

*Supreme Court of the State of California*

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

PETITIONER LOUIS  
MITCHELL'S BRIEF ON  
THE MERITS

*Honorable Kevin McCormick,*  
*Judge*

**PETITIONER LOUIS MITCHELL'S  
BRIEF ON THE MERITS**

**CERTIFICATE OF COMPLIANCE**

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## TABLE OF CONTENTS

<i>item</i>	<i>page number</i>
PETITIONER LOUIS MITCHELL’S BRIEF ON THE MERITS. . . . .	6
1. Statement of issues.. . . . .	6
2. Essential facts of the case.. . . . .	6
3. Argument.. . . . .	12
a. Does the “substantial concurrent causation” theory of liability of <i>People v. Sanchez</i> (2001) 26 Cal.4th 834 permit a conviction for first degree murder if the defendants did not fire the shot that killed the victim?.. . . . .	12
b. What impact, if any, do <i>People v. Chiu</i> (2014) 59 Cal.4th 155 and Senate Bill No. 1437 (Stats. 2018, ch. 1015, § 1, subd. (f)) have on the rule of <i>Sanchez</i> ? . . . . .	16
4. Conclusion.. . . . .	20
CERTIFICATE OF COMPLIANCE. . . . .	21
PROOF OF SERVICE. . . . .	22

## TABLE OF AUTHORITIES

cases	page number
<i>Alston v. State</i> (1995) 339 Md. 306.....	14
<i>Blansett v. State</i> (Texas 1977) 556 S.W.2d 322 .....	15
<i>Commonwealth v. Gaynor</i> (1993) 538 Pa. 258, 648 A.2d 295. .	14,15
<i>Dowden v. State</i> (Texas 1988) 758 S.W.2d 264. ....	15
<i>Lineaweaver v. Plant Insulation Co.</i> (1995) 31 Cal.App.4th 1409...	12
<i>People v. Bland</i> (2002) 28 Cal.4th 313. ....	16, 17
<i>People v. Canizalez</i> (2011) 197 Cal.App.4th 832.....	18
<i>People v. Carrillo</i> (2008) 163 Cal. App. 4th 1028 .....	17
<i>People v. Chiu</i> (2014) 59 Cal.4th 155 .....	6, 16, 18
<i>People v. Concha</i> (2009) 47 Cal.4th 653. ....	17
<i>People v. Fabian</i> (NY 1992) 154 Misc. 2d 957, 586 N.Y.S.2d 468...	14
<i>People v. Garcia</i> (2020) 46 Cal. App. 5th 123.....	16
<i>People v. Gilbert</i> (1965) 63 Cal. 2d 690.....	14, 15, 17
<i>People v. Jennings</i> (2010) 50 Cal. 4th 616. ....	12, 13
<i>People v. Kemp</i> (1957) 150 Cal. App. 2d 654. ....	15
<i>People v. Larios</i> (2019) 42 Cal.App.5th 956, review granted Feb. 26, 2020, 258 Cal.Rptr.3d 812, 458 P.3d 860. ....	19
<i>People v. Lopez</i> (2019) 38 Cal.App.5th 1087, review granted November 13, 2019, 254 Cal. Rptr. 3d 638, 451 P.3d 777... ..	19

<i>cases</i>	<i>page number</i>
<i>People v. Mai</i> (1994) 22 Cal. App. 4th 117. . . . .	14
<i>People v. McCoy</i> (2001) 25 Cal.4th 1111. . . . .	19
<i>People v. Medrano</i> (2020) 42 Cal.App.5th 1001, review granted March 11, 2020, no. S259948 at 2020 Cal. LEXIS 2237. . . . .	19
<i>People v. Pock</i> (1993)19 Cal. App. 4th 1263 . . . . .	13, 14
<i>People v. Russell</i> (1998) 91 N.Y.2d 280 . . . . .	13, 14
<i>People v. Sanchez</i> (2001) 26 Cal.4th 834. . . . .	6, 11-17
<i>People v. Sanchez</i> (2020) 46 Cal. App. 5th 637, review granted June 10, 2020, no S261768, 2020 Cal. LEXIS 3730. . . . .	19
<i>Pettigrew v. State</i> (Tex. 1999) 999 S.W.2d 810. . . . .	14
<i>Pizano v. Superior Court</i> (1978) 21 Cal. 3d 128. . . . .	14, 15
<i>Viner v. Sweet</i> (2003) 30 Cal.4th 1232. . . . .	12
<i>statutes and rules</i>	<i>page number</i>
California Rules of Court 8.520(c). . . . .	21
Penal Code section 188(a)(3). . . . .	18
Senate Bill No. 1437 . . . . .	6, 16, 18
Stats. 2018, ch. 1015, § 1, subd. (f). . . . .	6
<i>instructions</i>	<i>page no</i>
CALCRIM 520. . . . .	9

