Supreme Court of California
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Supreme Court of California
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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

The People of the State of California,	)	
	)	S260063
Plaintiff and Respondent,	)	
	)	
v.	)	
	)	
James Leo Carney et al.,	)	
	)	
Defendants and Appellants.	)	
______________________________	)	

Third Appellate District No. C077558
Sacramento County Superior Court No. 11F00700
The Honorable Kevin J. McCormick, Judge

Application to File Amicus Curiae Brief and
Amicus Curiae Brief of Amicus Populi
In Support of the People of the State of California

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Plaintiff and Respondent,	)	
v.	)	
James Leo Carney et al.,	)	
Defendants and Appellants.	)	

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

Amicus curiae Amicus Populi requests permission to file the attached amicus curiae brief in support of respondent, The People of the State of California, pursuant to Rule 8.520(f) of the California Rules of Court.

Amicus Populi represents individuals who worked as prosecutors during the past three decades, when California became much safer. From 1993 to 1998 alone, the state's homicide rate was cut in half. From 1993 to 2014, the homicide rate dropped from 12.9 to 4.4 (per 100,000), its lowest in 50 years. The violent crime rate dropped from 1059 to 393 in 2014, so there were about 3,330 fewer homicides and 256,000 fewer violent crimes in that year than there would have been had crime remained at its 1993 level. The crime rate's decline saved tens of thousands of lives and

prevented millions of violent crimes over two decades.

Amicus Populi works to preserve this improvement, balancing the imperative of punishing offenders according to their culpability with the imperative of protecting public safety, the first duty of government. (See *People ex rel. Gallo v. Acuna* (1996) 14 Cal.4th 1090, 1126; *People v. Blake* (1884) 65 Cal. 275, 277.)

Amicus curiae certifies that no party or counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

If this Court grants this application, amicus curiae requests the Court permit the filing of this brief which is bound with the application.

____

Mitchell Keiter
Counsel for Amicus Curiae
Amicus Populi

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Introduction

Twenty years ago, this Court unanimously upheld the firsr degree murder conviction of a defendant who participated in an urban shootout but *did not fire the fatal shot*. (*People v. Sanchez* (2001) 26 Cal.4th 834.) It was unclear which defendant, Sanchez or Gonzalez, was this nonshooter, and which one actually fired the fatal shot, but it did not matter because *direct causation* is not necessary (or sufficient) for liability; *proximate causation* is necessary (and sufficient) to support a conviction. (*Id*. at p. 845.) Contrary to the contention that the nonshooter could not be liable as an indirect proximate cause, this Court relied on other cases where the direct cause *was* known to support the convictions for both the direct proximate cause and the indirect proximate cause. (*Id*. at pp. 846-847, citing *People v. Kemp* (1957) 150 Cal.App.2d 654; *Commonwealth v. Gaynor* (1994) 538 Pa. 258 [648 A.2d 295].) If, as appellants claim, direct causation were a necessary element, *neither* Sanchez' *nor* Gonzalez' conviction could have stood.

Contrary to petitioners' argument, SB 1437 does not affect this case. The statute serves to limit vicarious liability, so an aider and abettor will be liable only for the crime he intended to assist, and not any other crime committed by the direct perpetrator that is a natural and probable consequence of the first. One who intends to assist only an assault or burglary will not be liable when the perpetrator goes beyond the planned crime and commits a murder. But the term

“natural and probable consequence” also appears where liability is not vicarious. For example, where one Wright shot at a driver, who lost control of his vehicle and fatally struck a pedestrian, the death was attributable to the shooter, because the death was the “natural and probable consequence **of the defendant’s act**.” (*People v. Roberts* (1992) 2 Cal.4th 271, 319, citing *Wright v. State* (Fla.Dist.Ct.App. 1978) 363 So.2d 617, emphasis added.) Where the victim’s death is the natural and probable consequence of the defendant’s own conduct, liability is not vicarious.

Finally, this Court should implement the principle announced in the companion case to *Sanchez*, *supra*, 26 Cal.4th 834, *People v. Cervantes* (2001) 26 Cal.4th 860, 872, fn. 15., which explained that “whether or not a defendant's unlawful conduct is ‘provocative’ in the literal sense, when it proximately causes an intermediary to kill through a dependent intervening act, the defendant's liability for the homicide will be fixed in accordance with his criminal mens rea. (See *Cervantes*, at p. 869, citing *People v. Fowler* (1918) 178 Cal. 657, 669, disapproved on another ground in *People v. Thomas* (1945) 25 Cal.2d 880, 901).

Statement of Facts

Defendants James Carney (with others) engaged in a public shootout with defendants Lonnie and Louis Mitchell. (Opn. 1.) One bullet fired killed Monique N., who died as she tried to shield her two-year-old daughter from the crossfire. (Opn. 1.) It was Carney's gun that fired the fatal bullet. (Opn. 3.)

Argument

I. Both Carney and the Mitchells could be liable for Monique N.'s death even though she was hit by only one bullet.

This Court considered another fatal urban shootout two decades ago in *People v. Sanchez* (2001) 26 Cal.4th 834, where both shooters could be liable for the bystander's death even though he was hit by only one bullet. This Court affirmed both murder convictions, as both shooters were proximate causes of the victim's death, even though only defendant fired the fatal shot, and was thus the direct cause. This Court correctly observed that direct causation is not an element of homicide liability, as "it is proximate causation, not direct or actual causation, which, together with the requisite culpable mens rea (malice), determines defendant's liability for murder." (*Sanchez*, at p. 845.) If direct causation had been an element, then neither Sanchez nor Gonzalez could have been guilty of the homicide.

The instant jury found all defendants proximately caused the victim's death. So long as substantial evidence supported this conclusion, all were properly convicted of homicide, in accordance with their mens rea.

A. Proximate causation, not direct causation, establishes liability.

Proximate causation, not direct (or actual) causation, combines with the requisite culpable mens rea (malice) to determine a defendant's liability for murder. (*Sanchez*, *supra*, 26 Cal.4th 834, 845.) Though direct causation is a question of fact, proximate causation is a policy determination, through which the law seeks to assign liability fairly and justly. (*People v. Cervantes* (2001) 26 Cal.4th 860, 872.) Where two defendants engage in mutual combat that results in the death of a bystander, both defendants may be liable as a proximate cause of death, even though a single bullet is the direct cause of death. (*Sanchez*, *supra*, at pp. 846-847.)

Cervantes cited cases showing indirect proximate causation can support homicide liability. (*Cervantes*, *supra*, 26 Cal.4th at pp. 869-871.) Where Fowler bludgeoned Duree and left him lying in the road, and a motorist then drove over him, it did not matter whether the “immediate instrumentality of death” (direct cause) was Fowler’s club or the motorist’s car; unless the motorist purposely drove over Duree, Fowler proximately caused Duree’s death. (*Ibid*.) Similarly, multiple defendants fatally stabbed Gardner, who, before he died, pursued one them while in a state of hypovolemic shock and fatally stabbed a prison guard. (*Id.* at pp. 869-870; *People v. Roberts* (1992) 2 Cal.4th 271, 294-295.) Gardner was the direct cause of the guard’s death, but the defendants were the proximate cause. (*Roberts*, at p.

321.) *Cervantes* also recalled *Wright v. State* (Fla.Dist.Ct.App. 1978) 363 So.2d 617, 618, where the defendant shot at a driver who, “ducking bullets,” lost control of his car and fatally ran over a pedestrian. (*Cervantes*, at pp. 870-871.) The driver was the immediate instrumentality of death, but blame, and thus proximate causation, properly lay with the shooter, not the driver. And murder liability lay with a defendant who threw a hand grenade at one Couch, who impulsively kicked it away toward the decedent. (*Cervantes*, at p. 870, citing *Madison v. State* (1955) 234 Ind. 517 [130 N.E.2d 35].) It was the defendant. not Couch, whose act set in motion a chain of events that produced death as its natural and probable consequence, and who thus deserved liability. (*Cervantes*, at p. 866.)

