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Supreme Court of the State of California

PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff-Respondent*, vs. LOUIS MITCHELL, *Defendant-Petitioner*.	No. Appeal No. C077558 Sacramento County Superior Court No. 11F00700 PETITION FOR REVIEW; CERTIFICATE OF COMPLIANCE; APPENDIX *Honorable Kevin McCormick, Judge*

3RD PETITION **PETITION FOR REVIEW**

CERTIFICATE OF COMPLIANCE

APPENDIX

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TABLE OF CONTENTS

item *page number*

PETITION FOR REVIEW.. 7

1. Statement of issues.. 7

2. Grounds for review... 8

3. Statement of the case.. 10

4. Argument.. 15

a. There was no theory of liability in the jury instructions under which Louis could have been found liable for the death of the bystander.. 15

i. Louis couldn't have been convicted as a perpetrator because he didn't shoot the bystander.. 15

ii. Louis couldn't have been found liable on a theory that he aided and abetted the perpetrator.. 17

iii. If *Julio Sanchez* applies where the actual perpetrator can be identified, it should be revisited in light of newer law restricting homicide liability for a non-perpetrator.. 20

iv. The prosecutor expressly disclaimed any reliance on the "provocative act" theory.. 21

v. There was, accordingly. insufficient evidence to support Louis's murder conviction.. 22

item *page number*

b. The trial court erroneously instructed the jury that the only defendant that could raise the defenses of self-defense, imperfect self-defense, or heat of passion as to the bystander was Carney, the defendant who actually fired the fatal shot.. 23

i. The trial court gave defense instructions that literally applied only to Carney. 23

ii. Louis didn't invite error.. 27

iii. The error was not harmless.. 28

c. The cumulative impact of the errors denied Louis Fourteenth Amendment due process and a fair trial.. . . 30

d. The Court of Appeal erroneously shifted its own burden of showing that remand would be futile to Louis. 30

5. Conclusion.. 32

CERTIFICATE OF COMPLIANCE. 33

APPENDIX. 34

PROOF OF SERVICE. 71

TABLE OF AUTHORITIES

cases *page number*

Carella v. California (1989) 491 U.S. 263, 109 S. Ct. 2419, 105 L. Ed. 2d 218. 29

Chambers v. Mississippi, (1973) 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297. 30

Chapman v. California (1967) 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705. 29

Jackson v. Virginia (1979) 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560. 23

Johnson v. Louisiana (1972) 406 U.S. 356, 362, 92 S. Ct. 1620, 32 L. Ed. 2d 152. 23

Neder v. United States (1999) 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35. 29

Parle v. Runnels (9th Cir. 2007) 505 F.3d 922.. 30

People v. Cervantes (2001) 26 Cal. 4th 860. . . . . 21, 22

People v. Chiu (2014) 59 Cal.4th 155. 20

People v. Chun (2009) 45 Cal.4th 1172.. 29

People v. Croy (1985) 41 Cal.3d 1 18

People v. Esquivel (1994) 28 Cal.App.4th 1386.. 29

People v. Flood (1998) 18 Cal.4th 470. 29

People v. Gilbert (1965) 63 Cal. 2d 690.. . . . . 16, 21

People v. Hill (1998) 17 Cal.4th 800. 30

cases *page number*

People v. Hill (2015) 236 Cal.App.4th 1000. 29

People v. Johnson (2015) 61 Cal. 4th 734. 28

People v. Julio Sanchez (2001) 26 Cal. 4th 834. . . . . 9, 15-17, 20

People v. Levitt (1984) 156 Cal. App. 3d 500. 27

People v. Matthews (1979) 91 Cal. App. 3d 1018. 26

People v. Roberts (1992) 2 Cal. 4th 271.. 17

People v. Russell (1998) 91 N.Y.2d 280. 15

People v. Washington (1965) 62 Cal. 2d 777. 21

People v. Wilkins (2013) 56 Cal.4th 333. 29

People v. Zermeno (1999) 21 Cal.4th 927 18

Sullivan v. Louisiana (1993) 508 U.S. 275, 279, 113 S. Ct. 2078, 124 L. Ed. 2d 182. 29

statutes and rules *page number*

California Rules of Court 8.500(b)(1). 8

Penal Code sections 189(e)(2.. 9

Penal Code section 1170.95. 9

Proposition 1437.. 9

United States Constitution, Fourteenth Amendment 8, 23, 29, 30

United States Constitution, Sixth Amendment 29

instructions *page no*

CALCRIM 520 12

CALCRIM 560 11

CALCRIM 561. 11

CALCRIM 562 24-26

Supreme Court of the State of California

PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff-Respondent*, vs. LOUIS MITCHELL, *Defendant-Petitioner*.	No. Appeal No. C077558 Sacramento County Superior Court No. 11F00700 PETITION FOR REVIEW

PETITION FOR REVIEW

1. Statement of issues.

There was no theory of liability in the jury instructions under which petitioner could have been found liable for the death of the bystander, because petitioner was not the perpetrator, nor did he aid and abet the perpetrator.

If *People v. Julio Sanchez* (2001) 26 Cal. 4th 834 applied to petitioner's case, s where the actual perpetrator was identified, it should be revisited in light of newer law restricting homicide liability for a non-perpetrator.

Petitioner could not have been convicted of first degree murder of the bystander under a natural and probable cause theory of aiding and abetting.

The prosecutor expressly disclaimed the only theory that could have supported any homicide conviction, the "provocative act" theory.

Based on the above, as there was insufficient evidence to support petitioner's murder conviction, the conviction violated petitioner's due process rights.

The trial court erroneously instructed the jury that the only defendant that could raise the defenses of self-defense, imperfect self-defense, or

heat of passion as to the bystander was the defendant who actually fired the fatal shot, Carney.

The instructional error was not harmless.

The cumulative impact of these trial errors denied petitioner Fourteenth Amendment due process and a fair trial.

The Court of Appeal erroneously shifted it's own burden of showing that remand would be futile to petitioner.

2. Grounds for review.

Review is appropriate under California Rules of Court 8.500(b)(1) to resolve important questions of law.

The result at trial was bizarre and anomalous. During an exchange of gunfire, a bystander was killed by a stray bullet. The actual killer, James Carney, was convicted of only voluntary manslaughter. Petitioner Lonnie Mitchell and his brother, Louis Mitchell, however, were convicted of first degree murder, even though they were not the actual killers but were themselves the intended targets of bullets fired by Carney and his associates. The Court of Appeal upheld the Mitchell's convictions based on this Court's decision *People v. Julio Sanchez* (2001) 26 Cal. 4th 834, a case that imposed concurrent liability for first degree murder in a gun battle bystander death where it was impossible to determine which participant in the gun battle fired the fatal shot.

This Court should grant review to determine whether its opinion in *People v. Julio Sanchez* (2001) 26 Cal. 4th 834, should be revisited because *Julio Sanchez's* "substantial concurrent causation" theory of liability is inconsistent with later efforts to restrict first degree murder liability for defendants who did not fire the fatal shot or strike the fatal blow. See this Court's later opinion in *People v. Chiu* (2014) 59 Cal.4th 155, and the California Legislature's later enactment of Proposition 1437 set forth in Penal Code sections 189(e)(2) and 1170.95 restricting murder liability for such defendants.

Review is also appropriate under California Rules of Court 8.500(b)(4). The court remanded the co-appellant Carney's appeal to the Superior Court for exercise of discretion to strike gun enhancements under Senate Bill 620, but not petitioner's, on the grounds that petitioner failed to show that remand would not be futile. There was an obvious reason on the record why a sentencing court might strike Louis's firearms enhancement under SB 620. Louis didn't fire the fatal shot. That was the main point of Louis's appeal. Also, petitioner didn't have the burden of showing that remand would not be futile. At a minimum, this court should grant review and transfer this case to the Court of Appeal with instructions to remand petitioner's appeal for exercise of such striking

discretion.

3. Statement of the case.

Petitioner Louis Mitchell ("Louis")[1] adopts the factual summary in the Court of Appeal's opinion (Appendix) and adds the following:

a. Introduction.

This case arose from a gun battle on December 4, 2010 in Sacramento, California. Lonnie and Louis Mitchell found themselves inside the Fly Cuts barber shop in Sacramento, shooting out at James Carney, Charles Barksdale, Charles Lott, and others. Carney, Barksdale, and Lott were outside the Fly Cuts barber shop, shooting in at Lonnie and Louis. Jones had originally been inside the barber shop and had called Carney and others to let them know that Lonnie and Louis had arrived in the barber shop.

During the gun battle, an innocent bystander inside the barber shop was shot and killed. The fatal bullet was traced to Carney's gun. All of these individuals, plus former defendant Larry Jones, were charged with her killing.

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[1] As Louis's brother Lonnie Mitchell is a co-appellant and is filing his own petition for review, this petition refers to both petitioner and Lonnie Mitchell by their first names when referring to them as individuals.

b. Settlement of instructions.

During settlement of instructions, attorneys for Carney and Jones asked the court to give CALCRIM 560 and 561, the "provocative act" instructions, complaining that the prosecution had not asked for these instructions as "a kind of a tactical maneuver." Carney's attorney argued that Lonnie's display of a handgun in the barber shop provoked a response by Carney and others. (RT. vol. 18, p. 4928-4929.) Attorneys for both Lonnie and Louis objected. (RT. vol. 18, p. 4930-4931.) The prosecutor responded that it was her right 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.) The court declined to instruct on the provocative act theory, apparently correctly noting that there was no "obligation to give an additional theory of liability that is not being pursued or sought by the People." (RT. vol. 18, p. 4933.)

b. Closing and rebuttal argument.

In her closing and rebuttal arguments, the prosecutor relied on aiding and abetting to hold both Lonnie and Louis criminally liable for the death of the bystander, stating:

> "The murder of Monique Nelson is, you know, the evidence shows, is as a result of the bullet fired by James Carney. But that doesn't stop the other three from being just as guilty.

> Because they aided and abetted each other, and they are each equally guilty."

(RT. vol. 18, p. 5065)

The prosecutor went on to discuss at length the ways in which Carney and his associates were aiding and abetting each other. This made it appear at first that she might have simply been arguing that Jones could be found liable as Carney's accomplice. But the prosecutor then suggested that all participants in the gun battle were aiding and abetting each other, arguing that "when you engage in this type of mutual combat, you are each responsible for the consequences." (RT. vol. 18, p. 5077-5078.) She discussed other bystanders in the barber shop that Lonnie and Louis might have injured, but not killed (RT. vol. 18, p. 5078-5079) and complained that after the battle, Lonnie and Louis played video games while "Monique is still laying out there on the ground. Adam Wade is still in the ER. How offensive is that?" (RT. vol. 18, p. 5118-5119.)

> "And that brings us to the issue of how they can all be held liable for first degree murder when we know it was Mr. Carney's bullet that killed Monique. Because of this instruction, and it is in [CALCRIM] 520.[2] And, essentially, what it says — you will have the instruction. I did put it up there, but you don't have to write it all down. I won't read

---

[2] CALCRIM 520 is simply the standard first / second degree murder instruction. It doesn't have any of the prosecutor's extra language about acting together or any aiding and abetting language.

> it to you.
>
> But, essentially, what it is, is if you're acting together and you're all working and you're all serving as a substantial factor, it doesn't matter that one bullet was the one that killed her. It doesn't even matter if we didn't know whose bullet killed Monique. It doesn't matter, not under these circumstances. When you have four individuals who together have joined up to do battle in a public street, they are encouraging each other, they are instigating each other, they are promoting. They are aiding and abetting. And if they are each shooting and they are a substantial factor in those events, they are all guilty for that. They are all responsible for that cause of death.
>
> And it's kind of like you look back at when we were talking about a street race. You have two people that join up, they get there at a stoplight. They don't know each other. They look at each other. One revs their engine, the other one revs their engine, boom, they're off. And they engage in a street race 100 miles an hour through the streets of Sacramento on a Sunday afternoon where there is a lot of traffic. One of them doesn't make the turn, ends up killing an innocent driver. They are both responsible for that. Without one, the other one wouldn't have been engaged in that behavior. They are both a substantial factor in that death."
>
> Here, without the Mitchells, it wouldn't have happened. Without Carney and Jones, it wouldn't have happened. They are all a substantial factor and they are all proximately — they are all a proximate cause in her death."

