In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JAMES LEO CARNEY, et al.,

Defendants and Appellants.

Case No. S260063

Court of Appeal, Third Appellate District, Case No. C077558
Sacramento County Superior Court, Case No. 11F00700
The Honorable Kevin J. McCormick, Judge

ANSWER BRIEF ON THE MERITS

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ISSUES PRESENTED

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*?

INTRODUCTION

A participant in a gun battle can be convicted of first degree murder of an innocent bystander, so long as his conduct was a substantial concurrent factor in proximately causing a death and, in addition, his mens rea rose to the level required for first degree murder. (*Sanchez*, *supra*, 26 Cal.4th 834.) *Sanchez* held that active, voluntary participation in a gun battle can be a proximate cause of death of an innocent bystander. Granted, in *Sanchez*, the identity of the shooter was unknown, and so the defendant convicted of first degree murder may have in fact fired the fatal shot. However, the application of the *Sanchez* rule does not turn on the inability to identify the person who fired the fatal shot. As this Court noted, "it is proximate causation, not direct or actual causation, which, together with the requisite culpable mens rea (malice), determines the defendant's liability for murder." (*Id.* at p. 845.) As long as the defendant premeditated and deliberated, forming a subjective intent to kill when participating in the gun battle, he need not have fired the fatal shot to be convicted of first degree murder. Here, defendant and appellant Mitchell brothers

deliberately engaged in a gun battle with rival gang members in a crowded public place. One brother's shot hit its intended target, killing a rival, and the brothers' stray bullets also hit and injured four innocent bystanders. The gunfight itself resulted in the death of another innocent bystander. Under the rule of *Sanchez*, defendants' actions, which proximately caused the bystander's death, together with their intent to kill another, are sufficient to support their convictions for first degree murder of the bystander, even though the specific bullet that killed her came from the gun of another.

This Court's opinion in *Chiu* and the statutory amendments enacted under Senate Bill No. 1437 have no effect on the rule of *Sanchez*. (*Chiu*, *supra*, 59 Cal.4th 155; Stats. 2018, ch. 1015, § 1.) *Chiu* and Senate Bill No. 1437 addressed concerns about penalizing a defendant for murder at a level greater than his personal culpability. *Sanchez*, in contrast, requires that the defendant himself possess the requisite mens rea to be convicted of murder. Because the rule of *Sanchez* requires an inquiry into the defendant's own intent, it does not risk the types of disproportionate penalties that were addressed in *Chiu* and Senate Bill No. 1437. *Sanchez* ensures that a defendant's conviction is commensurate with the defendant's personal culpability. The jury was instructed consistent with *Sanchez*, that precedent remains good law, and the judgments should be affirmed.

STATEMENT OF THE CASE

On December 14, 2010, a stray bullet from a gun battle "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 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. [The] [m]other was pronounced dead at the scene." (Opinion 3 [Opn.]; 3 RT 679, 688, 691–695, 697, 713–714, 725, 727–729; 5 RT 1402–1403; 15 RT 4057.) The gun battle involved numerous individuals, but included defendant James Carney on one side and defendants Lonnie and Louis Mitchell on the other side. (5 RT 1488.) Investigators determined that Carney's gun was likely the weapon that fired the fatal shot. (13 RT 3618–3619.)

The gun battle was the culmination of the contentious history between the Mitchell brothers and Carney's gang (the G-Mobb criminal street gang). Louis Mitchell had previously robbed one of Carney's fellow gang members, and Lonnie threatened to kill another. (5 RT 1201, 1258–1262, 1292–1297, 1330; 14 RT 3716.) Approximately a week after making that threat, the Mitchells entered a barbershop that was a known G-Mobb gang hangout. (5 RT 1466, 1468, 1470.) The Mitchells armed themselves before entering the barbershop—Louis with a handgun, and Lonnie with a TEC-9 assault weapon strapped around his neck, visible beneath his shirt. (5 RT 1468–1469; 6 RT 1557–1558; Opn. 2.) Lonnie paced in and out of the