<i>instructions</i>	<i>page no</i>
CALCRIM 520 .....	9
CALCRIM 560 .....	7
CALCRIM 561.....	7
CALJIC 3.40.....	16
CALJIC 3.41.....	16

<i>treatises</i>	<i>page no.</i>
<b>Prosser &amp; Keeton, Torts (5th ed. 1984) § 41 at p. 268. ....</b>	<b>12</b>

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PETITIONER LOUIS MITCHELL'S  
BRIEF ON THE MERITS

1. Statement of issues.

This court has granted review limited to the following issues:

1. Does the “substantial concurrent causation” theory of liability of *People v. Sanchez* (2001) 26 Cal.4th 834 permit a conviction for first degree murder if the defendants did not fire the shot that killed the victim?
2. What impact, if any, do *People v. Chiu* (2014) 59 Cal.4th 155 and Senate Bill No. 1437 (Stats. 2018, ch. 1015, § 1, subd. (f)) have on the rule of *Sanchez*?

2. Essential facts of the case.

This case arose from a gun battle on December 4, 2010 in Sacramento, California. Brothers 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. Larry 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. The Mitchell brothers, Carney, and Larry Jones, were charged with her killing. Jones was acquitted at trial. Carney, who fired the fatal shot, was convicted of voluntary manslaughter. The Mitchell brothers were convicted of first-degree murder.

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.)

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.<sup>1</sup> 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 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.

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<sup>1</sup> 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.

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.)

There were no facts presented at trial that could have supported a jury finding that either of the Mitchell brothers intended to kill the bystander.

The Court of Appeal found that the Mitchell brothers had been properly convicted under “substantial concurrent causation” theory of liability of *People v. Sanchez*, even though in *Sanchez*, it could not be determined who fired the fatal shot that killed the bystander, while in this case, the fatal shot was shown to have been fired by Carney.

### 3. Argument.

- a. Does the “substantial concurrent causation” theory of liability of *People v. Sanchez* (2001) 26 Cal.4th 834 permit a conviction for first degree murder if the defendants did not fire the shot that killed the victim?

There is no language in *People v. Sanchez* that suggests that this court intended to limit the case to a situation in which it couldn't be determined who fired the fatal shot.

Petitioner hasn't found any later decisions of this court that applied *Sanchez* in a situation where there was a gun battle between two sides and a third party was killed by a bullet that was either traced to the opposite side, or, as in *Sanchez*, untraceable. In *People v. Jennings* (2010) 50 Cal. 4th 616, 643-644, the court cited *Sanchez* but also relied on civil tort law which explained that “the ‘substantial factor’ rule for concurrent causes ‘was developed primarily for cases in which application of the but-for rule would allow each defendant to escape responsibility because the conduct of one or more others would have been sufficient to produce the same result.’” *Jennings, id.*, quoting *Prosser & Keeton, Torts* (5th ed. 1984) § 41 at p. 268. *Jennings* goes on to discuss the civil tort cases *Lineaweaver v. Plant Insulation Co.* (1995) 31 Cal.App.4th 1409, 1415 and *Viner v. Sweet* (2003) 30 Cal.4th 1232, 1239–1240. Thus, *Jennings*

implies that the *Sanchez* “substantial concurrent causation” theory might be limited to situations in which the fatal bullet couldn’t be traced to a particular participant, since otherwise, application of a “but for” rule would allow all participants in the gun battle to escape liability for the bystander’s death. However, *Jennings* didn’t involve a gun battle - bystander killing, but a series of assaults by the same defendant that may have combined to produce the victim’s death, a different kind of “concurrent causation” than that involved in *Sanchez*.

Of the various cases *Sanchez* relied on, only *People v. Pock* (1993) 19 Cal. App. 4th 1263 and *People v. Russell* (1998) 91 N.Y.2d 280 involved situations in which the alleged fatal shot couldn’t be traced to either side. But in *Pock*, defendant fired at least one shot that hit the victim and contributed to his death. *People v. Pock*, 19 Cal. App. 4<sup>th</sup> at 1277. *Russell* did involve such a gun battle. However, unlike *Sanchez*, *Russell* didn’t discuss any theory of concurrent causation, but held that participants on opposite sides of a gun battle could be considered accomplices who “intentionally aided each other to engage in the mutual combat” that caused the victim’s death. *People v. Russell*, 91 N.Y.2d at 288. In addition, unlike *Sanchez*, *Russell* was a second degree murder case where the defendant was liable for “recklessly engag[ing] in conduct

creating a grave risk of death to another person.” *People v. Russell*, 91 N.Y.2d at 287.