Sanchez recalled cases involving two antagonists where only one was the direct cause of death (and *known* to be the direct cause), but both were proximate causes. The Pennsylvania Supreme Court affirmed first degree murder convictions for both defendants who participated in a shootout that resulted in bystander casualties. (*Sanchez*, *supra*, 26 Cal.4th at p. 847, citing *Commonwealth v. Gaynor* (1994) 538 Pa. 258 [648 A.2d 295].) Though Johnson fired the fatal shot, “the conduct of Gaynor (as well as Johnson) . . . proximately caused the victims' death or injuries.” (*Sanchez*, *supra*, at p. 847.) Likewise, where Kemp and Coffin engaged in life-threatening activity (a drag race) on a public street that killed a bystander, both defendants were liable for the

homicide because "the acts of both . . . were a proximate cause of the result" even though only one defendant directly inflicted harm. (*Id*. at p. 846, citing *People v. Kemp* (1956) 150 Cal.App.2d 654, 659.)

The *Sanchez* court thus contemplated the possibility that the direct cause of death could be known in such circumstances but liability could properly rest with *both* antagonists nonetheless.

Direct causation is therefore not an element of homicide liability. Petitioners' position would produce a perverse incentive on prosecutors *not* to disclose the direct cause. If, as in *Sanchez*, the direct cause is uncertain, the prosecutor could obtain convictions for both defendants. But under petitioners' theory, if the prosecution proved which combatant filed the fatal shot, then only that defendant could be convicted of the homicide, and the other would escape liability for that crime.

There may be "multiple proximate causes of a homicide, even where there is only one known actual or direct cause of death." (*Sanchez*, *supra*, 26 Cal.4th at p. 846.) Petitioners contend they cannot find any post-*Sanchez* case affirming multiple homicide convictions where only one of several defendants directly injured the victim and the evidence showed which one did. (PRB 14.) To the contrary, appellants *did* find a case, which they cited on page 20 of their reply brief: *People v. Canizalez* (2011) 197 Cal.App.4th 832. As in *Kemp*, *supra*, 150 Cal.App.2d 654, defendants Canizalez and

Morones engaged in a fatal car race. Sufficient evidence supported the conclusion that Morones was the direct cause, though it did not matter because even if the "actual cause of death cannot be determined [it] does not undermine a first degree murder conviction." (*Canizalez*, at p. 845, citing *Sanchez*, *supra*, 26 Cal.4th at p. 845.)

B. All antagonists were substantial factors in Monique N.'s death.

A defendant's conduct may be a substantial factor, and thus a proximate cause, of a death even where it is not the direct cause. (*Sanchez*, *supra*, 26 Cal.4th 834, 845; *Kemp*, *supra*, 150 Cal.App.2d 654, 659; *Gaynor*, *supra*, 648 A.2d 295, 299.) Petitioners contend that because the evidence established Carney's shot directly caused death, and their shots did not, that they could not be liable for the homicide as a concurrent cause. This is incorrect.

1. Substantial factor causation suffices for liability; "but for" causation is not necessary.

Petitioners' theory rests on several misperceptions regarding causation law. First, they contend that finding multiple antagonists to be liable as proximate causes on a concurrent causation theory would render "actual 'causation' a legal fiction." (Petitioners' Reply Brief (RPB) 13.) Actual causation is synonymous with direct causation. (*Sanchez*, *supra*, 26 Cal.4th at p. 845.) As Argument IA, *ante*, showed, direct causation is neither necessary nor sufficient for liability.

Petitioners also incorrectly equate actual causation with "but for" causation. (RPB 13.) They are not the same. The "but for" cause is not the cause that directly inflicts death but a cause without which the death would not have occurred. (*People v. Jennings* (2010) 50 Cal.4th 616, 643-644; *Viner v. Sweet* (2003) 30 Cal.4th 1232, 1239.)

“Substantial factor” causation and “but for” causation are not mutually exclusive; the broader “substantial factor” test subsumes the “but for” test, though they ordinarily produce the same result. (*Jennings*, *supra*, 50 Cal.4th at p. 644, citing *Viner*, *supra*, 30 Cal.4th at pp. 1239-1240.) Conduct is neither a “but for” cause nor a substantial factor if the harm would have occurred even without it. (*Viner*, at p. 1240.) Conversely, if the harm would not have occurred without the conduct, it is both a “but for” cause and a substantial factor. (*Ibid*.) The difference between the two standards is that if two forces operate so that both could independently create the harm, the forces are substantial factors even though neither is a “but for” cause. (*Ibid*.)

The “substantial factor” standard explained the outcome in *People v. Pock* (1993) 19 Cal.App.4th 1263. Two defendants both shot and hit the decedent, and a forensic expert opined that *all* gunshot wounds contributed to death. (*Id*. at p. 1271, cited in *Sanchez*, *supra*, at p. 845.) Strict application of “but for” causation would have precluded conviction of either defendant, because the other’s shot by itself could have killed the victim. The substantial factor test thus presents a “clearer rule” that more “accurately” assigns liability where there are multiple casual forces. (*Jennings*, *supra*, 50 Cal.4th at p. 644.)

2. Substantial evidence supports the conclusion that both defendants were a "but for" cause, because it "takes two to tangle."

A defendant's conduct is a "but for" cause if, without it, the harm would not have occurred. (*Jennings*, *supra*, 50 Cal.4th 616, 643-644; *Viner, supra,* 30 Cal.4th 1232, 1239.) Where shootouts or drag races occur only through mutual agreement, the assent of both defendants is necessary, so the conduct of both is a "but for" cause, without which the harm would not occur.

The *Sanchez* court recalled the New York drag race where Abbott and Moon agreed to race and Abbott lost control of his car, which crashed into three victims. (*Sanchez*, *supra*, 26 Cal.4th 834, 848, citing *People v. Abbott* (1981) 84 A.D.2d 11 [445 N.Y.S.2d 344].) The New York court observed that a driver cannot race against himself, so the agreement of both was a precondition for the fatal activity. "Moon's 'conduct made the race possible' in the first place, as **there would not have been a race had Moon not 'accepted Abbott's challenge**.' " (*Sanchez*, at p. 848, citing *Abbott*, 84A.D.2d at p. 15, emphasis added.) If Abbott had not challenged Moon, or Moon had not accepted Abbott's challenge, there would have been no race — and no fatalities. Likewise, *Kemp* observed the two racers were not "acting independently" but were "jointly engaged" in the competition." (*Sanchez*, at p. 846, citing *Kemp*, *supra*, 150 Cal.App.2d at p. 659.) It takes two to tangle.

The prosecutor below made this precise argument to justify convictions to all defendants.

> "[I]t's kind of a like . . . a street race. . . . Without one, the other one wouldn't have engaged in that behavior. [¶.] Here, without the Mitchells, **it wouldn't have happened**. Without Carney, and Jones, **it wouldn't have happened**."

(Opn. at 31, emphasis added.)

The mutual agreement rendered petitioners and Carney "but for" causes of Monique N.'s death, as well as substantial factors.

Petitioners were active participants in a fatal shootout. They were substantial factors (if not but for causes) of Monique N.'s death. As even single-shot fatalities can have multiple proximate causes, multiple homicide convictions were proper.

II. SB 1437 has no effect on petitioners' liability.

The Legislature recently abolished the "natural and probable consequences doctrine." (*People v. Gentile* (2020)10 Cal.5th 830 [477 P.3d 539].) This abolition rejected the vicarious liability that held aiders and abettors liable for not only the crimes they intended to aid and abet but also those that were objectively foreseeable. (477 P.3d at p. 546.) The doctrine developed due to the special dangers arising from group crime as a "protection to society, for a group of evil minds planning and giving support to the commission of a crime is more likely to be a menace to society than where one individual alone sets out to violate the law." (*People v. Welch* (1928) 89 Cal.App. 18, 22.) Through this doctrine, a defendant who intended to aid and abet an assault could be liable for murder, if the perpetrator exceeded the planned crime, and the homicide was foreseeable. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117.)