(RT. vol. 18, p. 5122-5123.)

During settlement, attorneys for both Lonnie and Louis objected to any theory under which they could have aided and abetted Carney. (RT. vol. 18, p. 5013.), In her closing arguments, Louis's attorney

pointed out that Louis couldn't have been aiding and abetting Carney or Jones:

> "Clearly, Louis Mitchell is not aiding and abetting Mr. Jones and Mr. Carney. They are trying to kill him. So [he is] not aiding, promoting, instigating, contributing to any conduct to have himself killed. So there is certainly no theory of aiding and abetting as it relates to the four of them."

(RT. vol. 19, p. 5376-5377.)

In rebuttal, the prosecutor responded:

> "So why is it first degree murder? It is aiding and abetting. [Counsel for Louis] said well, they weren't aiding and abetting their own murder. No, they weren't.
>
> But the law is this: Although they were trying to harm each other, at the same time, they were acting in concert to create an explosive condition that resulted inevitably in Monique Nelson's death and the injuries of the others."

The court overruled Louis's objection that this misstated the law, and the prosecutor continued.:

> "They work together to create an explosive environment. And it was inevitable that somebody was going to die. In this case, it was Monique Nelson. They all had more than 25 minutes to make decisions. Decisions that could have changed everything. And they made their decisions, and they need to be held accountable. They are each a substantial concurrent proximate cause of what happened that day."

(RT. vol. 19, p. 5409-5410.)

4. Argument.

a. There was no theory of liability in the jury instructions under which Louis could have been found liable for the death of the bystander.

i. Louis couldn't have been convicted as a perpetrator because he didn't shoot the bystander.

The prosecution relied on *People v. Julio Sanchez*, 26 Cal. 4th 834 in support of an aiding and abetting theory of liability. The Court of Appeal eventually relied on *Julio Sanchez* in upholding Louis's liability as a perpetrator. However, in that case, it was impossible to tell whose bullet killed the bystander. The Supreme Court thus held that shooters on both sides were "substantial concurrent" causes of the bystander's death, stating:

> "The circumstance that it cannot be determined who fired the single fatal bullet, i.e., that direct or actual causation cannot be established, does not undermine defendant's first degree murder conviction if it was shown beyond a reasonable doubt that defendant's conduct was a substantial concurrent cause of [the bystander's] death."

People v. Julio Sanchez, 26 Cal. 4th at 845.

The language from *Julio Sanchez* strongly suggests that this Court's theory of "substantial concurrent causation" was limited to cases in which it was impossible to tell who fired the fatal shot. Julio Sanchez adopted the holding of *People v. Russell* (1998) 91 N.Y.2d 280, which, similarly,

was a case in which it was impossible to determine the perpetrator. See *People v. Julio Sanchez,* 26 Cal. 4th at 848-849. In reality, a bullet that doesn't hit a target doesn't actually cause any damage to any target, substantially or otherwise. It is only a "cause" of damage to the extent that it induces someone else to shoot back, and that bullet hits a target. But that is an example of the "provocative act" doctrine, which was expressly disclaimed by the prosecutor here, and which only results in liability for implied malice - second degree murder. See, e.g., *People v. Gilbert* (1965) 63 Cal. 2d 690, 705, cited in *Julio Sanchez*, 26 Cal. 4th at 852. The result in *Julio Sanchez* is better explained as a kind of "necessity" based on the inability to determine who fired the fatal shot. Since the fatal bullet couldn't be traced to any particular participant in the gun battle, the actual killer, who surely would have been liable for first degree murder under a transferred intent theory if the bullet had been traced to his gun, would have escaped first degree murder liability unless the doctrine of "substantial concurrent causation" was imposed.

Here, however, the evidence showed that Carney's gun fired the fatal shot. The prosecutor conceded in her argument that the evidence showed that Carney had fired the fatal shot, essentially electing to proceed under that theory. (RT. vol. 18, p. 5065.) Julio Sanchez's

"substantial concurrent causation" theory doesn't apply, since the evidence was clear that Carney's shot was the entire cause of the bystander's death.

Although Carney never intended to hit or kill the bystander, the doctrine of transferred intent made him culpable for the bystander's death. *People v. Roberts* (1992) 2 Cal. 4th 271, 317, discussed in *Julio Sanchez*, 26 Cal. 4th at 851. Bur the doctrine of transferred intent only applies to the person that fires the fatal shot, and, unlike the situation in *Julio Sanchez*, the evidence showed that only Carney could have done so. Thus, Louis couldn't have been found liable for the bystander's death as a perpetrator.

ii. Louis couldn't have been found liable on a theory that he aided and abetted the perpetrator.

While the jury could have found that Lonnie and Louis aided and abetted each other's actions in shooting at Carney and his associates, Louis could not have aided and abetted the actions of those trying to kill him. The aiding and abetting instructions given were as follows:

> "To prove that the defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that: One, the perpetrator committed the crime; Two, the defendant knew that the perpetrator intended to commit the crime; Three, before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in

> committing the crime; And four, the defendant's words or conduct did, in fact, aid and abet the perpetrator's commission of the crime.
>
> Someone aids and abets a crime if he or she knows of the perpetrator's unlawful purpose, and he or she specifically intends to and does, in fact, aid, facilitate, promote, encourage or instigate the perpetrator's commission of that crime."

(RT. vol. 18, p. 5021-5022.)

While Louis's actions in shooting at Carney might well have induced Carney to shoot back at him, Louis could not have actually "aid[ed] or facilitate[d]" Carney in shooting back. If anything, Louis's shooting would have had the opposite effect, since Carney would have had to avoid their shots while at the same time trying to fire back. And more critically, Louis couldn't have specifically intended that Carney shoot back at him unless he had engaged in the gun battle as a form of assisted suicide. To have the required specific intent under this instruction, a purported aider and abetter must ". . . share [the perpetrator's] purpose or intend to commit, encourage, or facilitate the commission of the crime." *People v. Croy* (1985) 41 Cal.3d 1 at 11-12. And an accomplice must aid and abet the specific crime "committed by the perpetrator," not some other crime. *People v. Zermeno* (1999) 21 Cal.4th 927 at 932, *People v. Croy*, 41 Cal. 3d at 12.

The prosecutor's attempt to compare a gun battle with a street race was likewise invalid. In a street race, the participants are indeed aiding and abetting each other under the classic instruction. They are sharing the same purpose, to have a road race. But the defendants weren't simply shooting up the town, like cowboys out of a Hollywood western. They were shooting at each other, presumably trying to kill or injure each other. Louis could not have shared Carney's intent.

Louis seemingly couldn't have been found liable for the bystander's death under a natural and probable consequences theory. The court instructed the jury as follows:

> "To prove the defendant is guilty of murder, the People must prove that:
>
> One, the defendant is guilty of assault with a firearm; Two, during the commission of that assault with a firearm, a co-participant in that assault with a firearm committed the crime of murder; And three, under all of the circumstances, a reasonable person in the defendant's position would have known that the commission of murder was a natural and probable consequence of the commission of the assault with a firearm.
>
> A coparticipant in a crime is the perpetrator or anyone who aided and abetted the perpetrator. It does not include a victim or innocent bystander."

(RT. vol. 18, p. 5022-5023.)

While there was evidence that Louis were guilty of assault with

firearms and might have aided or abetted each other in the commission of such assaults, neither of them qualified as the "perpetrator", since neither shot the bystander, nor did either aid and abet the perpetrator, Carney in his commission of firearms assaults against either Lonnie or Louis.

Moreover, a "natural and probable consequences" theory of liability could only have resulted in a conviction for second degree murder under *People v. Chiu* (2014) 59 Cal.4th 155. See discussion below.

iii. If *Julio Sanchez* applies where the actual perpetrator can be identified, it should be revisited in light of newer law restricting homicide liability for a non-perpetrator.

Julio Sanchez literally only applies to the specific situation where it is impossible to identify the perpetrator of a death in a gun battle. When applied to a person who wasn't actually the perpetrator, *Julio Sanchez* is inconsistent with later developments in the law.

In *People v. Chiu*, 59 Cal.4th at 158-159, this court held that an aider and abetter cannot be convicted of first degree murder under a natural and probable consequences theory of liability, but only if he intentionally aided and abetted the perpetrator. The extension of liability to a non-perpetrator like Louis based on *Julio Sanchez* here, where Louis

surely didn't intend to aid or abet Carney's shooting at him and Louis, is inconsistent with the holding and policy stated in *Chiu*.[3] For the result here is practically indistinguishable from the kind of "natural and probable consequences" liability rejected in *Chiu*. And it's similarly inconsistent with the Legislature's post-*Chiu* enactment of Proposition 1437 further restricting homicide liability for non-perpetrators.

iv. The prosecutor expressly disclaimed any reliance on the "provocative act" theory.

The only theory under which Louis could have been found liable for the bystander's death would have been some variety of the "provocative act" theory, in which his shooting at Carney provoked Carney to shoot back.. See *People v. Cervantes* (2001) 26 Cal. 4th 860, 867, discussing *People v. Washington* (1965) 62 Cal. 2d 777 and *People v. Gilbert*, 63 Cal. 2d 690 and holding: "The provocative act murder doctrine has traditionally been invoked in cases in which the perpetrator of the underlying crime instigates a gun battle, either by firing first or by otherwise engaging in severe, life-threatening, and usually gun-wielding conduct, and the police, or a victim of the underlying crime, responds with privileged lethal force by shooting back and killing the perpetrator's

[3] *Julio Sanchez* seems inconsistent with *Chiu* even in its original context.

accomplice or an innocent bystander." This theory can apply even if the provoked shooter was himself engaged in criminal conduct. *Cervantes, id.* at 867. In any case, *Cervantes* made it clear that the provocative act theory would support only an implied malice second degree murder conviction, *Cervantes, id.* at 867 ("we have applied principles of implied malice murder to situations in which criminal defendants neither kill nor intend to kill, but cause a third party to kill in response to their life-threatening provocative acts"), not first degree murder convictions as Louis sustained here.

The prosecutor chose not to proceed on a provocative acts theory, with its need to show who provoked the gun battle and limitation of er liability to second degree murder. The court didn't instruct on such a theory, and the jury could not have relied on a theory of liability on which they were not instructed.

v. There was, accordingly. insufficient evidence to support Louis's murder conviction.

Louis could have validly been convicted of first degree murder or some lesser degree of homicide if there was substantial evidence that he fired the fatal shot. But there wasn't, as shown above. Since this was the only scenario under which he could have been validly convicted,

convicting Louis of homicide violated his right to Fourteenth Amendment due process of law, because, after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia* (1979) 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560, citing *Johnson v. Louisiana* (1972), 406 U.S. 356, 362, 92 S. Ct. 1620, 32 L. Ed. 2d 152.

b. The trial court erroneously instructed the jury that the only defendant that could raise the defenses of self-defense, imperfect self-defense, or heat of passion as to the bystander was Carney, the defendant who actually fired the fatal shot.

i. The trial court gave defense instructions that literally applied only to Carney.

