney to fire back and kill the bystander. The Mitchells' liability would be as a provocative act, not a direct cause.

Also, where the actual shooter is known, as here, there is no problem with mutually exclusive theories of liability between direct and provocative acts, as there would have been in *Sanchez* where it was

uncertain which defendant played which role. There was thus no need to resort to a tort-like theory of "substantial" causation. The direct killer was known. Those who allegedly provoked the direct killer were also known.

Cases decided since *Sanchez* support petitioner's interpretation that *Sanchez* was intended to be limited to situations in which the direct killer couldn't be determined. It has been nearly twenty years since *Sanchez* was decided. Petitioner has been unable to find any published opinion that applied the "substantial concurrent causation" theory to find liability where only one of several defendants injured the victim and the evidence showed which defendant that was. Respondent hasn't cited any such cases. (The exact *Sanchez* situation, where the actual killer is unknown, has not been the subject of any later published opinions either as far as petitioner is aware.) While later cases have cited *Sanchez*, these have either been "provocative act" cases, (see, e.g. *People v. Nunez and Satele* (2013) 57 Cal.4th 1, 43-44, citing *People v. Concha,* 47 Cal.4th at 658, *People v. Gonzalez* (2012) 54 Cal.4th 643, 654-655, citing *People v. Briscoe* (2001) 92 Cal.App.4th 568, 581.) Or, like *Jennings*, they have been cases where more than one defendant injured the victim. Gun battles are not unusual. If respondent is correct, it is surprising that no

post-*Sanchez* cases have applied the "substantial concurrent causation" theory in a situation like the one here, where the single bullet was traced to only one of the defendants.

3. The elimination of "natural and probable consequences" homicide liability invalidated the "substantial concurrent causation" theory of homicide liability, since that theory is an application of the "natural and probable consequences" doctrine.

In discussing a defendant's liability as an accomplice under the natural and probable consequences theory of liability, *People v. Carrillo* (2008) 163 Cal. App. 4th 1028 held that "natural and probable consequences" is the same as "proximate cause" in *Sanchez*:

> " . . . the jury was told that '[a]n act causes death if the death is the direct, natural, and probable consequence of the act and the death would not have happened without the act. A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence.'
>
> This is the definition of proximate cause approved in [*People v.*] *Bland* [(2002)], supra, 28 Cal.4th [313] at page 335. In holding that proximate cause under subdivision (d) did not require proof that the defendant actually fired the shot that harmed his victim, the *Bland* court relied on *People v. Sanchez* (2001) 26 Cal.4th 834 (*Sanchez*), which held that a defendant who joined with others in firing at a victim was the proximate cause of death for purposes of the murder conviction even when it was impossible to tell who fired the fatal shot. (*Bland, supra*, at pp. 337–338, citing *Sanchez, supra*, at pp. 848–849.)."

People v. Carrillo, 163 Cal. App. 4th at 1038.

Similarly, in *People v. Concha,* 47 Cal.4th at 661, this Court equated "proximate cause" with "natural and probable consequences," holding:

> "In all homicide cases in which the conduct of an intermediary is the actual cause of death, the defendant's liability will depend on whether it can be demonstrated that his own conduct *proximately caused* the victim's death … ." (*People v. Cervantes* (2001) 26 Cal.4th 860, 872–873, fn. 15 (*Cervantes*).) '[I]f the eventual victim's death is not the natural and probable consequence of a defendant's act, then liability cannot attach.' (*[People v.] Roberts* (1992), supra, 2 Cal.4th [271] at p. 321.)"

Concha then went on to specifically state that it was referring to the "proximate cause" referred to in *Sanchez*, holding:

> "[i]f a jury finds that a defendant proximately caused a death, either solely through his own conduct or through the actions of others where his conduct is shown to be a substantial concurrent cause of the death, and the defendant did so with a premeditated intent to kill, then the defendant is guilty of first degree murder."

People v. Concha, 47 Cal.4th at 662, citing *People v. Sanchez*, 26 Cal.4th at 849.

