

*Supreme Court of the State of California*

<p>PEOPLE OF THE STATE OF CALIFORNIA,</p> <p style="text-align: center;"><i>Plaintiff- Respondent,</i></p> <p style="text-align: center;">vs.</p> <p>LONNIE MITCHELL, <i>et al.</i></p> <p style="text-align: center;"><i>Defendants- Petitioners.</i></p>
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No. S260063  
Appeal No. C077558  
Sacramento County Superior  
Court No. 11F00700

PETITIONER LONNIE  
MITCHELL'S ANSWER TO  
AMICUS BRIEF OF AMICUS  
POPULI

*Honorable Kevin McCormick, Judge*

**PETITIONER LONNIE MITCHELL'S ANSWER  
TO AMICUS BRIEF OF AMICUS POPULI**

**CERTIFICATE OF COMPLIANCE**

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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. The amicus brief’s discussion of the provocative act doctrine is not only beyond the scope of this court’s grant of limited review, but the scope of the appeal itself.**

On page 27 of the amicus brief, beginning in Section III, the amicus begins as follows:

“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 . . .”

The amicus brief extensively discusses the *Sanchez Court of Appeal* decision at pages 29, 30, 32, 35, 40, 41, and 44, as part of an extended discussion on the “provocative act” doctrine and how the amicus proposes that this court revise that doctrine. This extended discussion, from pages 2 through 60, takes up nearly two-thirds of the amicus brief (excluding tables and certificates.)

This discussion is not only beyond the scope of the grant of review but is beyond the scope of the underlying appeal itself.

The only “Sanchez” decision this Court has asked the parties to address is its own decision in *People v. Sanchez* (2001) 26 Cal.4th 834, not the reversed and superseded decision of the Court of Appeal. The “Sanchez Court of Appeal” decision was unpublished to begin with, and could neither be cited nor relied on by anyone except the parties to that case. California Rules of Court 8.1115(a), *County of Riverside v. Superior Court* (2003) 30 Cal.4th 278, 290, *People v. Russo* (2001) 25 Cal.4th 1124, 1133, fn. 1 (discussing former California Rules of Court 977(b)). And even if the Court of Appeals’ decision had been originally published,

it was reversed by this Court and thus became non-citeable. (This Court’s discussion in *People v. Sanchez* of the reversed Court of Appeals decision can be cited and relied on, but the discussion in the amicus brief is not so limited.)

The limited issues on review do not cover the proposal by amicus to revise or modify the provocative act doctrine or replace it with something else. The issues on review concern only the scope of the substantial concurrent causation theory of liability in *People v. Sanchez* and what effect later law has had on this theory.

Moreover, the provocative act doctrine was not even an issue in the larger appeal. As petitioners’ briefs report, the trial court declined to instruct the jury on the provocative act doctrine based on the prosecutor’s representation that it that it was her right as prosecutor to decide what theories of liability to proceed on and that she was choosing “not to proceed on the provocative act theory.” (RT. vol. 18, p. 4932.) (Petitioner’s merits brief at p. 7, reply merits brief at pp. 9-10.) The amicus brief doesn’t mention that the prosecutor disclaimed reliance on the provocative act theory, suggesting that amicus wasn’t aware of it.

While petitioner briefly discussed the provocative act doctrine in his briefs, it was to show what this review proceeding was *not* about. In

the reply merits brief, petitioner argued 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.” (Reply merits brief, p. 17.) The prosecution here could not rely on substantial concurrent causation alone in a known-shooter case while, at the same time, disclaiming provocative act liability. Petitioner also briefly mentioned the provocative act doctrine when pointing out that some of the authorities that *People v. Sanchez* relied on as prior “concurrent causation” cases were really “provocative act” cases. (See, e.g., discussion at merits brief, pp. 14-15, reply merits brief, p. 9-10.)

Any attempt by this Court to address a modification or revision of the provocative act doctrine, as amicus urges, would be hypothetical, since it would not affect the rights of the parties to this appeal. The provocative act doctrine is not an issue on appeal or in this review proceeding.

There are other review proceedings pending in this court in which the provocative act doctrine is at least potentially an issue on review. See, e.g., *People v. Lee* (2020) 49 Cal. App. 5th 254, review granted at *People*



*v. Lee* (2020) no. S262459, 468 P.3d 1120, (presently deferred pending consideration and disposition of other issues in *People v. Lewis* (2020) S260598, 460 P.3d 262.) The discussion in the amicus brief from pages 27 to 60 has been filed in the wrong review proceeding. Presumably, once this Court resolves *Lewis*, the amicus will have an opportunity to seek leave to file an amicus brief on the provocative act doctrine.

**3. The rest of the amicus brief is inaccurate and otherwise doesn't offer anything not already adequately addressed by respondent's brief.**

In its introduction, the amicus states “Twenty years ago, this Court unanimously upheld the first (sic) degree murder conviction of a defendant who participated in an urban shootout but did not fire the fatal shot”, citing *People v. Sanchez*. (Amicus brief, p. 11.) This is contrary to this Court's issue 1 on review, since, if amicus was correct that *Sanchez* had already resolved liability for a defendant who did not fire the fatal shot, there would be no need to address that issue on review here.