At trial, appellants and Jones all asserted defenses of self-defense and partial defenses of imperfect self defense and heat of passion. The jury instructions allowed such defenses ***only to the individual who fired the fatal shot*** – Carney. This led to the bizarre result that the more culpable defendant (in the sense that he fired the fatal shot) had the benefit of defenses that the less culpable defendants (who didn't fire the fatal shot) lacked. And this likely explains the odd verdict that the jury reached – manslaughter for the principal, Carney, and first degree murder for those only vicariously liable, Lonnie and Louis.

The problem first arose in the discussion of proposed instructions. Counsel for Louis Mitchell asked for "language that any defenses that apply to the intended killing, or to the killings, apply to the unintended killings as well." (RT. vol. 18, p. 4933.) Counsel for Lonnie Mitchell joined in the request. (RT. vol. 18, p. 4934.) The court then decided to add the following language to CALCRIM 562 (the transferred intent instruction.):

> ""The defenses, if any, which apply to the intended killing apply to an unintended killing. This includes defenses that decrease the level of homicide, such as heat of passion or imperfect self-defense."

(RT. vol. 18, p. 4935-4936.) Various counsel suggested addition of language regarding self-defense or defense of others, but there were no other suggestions. (RT. vol. 18, p. 4936.)

The actual instruction that the court read to the jury was as follows:

> "If the defendant intended to kill one person, but by mistake or accident killed someone else, then the crime, if any, is the same for the unintended killing as it is for the intended killing.
>
> Defense, if any, which apply to the intended killing also apply to the unintended killing. This includes defenses that decrease the level of homicide, such as heat of passion or imperfect self-defense. Obviously, it applies to self-defense or defense to others."

(RT. vol. 18, p. 5037.)

The above instruction literally advises the jury that, in regards to the bystander killing, the defenses of self defense, defense of others, heat of passion or imperfect self defense apply only to the defendant who "intended to kill one person, but by mistake or accident killed someone else." The only defendant in this position was Carney, whose gun fired the fatal bullet and whom the evidence suggested most likely fired the bullet that killed the bystander. While there was evidence that Louis may have fired his gun while intending to kill someone, there is no evidence that "by mistake or accident" Louis fired the fatal shot that killed the bystander. At most, evidence suggested that his firing bullets at Carney and his associates may have prompted Carney to fire back, and "by mistake or accident" kill the bystander.

Other instructions do not remedy the defect in this instruction. The only other instruction that suggests that self-defense could apply to someone other than an attacker is one sentence immediately following the modified CALCRIM 562, in which the court said:

> "the defendants are not guilty of murder if they were justified in killing someone in self-defense or defense of another."

(RT. vol. 18, p. 5037.) (This was the instruction Carney complained of

on appeal that unfairly limited self-defense to a defense to murder.)

While the word "someone" is vague and might possibly be interpretable to apply to someone other than an attacker, nothing in that sentence, taken alone, would enlighten the jury how a defendant could be "justified" is killing a bystander in self-defense or defense of another. The only instruction that does that is the modified CALCRIM 562, which tells the jury that self defense applies to a person who "by mistake or accident killed someone else." As this sentence immediately followed the modified CALCRIM 562, a reasonable juror could well simply regard the sentence as a continuation of or part of that instruction and thus consistent with it.

There were no other instructions that suggested that self-defense, imperfect self-defense, heat of passion, or defense of others could be a defense to the killing of a bystander. The only instruction that said so was the modified CALCRIM 562, which, as shown above, literally limited such defenses to a transferred intent situation.

In *People v. Matthews* (1979) 91 Cal. App. 3d 1018, 1023, the court recognized that "self-defense is available to relieve one of criminal responsibility where his legitimate act of self-defense results in the inadvertent death or injury of an innocent bystander." In *Matthews*, the

defendant shot at a passenger in a car, claiming to be firing in self-defense, and inadvertently hit the driver, killing him. Accord, *People v. Levitt* (1984) 156 Cal. App. 3d 500, 507.

The defendant in *Matthews* was in Carney's situation, who claimed to be firing at Lonnie and Louis in self-defense but inadvertently hit the bystander. However, it seems logical that this same principle would apply to a defendant who is charged with being liable in some way for the homicide of a bystander, but who did not actually fire the fatal shot. The prosecution's theory of liability as to the Mitchells was apparently that their firing guns at Carney resulted in Carney shooting back and killing the bystander. Thus, under the language of *Matthews*, if not the exact fact situation, Louis should have had the benefit of any defenses.

ii. Louis didn't invite error.

Matthews found that the trial court had a duty to instruct the jury that self-defense applies to bystander killings, if requested, but did not have a *sua sponte* duty to instruct otherwise. Here, however, the trial court actually gave the instruction, although erroneously restricting the availability of defenses to Carney. "Even if the court has no sua sponte duty to instruct on a particular legal point, when it does choose to instruct, it must do so correctly." *People v. Castillo* (1997) 16 Cal.4th

306, accord, *People v. Pearson* (2012) 53 Cal.4th 306, 325. There is no duty to request modification of an instruction that contains an incorrect statement of the law. *People v. Hudson* (2006) 38 Cal.4th 1002, 1011, *People v. Smithey* (1999) 20 Cal.4th 936, 976 fn. 7. Moreover, a court will find invited error "only if counsel expresses a deliberate tactical purpose in resisting or acceding to the complained of instruction." *People v. Souza* (2012) 54 Cal.4th 90, 114. As Louis' counsel asked for "language that any defenses that apply to the intended killing, or to the killings, apply to the unintended killings as well" and Lonnie's counsel joined (RT. vol. 18, p. 4933-4934), the record doesn't show that Louis's counsel had any deliberate tactical purpose in obtaining an erroneous instruction.

iii. The error was not harmless.

Reviewing courts presume that juries follow their instructions. *People v. Johnson* (2015) 61 Cal. 4th 734, 770.

A lack of justification (the absence of defense of self/other) is an element of murder. Similarly, the lack of partial justifications that would reduce murder to manslaughter, such as heat of passion or imperfect self defense, would be an element of murder. The erroneous instruction limiting these defenses as to the bystander's killing to Carney, was a

denial of Louis's Sixth Amendment right to jury trial and Fourteenth Amendment right to due process. *Neder v. United States* (1999) 527 U.S. 1, 12, 119 S. Ct. 1827, 144 L. Ed. 2d 35; *Carella v. California* (1989) 491 U.S. 263, 265, 109 S. Ct. 2419, 105 L. Ed. 2d 218. And:

> "A trial court's misinstruction on an element of an offense is subject to federal harmless error analysis under *Chapman v. California* (1967) 386 U.S. 18, [87 S. Ct. 824, 17 L. Ed. 2d 705. ([*People v.*] *Wilkins* [(2013)] 56 Cal.4th [333] at pp. 348-350; *People v. Flood* (1998) 18 Cal.4th 470, 503-504; [*People v.*] *Esquivel* [(1994)] 28 Cal.App.4th [1386] at p. 1399.) 'Instructional error regarding the elements of the offense requires reversal of the judgment unless the reviewing court concludes beyond a reasonable doubt that the error did not contribute to the verdict.' (*People v. Chun* (2009) 45 Cal.4th 1172, 1201; see *People v. Flood, supra*, 18 Cal.4th at p. 504.) The inquiry 'is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error.' (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279, [113 S. Ct. 2078, 124 L. Ed. 2d 182].) Phrased another way, the error is harmless only '[i]f other aspects of the verdict or the evidence leave no reasonable doubt that the jury made the findings necessary' [for a valid first degree murder theory.] (*People v. Chun, supra*, 45 Cal.4th at p. 1205.)

People v. Pui Hill (2015) 236 Cal.App.4th 1000, 1112.

This court can't find that "the guilty verdict actually rendered in this trial was surely unattributable to the error." Indeed, the facts strongly suggest the opposite. Carney, who fired the fatal shot, had his murder

exposure reduced to manslaughter, suggesting that the jury concluded that a reasonable possibility existed as to his defenses of either imperfect self-defense or heat of passion. Louis, however, who didn't fire the fatal shot, was convicted of first degree murder, suggesting that the jury, as the instruction literally directs, did not consider any defenses that would either justify the bystander's killing or reduce their culpability to manslaughter. The erroneous instruction was not harmless.

c. The cumulative impact of the errors denied Louis Fourteenth Amendment due process and a fair trial.

Even if, for the sake of argument, the errors discussed above don't require reversal when examined separately, this court must consider their cumulative impact. "[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." *People v. Hill* (1998) 17 Cal.4th 800, 844-845, *Parle v. Runnels* (9th Cir. 2007) 505 F.3d 922, 927-928, citing *Chambers v. Mississippi,* (1973) 410 U.S. 284, 298, 302-03, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (cumulative error doctrine is a clearly established federal constitutional principle.)

d. The Court of Appeal erroneously shifted its own burden of showing that remand would be futile to Louis.

While the appeal was pending, the Legislature enacted Senate Bill

620, which granted the trial court discretion to strike firearms enhancements under Penal Code sections 12022.5 and 12022.53. The courts have universally held that SB 620 is retroactive to cases that are not yet final on appeal. Carney filed a supplemental brief requesting remand under SB 620, in which Louis joined.

The Court of Appeal remanded Carney's appeal to the superior court for resentencing but not Louis's. Relying on *People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110 at p. 1110. *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896, they held that Louis didn't offer "any discussion" to show that remand "would not be necessarily futile." Appendix, p. 55.

Of course, there was an obvious reason on the record why a sentencing court might strike Louis's firearms enhancement under SB 620. ***Louis didn't fire the fatal shot.*** That was the main point of Louis's appeal. For the Court of Appeal to hold that Louis didn't offer "any discussion" that would show remand "would not necessarily be futile" overlooks most of what Louis argued on appeal.

Moreover, the Court of Appeal erroneously shifted the burden to Louis to show that remand would not be futile. The burden was on the Court of Appeal to show that remand would be futile to avoid its duty to

remand. See, e.g., *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1081, quoting *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391 (case must be remanded unless the record "'clearly indicate[s]' the [sentencing] court would not have exercised discretion to strike the firearm allegations"), *People v. Chavez* (2018) 22 Cal. App. 5th 663, 713 (same.)

Because the Court of Appeal failed to follow the law, this case should be transferred to the Court of Appeal with instructions that they remand Louis's appeal to the superior court to exercise its discretion in determining whether or not to strike the firearms enhancements.

5. Conclusion.

For these reasons, this court should grant review.

Dated: Oakland, California, Friday, January 17, 2020.

Robert J. Beles
Paul McCarthy
Attorneys for *Petitioner* LOUIS MITCHELL

Supreme Court of the State of California

PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff-Respondent*, vs. LOUIS MITCHELL, *Defendant-Petitioner*.	No. Appeal No. C077558 Sacramento County Superior Court No. 11F00700 CERTIFICATE OF COMPLIANCE

CERTIFICATE OF COMPLIANCE

I hereby certify under California Rules of Court 8.504(d) that this Petition for Review is printed in proportionally spaced 13 point type, contains 6,063 words, and is within the 8.400 word limit specified by Rule 8.504(d).

Dated: Oakland, California, Friday, January 17, 2020.

Paul McCarthy
Attorney for *Petitioner LOUIS MITCHELL*

APPENDIX

People v. Carney
Court of Appeal of California, Third Appellate District
December 10, 2019, Opinion Filed
C077558

Reporter

2019 Cal. App. Unpub. LEXIS 8199 *; 2019 WL 6709490

THE PEOPLE, Plaintiff and Respondent, v. JAMES LEO CARNEY et al., Defendants and Appellants.

Notice: NOT TO BE PUBLISHED IN OFFICIAL REPORTS. CALIFORNIA RULES OF COURT, RULE 8.1115(a), PROHIBITS COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY RULE 8.1115(b). THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR THE PURPOSES OF RULE 8.1115.

Prior History:

[*1]

Superior Court of Sacramento County, No. 11F00700.
Judges: HULL, J.; BLEASE, Acting P. J., RENNER, J. concurred.
Opinion by: HULL, J.