Petitioners contends SB 1437 precludes their liability here because "*Sanchez's* proximate cause - substantial concurrent causation doctrine is a subset of natural and probable consequences liability." (PRB 17.) It is not; the words "natural and probable" appear in contexts other than vicarious liability. In *People v. Fowler* (1918) 178 Cal. 657, disapproved on another ground in *People v. Thomas* (1945) 25 Cal.2d 880, 901, where Fowler beat Duree and left him lying in a roadway, the death was the "natural and probable result of the defendant's conduct in leaving Duree lying helpless and

unconscious in a public road, exposed to that danger." (*Id*. at 667-669.)[1] Similarly, where Wright shot at a driver, who lost control of his vehicle and fatally struck a pedestrian, that death was the "natural and probable consequence **of the defendant's act**." (*Roberts*, *supra*, 2 Cal.4th 271, 319, citing *Wright v. State*, *supra*, 363 So.2d 617, emphasis added.) Liability was personal, due to the defendant's own conduct, not vicarious, through the conduct of another person.

The difference between the personal murder liability authorized in *Fowler*, *supra*, 178 Cal. 657, and *Roberts*, *supra*, 2 Cal.4th 271, and the vicarious murder liability prohibited by SB 1437, is the difference between the realm of nature and the realm of will. (Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine* (1985) 73 Calif. L. Rev. 323, 327.) Neither antecedent events (or acts of others) "cause a **person to act** in the same way that they cause **things to happen**." (*Id*. at p. 333, emphasis added.) If a defendant leaves a victim lying vulnerable in a road, or shoots at a driver, there is a "physical causation," through which the victim's death is natural and probable, and "happens," so tracing homicide liability to the antecedent cause is proper. (*Id*. at p. 334.) Nothing intervened to break the chain of causation.

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[1] The beating would not have been the proximate cause of the death if the driver had purposely run over the body, as that would be an independent intervening cause. (*Cervantes*, *supra*, 26 Cal.4th 860, 869, 871.)

A different result obtains where an aider and abettor equips the perpetrator with a rope so the latter can bind the victim to effect a burglary, but the perpetrator instead uses the rope to strangle her. The aider and abettor did not *cause* the perpetrator to act that way, so the homicide is the product of the perpetrator's independent choice, not the natural result of a chain of events. (*Kadish*, *supra*, 73 Calif. L. Rev. at p. 333.) An intermediary's criminal and felonious acts break the chain of causation, so they are attributable to an antecedent party only if *intended* by that party: "What another freely chooses to do is his doing, not mine. It cannot be seen as a part of my action the way a natural physical consequence would be. Only if I chose to identify with his action may I incur liability that action creates." (*Kadish, supra*, 73 Calif. Rev. at p. 406; see also *Cervantes*, *supra*, 26 Cal.4th 860, 874.)[2]

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The distinction between the realms of nature and will can be elusive even for top legal minds. In addressing whether the First Amendment protects Koran-burning (as it protects flagburning), Justice Breyer cited Justice Holmes' observation in *Schenck v. United States* (1919) 249 U.S. 47, 52, that one may not falsely shout "Fire!" in a crowded theater. (Jonathan H. Adler, *Is Koran-Burning Protected by the First Amendment?*, The Volokh Conspiracy (Sep. 14, 2010) http://volokh.com/2010/09/14/is-koran-burning-protected-by-the-first-amendment/) "Why? Because people will be trampled to death. And what is the crowded theater today? What is the being trampled to death?" Under the Kadish/*Cervantes* analysis, the panic caused by a false shout of "Fire!" would be a thing that happens, a natural, physical

Cases involving mutual competitions, be they drag races or shootouts, do not rest on vicarious liability. (*Sanchez*, *supra*, 26 Cal.4th 834, 845, *Canizalez*, *supra*, 197 Cal.App.4th 832.) The Court of Appeal addressed the distinction between accomplice liability and joint participation in *People v. Garcia* (2020) 46 Cal.App.5th 123, where defendant Austin handed codefendant Garcia duct tape, which Garcia then wrapped over the victim's mouth and asphyxiated him. (*Id*. at pp. 136, 141.) *Garcia* distinguished *Sanchez*, where the two shooters acted *concurrently*, from its own facts, where the aider and abettor Austin "first did something (i.e., provide the tape) and then another person *subsequently* did an act that caused the death." (*Garcia*, at p. 154.) In contrast to the concurrent actions in *Sanchez* or *Canizalez*, Austin's involvement ended once he gave the tape to Garcia, who then had complete control over whether the victim lived or died.

Where multiple participants act together, however, both may act as direct perpetrator *and* as aider and abettor. (*People v. Thompson* (2010) 49 Cal.4th 79, 117-118, citing *McCoy*, *supra*, 25 Cal.4th 1111, 1120.) "[O]ne person might lure the victim into a trap while another fires the gun; in a stabbing case, one person might restrain the victim while the

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consequence, attributable to the shouter, but violence following the burning of a Koran would be an independent and felonious act, which could not be attributed to the antecedent act.

other does the stabbing." (*Thompson*, at p. 118; *McCoy*, at p. 1120.) This appears to be what occurred in *Roberts*, *supra*, 2 Cal.4th 271, 295, as inmates "saw defendant stab Gardner repeatedly and saw Menefield restrain Gardner when he tried to escape." And one's conduct can be a "direct cause" of an arson-related death where he spreads kerosene even if another defendant lights the match. (See *People v. Billa* (2003) 31 Cal.4th 1064, 1072.)

Such "joint manuver[ing]" supports murder convictions for both participants. (*Thompson*, *supra*, 49 Cal.4th at p. 118.) It occurs in shootouts and drag races; the *Canizalez* racers were both liable as "coperpetrators," as they were "jointly engaged in a speed race that led directly to the fatal collision." (*Canizales*, *supra*, 197 Cal.App.4th 832, 846, citing *Thompson*, at p. 118.) The Court of Appeal affirmed both murder convictions, finding the "primary cause of the collision was *street racing*," not either one's independent conduct. (*Canizalez*, *supra*, at p. 846, emphasis added.) Likewise, the primary cause of Monique N.'s death was the *shootout*, not any one defendant's independent conduct.

Petitioners were properly liable as coperpetators of the homicide. (*Canizalez*, *supra*, 197 Cal.App.4th 832, 846.) There convictions did not rest on the vicarious liability addressed by SB 1437.

III. This Court should implement *Cervantes*' footnote 15 and assign liability according to the *Fowler* formula whether or not the defendant's conduct is "provocative" in the literal sense.

The *Sanchez* Court of Appeal did not realize both antagonists could be liable for murder because it erroneously evaluated the case according to the "provocative act" doctrine developed in *People v. Washington* (1965) 62 Cal.2d 777, and *People v. Gilbert* (1965) 63 Cal.2d 690. (*Sanchez*, *supra*, 26 Cal.4th at p. 844.) *Cervantes* explained that "provocative act" murder was but a subset of homicides where the direct or actual cause is not the proximate cause (so there is an indirect proximate cause). (*Cervantes*, *supra*, 26 Cal.4th at p. 872, fn. 15.) In evaluating liability, the formula provided in *Fowler*, *supra*, 178 Cal.657, that when a defendant "proximately causes an intermediary to kill through a dependent intervening act, the defendant's liability for the homicide will be fixed in accordance with his criminal mens rea," will *always* correctly describe a defendant's liability, "whether or not a defendant's unlawful conduct is 'provocative' in the literal sense." (*Cervantes,* at p. 872*,* fn.15.) If the driver had directly caused Duree's death by purposely driving over him, that would have been criminal, and an independent superseding cause, which would break the causal chain and relieve Fowler of liability. (*Cervantes,* at pp. 869, 872, fn. 15, 874.) But if the driver's contact was a dependent intervening cause (the natural and probable result of Fowler's leaving the body exposed) then Fowler's liability

would vary according to the mental state with which he inflicted the blow. "If it was done in self-defense, it would be justifiable. If it was felonious, it would be murder or manslaughter, according to the intent and the kind of malice with which it was inflicted." (*Fowler*, at p. 669.) In sum, Fowler prescribed a defendant's liability would be the product of "proximate causation times mens rea."

