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Friday, November 12, 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 **reply letter brief** in response to this Court's October 13, 2021 order directing the parties to serve and file letter briefs and allowing for replies to letter briefs.

A. Holding the Mitchells liable involves imputing Carney's malice to them solely because they participated in a gun battle with Carney, in violation of Senate Bill 775.

Respondent argues that Senate Bill 775 does not apply to this case, stating:

"The rule of *Sanchez* requires a jury to inquire into a defendant's subjective mental state when determining whether a defendant is guilty of murder and, if so, of which degree. It is this inquiry into a defendant's personal malice (or lack thereof) that removes *Sanchez* murder convictions from the categories of convictions that are eligible for resentencing under either Senate Bill No. 1437 or Senate Bill No. 775. A finding that a defendant personally harbored malice cannot, by definition, be considered imputation of malice. The amendment to subdivision (a) of section 1170.95 by Senate Bill No. 775, therefore, has no impact on the issues in this case."

Page 2, respondent's letter brief.

Respondent basically offers a bootstrap argument in which respondent assumes what it is trying to prove. Respondent assumes that the "rule of *Sanchez*" applies so that the Mitchells' malice toward Carney was deemed transferred to the bystander, even though the Mitchells' shots didn't hit the bystander. Respondent then declares that because the Mitchells harbored malice (toward Carney), the "rule of *Sanchez*" does not involve the imputation of malice as set forth in SB 775.

This is not correct. The “rule of Sanchez” in effect in the fact situation of *this* case, (which is not the same as *Sanchez* itself) does impute malice within the meaning of SB 775. It imputes Carney’s malice to the Mitchells.

People v. Sanchez (2001) 26 Cal.4th 834’s “substantial concurrent causation’ theory of liability” was an extension of the common law doctrine of “transferred intent” to a situation in which the shooter wasn’t known. See *People v. Scott* (1996) 14 Cal. 4th 544, in which this scott resolved a series of appellate level “bad aim” cases in which a defendant fired a bullet at an intended victim, missed, and the defendant’s bullet hit and killed a bystander. *People v. Scott*, 14 Cal. 4th at 550. In his concurring opinion in *Scott*, Justice Mosk attempted to explain the “transferred intent” doctrine as extending a defendant’s malice from an intended to an unintended victim, so long as the defendant was the “proximate cause” of the victim’s death. See *Scott*, 14 Cal.4th at 556, fn. 2, citing *People v. Roberts* (1992) 2 Cal.4th 271, 317.

However, under *Roberts*, “proximate cause” was limited. A criminal defendant who attacked a second party could only be the “proximate cause” of the death of a bystander that the second party attacked if the defendant’s attack was sufficient to cause the second party to “lose his faculties and [attach the third party] impulsively or unreasoningly.” and act without volition. *People v. Roberts*, 2 Cal.4th at 315.

Had *Sanchez* not been decided and the law was as set forth in *Scott*, Carney, who fired the fatal bullet at the Mitchells, but hit and killed a bystander, would have been responsible for the bystander’s death since his malice towards the Mitchells, his intended victims, extended to the bystander that his bullet directly and proximately hit and killed. The Mitchells, who didn’t fire the fatal bullet, would not be responsible, at least under Scott’s “transferred intent” theory, since their actions were not the direct cause of the bystander’s death under *Roberts*. To make the Mitchells’ responsible for the bystander’s death under a transferred intent theory, Carney’s malice would have to be imputed to the Mitchells.

Sanchez had been decided, however. *Sanchez* extended Scott’s theory of “transferred intent” and “proximate cause” by broadening the group of responsible defendants to anyone whose bullet might have hit the bystander. This extended version of “proximate cause” was explained under *Sanchez*’ “substantial concurrent causation” theory.

This case is not *Sanchez*, and the Mitchells are not defendants whose bullets might have hit and killed the bystander. The fatal bullet was fired by Carney.

This Court’s grant of review asks both whether *Sanchez* should be extended to a situation where the actual shooter is known, and, if it does, whether the *Sanchez* rule would violate *People v Chiu* (2014) 59 Cal.4th 155, Senate Bill No. 1437, and now, Senate Bill 775. If *Sanchez* can’t be extended, holding the Mitchells responsible for the bystander’s death under

Scott's "transferred intent" theory would necessarily require imputing Carney's malice to the Mitchells, since Carney, not them, fired the fatal bullet. If *Sanchez* was directly applied to this case, the idea that the Mitchells could have caused the bystander's death would be a legal fiction that would involve imputing Carney's malice to them within the meaning of SB 775 imply because they participated in a gun battle with Carney. (Or, as petitioners previously argued in their earlier letter brief, would involve holding the Mitchells liable for the natural and probable consequences of engaging in such a gun battle, within the meaning of SB 775 and SB 1437.)

