Attorney at Law
Certified Criminal Law Specialist

Paul McCarthy
Certified Appellate Law Specialist

Manisha Daryani
Certified Appellate Law Specialist

Emilio T. Parker
Certified Immigration Law Specialist
Attorneys at Law

Law Offices Of
Beles & Beles
California State Bar Certified Specialists in Criminal Law,
Appellate Law, and Immigration & Naturalization Law
The Ordway Building
1 Kaiser Plaza, Suite 2300
Oakland, California 94612-3642
phone: (510) 836-0100 ✦ fax: (510) 832-3690
email: beleslaw@yahoo.com ✦ web: www.beleslaw.com
Se Habla Español

Attorney at Law
Certified Criminal Law Specialist

Matthew Matejcek
Moises Jrade (Florida)
Charles Duggan
Gregory Humphreville
Micah Reyner
Charles Balara

Attorneys at Law

Thursday, November 4, 2021

People v. Carney, No. S260063

Honorable Chief Justice Tani G. Cantil-Sakauye
and the Justices of the California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

Petitioners Lonnie and Louis Mitchell submit this letter brief in response to this Court's October 13, 2021 order directing the parties to serve and file letter briefs

1. Senate Bill 775 applies to this case.

This Court has asked the parties to address "the significance, if any, of Senate Bill No. 775 (Stats. 2021, ch. 551) to the issues presented in this case." There is a threshold issue of whether SB 775 would directly apply to this proceeding, since petitioners were convicted before SB 775's effective date.

SB 775's effective date is January 1, 2022, and it is not yet effective. However, SB 775 will undoubtedly become effective before petitioners' direct appeal is concluded. While this court cannot grant relief now based on SB 775, it can consider petitioners' arguments on the application of SB 775 to his case. See Code of Civil Procedure section 187 (giving courts broad power to use all the means necessary to carry jurisdiction into effect) and *20th Century Ins. Co. v. Superior Court (Ahles)* (2001) 90 Cal.App.4th 1247, 1257-1258 (acknowledging propriety of Superior Court's conditional grant of a motion, the effect of which was put over until the statute's effective date.)

SB 775 expressly states that the amendments bringing people convicted of manslaughter and attempted murder within the ambit of section 1170.95 were intended to clarify existing law. See Section 1(a), SB 775's uncodified declaration of findings and intent preamble. "An amendment which merely clarifies existing law may be given retroactive effect even without an expression of legislative intent for retroactivity." *Negrette v. California State Lottery Com.*(1994) 21 Cal.App.4th 1739 at p. 1744.

In addition, the purpose of section 1170.95, both as originally enacted and as amended by

SB 775, is to provide retroactive relief to persons already convicted of homicide crimes. In *People v. Martinez* (2019) 31 Cal.App.5th 719, the court expressly recognized section 1170.95 as a specific, limited retroactivity provision for the other changes wrought by SB 1437. Following the reasoning in *Martinez*, this Court should apply the SB 775 amendments to section 1170.95 to persons convicted before the enactment of either SB 1437 or SB 775. Because the purpose of section 1170.95 is to apply amendments to Penal Code section 188 and 189 retroactively, including as to final convictions, any amendments to this law should also apply retroactively to the same final convictions.

Finally, the SB 775 amendments to section 1170.95 apply to petitioners under *In re Estrada* (1965) 63 Cal.2d 740. Under *Estrada*, the courts presume that the Legislature intended sentence-ameliorating legislation to apply to all defendants whose judgments are not yet final on the statute's operative date unless a contrary legislative intent can be gleaned from the language of the enactment or its legislative history. *In re Estrada*, 63 Cal.2d at p. 742. The "consideration . . . of paramount importance" is whether the amendment lessens punishment. If it does, that leads to the "inevitable inference that the Legislature must have intended that the new statute" controls.

A judgment is not "final" until the 90-day period has passed in which a defendant could seek certiorari in the United States Supreme Court, following the California Supreme Court's denial of review. *People v. Vieira* (2005) 35 Cal.4th 264, 306. This case will not be final until after this Court considers defendant's SB 775 arguments.