The provocative act rule was "specifically conceived as a caveat to the felony-murder rule," and should produce the same outcome as that produced through *Fowler*. (*Cervantes*, *supra*, 26 Cal.4th at p. 872, fn. 15.) "**In all homicide cases in which the conduct of an intermediary is the actual [direct] cause** of death," defendants will be liable where their own conduct "*proximately caused* the victim's death." (*Ibid*, boldface added.) Where the intermediary's conduct is a dependent intervening cause, liability remains with the defendant (and varies according to his mens rea); only if the intermediary's conduct is an independent superseding cause will the causal chain be broken. (*Ibid*.)

However, as *Sanchez* shows, the provocative act rule is not necessary to impose liability on defendants who proximately but indirectly cause death. And it can produce confusing results and fail to align defendants' liability with their culpability. This Court should implement footnote 15 and apply the *Fowler* formula to all indirect homicides, "whether or not a defendant's unlawful conduct is 'provocative' in the literal sense."

A. The provocative act doctrine was specifically conceived as a caveat to the felony-murder rule, and should not be extended beyond that function.

The *Fowler* rule, through which proximate causation (even if indirect) combines with malice to support a murder conviction first applied in the felony-murder context in *People v. Harrison* (1959) 176 Cal.App.2d 330, disapproved in *Washington*, *supra*, 62 Cal.2d 777. During a robbery, Harrison began shooting at employee Jones, who returned fire and inadvertently killed employer Williams. (*Id*. at p. 331.) *Harrison* extensively addressed the **causation** element, and cited *Fowler* as "illustrative" of the principle that a defendant's conduct is the proximate cause of a harm if the "intervening cause . . . was the natural and probable result of [defendant]'s conduct. (*Harrison*, at p. 334.) The intervening cause, Jones' shot, like the "injury from the vehicle" in *Fowler*, was one such natural and probable result. (*Ibid*.) Just as "street racing" was the cause of death in *Canizalez*, *supra*, 197 Cal.App.4th 832, 846, *Harrison* broadly characterized the proximate cause of death as the overall activity: the "attempted robbery was the proximate cause of the death." (*Harrison*, at p. 345.) There was no analysis regarding the **mens rea** element; the Court of Appeal assumed that if the defendant proximately caused the homicide, then it was first degree murder. (*Id*. at p. 332.) As the defendant proximately caused death, and section 189 imputed malice, the Court of Appeal affirmed the first degree murder conviction. (*Id*. at p.

346.)

The facts of *Washington*, *supra*, 62 Cal.2d 777, differed only slightly, in that the robber did not begin shooting but only "pointed a revolver directly at" the proprietor, who fired first. (*Id*. at p. 779.)[3] In reversing Washington's first degree murder conviction and disapproving *Harrison*, the Supreme Court articulated the dissatisfaction with the felony-murder rule that has since generated SB 1437. The felony-murder rule "should not be extended beyond any rational function that it is designed to serve," because it was almost always unnecessary and it "erodes the relation between criminal liability and moral culpability." (*Id*. at p. 783.) To authorize liability without imputing malice, this Court created the "provocative act" doctrine. (*Cervantes*, *supra*, 26 Cal.4th 860, 868, citing *People v. Gilbert* (1965) 63 Cal.2d 690; *Washington*, *supra*.) The doctrine's function was to ensure liability derived from the "principles of criminal liability that should govern the responsibility of one person for a killing committed by another" rather than from imputing malice based on the commission of the felony. (*Washington*, *supra*, 62 Cal.2d at p. 782.) This Court had explained the "principles of criminal liability" governing the responsibility for indirectly

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[3] Another difference was that the *Washington* victim was an accomplice, not an innocent party as in *Harrison*, *supra*, 176 Cal.App.2d 330, though this Court denied that distinction held any significance, because liability should not turn on such a "fortuitous circumstance." (*Washington*, at p. 780.)

caused homicides almost 50 years earlier. (*Fowler*, *supra*, 178 Cal.657.

The Supreme Court thus devised the provocative act doctrine as an exception to an exception. It was an exception to the felony-murder rule, as section 189 would not impute malice where the homicide had an indirect proximate cause, but an exception to that limitation, because there could still be malice if a felon committed a "provocative act." But the provocative act rule soon became the default framework for indirect causation liability, even where there was no section 189 felony.

The Court of Appeal applied the traditional principles of criminal liability governing intermediary killings in *People v. Harris* (1975) 52 Cal.App.3d 419, 422-424, where a driver prompted a police chase, as he drove at over 90 miles per hour and drove past numerous stop signs. The officer's car collided with another, killing one of that car's passengers, and *Harris* observed the defendant could be a proximate cause even where he was not directly involved in the fatal collision. (*Id*. at p. 423, 426.) *Harris*' analysis would be quoted more than a quarter-century later in *Cervantes, supra*, 26 Cal.4th 860, 871. (See Argument IIIB, *post*.) As is relevant for the instant case, *Harris* explained "the ordinary principles governing proximate causation" held that "When the conduct of two or more persons contributes concurrently as proximate causes of a death, the conduct of each of said persons is a proximate cause of the death regardless of the extent to

which each contributes to the death." (*Id.* at p. 427, fn. 3.) Because evidence supported the finding the mens rea element, as the defendant committed an unlawful act with gross negligence, the evidence supported charging the defendant with vehicular manslaughter. (*Id.* at pp. 426, 428.)

But rather than continue applying those ordinary principles, the Court of Appeal invoked the provocative act doctrine in another case where the defendant and his brother were assaulting a deputy sheriff until another deputy intervened to protect him and fatally shot the brother. (*People v. Velazquez* (1975) 53 Cal.App.3d 547.) Though the brother's death was a "reasonable and foreseeable response" to the brothers' actions, *Velazquez* nonetheless cited *Gilbert*, *supra*, 63 Cal.2d 690, 704-705, and *Washington*, *supra*, 62 Cal.2d 777, 780, rather than *Fowler*, *supra*, 178 Cal.657, and other non-felony-murder cases.

Further analysis appeared in *In re Aurelio R.* (1985) 167 Cal.App.3d 52. A gang member drove his cohorts into another gang's territory and they shot at rivals, who returned fire and killed a passenger. (*Id.* at pp. 55-56.) There was proximate causation, as shooting back was a "natural and 'highly probable' reaction" to the defendants' conduct. (*Id.* at p. 59.) And there was malice, either express, because the defendants had the "intent to kill," or implied, because they had "at least an intent to commit life-threatening acts." (*Id.* at pp. 59-60.) *Washington*'s concern that the felony-murder rule "should not be extended" played no role here, and the *Fowler* formula

could have easily produced an murder conviction without resort to that disfavored doctrine. (*Washington*, *supra*, 62 Cal.2d 777, 783.) But instead of following *Fowler* to derive murder liability from the combination of proximate causation and malice, *Aurelio R.* strained to fit the case's facts into the "provocative act" doctrine, through which liability requires an act beyond the underlying felony, and found an exception to this requirement: "no separate and independent 'provocative act need be committed" because the instant defendants had the "intent to kill or at least . . . to commit life-threatening acts." (*Id.* at pp. 59-60.)

The decisions in *Washington*, *supra*, 62 Cal.2d 777, and *Gilbert*, *supra*, 63 Cal.2d 690, like SB1437, sought to confine the reach of the felony-murder rule in establishing murder liability. This can be achieved by following *Fowler* (and other cases like *Roberts*, *supra*, 2 Cal.4th 271, *Sanchez*, *supra*, 26 Cal.4th 834, and *Cervantes*, *supra*, 26 Cal.4th 860, by imposing homicide liability on defendants who proximately cause death, to a degree commensurate with their mens rea. This formula could apply in *all* cases; courts could find causation and then assign liability according to the defendant's mens rea, and malice would need to be proved, not imputed. If the provocative act doctrine must be retained, it should apply only in the context for which it was specifically conceived: felony-murder. Such limitation is especially necessary now that this Court has rejected many of the premises on which *Washington-Gilbert* rested.