B. Senate Bill 775 bars reliance on substantial concurrent causation because the only causation-based defense – superseding or intervening causation – improperly imports imputed malice concepts into the jury's consideration of murder liability.

The superseding or intervening causation defense asserts that some third party's action broke the causal chain between the defendant's action and the decedent's death. "In law, the term 'superseding cause' means 'an independent event [that] intervenes in the chain of causation, producing harm of a kind and degree so far beyond the risk the original [wrongdoer] should have foreseen that the law deems it unfair to hold him responsible.'" (*People v. Sanchez* (2001) 26 Cal.4th 834, 855 (conc. opn. of Kennard, J.)) "In general, an "independent" intervening cause will absolve a defendant of criminal liability. [Citation.] However, in order to be "independent" the intervening cause must be "unforeseeable . . . an extraordinary and abnormal occurrence, which rises to the level of an exonerating, superseding cause." [Citation.] On the other hand, a "dependent" intervening cause will not relieve the defendant of criminal liability. "... If an intervening cause is a normal and reasonably foreseeable result of defendant's original act the intervening act is 'dependent' and not a superseding cause, and will not relieve defendant of liability."'" *People v. Cervantes* (2001) 26 Cal.4th 860, 871; see also *People v. Schmies* (1996) 44 Cal.App.4th 38, 49-50. To determine whether an intervening cause can relieve the defendant of criminal liability, the fact-finder must determine whether the intervening cause was foreseeable by the defendant or, if not foreseeable, whether it caused injury of a type which was foreseeable. If either of these questions is answered in the affirmative, then the defendant is not relieved from liability. *Pappert v. San Diego Gas & Electric Co.* (1982) 137 Cal.App.3d 205, 210. If neither the cause nor the results which it caused was foreseeable, the intervening cause relieves the defendant of liability. (*Ibid.*)

Thus, the limitations on the superseding cause defense allow the prosecution to defeat it by relying on natural and probable consequences type liability: If the defendant committed an act, and he should have known that a possible result of that act was some act by a third party, the defendant is liable for the third party's fatal act so long as the act was possibly foreseeable. The prosecution can defeat the defense if the defendant did not know the intervening act would occur or did not intend that it occur, since the standard is whether it caused injury of a type that was possibly foreseeable.

In connection with a similar kind of instructional problem, this Court has made it clear that “implied malice instructions should never be given in relation to an attempted murder charge” *People v. Lee* (1987) 43 Cal.3d 666, 670, because they “may confuse the jury by suggesting that they can convict without finding a specific intent to kill.” *People v. Visciotti* (1992) 2 Cal.4th 1, 58, quoting *People v. Murtishaw* (1981) 29 Cal.3d 733, 765. If a defendant in a concurrent causation case chooses to raise the only causation-based defense, he will necessarily introduce natural and probable type instructions into the matter, reducing the prosecution’s burden of proof and allowing jurors to infer that the defendant caused the death if he committed an act that possibly could have been predicted to lead to a death.

Respectfully submitted,



Paul McCarthy
Attorney for Petitioners Louis and 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:

Petitioners Lonnie and Louis Mitchells' Reply Letter Brief

I served the following persons by the Truefiling system on Friday, November 12, 2021

Office of the State Attorney General P.O. Box 944255 Sacramento, CA 94244-2550 Attorney for <i>Respondent</i>	Central California Appellate Program 2150 River Plaza Dr #300 Sacramento, CA 95833
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I served the following persons by mail on Thursday, November 4, 2021:

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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 Friday, November 12, 2021.



STATE OF CALIFORNIA
Supreme Court of California**PROOF OF SERVICE**STATE OF CALIFORNIA
Supreme Court of CaliforniaCase Name: **PEOPLE v. CARNEY**Case Number: **S260063**Lower Court Case Number: **C077558**

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11/12/2021

Date

/s/Robert Beles

Signature

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Last Name, First Name (PNum)

Beles & Beles Law Offices

Law Firm