Most of the other cases relied on in *Sanchez* didn’t involve gun battles between rival groups. See, e.g., *People v. Mai* (1994) 22 Cal. App. 4th 117, 125, a “provocative act” case where the victim shot one of the accomplices, *Pizano v. Superior Court* (1978) 21 Cal. 3d 128, 131 (third party shot victim that robber was using as a human shield). In the gun battle cases, the fatal shot was either traced to someone other than the defendant, see, e.g., *Alston v. State* (1995) 339 Md. 306 at 308, *Pettigrew v. State* (Tex. 1999) 999 S.W.2d 810, 812, *Commonwealth v. Gaynor* (1993) 538 Pa. 258, 260, 648 A.2d 295, or defendant fired a shot that actually hit the bystander victim as in *Pock*, see, e.g., *People v. Fabian* (NY 1992) 154 Misc. 2d 957, 958, 586 N.Y.S.2d 468.

In *Gaynor*, the Pennsylvania Supreme Court rejected any theory that participants on opposite sides of a gun battle could be accomplices of each other, finding that they were enemies and therefore could not have shared any intent. *Commonwealth v. Gaynor*, 538 Pa. at 263. *Gaynor*, instead, relied on this court’s opinion in *People v. Gilbert* (1965) 63 Cal. 2d 690, which *Sanchez* discusses as a “provocative act” case, not a “substantial concurrent causation” case. *People v. Sanchez* (2001) 26

Cal.4th at 852. Thus, *Gaynor* disagreed with *Russell* and *Sanchez* on whether the two sides of a gun battle could be considered intentional aiders or abettors. Other cases *Sanchez* cites on rely on *Gilbert's* “provocative act” theory. See *People v. Mai*, 22 Cal. App. 4th at 121, *Pizano v. Superior Court*, 21 Cal. 3d at 121, *Blansett v. State* (Texas 1977) 556 S.W.2d 322 at 325, *Dowden v. State* (Texas 1988) 758 S.W.2d 264, 272.

Besides *Russell*, the primary case *Sanchez* relies on in support of the “substantial concurrent causation” is *People v. Kemp* (1957) 150 Cal. App. 2d 654, which is not a gun battle case but a case involving two people drag racing on a public street. *Kemp*, however, was an unlawful act - manslaughter case, not a murder case, where defendant’s liability was based on committing an unlawful act with gross negligence. The car that the defendant *Kemp* was racing against was involved in the fatal accident, so *Kemp* was not a case where the fatal act couldn’t be traced to a single individual. And the cooperation of two participants engaged in a car race is much more obvious than ones engaged in a gun battle.

Based on all of this, the limitations of *Sanchez's* “substantial concurrent causation” doctrine are unclear.

b. What impact, if any, do *People v. Chiu* (2014) 59 Cal.4th 155 and Senate Bill No. 1437 (Stats. 2018, ch. 1015, § 1, subd. (f)) have on the rule of *Sanchez*?

As *Sanchez*'s "substantial concurrent causation" theory is a type of natural and probable consequences liability, *Chiu* and SB 1437 are inconsistent with *Sanchez*.

*Sanchez* approved the trial court's instruction, under CALJIC 3.40, that "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." *People v. Sanchez*, 26 Cal at 843. *Sanchez* also approved the trial court's instruction, under CALJIC 3.41, that "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." *Id.* *Sanchez* does not discuss natural and probable consequences liability any further.

In *People v. Bland* (2002) 28 Cal.4th 313, however, this court explained that "proximately causing and personally inflicting harm are two different things." *Bland, id.* at 336, discussed in *People v. Garcia* (2020) 46 Cal. App. 5th 123, 151. *Bland* held that a defendant could proximately cause an injury if he "sets in motion a chain of events that



produces as a direct, natural and probable consequence of the act or omission the great bodily injury or death.”, even if the defendant didn’t personally inflict the injury. *People v. Bland* (2002) 28 Cal at 335. *Bland* cited *Sanchez* as an example of this type of proximate cause, *People v. Bland*, 28 Cal at 337. Thus, *Sanchez’s* theory of proximate causation is based on a defendant being held liable under a natural and probable consequences theory of liability.