B. The premises underlying the provocative act doctrine have been rejected.

1. Felons are now responsible for harms "on the basis of the response by others."

One concern that motivated the *Washington* Court to create the provocative act doctrine was the prospect that defendants could be liable for events beyond their control.

> In every robbery there is a possibility that the victim will resist and kill. The robber has little control over such a killing once the robbery is undertaken as this case demonstrates. To impose an additional penalty for the killing would discriminate between robbers, not on the basis of any difference in their own conduct, but solely on the basis of the response by others that the robber's conduct happened to induce.

(*Washington*, *supra*, 62 Cal.2d 777, 781.)[4]

Contrary to this paragraph, the law has always imposed criminal liability on defendants for third parties' conduct, over which the defendant had no control. The *Fowler* defendant had no control over whether a motorist would drive over the body or discover it and stop before doing so. The *Aurelio R.*

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This paragraph was preceded by the majority's rejecting the dissent's view that the purpose of the felony-murder rule was to deter not just negligent or accidental killings during felonies but the felonies themselves. (Compare *Washington*, at p. 781 with *Washington*, at p. 785 (dis. opn. of Burke, J.) This Court has since accepted the dissent's position. (*People v. Chun* (2009) 45 Cal.4th 1172, 1193; see also *Aurelio R.*, *supra*, 167 Cal.App.3d 52, 60: "More people will be deterred if they know when the smoke clears they will be held accountable for all the dead bodies, friend or foe alike.")

defendant had no control over whether the rival gang returning fire would miss or hit any of their targets, and, if they hit the target, whether that victim would be saved by paramedics in time or not. Post-*Washington* caselaw has reaffirmed the validity of such liability.

The issue resembles that of victim impact statements in capital trials' penalty proceedings. Just as some but not all felony victims will resist, and those who resist will shoot with varying degrees of accuracy, so too will some but not all survivors of murder victims testify, and those who do will speak with varying degrees of persuasiveness. Following the *Washington* rationale, the Court of Appeal barred such statements because they differentiated among murderers on the basis of others' reactions, which were beyond the defendants' control, and the United States Supreme Court soon adopted that reasoning.

> [A] defendant's level of culpability depends not on fortuitous circumstances such as the composition of his victim's family, but on circumstances over which he has control. . . .the fact that a victim's family is irredeemably bereaved can be attributable to no act of will of the defendant other than his commission of homicide in the first place.

(*People v. Levitt* (1984) 156 Cal.App.3d 500, 516-517, quoted in *Booth v. Maryland* (1987) 482 U.S. 496, 505, fn. 7, disapproved in *Payne v. Tennessee* (1991) 501 U.S. 808.)

But the high Court reversed course just four years later, and authorized juries to consider not just defendants' subjective blameworthiness but also their conduct's objective harm, as the law had long based liability on harms beyond the intent,

control, or even awareness of the defendant. (See *Payne*, at pp. 835-836 (conc. opn. of Souter, J.): "[C]riminal conduct has traditionally been categorized and penalized differently according to consequences not specifically intended, but determined in part by conditions unknown to a defendant when he acted." *Payne* thus adopted Justice Scalia's reasoning, which referenced a *Gilbert*-like hypothetical, and observed two equally blameworthy criminal defendants could be guilty of different offenses based on factors beyond their control.

> If a bank robber aims his gun at a guard, pulls the trigger, and kills his target, he may be put to death. If the gun unexpectedly misfires, he may not. His moral guilt in both cases is identical, but his responsibility in the former is greater.

(*Payne*, at p. 819, quoting *Booth*, at p. 519 (dis. opn. of Scalia, J.)

The same contrast exists between a case where the guard kills a bystander and one where the guard's gun misfires.

Less than a year after *Payne*, this Court implemented its reasoning. The defendant in *Roberts*, *supra*, 2 Cal.4th 271, after stabbing Gardner, had no control over whether Gardner would go into hypovolemic shock and fatally stab a guard. In contrast to others who committed fatal stabbings of a single victim, the *Roberts* defendant was subject to liability for *two* homicides (after Gardner and the guard both died), and the difference derived not from "any difference in their own conduct, but solely on the basis of the response by [another] that the [sta]bber's conduct happened to induce."

(See *Washington*, *supra*, 62 Cal.2d at p. 781.) Similarly, *Roberts* recalled *Wright v. State*, *supra*, 363 So.2d 617, where the shooter was liable when his target lost control over his vehicle and fatally collided with a pedestrian. (*Roberts*, at p. 319.) Some drivers would have been able to avoid such a collision, so the defendant was liable for a homicide "solely on the basis of the response by [the driver] that the [shooter]'s conduct happened to induce."

Victims' reactions can also impose liability on the defendant where those reactions result in the victims' own deaths rather than bystanders'. *Roberts* recalled *Letner v. State* (1927) 156 Tenn. 68 [299 S.W. 1049], where the defendant shot at his victims' boat, and they jumped off to escape, which capsized the boat and led to their drowning. (*Roberts*, *supra*, 2 Cal.4th at p. 318.) As in *Wright*, *supra*, 363 So.2d 617, the loss of the vehicle was the "natural result" of the shooting, for which the shooter was liable. (*Roberts*, at p. 318, citing *Letner*, 156 Tenn. at p. 80.) The Court of Appeal has affirmed murder convictions where victims suffered heart attacks during robberies (*People v. Hernandez* (1985) 169 Cal.App.3d 282; *People v. Stamp* (1969) 2 Cal.App.3d 203), and this Court affirmed a murder conviction where the defendant gave methyl alcohol to a victim who drank it and died. (*People v. Mattison* (1971) 4 Cal.3d 177, 180-181.)

Far from excluding victims' responses from the liability analysis due to their tendency to vary from victim to victim, this Court now expressly includes the victim's response in

determining whether there is proximate causation and malice.

> A provocative act is conduct that is dangerous to human life, not necessarily in and of itself, but because, in the circumstances, it is likely to elicit a deadly response. The danger addressed by the provocative act doctrine is not measured by the violence of the defendant's conduct alone, but also by the likelihood of a violent response.

(*People v. Gonzalez* (2012) 54 Cal.4th 643, 657.)

Like a false shout of “Fire!” in a crowded theater, a shout of “This is a holdup!” can produce impulsive reactions that may include violence. These are attributable to the robber, not the victim, whose response is a reasonably foreseeable consequence.

2. Intermediaries' responses are dependent intervening causes not only where they are *reasonable* but also where they are *reasonably foreseeable*.

Proximate causation reflects a policy judgment that it is fair and just to impose liability on a defendant. (*Cervantes*, *supra*, 26 Cal.4th 860, 872.) A dependent intervening cause, such as the driver's running over Duree in *Fowler*, *supra*, 178 Cal. 657, does not relieve a defendant of liability, as it is the product of his own conduct. (*Cervantes*, at p. 871.) Independent intervening causes will relieve the defendant of liability, so if the driver had seen the body and intended to exploit the situation by purposely running it over, it would have relieved Fowler of liability. (*Id*. at pp. 869, 871.) For an intervening cause to be independent, however, it must be "unforeseeable," an "extraordinary and abnormal occurrence." (*Id*. at p. 871.) This explanation in *Cervantes* (which cited even the pre-*Washington* case of *People v. Hebert* (1964) 228 Cal.App.2d 514, 520), conclusively buried the dicta on which *Gilbert*'s reasonable response rules rested. (*Cervantes*, at p. 871.)

Gilbert, *supra*, 63 Cal.2d 690 concerned a bank robbery in which Gilbert and accomplice Weaver entered the bank armed, and the former shouted, " 'Everybody freeze; this is a holdup.' " (*Id*. at pp. 696-697.) Gilbert grabbed a hostage and fatally shot an officer while escaping, and another officer fatally shot Weaver. (*Id*. at p. 697.) This Court elaborated on the provocative act principles generated in *Washington*, *supra*, 62 Cal.2d 777:

> [T]he victim's self-defensive killing or the police officer's killing in the performance of his duty cannot be considered an independent intervening cause for which the defendant is not liable, for it is **a reasonable response** to the dilemma thrust upon the victim or the policeman . . . .