Opinion

The Appeal

With defendants James Leo Carney and others on one side and defendants Louis James Mitchell and Lonnie Orlando Mitchell (brothers) on the other, the two sides, obviously without any concern for people nearby, engaged in a gun battle at a barbershop in South Sacramento. This exchange of gunfire resulted in the death of Monique N., an

innocent bystander, who was trying to shield her two-year-old son from the gunfire at the time she was killed. Each side claimed the other side fired first.

Defendants Carney (Carney), Louis Mitchell (Louis Mitchell) and Lonnie Mitchell (Lonnie Mitchell) were each convicted by a jury of various crimes relating to the gun fight, convictions which we will detail below. Each defendant advances various claims of error occurring during the course of his trial.

In a supplemental brief, Carney argues he should have the benefit of recently enacted Senate Bill No. 620 and his matter should be remanded to the trial court so that it may consider striking or dismissing his firearm enhancement.

As to Carney, we will remand for the trial court to exercise

[*2]

its discretion to strike or dismiss the firearm enhancement, to consider joint and several liability for direct victim restitution and to amend the abstract of judgment as appropriate and otherwise affirm the judgment.

As to the Mitchell brothers, we affirm the judgments in their entirety.

Facts

Distilled to its essence, the evidence showed that, shortly after noon on December 14, 2010, the Mitchells went to a barbershop, which was a legitimate business frequented by members of a street gang to which the Mitchells did not belong. Lonnie Mitchell wore a TEC-9 assault weapon tied around his neck, the imprint of which was visible under his hoodie. Lonnie paced back and forth and spoke on his phone about "clapping" (shooting) the place up. Louis Mitchell, who also appeared to be carrying a gun, put on a barbershop cape and sat in a chair.

Carney's friends — Larry Jones and Ernest S. — were inside the barbershop. Ernest was in a barber's chair wearing a cape, and his son was getting a haircut. Concerned about the Mitchells' hostile armed

presence, Jones phoned Carney and asked him to drop everything and come pick up Jones and Ernest. Jones tried to convey urgency without mentioning the Mitchells.

[*3]

Carney phoned Marvion Barksdale (Barksdale), whom Lonnie Mitchell had recently threatened to kill after Barksdale and Lonnie Mitchell fought over Louis Mitchell having robbed Barksdale's half-brother (Marquelle J.) The Barksdale and Mitchell families had known each other for years but were no longer friendly.

Carney, armed with a revolver, drove to the barbershop in his gray Ford Taurus. He parked across the street and stood outside his car. Ernest quickly left the shop and put his son in Carney's car.

Barksdale separately drove to the barbershop with his brother Charles Edward Barksdale (Charles Barksdale) and Dominique Marcell Lott (Lott) and a woman, K.H.We note that Lott and Charles were named as defendants but before trial pleaded to voluntary manslaughter, with a firearm enhancement for Lott and a gang enhancement for Barksdale, and each was sentenced to 21 years in prison.

Barksdale and Lott went toward the barbershop. The Mitchells stood outside the shop. Gunfire erupted. There was conflicting evidence as to who shot first. Outside the shop, Louis, still wearing the cape, fired a couple of shots towards Carney and Ernest, while Lonnie fired the TEC-9 randomly.

Carney told Ernest

[*4]

to get down and returned fire with a small revolver. A bullet from Carney's gun struck and killed innocent bystander Monique N., who was on the street leaning into the backseat of her SUV to cover and protect her two-year-old son in his car seat. (The Mitchells' appellate brief incorrectly states she was killed inside the barbershop.) The child had just had his hair cut at the barbershop, and mother and child had just had

their Christmas photograph taken at a photo shop next to the barbershop. Mother was pronounced dead at the scene.

The participants in the shootout got into their separate cars and ran away.

Before leaving the barbershop, the Mitchells fired gunshots inside the barbershop, hitting and injuring four innocent bystanders inside the shop. Customer John E. was shot twice in the leg as he was getting a haircut. Adam W., who was waiting for a haircut, suffered a gunshot wound to the liver from a bullet which the prosecution argued was fired by Lonnie Mitchell. Joshua B. was shot twice, but the bullets exited his body, so it was not clear who shot him. One of the barbers, Gralin M., was shot in the ankle as he tried to flee.

Victim John E., a military veteran familiar with firearms,

[*5]

testified "some guy" came in, fired shots that sounded like .45 until the gun jammed, dropped the gun, then fired numerous quick shots that sounded like an "UZI-style" 9 mm. A criminalist testified a TEC-9 is similar to an UZI. John E. said a second shooter returned fire. The second shooter (likely Larry Jones) was one of two African-American men with dreadlocks wearing pea coats who appeared to be together. On that date, both Jones and Ernest S. had long dreadlocks, as did Lott.

Lott, who pleaded guilty to voluntary manslaughter and gun use, testified under use immunity. He was in a white car with Barksdale, Charles, and a woman (K.H.). Barksdale said he needed to stop at the barbershop. Charles drove there, parked across the street, and waited in the car with K.H., while Barksdale walked toward the barbershop with Lott, who was armed with a 9 mm semiautomatic gun. Someone in a black barbershop smock jumped out of the shop and began shooting at them. Lott returned fire from the nearby auto repair shop and then he and Barksdale ran back to the car. Both had been shot, Lott in the right hip. They drove to a hospital and dropped off Barksdale, who later died from a bullet that hit him

[*6]

as he faced the shooter. Lott threw away his gun as they drove. They then went to a different hospital, where Lott falsely identified himself and gave a false location of the shooting.

K.H. testified she overheard the men in the car saying they had to stop at the barbershop because "somebody needed help," was "stuck," and "they were going to fight." While she waited in the car, she heard gunshots and ducked down.

Larry Jones (who was acquitted) was the only defendant who testified at trial. That day, he was carrying a .40 caliber gun, which he bought a few days earlier to protect himself because his "baby mama" was threatening him, and she was a scorned woman capable of having someone harm him. After Ernest and his son left the shop, Larry who was still in the shop heard someone outside yell "fuck [something]" and heard gunshots fired by the front of the shop. People took cover or ran toward the back of the shop. Then shots were fired inside the shop, and some people were hit. Larry ran towards the back of the shop, turned and fired his gun two or three times. Larry fled the shop and ran to a friend's home, where he discovered a bullet hole in his jacket, shot back to front. He had associated

[*7]

with Ridezilla and Oak Park gangs but phased out after he got out of prison in February 2009. Now in his 30's, he was trying to turn his life around and take care of his son. He kept in contact with old friends who happened to be gang members but did not participate in gang activity. He sells marijuana on the street but still thinks he is on the straight and narrow. He was convicted of illegal possession of a gun in 2005 and had a misdemeanor conviction for domestic violence in 2002 and for a bad check in 2001. He had no idea who the Mitchells were before December 14, 2010.

Legal Proceedings

A jury found Carney, who fired the fatal shot, guilty of voluntary

manslaughter (Pen. Code, § 192, subd. (a); unless otherwise stated, statutory section references that follow are to the Penal Code) as a lesser offense of murder and found true that he personally used a firearm (§ 12022.5, subd. (a)), but the jury found not true an allegation that he committed the offense for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)). The jury also found Carney guilty of possession of a firearm by a felon (former § 12021, subd. (a)(1) [repealed by Stats. 2010, ch. 711, § 4], now § 29800 [enacted Stats. 2010, ch. 711, § 6]), but not guilty of assault with a firearm on four other victims who were

[*8]

injured but not killed inside the barbershop.

The same jury acquitted Carney's friend, codefendant Larry Dean Jones, on all counts.

The same jury found each Mitchell brother guilty of first-degree murder of Monique N. (§ 187) with personal and intentional discharge of a firearm (§ 12022.53, subds. (b)(c)), and guilty of assault with a firearm on the four other victims (§ 245, subd. (a)(2)), and guilty of possession of a firearm by a felon. The jury also found Lonnie Mitchell guilty of possession of an AK-47 assault weapon. (Former § 12280, subd. (b) [repealed by Stats. 2010, ch. 711, § 4], now §§ 30605, 30680 [Stats. 2010, ch. 711, § 6].)

The trial court sentenced Carney to 21 years in prison: The upper term of 11 years for manslaughter, a consecutive term of 10 years for the firearm enhancement, and a concurrent three-year term for the gun possession. The court ordered Carney to pay a restitution fine of $4,200 to specified victims, the same amount stayed unless parole is revoked, and $7,500 restitution to the Victims of Violent Crime Fund.

The court sentenced Lonnie Mitchell to a total of 53 years four months to life as follows: A term of 25 years to life in prison for murder, plus a consecutive term of 20 years to life for the firearm enhancement, plus a consecutive

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high term of four years for assault with a firearm on one victim, plus consecutive terms of one year (one-third the midterm of three years) for each of the other three assault victims, plus a consecutive term of eight months (one-third the midterm) for possession of a gun by a felon, plus a consecutive term of eight months (one-third the midterm) for possession of the assault weapon.

The court sentenced Louis Mitchell to the same term as Lonnie, minus the eight-month term for possession of an assault weapon, resulting in a total term of 52 years and eight months to life.

The court ordered each Mitchell brother to pay a restitution fine of $2,500, plus the same amount, suspended, as a parole revocation restitution fine, plus $7,500 to the Victims' Compensation Government Claims Board. The court also ordered direct restitution to these victims as set forth in the probation reports, "joint and several as to any other defendant with similar restitution orders."

On appeal, Carney contends (1) the trial court improperly excluded spontaneous-statement evidence as to who started shooting; (2) the jury instruction improperly omitted self-defense and defense-of-another as a defense to manslaughter;

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(3) where the pattern instruction limited self-defense to one who acts "only because of" belief in imminent danger, the court erroneously refused to instruct that multiple states of mind do not preclude the defense; (4) cumulative impact of these errors denied due process and a fair trial; (5) the trial court improperly imposed on Carney a restitution fine and parole revocation fine 68 percent higher than the fines imposed on the Mitchells; and (6) the abstract of judgment must be amended to reflect the trial court's intent that his liability for direct victim restitution be joint and several with his codefendants.

In a supplemental brief, Carney seeks remand for the trial court to exercise discretion to strike or dismiss the firearm enhancement, as authorized by legislation (Sen. Bill No. 620) enacted while this appeal was pending. (§ 12022.5, subd. (c); Stats. 2017, ch. 682, § 2.)

The Mitchell brothers jointly filed a separate appellate brief, contending (1) the prosecutor's aiding and abetting theory was invalid and there was no other theory under which the Mitchells could be found criminally culpable for Carney's shooting of Monique N.; and (2) the trial court erroneously instructed the jury that only

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the defendant who fired the fatal shot (Carney) could raise the defenses of self-defense, imperfect self-defense, or heat of passion. The Mitchells also join in Carney's argument that the jury instruction erroneously limited self-defense to a person who acts only because of belief in imminent danger, and they argue the cumulative impact of errors denied due process and a fair trial. In a supplemental brief, the Mitchells argue they could not have been found guilty of first-degree murder under a natural and probable consequence theory.

Discussion

I

Carney's Appeal

A. Exclusion of Evidence

Carney contends the trial court improperly excluded spontaneous-statement evidence from Dominique Lott that it was one of the Mitchells who started shooting first.

At trial, Lott testified that as he walked behind Barksdale toward the barbershop, someone in a barbershop cape emerged from the open door and started shooting at them. Lott fled toward the street, fired back and was shot in the hip before reaching the car where Charles Barksdale and K.H. were waiting. When asked on cross-examination if Lott remembered telling Charles and K.H. that the other guy fired first, the trial court sustained a hearsay

[*12]

objection by the Mitchells. Carney's attorney elicited from Lott that only about a minute had passed, and he was "kind of like in shock because something crazy just happened" that he did not expect. But when he again tried to testify what he told the car's occupants, the trial court again sustained the Mitchells' hearsay objection.