SB 775 made resentencing relief – and thus shorter sentences – available to a greater number of defendants. While the amended statute here does not guarantee a reduced sentence, the *Estrada* rule applies. See *In re Griffin* (1965) 63 Cal.2d 757, 759-760 (the mere possibility of a reduction of the minimum term from 10 years to life to 5 years to life was sufficient to trigger the applicability of *Estrada* rule. See also *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 308 (even though Proposition 57, the new law at issue that prohibited prosecutors from directly filing charges against minors in adult court, did not mitigate punishment for a particular crime, the inference of retroactivity set forth in *Estrada* applied because the new law itself "reduces the possible punishment for a class of persons, namely juveniles"), and *People v. Frahs* (2020) 9 Cal.5th 618, 631 (possibility of mental health diversion under Penal Code section 1001.36 did not guarantee reduced punishment, but provided a possibility of "dramatically different and more lenient treatment.")

There is no "contrary legislative intent" set forth in SB 775 that would render the *Estrada* presumption inapplicable. Indeed, the Legislature set forth an intent that *Estrada* principles apply, superseding *People v. Gentile* (2020) 10 Cal.5th 830 by specific language that a non-final conviction "may be challenged on SB 1437 grounds on direct appeal from that conviction." See discussion below.

2. Senate Bill 775 has superseded *People v. Gentile's* "exclusive remedy" holding.

In *People v. Gentile* (2020) 10 Cal.5th 830, 843, this court "found that the petition process set forth in Penal Code section 1170.95 is the exclusive remedy for retroactive SB 1437 relief on nonfinal judgments. (People v. Gentile, supra, 10 Cal.5th at pp. 851–859.)" July 13, 2021 Assembly Com. Pub. Safety report on SB 775, p. 11, section 9.

https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202120220SB775#

(Petitioners are filing a separate request to take judicial notice of this report.)

The report goes on to find:

> "Generally, the rule is that a judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed. *(People v. Vieira* (2005) 35 Cal.4th 264, 306, quoting *People v. Nasalga* (1996) 12 Cal.4th 784, 789, fn. 5.)
>
> This bill would provide that where a conviction is not final, it may be challenged on SB 1437 grounds on direct appeal from that conviction."

SB 775 added subdivision (g) to Penal Code section 1170.95 providing as follows:

> "A person convicted of murder, attempted murder, or manslaughter whose conviction is not final may challenge on direct appeal the validity of that conviction based on the changes made to Sections 188 and 189 by Senate Bill 1437 (Chapter 1015 of the Statutes of 2018)."

By adding subdivision (g), the Legislature intended to supersede *Gentile's* holding that the petition process is the exclusive remedy, and permit SB 1437 and SB 775 issues to be raised directly on appeal.

This court's grant of review addressed two issues:

> "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?"

and also:

> "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?"

1 KAISER PLAZA, STE 2300 ✦ OAKLAND, CA 94612-3642 ✦ PH: (510) 836-0100 ✦ FAX: (510) 832-3690 ✦ EMAIL: beleslaw@yahoo.com ✦ WEB: www.beleslaw.com

If petitioners were to prevail on the first issue or the issue of whether *Chiu* restricted or overruled *Sanchez*, convicting petitioners under the "substantial concurrent causation" theory would be analyzed as appellate error under *Chapman v. California* (1967) 386 U.S. 24. For example, if *Sanchez*'s "substantial concurrent causation" theory of liability didn't extend to a case where the actual killer was known, petitioners would have been convicted under a legally invalid theory and their convictions subject to reversal unless harmless beyond a reasonable doubt. *People v. Aledamat* (2019) 8 Cal.5th 1, 18, *People v. Chiu*, 59 Cal.4th at 168.

The effect of SB 775's superseding of *Gentile* is that the impact of SB 1437 and SB 775 would also be analyzed as Chapman appellate error, so that the remedy would not be to remand for a section 1170.95 hearing, but to reverse unless the error was harmless beyond a reasonable doubt. SB 775's change thus simplifies a potential problem in remedies that was previously present in this proceeding.

One additional consideration raised by SB 775's changes to *Gentile* is that *Aledamat* and *Chiu* were cases in which juries were presented with both a legally valid and a legally invalid theory of liability, and it was impossible to determine which theory the jury relied on. In those cases, the prosecutor had the option of retrying the case on the legally valid theory. Here, however, the prosecutor relied on an aiding and abetting theory that would only be applicable under the "substantial concurrent causation" theory of *Sanchez*. The prosecutor expressly disclaimed an alternative "provocative act" theory, and the declined to instruct the jury on such a theory. (RT. vol. 18, p. 4932-4933.) Should this court determine that the "substantial concurrent causation" theory was legally invalid, there would be no legally valid theory of liability that was presented to the jury under which petitioners' convictions for murder could have been supported.