SB 1437 modified Penal Code section 188 to provide, "Malice shall not be imputed to a person based solely on his or her participation in a crime." Penal Code section 188(a)(3). The purpose of SB 1437 was

to "preclude any imposition of vicarious liability under the natural and probable consequences doctrine if the charged offense requires malice aforethought." *People v. Larios* (2019) 42 Cal.App.5th 956, 966. Since *Sanchez's* proximate cause - substantial concurrent causation doctrine is a subset of natural and probable consequences liability, SB 1437 eliminated this theory of liability in homicide cases as a barred form of imputed malice.

Petitioner has shown that in a gun battle where the co-defendant is known to have fired the fatal shot and the defendant's bullet did not hit the victim, the only type of "causation" attributable to the defendant is a "provocative act," where the defendant's gunfire caused the co-defendant to fire back and hit the victim. *People v. Concha,* 47 Cal.4th at 661, held that a defendant is guilty of "provocative act" murder only when the requirements of the natural and probable consequences doctrine are satisfied, thus holding that the "provocative act" doctrine is a type of natural and probable causes liability. Like the "proximate cause - substantial concurrent causation" doctrine, the provocative act doctrine imputes malice onto the defendant, as to the murder victim, based solely on the defendant's participation in a crime. *People v. Cervantes*, 26 Cal.4th at 872, fn. 15, *People v. Washington* (1965) 62 Cal.2d 777, 782,

People v. Reed (1969) 270 Cal.App.2d 37, 41-42. See also *People v. Gonzalez,* 54 Cal.4th 643 (a defendant is guilty of provocative act murder only when the victim's death was a natural and probable consequence of the defendant's act), *Sisson v. Superior Court* (2013) 216 Cal.App.4th 24, 37 (same.)

Three recent published appellate opinions have disagreed, holding that SB 1437 does not eliminate the analogous provocative act theory of liability, see *People v. Lee* (2020) 49 Cal. App. 5th 254, *People v. Johnson & Baker-Riley* (2020) 57 Cal. App. 5th 257, and *People v. Swanson* (2020) 57 Cal. App. 5th 604. However, review has already been granted in *People v. Lee* (July 15, 2020), no S262459, 2020 Cal. LEXIS 4599, although actual review has been deferred pending consideration of a different issue in *People v. Lewis*, no. S26059S. As for the other two cases, a petition for review was filed on December 18, 2020 in *People v. Johnson & Baker-Riley*, no. S266188, and the window for filing a petition for review opened in *People v. Swanson* on December 21, 2020, although no petition for review has yet been filed in that case.

4. Petitioner could not be liable as a direct aider and abetter of Carney's shooting of the bystander.

Respondent has argued that petitioner could be liable on a

traditional aiding and abetting theory despite SB 1437 and that the jury actually relied on such a theory, citing the Court of Appeal's discussion of *People v. Kemp* (1957) 150 Cal.App.2d 654 and language that "the Mitchells did not aid and abet Carney's attempts to kill them", but that petitioners "'worked together to create an explosive environment'" that inevitably led to the victim's death." Respondent's brief at p. 17, fn. 7, quoting opinion.

If the jury actually convicted petitioner as a traditional aider and abetter, it relied on an inapplicable theory of liability. Respondent's and the Court of Appeal's theory is contrary to *People v. Carrillo,* 163 Cal. App. 4th at 1038 and *People v. Concha*, 47 Cal.4th at 662, both of which treated the liability of a defendant like petitioner under the "natural and probable consequences" theory and not as an example of traditional aiding and abetting. Moreover, respondent and the Court of Appeals would treat a life or death gun battle as if it was a professional wrestling match, where the intent of the participants is really to put on a show, not to win or survive. This is not a correct description of traditional aiding and abetting liability:

> "'[U]nder the general principles of aiding and abetting, "an aider and abettor [must] act with knowledge of the criminal purpose of the perpetrator and with an intent or purpose

> either of committing, or of encouraging or facilitating commission of, ***the offense***." [Citation.]' *(People v. Prettyman* (1996) 14 Cal.4th 248, 262, italics omitted (*Prettyman*).) ***When the offense is a specific intent offense, 'the accomplice must "share the specific intent of the perpetrator"***; this occurs when the accomplice "knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of ***the crime***."' ([*People v.*] *Samaniego* [(2009)] 172 Cal.App.4th [1148] at p. 1164."

People v. Canizalez (2011) 197 Cal. App. 4th 832, 850-851, emphasis added. Accord, *People v. Beeman* (1984) 35 Cal.3d 547, 560.