Outside the jury's presence, Carney's counsel argued he had established a foundation for Lott's reply to be admitted as an excited utterance or spontaneous statement under Evidence Code section 1240. The Mitchells objected the statement was not reliable because Lott had the opportunity to fabricate it. The trial court instead ruled the statement was properly excluded as cumulative under Evidence Code section 352 because Lott had already recounted the same fact in his testimony.

On cross-examination by Carney's counsel, witness K.H. said she did not remember Lott or Barksdale saying what happened. Counsel asked, "Do you remember the guy in the back seat [Lott] saying, as soon as we hit the sidewalk" — but the court sustained hearsay objections and noted the witness had answered "no." Counsel tried to refresh her memory with what she had told detectives, and she recalled that Barksdale said, "[t]hat he dropped

[*13]

the gun" but that was all she remembered, and the court sustained another hearsay objection.

Outside the jury's presence, the court stated it excluded Lott's and Barksdale's statements in the car because they were exculpatory and without adequate foundation and there was insufficient evidence that they felt "any nervous excitement." Instead, both Lott and Barksdale left the car armed with guns and approached the location where the shooting took place, and other evidence suggested Barksdale was the type of person one would want to bring to a gunfight. Carney's attorney also tried to elicit from a police detective that Lott told the detective the Mitchells fired first, but the court ruled it was inadmissible as a spontaneous statement because it was self-serving and untrustworthy, since Lott had a motive to lie.

When an out-of-court statement is offered under a hearsay exception, the trial court must determine, as a preliminary fact, that it meets certain standards of trustworthiness, taking into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant. (*People v. Cudjo* (1993) 6 Cal.4th 585, 608.) On appeal, we will

[*14]

not disturb the trial court's ruling to exclude the evidence unless the appellant shows the court abused its discretion. (*People v. Brown* (2003) 31 Cal.4th 518, 534.)

Under Evidence Code section 1240, evidence of a statement is not made inadmissible by the hearsay rule if the statement "(a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception." A statement is "spontaneous" if it was undertaken without deliberation or reflection. (*People v. Farmer* (1989) 47 Cal.3d 888, 903.) "[T]he basis for the circumstantial trustworthiness of spontaneous utterances is that in the stress of nervous excitement, the reflective faculties may be stilled and the utterance may become the instinctive and uninhibited expression of the speaker's actual impressions and belief." (*Ibid.*)

Carney argues Lott's utterance that it was a Mitchell who fired first was spontaneous because it was made while Lott was under the stress and excitement of being shot. However, although we may assume he was experiencing excitement and perhaps physical pain from being shot, the trustworthiness of his statements depended on the circumstances under which they were made and his possible

[*15]

motivation for making them. Because Lott himself brought a gun to a gunfight and brought a companion who would be good in a gunfight, and because Lott knew police would be called when he sought medical attention for his own gunshot wound, he had a clear and immediate motive of self-preservation to position himself as the victim rather than

the aggressor. The trial court could reasonably find that Lott's utterance was a self-serving attempt to minimize or excuse his criminal conduct, made with deliberation and reflection.

In any event, even assuming for the sake of argument that the trial court should have allowed evidence that Lott said a Mitchell fired first, any error was clearly harmless. Generally, application of the ordinary rules of evidence does not impermissibly infringe on a defendant's right to present a defense. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103.) It is not reasonably probable that Carney would have obtained a more favorable result (*People v. Watson* (1956) 46 Cal.2d 818, 836) if the jury had been allowed to hear that, *at the crime scene*, Lott made a statement that was consistent with *his trial testimony* that the Mitchells fired first. And the jury verdicts indicate the jurors believed the Mitchells fired first in any event.

B. Self-Defense Jury Instruction

[*16]

Carney argues the trial court erred in failing to instruct the jury that self-defense or defense of others (collectively, "self-defense") could excuse not only murder, but also manslaughter. Defendant argues omission of reference to "manslaughter" removed self-defense as a defense to manslaughter, violating his federal constitutional rights. Carney describes his argument "in a nutshell" — "Error occurred where (1) in defining self-defense for the jury (CALCRIM No. 505), the court mistakenly omitted manslaughter from the crimes subject to the defense [citation]; and (2) although such applicability appeared elsewhere, the instructions as a whole remained ambiguous, with a reasonable likelihood of being erroneously understood [citation], particularly where (3) closing arguments didn't address and clarify the specific ambiguity [citation]." In their separate appellate brief, the Mitchells agree (without analysis) and support Carney's request for reversal. We conclude there is no reversible error.

The pattern jury instruction, CALCRIM No. 505, states in part: "The defendant is not guilty of (murder/ [or] manslaughter . . .) if (he/she) was justified in (killing . . .) someone in (self-defense/ [or] defense of

another.)

[*17]

. . . .” (Orig. brackets.)

The trial court instructed the jury only as to murder: “The defendants are not guilty of murder if they were justified in killing someone in self-defense or defense of another.”

However, the court also instructed the jury with CALCRIM No. 571 that imperfect self-defense would reduce murder to voluntary manslaughter, but “If you conclude the defendant acted in *complete* self-defense or defense of another, their action was lawful and you must find him not guilty of any crime.” (Italics added.) The instructions fully explained the differences between complete self-defense and imperfect self-defense, and that the difference “depends on whether the defendant’s belief in the need to use deadly force was reasonable.” The instructions also stated, pursuant to CALCRIM No. 500 (general principles of homicide) that “If a person kills with a legally valid excuse or justification, the killing is lawful and he’s not committed a crime. If there is no legally valid excuse or justification, the killing is unlawful and, depending on the circumstances, the person is guilty of either murder or manslaughter.”

Carney argues he requested the form instruction CALCRIM No. 505 but was unsuccessful in making it a part of the record

[*18]

on appeal, and in any event he did not forfeit his challenge by failing to object to omission of the word “manslaughter” in the trial court, because the issue goes to his “substantial rights.” (§ 1259; *People v. Lewis* (2009) 46 Cal.4th 1255, 1294, fn. 28.) His backup argument is ineffective assistance of counsel.

We will assume for purposes of this appeal that Carney did not forfeit this contention.

Carney complains that many appellate court opinions, including opinions

of this court, unthinkingly and incorrectly apply a "judgment-favoring" "standard of review" to jury instructions instead of the more appropriate standard of review pursuant to which error occurred if there is a "reasonable likelihood" the jury misapplied the instruction, even if the jury might have construed the instruction properly. Carney clams there should be no "judgment-favoring" rule of interpretation as to jury instructions, and such a rule cannot be reconciled with the "reasonable likelihood" standard of review. Carney asks us to overrule various cases in which we stated the general principle that, if reasonably possible, we interpret jury instructions to support rather than defeat the judgment. (E.g., *People v. McPheeters* (2013) 218 Cal.App.4th 124, 132; *People v. Mathson* (2012) 210 Cal.App.4th 1297, 1312; *People v. Vang* (2009) 171 Cal.App.4th 1120, 1129; *Mullanix v. Basich* (1945) 67 Cal.App.2d 675, 681.) The People respond the judgment-favoring rule does not

[*19]

conflict with the reasonable-likelihood rule, because the former is a rule of construction while the latter presents the ultimate question for a due process claim.

Carney fails to explain why any of the cited cases should be overruled. Carney's argument about not viewing the evidence in favor of the judgment appears to derive from the rule applicable to the specific situation where erroneous instructions preclude the jury from considering a defense theory on a question that is one of fact on conflicting evidence. Such a contention is not at issue in this appeal and not in conflict with the familiar constitutional principle of prejudicial error — that in determining whether error requires reversal of a judgment, the appellate court construes the evidence in support of the judgment. (Cal. Const., art. VI, § 13 ["No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury . . . unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice"]; *People v. Giordano* (2007) 42 Cal.4th 644, 666.)

People v. Young (1963) 214 Cal.App.2d 641 (not cited by the parties) explained the difference. *Young* reversed a voluntary manslaughter conviction due

[*20]

to the trial court's failure to instruct on self-defense to prevent commission of a felony, even though the appellate court said it was "difficult to envisage" that the jury might have believed the defendant's testimony (that the victim inflicted the fatal wound on himself by impaling himself upon the defendant's knife) or found the defendant did not use excessive force that would negate self-defense (questions of fact for the jury). (*Id.* at pp. 643, 650.)

Young explained: "In examining the question of error in refusing to instruct upon defendant's theory the reviewing court must assume that the jury might have believed appellant's story and found according to his theory had appropriate instruction thereon been given. [Citation to civil case.] '[Respondents] rely on the rule that a judgment will not be reversed on appeal if there is substantial evidence to support the verdict on any theory on which it might have been reached. . . . It is not applicable, however, to a case such as this, in which the jury has been *precluded by erroneous instructions* [italics added] from considering a valid theory upon which a result different from that actually reached might have been supported. The error in such a case

[*21]

is not cancelled by the fact that the jury might have found for the prevailing party on some other ground. "'It is true that in determining whether a verdict is supported by the evidence, we must assume that the jury accepted the view most favorable to the respondent. However, in determining whether or not the instructions given are correct, we must assume that the jury might have believed the evidence upon which the [defense of the] losing party was predicated, and that if the correct instruction had been given upon that subject the jury might have rendered a verdict in favor of the losing party.'" [Citations.] Where, as here, the error consisted in instructing the jury as a matter of law on a question that is one of fact on conflicting evidence, and a determination favorable to the losing party might have been made if the error had not been committed, that error is prejudicial. [Citations.]'" (*Young, supra*, 214 Cal.App.2d at pp. 644-645.) "[A] defendant is entitled to instructions on his theory of the case as disclosed by the evidence, no matter how weak."

(*Id.* at pp. 645, 650; accord, *People v. Salas* (2006) 37 Cal.4th 967, 982-983 [in determining whether evidence is sufficient to warrant a jury instruction, the trial court does not determine the credibility of the defense evidence, but

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only whether there was evidence which, if believed by the jury, sufficed to raise a reasonable doubt].)

Here, there is no issue about instructions erroneously precluding the jury from considering the defendant's factual theory.

On appeal, we determine de novo whether the trial court fully and fairly instructed the jury on the applicable law, based on the instructions as a whole. (*People v. Carrington* (2009) 47 Cal.4th 145, 192.) The absence of a point in one instruction may be supplied by another instruction or cured in light of the instructions as a whole. (*People v. Holt* (1997) 15 Cal.4th 619, 677.) We presume the jurors are intelligent persons, capable of understanding and correlating the instructions given. (*People v. O'Malley* (2016) 62 Cal.4th 944, 991.) We also consider closing arguments of counsel in assessing the probable impact of the challenged instruction on the jury. (*People v. Young* (2005) 34 Cal.4th 1149, 1202.)

Here, as indicated, although the trial court's version of CALCRIM No. 505 did not say that self-defense could justify manslaughter as well as murder, the court also instructed the jury "If you conclude the defendant acted in *complete* self-defense or defense of another, their [*sic*] action was lawful and you must find him not guilty of any crime." (Italics added.) This language was part of CALCRIM No. 571 that *imperfect* self-defense would reduce murder to voluntary manslaughter.

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Other instructions fully explained the differences between complete self-defense and imperfect self-defense, and that the difference "depends on whether the defendant's belief in the need to use deadly force was reasonable." The instructions also stated, pursuant to CALCRIM No. 500 (general principles of homicide) that "If a person kills with a legally valid

excuse or justification, the killing is lawful and he's has not committed a crime. If there is no legally valid excuse or justification, the killing is unlawful and, depending on the circumstances, the person is guilty of either murder or manslaughter."