(*Gilbert*, at p. 706, emphasis added.)

Gilbert highlighted the "crucial question" of whether the robber was shot in response to the felon's shooting a guard, or to prevent the robbery. (*Id*. at p. 704.)

Post-*Gilbert* cases however, have established the quoted statement is simply dicta, as a defendant's response is a dependent intervening cause even where it is not "reasonable," so long as it is reasonably foreseeable. And a victim's use of lethal force, whether to answer a shooting *or* to repel a violent felony, is a dependent intervening cause that does not break the causal chain. (See Argument IIIB(3), *post*.)

The Supreme Court backed away from the "reasonable response" requirement in *Pizano v. Superior Court* (1978) 21 Cal.3d 128, 132, where two robbers invaded a home and took a resident hostage. A neighbor, not seeing the hostage, attempted to foil the robbery and accidentally shot the hostage. (*Ibid*.) The defense contended the neighbor shot "solely to prevent the robbery" so his conduct fell was not the reasonable response required by *Gilbert*, *supra*, 63 Cal.2d 690, 704-705, to preserve the defendant's responsibility. (*Pizano*, at p. 137.)[5] The neighbor was acting to prevent the

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[5] The Court of Appeal had held that under *Gilbert*, *supra*, 63

robbery, but this Court still found the death attributable to the felon. Recalling *Gilbert*'s conclusion that an officer's killing in the course of his duty was not an independent intervening cause, *Pizano* followed the People's position that the "reasonable response" requirement was an objective proximate cause determination. (*Id*. at p. 137-138.)

The Court of Appeal later elaborated on this objective proximate cause analysis. One drug dealer shot a second in *People v. Gardner* (1995) 37 Cal.App.4th 473, which promoted a third to shoot, and the third thereby killed the second. (*Ibid*.) *Gardner*, the first case since before *Washington*, *supra*, 62 Cal.2d 777, to cite *Fowler*'s proximate causation analysis, clarified that "reasonable response" was shorthand phrase signifying an objective proximate cause determination. (*Gardner*, at pp. 479, 481.) "In *Roberts*, *supra*, [2 Cal.4th 271] our Supreme Court indicated the proper test is one of proximate cause and natural and probable consequences." (*Gardner*, at p. 481.) *Gardner* recalled the intermediary in *Roberts* acted in an unconscious state, in a "purely reflexive" struggles, and the intermediary in *Madison*, *supra*, 130 N.E.2d 35, acted "impulsively." (*Id*. at pp. 479, 482.) Such arational behavior is not an independent intervening cause. After all, "Detached reflection cannot be

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Cal.2d 690, the neighbor's shooting was an "intentional, intervening act," that broke the causal chain, though it would have ruled otherwise if it were not bound by that precedent. (*Pizano v. Superior Court* (1977) 69 Cal.App.3d 757, vacated in *Pizano v. Superior Court* (1978) 21 Cal.3d 128.)

demanded in the presence of an uplifted knife." (*Brown v. United States* (1921) 256 U.S. 335, 343.)

Gardner thus presaged the *Cervantes* footnote, by observing the actus reus should be measured objectively, by proximate causation:

> This reasonable response requirement is unnecessary and confusing. Derivative liability for homicide attaches . . . when the defendant's intentional provocative act proximately causes the death of a victim through the action of a third party.

(*Gardner*, *supra*, 37 Cal.App.4th at p. 475.)
Accordingly, the defendant could be liable if the victim's death was the "natural and probable consequence of the lethal acts in which appellant intentionally engaged." (*Id*. at p. 477.)

People v. Schmies (1996) 44 Cal.App.4th 38, presented facts similar to those in *People v. Harris*, *supra*, 52 Cal.App.3d 419, as the defendant's flight led to fatal collision between an officer's car and a bystander's. (*Id*. at p. 43.) The defendant sough to introduce the Highway Patrol's pursuit policies to show the pursuing officer acted unreasonably, but the officer's noncompliance with those policies would not preclude liability: "[T]o exonerate defendant it is not enough that the officers' conduct be *unreasonable*; rather it must be sufficiently extraordinary as to be *unforeseeable*. (*Id*. at p. 52, emphasis added.)

Accordingly, intermediaries' unreasonableness will qualify as an independent intervening cause only where it is extraordinary or abnormal, not where it is foreseeable.

Defendants whose methamphetamine production started a fire proximately caused the death of two firefighting pilots who crashed in trying to extinguish the fire, even though (1) one pilot's blood-alcohol count exceeded FAA standards; (2) the pilot failed to make required radio contact; and (3) the plane was negligently maintained. (*People v. Brady* (2005) 129 Cal.App.4th 1314, 1331-1332.) Such unreasonable conduct was reasonably foreseeable, and thus was a dependent intervening cause. so liability remained with the felons.

Unless an intervening cause is unforeseeable, it is a dependent intervening cause, which does not break the causal chain. (*Cervantes*, *supra*, 26 Cal.4th 860, 871.)

3. **Using force to resist a forcible, atrocious felony is justifiable, and a dependent intervening cause.**

Both *Washington*, *supra*, 62 Cal.2d 777, and *Gilbert*, *supra*, 63 Cal.2d 690, described the provocative act doctrine through dicta that are no longer valid but which still govern jury instructions. *Washington* prescribed murder convictions for indirect homicides where defendants "initiate gun battles." (*Washington*, at p. 782.) This condition distinguished *Harrison*, *supra*, 176 Cal.App.2d 330, where the robber started shooting, with *Washington*, where the robber only "pointed a revolver directly" at the station owner. (*Washington*, at p. 779.) The dissent urged a broader reading of the verb "initiate": "If a victim or someone defending the victim seizes an opportunity to shoot first when confronted by robbers with a deadly weapon (real or simulated), any 'gun battle' *is* initiated by the armed robbers." (*Id*. at p. 785 (dis. opn. of Burke, J.).) The dissent thus favored *Harrison*'s analysis.

> The majority now attempt to distinguish *Harrison* on the ground that there the robbers "initiated" the gun battle; in the present case the victim fired the first shot. . . . There is no room in the law for sporting considerations and distinctions as to who fired first when dealing with killings which are caused by the actions of felons in deliberately arming themselves to commit any of the heinous crimes listed in Penal Code section 189.

(*Ibid*.)

Post-*Washington* developments have vindicated Justice Burke. The Court of Appeal, recalling the tragic case of an officer who was killed by a defendant after giving him the

courtesy of a first shot (*People v. Ford* (1964) 60 Cal.2d 772, 783-784), rejected any such legal obligation in a case where an officer fired first at an armed kidnapper who pointed his gun at an officer. (*People v. Reed* (1969) 270 Cal.App.2d 37, 42, 45-46.)

> In this case the **defendant pointed his gun toward one of the officers** and toward the victim. Such aggressive actions required immediate reaction unless an officer is to be held to the unreasonable requirement that an armed robber be given the courtesy of the first shot. . . . Under these circumstances it may be said that **defendant initiated the gunplay**.

(*Id*. at pp. 45-46, emphasis added.)

Perhaps the kidnapper would not have shot, but the officer did not need to expose himself to additional danger by delaying his defense.

The Supreme Court then clarified that it was justifiable to use deadly force to prevent a forcible and atrocious crime like robbery, rape or mayhem. (*People v. Ceballos* (1974) 12 Cal.3d 470, 478.) Defensive deadly force was justifiable where the felony reasonably created a fear of bodily harm. (*Ibid*.) Few events more reasonably create a fear of bodily harm than having a revolver pointed directly at oneself.

And this Court then favorably cited out-of-state cases recognizing the "great public interest" in preventing crimes "as vicious as armed robbery," so that victims were excused, justified, and privileged in using force to resist. (*Kentucky Fried Chicken of California, Inc. v. Superior Court* (1997) 14 Cal.4th 814, 825, citing *Yingst v. Pratt* (1966) 139 Ind.App.