This is discussed in greater detail in *People v. Carrillo* (2008) 163 Cal. App. 4th 1028. In *Carrillo*, the court noted that *Bland* had approved the following instruction defining proximate cause as follows, based on *Sanchez*:

“An act causes death if the death is the direct, natural, and probable consequence of the act and the death would not have happened without the act. A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence.”

*People v. Carrillo*, 163 Cal. App. 4th at 1038, citing *People v. Bland*, 28 Cal.4th at page 335 and *People v. Sanchez*, 26 Cal.4th at 848–849.

See also *People v. Concha* (2009) 47 Cal.4th 653, 661-662, citing *People v. Sanchez*, 26 Cal.4th at 849 and *People v. Gilbert* 63 Cal. 2d at 705.

In *People v. Chiu*, this court held that the “natural and probable consequences” theory of aiding and abetting does not apply to first degree premeditated murder. *People v. Chiu*, 59 Cal. 4th at 158. *Chiu* pointed out that:

“By its very nature, aider and abettor culpability under the natural and probable consequences doctrine is not premised upon the intention of the aider and abettor to commit the nontarget offense because the nontarget offense was not intended at all. It imposes vicarious liability for any offense committed by the direct perpetrator that is a natural and probable consequence of the target offense. [citation.] Because the nontarget offense is unintended, the mens rea of the aider and abettor with respect to that offense is irrelevant and culpability is imposed simply because a reasonable person could have foreseen the commission of the nontarget crime.”

*People v. Chiu* (2014) 59 Cal. 4th at 164, quoting *People v. Canizalez* (2011) 197 Cal.App.4th 832, 852. *Chiu* held that “the connection between the defendant's culpability and the perpetrator's premeditative state is too attenuated to impose aider and abettor liability for first degree murder under the natural and probable consequences doctrine.”

SB 1437 does away with aider and abettor liability for any degree of murder under a natural and probable consequences theory. SB 1437 amended Penal Code section 188(a)(3) to prohibit imputing malice “to a person based solely on his or her participation in a crime.” “[O]utside

of the natural and probable consequences doctrine, an aider and abettor's mental state must be at least that required of the direct perpetrator.” *People v. Medrano* (2020) 42 Cal.App.5th 1001, 1013, review granted March 11, 2020, no. S259948 at 2020 Cal. LEXIS 2237, quoting *People v. McCoy* (2001) 25 Cal.4th 1111, 1118. “It follows that if malice is an element of a charged offense, accomplice liability under the natural and probable consequences doctrine necessarily entails the imputation of malice.” *People v. Medrano*, 42 Cal.App.5th at 1013. Because malice in the murder context is no longer imputable under section 188(a)(3) , the Legislature has eliminated the natural and probable consequences doctrine as a viable theory to prove murder. *Medrano, id, People v. Larios* (2019) 42 Cal.App.5th 956, 968, review granted Feb. 26, 2020, 258 Cal.Rptr.3d 812, 458 P.3d 860, *People v. Sanchez* (2020) 46 Cal. App. 5th 637, 642, review granted June 10, 2020, no S261768, 2020 Cal. LEXIS 3730, *People v. Lopez* (2019) 38 Cal.App.5th 1087, 1103, review granted November 13, 2019, 254 Cal. Rptr. 3d 638, 451 P.3d 777.

#### 4. Conclusion.

For these reasons, this court should reverse petitioner's first degree murder conviction.

Dated: Oakland, California, Monday, July 6, 2020.



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MITCHELL*

Supreme Court of the State of California

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CERTIFICATE OF  
COMPLIANCE

CERTIFICATE OF COMPLIANCE

I hereby certify under California Rules of Court 8.520(c) that this merits brief is printed in proportionally spaced 13 point type, contains 3,221 words, and is within the 8,400 word limit specified by Rule 8.520(c).

Dated: Oakland, California, Monday, July 6, 2020.



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Attorney for *Petitioner* LOUIS  
MITCHELL

## PROOF OF SERVICE

I, the undersigned, depose and state: I reside or do business within the County of Alameda. I am over eighteen years of age and not a party to this action. My business address is 1 Kaiser Plaza, Suite 2300, Oakland, CA 94612-3642. I served the following documents:

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I declare under penalty of perjury that the above is true. Executed in Oakland, California on Monday, July 6, 2020.



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**STATE OF CALIFORNIA**  
Supreme Court of California

**PROOF OF SERVICE**

**STATE OF CALIFORNIA**  
Supreme Court of California

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Case Number: **S260063**

Lower Court Case Number: **C077558**

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