Carney's counsel argued to the jury that, because Carney was acting in self-defense, he was not guilty of murder "or even voluntary manslaughter." He committed no crime. The prosecutor's rebuttal argument did not disagree.

We conclude the instructions as a whole and counsels' arguments adequately directed the jurors to consider self-defense with respect to manslaughter as well as murder.

C. Mixed Emotions for Self-Defense Jury Instruction

Carney next contends that, because the pattern self-defense jury instruction (CALCRIM No. 505) limited the defense to one who "*act[s] only because of*" fear of imminent danger,

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the trial court erred in refusing an instruction — proposed by Louis Mitchell and "seconded" by Carney — that mixed emotions do not preclude self-defense. The Mitchells join in this argument with no independent analysis. We conclude the trial court did not err, because the pattern instruction was a correct statement of law, which Carney through his proposed instruction hoped to distort.

The trial court instructed the jury, pursuant to CALCRIM No. 505, that for self-defense, "The defendant must have believed there was an imminent danger of death or great bodily injury to himself or someone else. The defendant's belief must have been reasonable and he *must have acted only because of that belief*." (Italics added.)

Proposed Instruction No. 13 would have told the jury: "A state of mind may be mixed, that is, anger and fear may coexist at the same time. [¶] One who acts in self-defense on the basis of reasonable fear may feel anger or other emotions and still not lose the right to kill in self-defense.

[¶] It would be unreasonable to require an absence of any feeling other than fear before the use of deadly force could be considered justifiable. Such a requirement is not a part of the law. The party is not

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precluded from feeling anger or other emotions save and except fear. But if the causation of use of deadly force was the reasonable fear that there was imminent danger of death or great bodily injury, then the use of force in self-defense is proper regardless of what other emotions the party who acts may have been feeling, but not acting upon."

The trial court declined to give the proposed instruction because the pattern instruction adequately covered the issue.

We review de novo the trial court's refusal to give the instruction requested by the defense. (*People v. Manriquez* (2005) 37 Cal.4th 547, 581.) A criminal defendant has a right to instructions that pinpoint the defense theory of the case. (*People v. Gurule* (2002) 28 Cal.4th 557, 660.) But a proposed instruction may be properly rejected if it incorrectly states the law, is argumentative, duplicative, or potentially confusing, or if it is not supported by substantial evidence. (*People v. Moon* (2005) 37 Cal.4th 1, 30.)

In the pattern jury instruction, the "acted only because of" language is based on section 198, which provides: "A bare fear of the commission of any of the offenses . . . to prevent which homicide may be lawfully committed, is not sufficient to justify it. But the circumstances must be sufficient to excite the fears of a reasonable person, and the party

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killing *must have acted* under the influence of such fears *alone*." (Italics added.) Thus, the instruction as given by the trial court was a correct statement of the law. (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1044-1045; *People v. Trevino* (1988) 200 Cal.App.3d 874, 879.)

Trevino said that mixed emotions (e.g., anger and fear) will not negate self-defense, as long as the defendant *acted only* because of the fear.

"[W]e do not mean to imply that a person who feels anger or even hatred toward the person killed, may never justifiable use deadly force in self-defense . . . [¶] [I]t would be unreasonable to require an absence of any feeling other than fear, before the homicide could be considered justifiably. Such a requirement is not a part of the law, nor is it a part of [the pattern jury instruction]. Instead, the law requires that the party killing *act* out of fear alone. . . . The party killing is not precluded from feeling anger or other emotions save and except fear; however, those other emotions cannot be causal factors in his decision to use deadly force. If they are, the homicide cannot be justified on a theory of self-defense. But if the only causation of the killing was the reasonable fear that there was imminent danger of death or great bodily injury, then the use of deadly

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force in self-defense is proper, regardless of what other emotions the party who kills may have been feeling but not acting upon. [¶] [The pattern jury instruction] properly instructs the jury that the party killing must have *acted* under the influence of reasonable fears alone. It does not eliminate a feeling of anger or any other emotion so long as that emotion was not part of the cause of the use of deadly force. It is, therefore, a correct statement of the law of self-defense." (*Trevino, supra*, 200 Cal.App.3d at pp. 879-880, orig. italics.)

The defense's Proposed Instruction No. 13 tracked *Trevino*'s language but omitted the word "only." Whereas *Trevino* said "But if the *only* causation of the killing" was reasonable fear (*id.*, 200 Cal.App.3d at p. 879, italics added), the proposed instruction said, "But if the causation of use of deadly force was the reasonable fear that there was imminent danger of death or great bodily injury, then the use of force in self-defense is proper regardless of what other emotions the party who acts may have been feeling, but not acting upon."

In effect, it appears that Carney wanted to argue that his fear was a but-for cause of the killing, justifying the killing, regardless whether or not the jury believed the prosecution's

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theory that Carney acted out of anger with his rivals. *Trevino* said the pattern instruction properly instructed the jury that the killer "must have acted under the influence of reasonable fears alone. It does not eliminate a feeling of anger or any other emotion so long as that emotion was not part of the cause of the use of deadly force. It is, therefore, a correct statement of the law of self-defense. In the case at bench, Trevino could have requested additional instructions with regard to his feeling anger toward [the victim] as well as fear, or with regard to a situation where anger and fear were *both causal factors*. [Italics added.] He did not do so. Nor did he argue to the jury the presence of such dual motivation or feeling. Under such circumstances, his argument on appeal must fail." (*Id.* 200 Cal.App.3d at pp. 879-880.) *Nguyen, supra*, 61 Cal.4th 1015, which was decided after Carney's trial and which cited *Trevino* with approval, said, "We note that defendant did not argue in the trial court, nor has he argued on appeal, that the jury should have been instructed that acting based on mixed *motives* [italics added] is permissible so long as reasonable fear was the but-for cause of his decision to kill. We therefore have no occasion to consider

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whether such a rule would be consistent with section 198 as interpreted in *Trevino* or other cases." (*Nguyen*, at pp. 1045-1046.)

Here too, Carney did not argue in the trial court that the jury had to decide on but-for causation between mixed *motives*. Rather, he simply wanted to argue that mixed *emotions* would not negate self-defense.

Insofar as Carney on appeal invites us to interpret section 198 or *Nguyen* as permitting a defendant to claim self-defense despite having mixed *motives*, we decline to do so. The flaw in Carney's appellate position is apparent from his confusion between "motive" and "emotion." He cites civil case law (e.g., employment termination) that where a person (such as an employer) acts with both a proper "motive" and an improper "motive," determining which "motive" was the "but for" cause of the action can be complicated. Carney claims the jury here should have been instructed to determine which "motive" (gang-related revenge or fear) was the "but for" cause of his action. However, the lay definition of "motive" is "something (as a need or desire) that *causes a person to act*."

(Merriam-Webster's Collegiate Dictionary (11th ed. 2006) p. 810, italics added.) Section 198 requires self-defense to be based on a reasonable fear

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alone. (*Nguyen, supra*, 61 Cal.4th at pp. 1044-1045.)

Here, Carney did not claim there were two *causes* for his action. He claimed he acted out of fear alone. Had he claimed two causes for his action, that alone would have negated self-defense.

Carney nevertheless argues the proposed instruction was needed here, because the theory of the prosecution and the Mitchells was that Carney was a gang-affiliated participant in a group effort to take violent revenge against the Mitchells. There was evidence that Carney was an Oak Park Blood gang member who was friends with G-MOBB gang members. This does not help Carney, because section 198 expressly requires sole causation in order for self-defense to apply.

Carney suggests the proposed instruction was mandated by the state and federal constitutional rights to self-defense embodied by California Constitution, article I, section 1 (inalienable right to defend life), and the U.S. Constitution, Sixth Amendment (right to jury trial) and Fourteenth Amendment (due process), so as not to require absolute purity of motivation. While there is a constitutional right to present a defense of self-defense (*McDonald v. Chicago* (2010) 561 U.S. 742, 767; *People v. McDonnell* (1917) 32 Cal.App.694, 704), Carney cites no authority that the constitutional right to self-defense applies even when the defendant acted, in part, for reasons other than self-defense. He cites no authority compelling a construction

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of section 198 that would embody the right to kill an aggressor in part because of anger, ill will, or a desire to do him harm. Under federal substantive due process jurisprudence, courts must carefully describe the liberty interest that is asserted to be fundamental in a concrete and particularized, rather than abstract and general, manner. (See, *Washington v. Glucksberg* (1997) 521 U.S. 702, 720; *In re Lira* (2014) 58 Cal.4th

573, 585.) Carefully described, we deal here not with an asserted "right to self-defense," but rather an asserted right to kill where the decision to use deadly force is motivated in part by animus or other unlawful motive as well as by a desire to defend oneself against a threat of great bodily harm or death. Carney cites no authority supporting such an asserted right. Though not binding on us, a federal appellate court rejected a federal constitutional challenge to a state-law restriction on the right to claim self-defense. (See *Taylor v. Withrow* (6th Cir. 2002) 288 F.3d 846, 853 [no precedent supported conclusion that state law limitation on right to claim self-defense where killing was not "pure self-defense" but "a mix of accident and self-defense" is unconstitutional].)

Assuming for the sake of argument that a pinpoint instruction would have been appropriate, it is not reasonably probable that Carney

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would have obtained a more favorable result had the court given the proposed instruction. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1144, applying harmless error test of *People v. Watson* (1956) 46 Cal.2d 818, 836-837.) Carney's defense was not that he acted with mixed emotions, but that he reluctantly showed up because of calls for help from his friend Larry Jones, and Carney fired the gun only in self-defense or defense of others because Louis Mitchell fired first, towards Carney, Ernest and Ernest's young son. Carney's attorney did not argue that Carney harbored gang-related anger, perhaps recognizing that Carney's interest was best served by portraying him as a reluctant participant who had no beef with the Mitchells and acted only out of fear. This strategy paid off, because the jury found the gang allegation to be not true.

There was no instructional error.

D. Cumulative Impact of Errors

Carney maintains the cumulative impact of errors denied him due process and a fair trial. Having reviewed the record and rejected Carney's arguments, we disagree.

E. Restitution Fines

1. Amount

The trial court imposed on Carney a restitution fine (§ 1202.4, subd. (b)) of $4,200, and imposed but stayed a parole revocation fine (§ 1202.45) of $4,200. The court presumably arrived at the $4,200 figure by using the formula

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suggested in the version of section 1202.4, subdivision (b)(2), in effect at the time of these offenses in December 2010. That formula was to multiply the minimum fine of $200 by the number of years of imprisonment (21). (Stats 2010, ch. 351, § 9, eff. Sept. 27, 2010; Stats. 2009, ch. 454, § 1.)

Carney argues that, because his conviction for manslaughter arose from the same shootout for which his codefendants, the Mitchells, were found guilty of murder and assaults with firearms, the trial court abused its discretion by imposing on him a restitution fine and parole revocation fine ($4,200 each) 68 percent higher than the fines imposed on each of the Mitchells ($2,500 for each fine). As Carney notes, he could not have raised this point at his sentencing hearing, because he was sentenced a month before the Mitchells. We will assume for the sake of argument that the contention may be raised for the first time on appeal.

We review a trial court's victim restitution order for abuse of discretion. (*People v. Selivanov* (2016) 5 Cal.App.5th 726, 780; *People v. Thygesen* (1999) 69 Cal.App.4th 988, 992.) The trial court has broad discretion in setting the amount of victim restitution. (*People v. Balestra* (1999) 76 Cal.App.4th 57, 63-64.) No abuse of discretion will be found when there is a factual and rational basis for the amount of victim restitution ordered. (*People v. Holmberg* (2011) 195 Cal.App.4th 1310, 1320.)