695 [220 N.E.2d 276, 279].) This Court also cited *Schubowsky v. Hearn Food Store, Inc*. (Fla.Dist.Ct.App. 1971) 247 So.2d 484: “When an opportunity arose to get the 'drop' on the robbers, the proprietor was entitled to act upon it in resistance of the robbery.” (*Kentucky Fried Chicken*, at p. 825.)

The commission of an atrocious crime justifies defensive force, which is a dependent intervening cause, and its consequences are attributable to the felon.

4. The "mere commission" of a felony can show the objective element of implied malice.

This Court also has rejected *Washington*'s conclusion that something beyond pointing a revolver is necessary to establish the objective component of malice. (*Washington*, *supra*, 62 Cal.2d at p. 782.)[6] Though *Washington* defined that element as requiring a "high degree of probability that it will result in death," this Court has since found it preferable to define the objective element as an act whose "natural consequences" are "dangerous to life." (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 104.) In *Nieto Benitez*, the Supreme Court rejected the Court of Appeal's conclusion, and held that brandishing a firearm *could* support a finding of implied malice where the defendant subjectively appreciated the risk. (*Id*. at pp. 96-97.) A fortiori, *directly pointing* it a victim satisfies the standard.

Even though this Court has held that victims are justified in using deadly force to repel atrocious crimes like rape or robbery, and that even brandishing a firearm can create the objective danger needed to establish implied malice, *Washington*'s dicta still governs trials through CALCRIM No. 560. That instruction tells juries a defendant

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[6] The objective component requires the defendant willfully commit an act whose natural and probable consequences are dangerous to human life, and the subjective component requires she knowingly acts with conscious disregard for that danger. (*Gonzalez*, *supra*, 54 Cal.4th 643, 653.)

will not be liable for a homicide committed by an intermediary unless he does an act that "goes beyond what is necessary to commit [the crime]." It is not even clear what act is "necessary" to commit a crime; as robbery can be committed without a weapon, using one could qualify as going "beyond" what is necessary. In any event, *Nieto Benitez*, *supra*, 4 Cal.4th 91, shows that even holding a firearm can establish implied malice, and *Reed*, *supra*, 270 Cal.App.2d 37, and *Ceballos*, *supra*, 12 Ca.3d 470, show a victim is justified in using deadly force to prevent forcible, atrocious felonies, and need not wait for the defendant to "initiate" the shooting. Even the "mere" commission of a robbery can therefore support murder liability where it proximately causes death through an intermediary.

If an unarmed defendant uses physical force to overpower a woman to effect a rape, she would be justified in shooting at him to prevent the crime. If her gun misfires and she inadvertently hits a bystander, her attempt to defend herself must be seen as a dependent intervening cause, so liability will remain with her assailant.

5. Because the reasonable foreseeability needed to establish proximate causation is synonymous with the "natural and probable consequence" establishing the objective component of implied malice, a proximate cause is liable for murder so long as he subjectively perceived the risk.

Washington limited not only the felony-murder rule's role in establishing the mens rea element of homicide but also its actus reus (causation) element. It construed section 189 as applying only where the felon or an accomplice directly caused death, because if a nonfelon directly caused death, then "the killing is not committed to perpetrate the felony." (*Washington*, *supra*, 62 Cal.2d 777, 781.) For such homicides, "It is not enough that the killing was a risk reasonably to be foreseen and that the robbery might therefore be regarded as a proximate cause of the killing." (*Ibid*.)[7]

This Court has since clarified that it *is* enough that the defendant's conduct be a proximate cause of the killing. Implied malice no longer requires "an act that involves a *high probability* that it will result in death." (*Washington*, *supra*, 62 Cal.2d 777, 782, emphasis added.) The preferred

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This no longer correctly states the reach of the felony-murder rule, because the "view of the felony-murder rule that the killing must somehow advance or facilitate the robbery has, however, been superseded by later cases. [W]e [have] held there need be only a logical nexus between the felony and the killing." (*People v. Dominguez* (2006) 39 Cal.4th 1141, 1162.) A cofelon could thus be liable for the felon's death that resulted from the planned arson, even though his death did not advance the crime. (*Billa*, *supra*, 31 Cal.4th 1064, 1071.)

formulation today is that the act's natural consequences must be dangerous to life. (*People v. Knoller* (2007) 41 Cal.4th 139, 157.) Proximate causation likewise requires the "victim's death must be the natural and probable consequence of the victim's act." (*Roberts*, *supra*, 2 Cal.4th 271, 318; see also *Wright*, *supra*, 363 So.2d 617, 618, quoted in *Roberts*, at p. 319: "the victim's consequent injury [must be] a natural and probable consequence of the defendant's violence.") Fowler therefore was the proximate cause of Duree's death, which was the "*natural and probable result* of the defendant's conduct in leaving Duree lying helpless and unconscious in a public road, exposed to that danger." (*Fowler*, *supra*, 178 Cal. 657, 669, emphasis added.)

The proximate causation inquiry and the implied malice inquiry are thus coterminous. If the death was a natural and probable consequence of the defendant's conduct, the defendant proximately caused it, and satisfied the objective component of implied malice. So long as the defendant subjectively appreciated that risk, she is guilty of second degree murder. (*Knoller*, *supra*, 41 Cal.4th 139, 152.)

Proximate causation does not require the fatal consequence be a "strong probability"; a "possible consequence which might reasonably have been contemplated is enough." (*Cervantes*, *supra*, 26 Cal.4th 860, 871.) *Washington*'s recognition that "In every robbery there is a possibility that the victim will resist and kill" is no longer an argument against murder liability for intermediary homicides,

but, so long as the robber perceived the possibility, one that compels its imposition.

C. Replacing the provocative act doctrine with the *Fowler* formula will better align defendants' liability with their culpability.

In holding the *Fowler* formula will correctly assign liability "whether or not a defendant's unlawful conduct is 'provocative' in the literal sense," this Court recognized the provocative act doctrine is unnecessary. (*Cervantes*, *supra*, 26 Cal.4th 860, 871, fn. 15.) If it were only superfluous, there would be minimal need to replace it. But it also "erodes the relation between criminal liability and moral culpability." (*Washington*, *supra*, 62 Cal.2d 777, 783.) The *Fowler* rule will more fairly and fully align the two.

1. CALCRIM No. 560 will enable some guilty defendants to escape liability.

One problem, identified in Argument III(B)(4), *ante*, is that the restrictions imposed by CALCRIM 560 create the risk that some offenders will escape liability, because jurors might question whether the defendant did an act beyond what was needed to accomplish the crime. The instruction is also defective in that the natural and probable danger must appear not from the defendant's conduct but only the response: "A provocative act is an act . . . whose natural and probable consequences are dangerous to human life, because there is a high probability that the act will provoke a deadly response." This conflicts with the caselaw, as there need not be a "strong" or "high" probability, only a reasonably foreseeable "possible consequence." (*Cervantes*, *supra*, 26 Cal.4th at p. 871.)

Worse, the instruction requires the danger derive solely from the response. To return to the rape hypothetical, it might appear unlikely that a woman would be have the means with which to resist a rapist by shooting him. But the rapist's own conduct presents a danger. The instruction turns the provocative act doctrine on its head. Initially, this Court expressed concern that a victim's response might be the source of the defendant's liability. (See *Washington*, supra, 62 Cal.2d at p. 781: "To impose an additional penalty for the killing would discriminate . . . solely on the basis of the response by others that the robber's conduct happened to

induce.") Now CALCRIM No. 560 requires that the response justify liability.

Conduct can create a danger to human life both on its own and through potential responses. Neither danger should be excluded from the analysis.