3. Effect of SB 775's addition of the phrase "or other theory under which malice is imputed to a person based solely on that person's participation in a crime" to the eligibility subdivisions, section 1170.95(a) and section 1170.95(a)(1).

Senate Bill 775 amended sections 1170.95(a) and 1170.95(a)(1) to clarify that SB 1437 would apply to persons convicted of felony murder or murder under the natural and probable consequences doctrine "or other theory under which malice is imputed to a person based solely on that person's participation in a crime." Through that amendment, the legislation effectively authorizes relief for defendants prosecuted on imputed malice theories that do not conveniently fit within the felony murder or the natural and probable consequences theories of liability.

SB 775's clarification provides additional support for invalidating the "substantial concurrent causation" theory of liability under *People v. Sanchez* (2001) 26 Cal.4th 834.

If justified as a theory of "aiding and abetting" liability, the "substantial concurrent causation"

1 KAISER PLAZA, STE 2300 ✦ OAKLAND, CA 94612-3642 ✦ PH: (510) 836-0100 ✦ FAX: (510) 832-3690 ✦ EMAIL: beleslaw@yahoo.com ✦ WEB: www.beleslaw.com

theory contradicts the intent and purpose of SB 775, and SB 1437 because it allows jurors to assign murder liability based on an adversary's actions. In petitioners' case, the "substantial concurrent causation" theory allowed jurors to impute malice to petitioners based solely on their participation in the crime of a gun battle.

The classic theory of direct aiding and abetting permitted under SB 1437 and SB 775 would have required petitioners to share the specific intent of the perpetrator, Carney, see *People v. Beeman,* 35 Cal. 3d 547, 560, *People v. Canizalez* (2011) 197 Cal. App. 4th 832, 850-851. Petitioners did not share Carney's specific intent, which was to shoot at petitioners. They only shared an "intent" to participate in an unlawful gun battle with Carney. Their liability was based on *Sanchez's* extension of *People v. Kemp* (1957) 150 Cal. App. 2d 654, see *People v. Sanchez*, 26 Cal.4th at 846-847, and *Kemp* was a classic example of imputing malice to the participant in an illegal car race who did not strike and kill the pedestrian, simply because he participated in the illegal car race.

Although Penal Code section 188 did not specifically address "concurrent causation" or the foreseeability element of implied malice, both the 2018 amendment to section 188 and SB 775 impacted both issues by forbidding factfinders from imputing malice to a defendant based on his participation in a crime. The ban on imputed malice was meant to abolish the natural and probable consequences theory of murder liability.

In their reply merits briefs, petitioners discussed *People v. Carrillo* (2008) 163 Cal. App. 4th 1028 and *People v. Concha* (2009) 47 Cal.4th 653, both of which held that "natural and probable consequences" theory of liability is the same as the type of "proximate cause" involved in *Sanchez*. The court in *Carrillo*, discussing an instruction that "a natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes", held that "this is the definition of proximate cause approved in *[People v.] Bland* [(2002)], supra, 28 Cal.4th [313] at page 335", which in turn relied on *Sanchez's* definition of "substantial concurrent causation", *Sanchez* at pp. 848–849. In *People v. Concha,* 47 Cal.4th at 661, this Court similarly required the "eventual victim's death" to be the "natural and probable consequence of a defendant's act" in order to qualify as a "substantial concurrent cause of the death" under *Sanchez*, 26 Cal.4th at 849.

In *People v. Jennings* (2010) 50 Cal. 4th 616, 643-644, this Court suggested that the purpose of *Sanchez's* "substantial concurrent causation" theory was a policy decision to allow for liability in situations where ordinary theories of causation would result in all defendants escaping responsibility (holding that "the 'substantial factor' rule for concurrent causes 'was developed primarily for cases in which application of the but-for rule would allow each defendant to escape responsibility.'") *Sanchez* purported to apply the traditional theory of "transferred intent" to hold participants in both sides of the gun battle liable for the death of the bystander. See *People v. Sanchez* , 26 Cal.4th at p. 141, fn 9, citing *People v. Scott* (1996) 14 Cal. 4th 544, 551. But *Scott* was one of a series of "bad aim" cases in which the "transferred intent" doctrine applied when a defendant shot at an intended target, missed,