"Creating an explosive environment" is not the offense. Thus, even if petitioner intended to "create an explosive environment", whatever that means, he would not have shared Carney's specific intent for "the offense." Carney's "offense" was assault or attempted murder of the Mitchells, and his "specific intent" was to carry out this offense.

Respondent's, and the Court of Appeal's reliance on *Kemp* as an authority for traditional aiding and abetting principles was misplaced. *Kemp* long preceded *Beeman*, the landmark Supreme Court case that clarified the traditional test of aiding and abetting by requiring that the accomplice "share the specific intent of the perpetrator" and defined that as knowing "the full extent of the perpetrator's criminal purpose" and giving aid or encouragement "with the intent or purpose of facilitating

the perpetrator's commission of the crime." *People v. Beeman,* 35 Cal.3d at 560. Any lesser requirement in *Kemp* would have long ago been superseded by *Beeman*.

5. This court's recent decision in *People v. Gentile* (2020) no. S256698, 2020 Cal. LEXIS 8575 has clarified that the natural and probable consequences doctrine of murder liability did not survive SB 1437.

On December 17, 2020, this Court issued its opinion in *People v. Gentile*. In *Gentile*, this Court unanimoul held that SB 1437's amendment to section 188 bars a conviction for second degree murder based on a natural and probable consequences theory: "Senate Bill 1437 bars a defendant from being convicted of second degree murder under a theory that the defendant aided and abetted a crime, the natural and probable consequence of which was murder." Slip opinion, p. 12. Thus, this court held that natural and probable consequences theory did not survive SB 1437, at least in the murder context. This means that any conviction for murder based on the natural and probable consequences doctrine would be subject to being set aside under SB 1437.

This Court also ruled that relief for a conviction already suffered on the basis of the natural and probable consequences doctrine isn't reversible on appeal but requires implementation of the procedures in SB

1437, codified at Penal Code section 1170.95; namely, that the defendant has to file a petition to obtain ultimate relief. This ruling doesn't affect review issue no. 1, which doesn't concern SB 1437. Concerning issue no. 2, *Gentile* simply means that this court couldn't simply vacate petitioner's murder conviction if it ruled in petitioner's favor. It could rule, however, that the basis of petitioner's murder conviction was a natural and probable consequences theory now barred by SB 1437.

6. Conclusion.

In the original merits brief, petitioner asked that this court reverse petitioner's first degree murder conviction. Based on Gentile, petitioner requests that this court rule that he was convicted on a natural and probable consequences theory of liability now barred by SB 1437 and that he is eligible for relief under the procedures in section 1170.95.

Dated: Oakland, California, Wednesday, December 23, 2020.

Robert J. Beles
Paul McCarthy
Attorneys for *Petitioner* L*OUIS* M*ITCHELL*

Supreme Court of the State of California

<table>
<tr><td>PEOPLE OF THE STATE OF CALIFORNIA,

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vs.

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Defendant-Petitioner.</td><td>No. S260063
Appeal No. C077558
Sacramento County Superior Court No. 11F00700

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I hereby certify under California Rules of Court 8.520(c) that this merits brief is printed in proportionally spaced 13 point type, contains 3,997 words, and is within the 8.400 word limit specified by Rule 8.520(c).

Dated: Oakland, California, Wednesday, December 23, 2020.

Paul McCarthy
Attorney for *Petitioner* LOUIS MITCHELL

PROOF OF SERVICE

I, the undersigned, depose and state: I reside or do business within the County of Alameda. I am over eighteen years of age and not a party to this action. My business address is 1 Kaiser Plaza, Suite 2300, Oakland, CA 94612-3642. I served the following documents:

Petitioner Louis Mitchell's Reply Brief on the Merits; Certificate of Compliance; Appendix

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I declare under penalty of perjury that the above is true. Executed in Oakland, California on Wednesday, December 23, 2020.

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 12/23/2020 by Tayuan Ma, Deputy Clerk

STATE OF CALIFORNIA
Supreme Court of California

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STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. CARNEY**
Case Number: **S260063**
Lower Court Case Number: **C077558**

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12/23/2020
Date

/s/Robert Beles
Signature

McCarthy, Paul (139497)
Last Name, First Name (PNum)