2. The provocative act instructions do not offer the possibility of a conviction for manslaughter or assault.

CALCRIM nos. 560 and 561 authorize a conviction for murder through the provocative act doctrine, but no instruction authorizes liability for the lesser crimes of manslaughter or aggravated assault where an intermediary is the direct cause. *Fowler* itself contemplated the possibility that the defendant could indirectly commit a manslaughter. "This conduct of the defendant would then be criminal or not, according to the character of the blow he gave Duree. . . . If it was felonious, it would be murder or manslaughter, according to the intent and the kind of malice with which it was inflicted." (*Fowler*, *supra*, 178 Cal. 657, 669.) If a defendant commits a dangerous act that indirectly proximate causes death, he should be liable for murder if he perceived the danger *but liable for manslaughter if he did not*. (*Walker v. Superior Court* (1988) 47 Cal.3d 112, 136-137.) Juries have returned manslaughter convictions in indirect causation homicides only because courts did not instruct on the provocative act doctrine. (E.g. *Schmies*, *supra*, 44 Cal.App.4th 38; *Harris*, *supra*, 52 Cal.App.3d 419.) Similarly, instructions like CALCRIM Nos. 875 and 925 do not enable juries to impose responsibility for nonfatal assaults committed through intermediaries. If Monique N. had been paralyzed rather than killed in the shootout, the provocative act doctrine would not have authorized liability for nonshooters, even if they were substantial factors in that injury.

Another problem derives from the Court's decision in *People v. Antick* (1975) 15 Cal.3d 79. When officers confronted Antick and accomplice Bose after an apparent burglary, Bose committed the provocative act of shooting at an officer, who returned fire and killed Bose. (*Id.* at p. 83.) Notwithstanding the general rule that felons are vicariously liable for their accomplices' acts, the Supreme Court precluded vicarious liability for Antick based on Bose's act. (*Id.* at p. 91.) This restriction followed the rule deriving an accomplice's liability from that of the direct perpetrator. Antick's liability would thus derive from Bose's, but Bose could not be liable for his own death. This exception to the provocative act liability (an exception to an exception to an exception) further divorces criminal liability from moral culpability.

First, it conflicts with Washington's declaration that it does not matter which person is killed. (*Washington*, *supra*, 62 Cal.2d 777, 781: "A distinction based on the person killed, however, would make the defendant's criminal liability turn upon marksmanship of victims and policemen. A rule of law cannot reasonably be based on such a fortuitous circumstance.") Had Antick and Bose been joined by another accomplice (conveniently alphabetized as "Caldwell")[8], but only Bose committed a provocative act, Antick would not be liable for Bose's death as it occurred. But if the officer had

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[8] See *People v. Caldwell* (1984) 36 Cal.3d 210.

killed Caldwell instead of Bose, Antick would be liable for Caldwell's death. In other words Antick's liability would "turn upon the marksmanship of victims and policemen."

Furthermore, two cases have called the *Antick* exception into question. *Antick* followed a case where the defendant Ferlin hired an arsonist who accidentally died while setting the fire. (*Antick*, *supra*, 15 Cal.3d at p. 89, citing *People v. Ferlin* (1928) 203 Cal. 587.) The *Ferlin* court rejected felony-murder liability there, as the Court denied "that defendant and deceased had a common design that deceased should accidentally kill himself." (*Ferlin*, at p. 597.) But the decision in *Billa*, *supra*, 31 Cal.4th 1064, cast doubt on Ferlin's vitality. A cofelon there died in an arson, but the *Billa* court distinguished the fatal outcome, which was not part of the felonious design, from the acts leading to death, which were. (*Billa*, at p. 1071.) *Billa* limited *Ferlin*, and endorsed liability "where one or more surviving accomplices were present at the scene and active participants in the crime." (*Billa*, at p. 1072.) These conditions appeared to describe the *Antick* facts, so the exception's foundation, like that of the *Washington–Gilbert*, is of questionable vitality.

But the deepest problem with the "*Antick* exception" is that the Supreme Court has rejected the very concept that an accomplice's liability Supreme Court has rejected the very concept that an accomplice's liability derives from the direct perpetrator's. (*People v. McCoy* (2001) 25 Cal.4th 1111.) *McCoy* used the facts of Shakespeare's *Othello* to show how

an accomplice may be liable for an offense though the direct perpetrator is not. (*Id*. at pp. 1121-1122.) Under the facts of the play, accomplice Iago might be liable for murder even though perpetrator Othello might be guilty of only manslaughter (because he acted in a heat of passion). The analysis concerned examples where the perpetrator was not liable for the full crime committed by the aider and abettor due to a personal defense that applied only to the perpetrator, e.g. insanity, heat of passion, duress, imperfect self-defense. (*Id*. at p. 1121.) *McCoy* disapproved "any interpretation of *People v. Antick* . . . that is inconsistent with this opinion," the death and consequent unprosecutability of a deceased provocateur could be another such personal immunity from liability, unavailable to a surviving accomplice.

3. The *Fowler* formula should apply in all homicides committed by intermediaries.

The *Fowler*, *supra*, 178 Cal. 657, formula prescribes homicide liability more fairly and rationally than the current provocative act doctrine. One possible reform could limit the doctrine to those cases where a cofelon (rather than an innocent party) dies. The Court has formally denied a meaningful distinction between cofelons and innocent victims. "One may have less sympathy for an arsonist who dies in the fire he is helping to set than for innocents who die in the same fire, but an accomplice's participation in a felony does not make his life forfeit or compel society to give up all interest in his survival." (*Billa*, *supra*, 31 Cal.4th 1064, 1071.) But this argument does not extend to crimes that provoke a self-defensive response like robbery, rape, or kidnapping. These felonies are punishable by substantial prison terms, yet killing to prevent their commission is justifiable homicide, for which no sentence is imposed. In other words, a violent felon does forfeit the protection of the law because he may be killed without penalty. If an officer kills to prevent a violent felony, there is no need for a criminal prosecution. But if he misses and kills an innocent person, there is an unjustifiable homicide demanding prosecution. It matters who dies.

But abolition may be preferable to piecemeal tinkering. The doctrine has taken more than half a century to reach its current state through natural evolution, as it expanded to react to new factual circumstances like the hostage in *Pizano*, *supra*, 21 Cal.3d 128, or the express malice in *Aurelio R.*,

supra, 167 Cal.App.3d 52. A doctrine established as an exception to an exception, designed to confine the reach of the felony-murder rule, has become the default vehicle for imposing liability for intermediary homicides. And due to its imperfect design and instructional lacunae, the doctrine cannot cover every factual predicate to ensure that the desired formula of proximate causation–times–mens rea always obtains. The law prescribes the provocative act doctrine to decide liability, except in those cases like *Roberts*, *supra*, 2 Cal.4th 271, and *Sanchez*, *supra*, 26 Cal.4th 834, where it does not fit, and trial courts must then haphazardly return to the proximate causation–times–mens rea formula, without any guidance from the Supreme Court. Using that formula in every case — as a first resort — will ensure greater consistency and justice in homicide prosecutions.

The *Washington* court described a doctrine that is "unnecessary," "erodes the relation between criminal liability and moral culpability," and "should not be extended beyond any rational function that it is designed to serve." (*Washington*, *supra*, 62 Cal.2d 777, 783.) Because the *Fowler* formula suffices to prescribe liability for intermediary homicides commensurate with the offender's mens rea, the provocative act doctrine is unnecessary. Due to loopholes through which some offenders might escape liability, and the lack of a manslaughter option, the doctrine erodes the link between liability and culpability. And because the *Washington-Gilbert* rule was specifically conceived to limit the

reach of the felony-murder rule, it has been extended beyond any rational function it was designed to serve. Although the above quotation from *Washington* referred to the felony-murder rule, the quote now describes that case's own creation.

Conclusion

This Court's decision in *Sanchez*, *supra*, 26 Cal.4th 834, which relied on cases where the direct cause was known, governs this case, and supports murder liability for petitioners. (*See also Kemp*, *supra*, 150 Cal.App.2d 654, 659; *Gaynor*, *supra*, 648 A.2d 295, 299.) It was their own concurrent conduct that proximately caused Monique N.'s death, and they were substantial factors in her death, if not "but for" causes. This Court should affirm their convictions.

Respectfully submitted,

Dated: February 1, 2021 ______________________

Mitchell Keiter
Counsel for Amicus Curiae
Amicus Populi

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(Cal. Rules of Court, rule 8.204, subdivision (c).)

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