On page 17, the amicus brief discusses *People v. Canizalez* (2011) 197 Cal.App.4th 832, which the amicus claims has some bearing on the Court's Issue 1. The amicus brief states:

“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.”

All this statement shows is amicus counsel’s inability to accurately review petitioner’s merits brief. To begin with, there is nothing on page 14 of petitioner’s merits brief saying anything about petitioners not being able to find post-*Sanchez* cases. This statement is on page 12, not 14.

The statement itself said:

“Petitioner hasn’t found any later decisions of this court that applied *Sanchez* in a situation where there was ***a gun battle between two sides and a third party was killed by a bullet*** that was either traced to the opposite side, or, as in *Sanchez*, untraceable.” (emphasis added.)

*People v. Canizalez* was a drag race case much like *People v. Kemp* (1956) 150 Cal.App.2d 654, not a gun battle case. As petitioner argued on page 15 of his merits brief, “the cooperation of two participants engaged in a car race is much more obvious than ones engaged in a gun battle.” Two people in a drag race are jointly engaging in the car race for sport, while two sides in a gun battle normally aren’t jointly engaging in the battle for the excitement of it all – they’re trying to shoot each other.

On pages 14-15 of his merits brief, petitioner discussed *Commonwealth v. Gaynor* (1993) 538 Pa. 258, 260, 648 A.2d 295,

discussed in *People v. Sanchez*, 26 Cal.4th at 848-842 as support for its substantial concurrent causation theory, pointing out that in *Gaynor*, “the Pennsylvania Supreme Court rejected any theory that participants on opposite sides of a gun battle could be accomplices of each other, finding that they were enemies and therefore could not have shared any intent. *Commonwealth v. Gaynor*, 538 Pa. at 263.” *Gaynor* instead relied on the provocative act case of *People v. Gilbert* (1965) 63 Cal. 2d 690.

If this Court had believed that a drag racing case like *Canizalez* would have resolved Issue 1 in a gun battle case, it would not have asked the parties to address Issue 1 because *Sanchez* had already relied on the similar case of *Kemp*. In *Kemp*, as petitioner pointed out in his merits brief on page 15, evidence showed that “the car that the defendant Kemp was racing against was involved in the fatal accident, so *Kemp* was not a case where the fatal act couldn’t be traced to a single individual.” See *People v. Kemp*, 150 Cal.App.2d at 656.

Amicus is correct on page 17 of its brief in that *Canizalez* identified the co-defendant as the participant in the drag race that caused the death of the third party, but remarked that it “did not matter because even if the ‘actual cause of death cannot be determined [it] does not undermine a first degree murder conviction.’” *People v. Canizalez*, 197 Cal. App. 4th

at p. 845, citing *People v. Sanchez*, 26 Cal.4th at p. 845. But not only is this dicta, since that was not the actual situation in *Canizalez*, but it shows the opposite of what amicus is arguing. Rather than extending *Sanchez* to a situation where the actual person who fired the fatal shot was known, it merely reaffirms *Sanchez*' result in a hypothetical situation where the driver of the fatal car was unknown.

The amicus brief otherwise adds little to what respondent has already said in its brief.

#### 4. Conclusion.

Petitioner requests that this court rule that he was convicted on a natural and probable consequences theory of liability now barred by Senate Bill 1437 and that he is eligible for relief under the procedures in Penal Code section 1170.95.

Dated: Oakland, California, Monday, March 8, 2021.



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Robert J. Beles  
Paul McCarthy  
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MITCHELL

Supreme Court of the State of California

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CERTIFICATE OF  
COMPLIANCE

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I hereby certify under California Rules of Court 8.520(c) that this answer to amicus brief is printed in proportionally spaced 13 point type, contains 2,029 words, and is within the 8.400 word limit specified by Rule 8.520(c).

Dated: Oakland, California, Monday, March 8, 2021.

  
Paul McCarthy  
Attorney for *Petitioner* LONNIE  
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 Lonnie Mitchell’s Answer to Amicus Brief of Amicus Populi**

I served the following persons by the Truefiling system on Monday, March 8, 2021.

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I declare under penalty of perjury that the above is true. Executed  
in Oakland, California on Monday, March 8, 2021.

  
\_\_\_\_\_

**STATE OF CALIFORNIA**  
Supreme Court of California

***PROOF OF SERVICE***

**STATE OF CALIFORNIA**  
Supreme Court of California

Case Name: **PEOPLE v. CARNEY**

Case Number: **S260063**

Lower Court Case Number: **C077558**

1. At the time of service I was at least 18 years of age and not a party to this legal action.
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.



3/8/2021

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Date

/s/Robert Beles

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Signature

McCarthy, Paul (139497)

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Last Name, First Name (PNum)

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Law Firm