Moreover, the

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restitution fine "must be in accord with each defendant's individual culpability," and we held in *People v. Kunitz* (2004) 122 Cal.App.4th 652, 656 that a trial court order for joint and several liability for fines was unauthorized. Whereas direct victim restitution is akin to a civil judgment and may be joint and several, the restitution fine is punishment and must relate to the defendant's individual culpability. (*Ibid.*) The statutes for imposing fines do not authorize a fine against more than one individual. (*Id.* at p. 657.)

Carney's appellate counsel acknowledges he cannot cite any supporting authority on point but touts his purpose of advocating changes in the law on behalf of his client. He argues *Kunitz* did not address the issue he raises, i.e., that the trial court abused its discretion by *failing* to consider what Carney perceives as the "much greater culpability" of the Mitchells. He points to *Kunitz*'s comment that equal culpability between codefendants would support imposition of equal restitution fines. (*Id.* at p. 658 [each pleaded guilty to four counts of same offense and received same sentence].) Carney asks us to extrapolate from this dictum that disparate culpability should just as rationally support imposition of disparate fines, with greater

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culpability resulting in higher fines, which in Carney's view means a trial court abuses its discretion by imposing the higher fine on the less culpable defendant.

However, the manslaughter verdict does not make Carney "less culpable" for restitution fine purposes. In setting the amount of the fine, the court "shall consider any relevant factors," including the circumstances of the defendant's commission of the crime and pecuniary and psychological harm to the victim's dependents. (Former § 1202.4, subd. (d); Stats. 2010, ch. 351, § 9, eff. Sept. 27, 2010; Stats. 2009, ch. 454, § 1.)

Carney fails to show abuse of discretion, and there is a factual and rational basis for his fines. Carney fired the bullet that killed the innocent bystander as she draped herself over her two-year-old son to protect him. She left behind not only her son but also parents and siblings. Her family was not involved with gangs or crime or violence. She was there that day

having a Christmas photo taken of herself and her son.

That the same jury found the Mitchells guilty of murder yet found Carney guilty only of manslaughter does not render Carney's fines irrational or unsupported by evidence. Even assuming the jurors determined Carney

[*36]

honestly felt a need for self-defense, the verdict means they also determined his belief was unreasonable. And it was Carney's bullet that struck and killed the victim.

That the court later imposed lesser amounts ($2,500) on the Mitchells does not render Carney's fines irrational or unsupported by facts. That the trial court imposed on the Mitchells less than the $10,000 recommended by the probation officer does not render Carney's fines irrational or unsupported by facts. The trial court struck from the probation report an incorrect assertion that Lonnie Mitchell while awaiting this trial had engaged in a jailhouse fight with Barksdale — which was clearly incorrect because Barksdale died in December 2010, shortly after the barbershop shootout.

We see no basis to disturb the fines imposed on Carney.

2. Joint and Several Liability

The trial court ordered Carney to pay *direct* victim restitution (§ 1202.4, subd. (f)) in an amount "to be determined" but did not expressly order that liability be joint and several. Carney did not ask for joint and several liability, though he could have done so. (*Kunitz, supra*, 122 Cal.App.4th at p. 657; *People v. Arnold* (1994) 27 Cal.App.4th 1096, 1100.)

On appeal, Carney asks us to order amendment of the abstract of judgment to make his liability for direct victim

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restitution joint and several with his codefendants. He argues the trial

court in this case *intended* joint and several liability for all defendants, because at the *Mitchells*' subsequent sentencing hearing, the court said, "Restitution will be ordered as set forth in each of the respective defendant's probation reports joint and several as to any other defendant with similar restitution orders."

Unlike restitution *fines*, the trial court has authority to order joint and several liability for direct victim restitution (§ 1202.4, subd. (f)), which is not punishment but is more akin to a civil judgment. (*Kunitz, supra*, 122 Cal.App.4th at p. 657; *People v. Arnold* (1994) 27 Cal.App.4th 1096, 1100.)

The People argue Carney forfeited the point by failing to raise it at his sentencing hearing. (*People v. Smith* (2001) 24 Cal.4th 849, 852 [claims challenging discretionary sentencing choices for the first time on appeal are not subject to review].) Carney claims he can raise it for the first time on appeal as an unauthorized sentence that could result in unjust enrichment for the victims, who should not receive a double recovery. (*People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1533-1535; *People v. Leon* (2004) 124 Cal.App.4th 620, 622.) The People maintain that, regardless what the order states, joint and several liability is achieved by operation of law which provides that if combined payments made by multiple defendants exceed the victims' losses,

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each defendant would be entitled to a pro rata refund of any overpayment. (§ 1202.4, subd. (j); *People v. Arnold, supra*, 27 Cal.App.4th at p. 1100.)

Because we must remand for the trial court to consider whether to strike or dismiss the firearm enhancement under recent legislation, as we discuss *post*, and because Carney's sole contention is that the trial court *intended* joint and several liability, we leave it to the trial court on remand to amend the judgment if that was its intent.

F. Supplemental Brief – Discretion Re: Enhancement (Sen. Bill No. 620)

In a supplemental brief (joined by the Mitchells), Carney asks that we remand for the trial court to exercise its new discretion to strike the firearm enhancement under 2017 amendments to sections 12022.5 and 12022.53, which provide effective January 1, 2018: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (Stats. 2017, ch. 682, §§ 1-2 [SB 620].) We will remand.

The People agree, as do we, that the amendments apply retroactively to Carney's case. (*People v. Woods* (2018) 19 Cal.App.5th 1080, 1090-1091.)

The People nevertheless argue remand is not necessary in this

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case and would be an idle act because any order striking the enhancement would be an abuse of the trial court's discretion, given the totality of circumstances. (*People v. Askey* (1996) 49 Cal.App.4th 381, 389 [defendant was a third-striker with numerous prior felony convictions and appeared to be a budding "Night Stalker"].) Nevertheless, we cannot say what the trial court would have done in this case, had it known it had discretion to strike the enhancement, nor can we say as a matter of law that striking or dismissing the enhancement would be an abuse of the trial court's discretion. (*People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110 ["Remand is required unless the record reveals a clear indication that the trial court would not have reduced the sentence even if at the time of sentencing it had the discretion to do so"].)

At the sentencing hearing, Carney said he was sorry and took "full responsibility." But when the trial court asked what that meant, Carney said, "That it's an accident. . . . [T]his was a tragic accident that happened in South Sacramento." When the court asked why Carney had a gun there, he said, "I kind of carry a gun a lot. It was the lifestyle that I was

in, to protect myself from any situation, and that's the truth." Defense counsel also portrayed the

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killing as a tragic accident, for which the Mitchells should bear the brunt of responsibility, because they started it, and the manslaughter verdict indicated the jury found Carney less culpable than the Mitchells whom the jury convicted of murder.

The trial court took issue with the word "accident" and said Carney "played a significant and integral role" in the innocent victim's death through the series of choices he made that day, as well his choice to live a life where he felt it necessary to carry a gun around. The court recited Carney's long criminal history as an adult (including narcotics offenses, petty theft, possession of ammunition, DUI and driving on suspended license, probation violations, etc.) and his juvenile record (including grand theft and narcotics) and involvement with gang members (despite disavowing current membership). Aggravating factors far outweighed the mitigating factors noted by defense counsel. The trial court noted it did not accept defense counsel's unsupported characterization of prior offenses (e.g., grand theft was "a playful prank") based on a claim of "true facts" that were not part of the record.

The trial court sentenced Carney to the upper term

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of 11 years for manslaughter, plus a consecutive term of 10 years for the gun-use enhancement. The court imposed a three-year concurrent term for gun possession and noted the gun possession was an additional justification for imposing the upper term for manslaughter. At the September 19, 2014, sentencing hearing, defense counsel asked that Carney remain in custody of the Sheriff's Department until October 17th, when he was scheduled to be married. The court ordered Carney remanded to the custody of the Sheriff's Department to be delivered to the custody of the Director of Corrections at Duel Vocational Institute.

Since we cannot conclude remand would be futile, we must remand to

allow the trial court to exercise its discretion under SB 620 as to Carney.

G. Conclusion of Carney's Appeal

We remand for the trial court to consider whether or not to strike or dismiss the gun enhancement under SB 620, and to consider joint and several liability for direct victim restitution. If necessary, the court shall prepare an amended abstract of judgment. We otherwise affirm the judgment as to Carney.

II

The Mitchells' Appeal

A. Viable Theory of Liability

The Mitchells argue there was no viable theory for

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holding them criminally liable for the death of the innocent bystander shot by Carney, because the prosecutor's aiding and abetting theory was clearly invalid (because the Mitchells could not have aided and abetted Carney in his attempt to kill the Mitchells), and there were no other theories of liability in the instructions under which the Mitchells could be found criminally liable for her death.In a supplemental brief, the Mitchells argue they could not have been found guilty of first-degree murder under a natural and probable consequences theory, and no other viable theory exists.

We need not address these arguments, because the Mitchells fail to negate another theory on which the court instructed the jury, first degree premeditated murder pursuant to *People v. Sanchez* (2001) 26 Cal.4th 834 (*Sanchez*), as follows:

"There may be more than one cause of death. When the conduct of two or more persons contributes concurrently as a cause of the death, the conduct of each is the cause of death if that conduct was also a substantial factor contributing to the death. [¶] A cause is a concurrent cause if it was

operative at the moment of death and acted with another force to produce the death. [¶] If you find a defendant's conduct

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was a cause of death to another person, then it is no defense that the conduct of some other person also contributed to the death."

In *Sanchez, supra*, 26 Cal.4th 834, two opponents in an exchange of gunfire were each convicted of first degree murder of an innocent bystander hit and killed by a single bullet. It could not be established whether the fatal shot was fired by the appellant (Sanchez) or his codefendant (Gonzalez, who was not a party to the appeal). The prosecution proceeded on two theories — premeditated first degree murder and first degree murder perpetrated by means of intentionally discharging a firearm from a motor vehicle with specific intent to inflict death.

The Supreme Court concluded either theory supported the appellant's first degree murder conviction: "The circumstance that it cannot be determined who fired the single fatal bullet does not undermine defendant's conviction under either [theory]. . . . Defendant's act of engaging Gonzalez in a gun battle and attempting to murder him was a substantial concurrent, and hence proximate, cause of [the victim's] death through operation of the doctrine of transferred intent." (*Sanchez, supra*, 26 Cal.4th at p. 839.)

The Supreme Court specified that, although the trial court instructed on

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the provocative act murder theory (homicide committed during commission of a crime by a person who is not a perpetrator of such crime, in response to an intentional provocative act with implied malice by a defendant, is considered in law to be an unlawful killing by such defendant), the verdict reflected that the defendant's conviction was not based on the provocative act theory. (*Id.* at pp. 839, fn. 4, 843-844 & fn. 8, and 844-845.) In our case, Carney asked the trial court to instruct the jury on "provocative act," but the court declined to do so because the

prosecutor stated she was not proceeding under that theory.

The trial court in the *Sanchez* case instructed on proximate causation: "A cause of death is an act that sets in motion a chain of events that produces as a direct, natural and probable consequence of the act, the death of a human being, and without which the death would not occur. [¶] There may be more than one cause of the death. [¶] When the conduct of two or more persons contributes concurrently as a cause of the death, the conduct of each is a cause of the death if that conduct was also a substantial factor contributing to the death. [¶] A cause is a concurrent cause if it was operative at the moment

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of death and acted with another force to produce the death. [¶] If you find that a defendant's conduct was a cause of death to another person, then it is no defense that the conduct of some other person also contributed to the death." (*Id.* 26 Cal.4th at pp. 843, 845.) We pause to observe that this instruction makes clear that "natural and probable consequence[]" is not a notion limited to aiding and abetting liability, as is sometimes assumed, as for example in the Mitchells' supplemental brief.

The trial court in *Sanchez* also instructed on transferred intent: "'When one unlawfully attempts to kill a certain person but by mistake or inadvertence kills another person, the crime, if any, so committed is the same as though the person originally intended to be killed had in fact been killed.'" (*Sanchez, supra*, 26 Cal.4th at p. 843.)