1 KAISER PLAZA, STE 2300 ✦ OAKLAND, CA 94612-3642 ✦ PH: (510) 836-0100 ✦ FAX: (510) 832-3690 ✦ EMAIL: beleslaw@yahoo.com ✦ WEB: www.beleslaw.com

and hit a bystander. The causation involved in the bystander's death was direct. Had the *Sanchez* court applied Scott's theory of "transferred intent" literally, no defendant would have been found responsible, since it was impossible to trace the fatal shot to any particular defendant. Thus, *Sanchez* explained *Scott's* "transferred intent" doctrine as "a policy—that a defendant who shoots at an intended victim with intent to kill but misses and hits a bystander instead should be subject to the same criminal liability that would have been imposed had he hit his intended mark." As suggested in *Jennings*, the result in *Sanch*ez – application of a "substantial concurrent causation" theory – appears to have been based on the court's "policy" decision that the "but-for" type of causation involved in *Scott* would have permitted the defendants on both sides of the gun battle to escape liability. (This was not true here, since the fatal bullet was traced to Carney's gun.)

A court's decision based on what it believes public "policy" requires, however, must give way to the Legislature's decision on what theories of criminal liability will be allowed.

Senate Bill 775 clarified that the ban on imputing malice is meant to extend to all theories of imputed liability based on participation in a crime. By banning the use of imputed malice theories, the Legislature required every person convicted of murder to not only harbor malice but also to commit an act that caused or helped to cause the murder. This is so because under an implied malice theory (which is the only theory affected by the amendments to section 188), an act causing death is essential to proof of malice.

Respectfully submitted:

Paul McCarthy
Attorney for *Petitioners LONNIE and 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:

Petitioners Lonnie and Louis Mitchells' Letter Brief

I served the following persons by the Truefiling system on Thursday, November 4, 2021.

Office of the State Attorney General
P.O. Box 944255
Sacramento, CA 94244-2550
Attorney for *Respondent*

Central California Appellate Program
2150 River Plaza Dr #300
Sacramento, CA 95833

Kimberley A. Donohue
P.O. Box 944255
Sacramento, CA 94244-2550
kimberley.donohue@doj.ca.gov
Attorney for *Respondent*

Steven Greenberg
P.O. Box 754
Nevada City, CA 95959-0754
Attorney for *Appellant JAMES CARNEY*

I served the following persons by mail on Thursday, November 4, 2021:

Sacramento District Attorney
901 G Street
Sacramento, CA 95814

Clerk, Sacramento Superior Court
720 9th Street
Sacramento, CA 95814

Louis Mitchell AV1575
P. O. Box 1050
Soledad, CA 93960-1050

Lonnie Mitchell AV1574
P.O. Box 8800
Corcoran, CA 93212-8309

I declare under penalty of perjury that the above is true. Executed in Oakland, California on Thursday, November 4, 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.

2. My email address used to e-serve: **nazcalito@gmail.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
LETTER	Letter brief-lonnie-louis-mitchell

Service Recipients:

Person Served	Email Address	Type	Date / Time
Mitchell Keiter Keiter Appellate Law	mkeiter@msn.com	e-Serve	11/4/2021 6:44:19 PM
Attorney Attorney General - Sacramento Office Court Added	sacawttruefiling@doj.ca.gov	e-Serve	11/4/2021 6:44:19 PM
Stephen Greenberg Attorney at Law 88495	sgberg1@mac.com	e-Serve	11/4/2021 6:44:19 PM
Mitchell Keiter Keiter Appellate Law 156755	Mitchell.Keiter@gmail.com	e-Serve	11/4/2021 6:44:19 PM
Paul McCarthy Beles & Beles Law Offices 139497	nazcalito@gmail.com	e-Serve	11/4/2021 6:44:19 PM
Kimberley Donohue DOJ Sacramento/Fresno AWT Crim 247027	kimberley.donohue@doj.ca.gov	e-Serve	11/4/2021 6:44:19 PM
Jeralyn Keller Attorney at Law 72565	jbk@kellerlaw.net	e-Serve	11/4/2021 6:44:19 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

11/4/2021
Date

/s/Robert Beles

Signature

McCarthy, Paul (139497)

Last Name, First Name (PNum)

Beles & Beles Law Offices

Law Firm