The Court of Appeal in *Sanchez* reversed the first degree murder conviction, which the Supreme Court found to be based on the Court of Appeal's "mistaken belief that concurrent causation could not be applied in this single-fatal-bullet case." (*Id.* 26 Cal.4th at p. 845.)

The Supreme Court explained, "it is proximate causation, not direct or actual causation, which, together with the requisite culpable mens rea (malice), determines defendant's liability

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for murder. The Court of Appeal erred in concluding principles of concurrent causation cannot be invoked in a single-fatal-bullet case. The circumstance that it cannot be determine who fired the single fatal bullet, i.e., that direct or actual causation cannot be established, does not undermine defendant's first degree murder conviction if it was shown beyond a reasonable doubt that defendant's conduct was a substantial concurrent cause of [the victim's] death." (*Sanchez, supra*, 26 Cal.4th at p. 845.)

We again pause to observe that this liability is based on the defendant's own "culpable mens rea (malice)," not on vicarious liability for aiding and abetting someone else who bore malice. The *Sanchez* Court cited *People v. Pock* (1993) 19 Cal.App.4th 1263, where two defendants fired guns at the victim, and it could not be determined who fired the fatal bullet. "The Court of Appeal observed that if Pock did not 'actually fire[] the fatal shot,' he 'participated in all major events, *not as an aider and abettor*, but as an actual participant who, if he did not fire the fatal shot, certainly was responsible for instigating the firing of the fatal shot.' [Citation.]" (*Sanchez, supra*, 26 Cal.4th at p. 845, italics added, citing *Pock, supra*, 19 Cal.App.4th at p. 1274.)

Sanchez, supra, 26 Cal.4th at page 846, also cited other cases, including *People v. Kemp* (1957) 150 Cal.App.2d 654, which held two actors responsible for

[*47]

a death directly caused by one of them, where both engaged in a car race down a public street that resulted in the death of a person struck by the car of one of the defendants. And *Sanchez* cited with approval similar cases from other jurisdictions. (*Id.* at p. 847.)

Here, the prosecutor's arguments to the jury did not always clearly separate out the aiding and abetting principle from proximate causation based on the Mitchells' own malice. The prosecutor told the jury in closing argument that the fact the victim died as a result of the bullet fired by Carney "doesn't stop the other three [Larry Jones and the Mitchells] from being just as guilty. Because they aided and abetted each other, and they are each equally guilty." "When you engage in this type of mutual

combat, you are each responsible for the consequences." And in later argument: "And that brings us to the issue of how they can all be held liable for first degree murder when we know it was Mr. Carney's bullet that killed Monique. Because of this instruction, and it is in [CALCRIM] 520 [the standard first degree versus second degree murder instruction, which does not contain the following language as asserted by the prosecutor]. [¶] . . .

[*48]

[¶] [E]ssentially, what it is, is if you're acting together and you're all working and you're all serving as a substantial factor, it doesn't matter that one bullet was the one that killed her. It doesn't even matter if we didn't know whose bullet killed Monique. It doesn't matter, not under these circumstances. When you have four individuals who together have joined up to do battle in a public street, they are encouraging each other, they are instigating each other, they are promoting. They are aiding and abetting. And if they are each shooting and they are a substantial factor in those events, they are all guilty for that. They are all responsible for that cause of death.

"And it's kind of like . . . a street race. You have two people that join up, they get there at a stoplight. They don't know each other. They look at each other. One revs their engine, the other one revs their engine, boom, they're off. And they engage in a street race 100 miles an hour through the streets of Sacramento on a Sunday afternoon where there is a lot of traffic. One of them doesn't make the turn, ends up killing an innocent driver. They are both responsible for that. Without one, the other one wouldn't

[*49]

have been engaged in that behavior. They are both a substantial factor in that death.

"Here, without the Mitchells, it wouldn't have happened. Without Carney and Jones, it wouldn't have happened. They are all a substantial factor and they are all proximately — they are all a proximate cause in her death."

In rebuttal, the prosecution reiterated: "So why is it first degree murder? [¶] It is aiding and abetting. [Louis's attorney] said well, they weren't aiding and abetting their own murder. No, they weren't. [¶] But the law is this: Although they were trying to harm each other, at the same time, they were acting in concert to create an explosive condition that resulted inevitably in Monique [N.'s] death and the injuries of the others." After the court overruled Louis's objection that this misstated the law, the prosecutor continued: "They work together to create an explosive environment. And it was inevitable that somebody was going to die. In this case, it was Monique [N]. They all had more than 25 minutes to make decisions. . . . And they made their decisions, and they need to be held accountable. They are each a substantial concurrent proximate cause of what happened that day."

We conclude

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the trial court properly instructed the jury consistent with *Sanchez*, and the prosecutor's arguments to the jury adequately covered this theory, and the jury instructions and arguments support the Mitchells' convictions without reliance on aiding and abetting.

The Mitchells argue *Sanchez* is inapplicable because there it could not be determined which participant fired the fatal shot, and therefore it was possible the defendant did fire the fatal shot, which would support making him liable for first degree murder. However, that possibility was not the justification for the conviction.

We observe that, in *Sanchez*, the two participants in the gunfight were rival gang members (*id.*26 Cal.4th at pp. 840, fn. 5, and 841-844), whereas in this appeal there was no evidence that the Mitchells were gang members. The Mitchells do not raise this point, and we do not view it as rendering *Sanchez* inapplicable. Although *Sanchez* referred to evidence that the two actors were rival gang members, the focus of its holding was not on gang activity but on the circumstance that Sanchez and Gonzalez "had equally culpable mental states and engaged in precisely the same conduct at the same time and place in exchanging shots" such that it was not

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unfair to hold them equally responsible for the victim's death. (*Id.* at p. 854, citing conc. opn. of Kennard, J., *id.* at p. 856.)

We reject the Mitchells' argument that no viable theory supported their convictions for first degree murder.

B. Jury Instruction Re: Defenses of Accomplices

The Mitchells argue the trial court erroneously instructed the jury that the *only* defendant who could raise defenses of self-defense, imperfect self-defense, or heat of passion was the defendant (Carney) who actually fired the fatal shot that killed the bystander-victim. The Mitchells maintain this "likely explains the odd verdict" — manslaughter for the principal (Carney) and first degree murder for those vicariously liable (the Mitchells). We disagree.

The Mitchells asked the trial court to instruct the jury that any defenses applicable to the intended killing also applied to the unintended killing of the innocent bystander. The court accordingly added a second paragraph to the CALCRIM No. 562 (Transferred Intent), though the People argued it was unnecessary:

"If the defendants intended to kill one person, but by mistake or accident killed someone else, then the crime, if any, is the same for the unintended killing as it is for the intended killing.

[*52]

"Defenses, if any, which apply to the intended killing also apply to an unintended killing. This includes defenses that decrease the level of homicide, such as heat of passion or imperfect self-defense." Obviously, it applies to self-defense or defense of others.

The last sentence was suggested by Larry Jones's attorney.

On appeal, the Mitchells contend the instruction, by referring to the one who "by mistake or accident killed someone else," improperly advised the

jury that the defenses of self-defense, etc., applied only to Carney, since he was the only one who by mistake or accident killed someone else.

We will assume for purposes of this appeal that the Mitchells' contention is not barred by the invited error doctrine, as urged by the People.

The contention improperly focuses on that one jury instruction, whereas we determine the matter based on the instructions as a whole and counsels' arguments to the jurors, whom we presume are intelligent persons capable of understanding and correlating the instructions. (*People v. O'Malley, supra*, 62 Cal.4th at p. 991; *People v. Carrington, supra*, 47 Cal.4th at p. 192; *People v. Young, supra*, 34 Cal.4th at p. 1202.)

Here, the trial court separately instructed the jury on each of the defenses as applicable to all defendants, with no restriction to any particular defendant. Indeed, the

[*53]

court specifically instructed regarding self-defense by Louis Mitchell, that "If you find that [Barksdale] threatened or harmed Louis Mitchell in the past, you may consider that information in deciding whether Louis Mitchell's conduct and beliefs were reasonable. [¶] Someone who has been threatened or harmed by a person in the past is justified in acting more quickly or taking greater self-defense measures against that person." The prosecutor argued to the jury that the Mitchells were not acting in self-defense but did not object to the Mitchells' closing arguments to the jury that self-defense excused them from liability.

We conclude the jury would not have reasonably believed that self-defense, defense of others, heat of passion, or imperfect self-defense, applied only to Carney and not to the Mitchells.

C. Mixed Emotions

The Mitchells join in Carney's argument that self-defense is available to a person who acts with mixed emotions. We have already explained why that argument fails.

D. Cumulative Impact of Errors

Having reviewed the record, we reject the Mitchells' argument that the cumulative impact of errors denied them due process and a fair trial.

E. New Discretion to Strike or Dismiss

[*54]

Gun Enhancements

The Mitchells filed a request to join in Carney's supplemental brief regarding the new legislation (Sen. Bill No. 620) giving the trial court discretion to strike or dismiss gun enhancements. However, the Mitchells failed to provide any independent analysis as to their particular circumstances.

Instead of filing a brief, a party may join in all or part of a brief in the same appeal. (Cal. Rules of Court, rule 8.200(a)(5).)

"Appellate counsel for the party purporting to join some or all of the claims raised by another are obligated to thoughtfully assess whether such joinder is proper as to the specific claims and, if necessary, to provide particularized argument in support of his or her client's ability to seek relief on that ground. If a party's briefs do not provide legal argument and citation to authority on each point raised, '"the court may treat it as waived, and pass it without consideration. [Citations.]"' (*People v. Stanley* (1995) 10 Cal.4th 764, 793.) 'Joinder may be broadly permitted [citation], but each appellant has the burden of demonstrating error and prejudice [citations].' (*People v. Nero* (2010) 181 Cal.App.4th 504, 510, fn. 11, 104 Cal.Rptr.3d 616.)" (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 363-364.)

Thus, we consider arguments made solely by joinder only if we are satisfied they were individually preserved and sufficient to meet the individual defendant's

[*55]

duty to demonstrate error and prejudice as to him.In considering a claim under Senate Bill No. 620, remand is not required if the record reveals remand would be futile. (*People v. Almanza, supra*, 24 Cal.App.5th at p. 1110; *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896.)

Neither Mitchell offers any discussion of his sentencing to show that remand would not be necessarily futile.

Because the Mitchells fail to adequately address the point in their briefs, we see no reason to remand for consideration of Senate Bill No. 620.

F. Conclusion

We conclude the Mitchells fail to show grounds for reversal.

DISPOSITION

As to Carney, that matter is remanded for the trial court to exercise its discretion to strike or dismiss that firearm enhancement under SB 620, to consider joint and several liability for direct victim restitution (§ 1202.4, subd. (f)), and to amend the abstract of judgment if appropriate and forward a copy to the Department of Corrections and Rehabilitation. The judgment as to Carney is otherwise affirmed.

As to Lonnie Mitchell, the judgment is affirmed. As to Louis Mitchell, the judgment is affirmed.

HULL, J.

We concur:

BLEASE, Acting P. J.

RENNER, J.

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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:

Petition for Review; Certificate of Compliance; Appendix

I served the following persons by the Truefiling system on Friday, January 17, 2020:

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I served the following persons by mail on Friday, January 17, 2020:

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I declare under penalty of perjury that the above is true. Executed in Oakland, California on Friday, January 17, 2020.

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **People vs. Louis**
Case Number: **TEMP-YWZW53LO**
Lower Court Case Number:

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: **beleslaw@yahoo.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
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PETITION FOR REVIEW	petition for review-louis

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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.

1/17/2020
Date

/s/Robert Beles
Signature

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