barbershop, speaking on a phone about shooting up the place, while Louis sat down and put on a barber's cape. (5 RT 1470, 1474–1475; 6 RT 1532–1534.) Larry Jones, an associate of the G-Mobb criminal street gang, was also at the barbershop. Jones's friend Ernest Stoute alerted him to the Mitchells' aggressive demeanor and their weapons. (16 RT 4380–4381.) Jones told Stoute to call his wife to get her to pick them up; because Stoute's wife was too far away, Jones then called Carney to ask for a ride. (16 RT 4381–4389.) In response, Carney and other G-Mobb gang members armed themselves and descended upon the barbershop. (Opn. 4; 7 RT 1889–1890; 8 RT 2259, 2268, 2334; 14 RT 3813–3816, 3877; 16 RT 4383–4389.)

After Carney and the others arrived, the two groups confronted one another on a public street; it was the middle of the day, and people were going about their business and errands. (3 RT 676, 685.) Although the parties presented conflicting evidence about who fired the first shot, at least one witness testified that Louis Mitchell came outside, still wearing a barber's cape, and shot arriving G-Mobb gang member Marvion Barksdale, killing him. (7 RT 1892–1894.) Louis Mitchell also shot towards Carney, and Lonnie Mitchell shot the assault weapon "recklessly." (5 RT 1486; 6 RT 1543–1544, 1568.) During the gun battle, Carney shot at the Mitchells from behind a parked vehicle. (5 RT 1486–1487; 6 RT 1794–1795.) In addition to Barksdale, at least one other G-Mobb gang member was shot. (7 RT 1896, 1900–1901.) The Mitchells also shot at Jones, still inside the barbershop, who returned fire as he attempted to run out the

back door. While shooting inside the barbershop, the Mitchells also shot and injured four other people, none of whom were members of or associated with the G-Mobb criminal street gang.[1] (4 RT 956–960, 1010, 1040–1041, 1056–1057, 1078–1079, 1085; 5 RT 1399, 1407–1409; 10 RT 2887.)

The Mitchells got in a waiting car and sped away from the scene. (5 RT 1225–1226, 1489–1492; 6 RT 1568.) They went to a friend's house, played video games, and fled when officers arrived. (10 RT 2979–2986, 2989; 11 RT 3027–3029; 12 RT 3362–3363; 14 RT 3704.) They were each apprehended the next day—Louis in a house he had broken into, and Lonnie in his vehicle. (11 RT 3058–3090; 12 RT 3107–3108, 3139–3146, 3155; 13 RT 3565–3572; 14 RT 3705.)

Carney drove away from the scene with Stoute, Stoute's son, and another man, leaving Jones behind. (5 RT 1492–1493.) Jones made his way to a friend's house where he appeared nervous and borrowed a phone; his sister arrived shortly thereafter to pick him up and noticed he was afraid.[2] (15 RT 4276–4278, 4292–4297.)

When officers arrived at the barbershop, they found Monique N.'s body draped over her toddler son, protecting him from the gunfire; she had been killed by a single bullet. (3 RT

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[1] The prosecutor argued Lonnie Mitchell shot at least one of the individuals inside the barbershop. (18 RT 5079.)

[2] Marvion Barksdale was driven from the scene by the gang members he arrived with. They left him at a hospital where he later died. (7 RT 1902–1903, 1909; 8 RT 2264–2266, 2288, 2296; 15 RT 4065–4066.)

679, 688, 691–695, 697, 713–714, 725, 727–729; 5 RT 1402–1403; 15 RT 4057.)

The Sacramento County District Attorney filed an information charging Carney, Jones, Louis Mitchell, Lonnie Mitchell, and two other G-Mobb gang members (Dominique Lott and Charles Barksdale) with murder (Pen. Code, § 187, subd. (a)) (all six defendants); four counts of assault with a firearm (Pen. Code, § 245, subd. (a)(2)) (all six defendants); possession of an assault weapon (Pen. Code, § 12280, subd. (b)) (Lonnie Mitchell only); and possession of a firearm by a felon (Pen. Code, § 12021, subd. (a)(1)) (Carney, Lonnie Mitchell, Louis Mitchell, and Dominique Lott). (1 CT 31–36.)

Among other allegations, the information further alleged as to the murder charge that each Mitchell personally discharged a firearm (Pen. Code, § 12022.53, subds. (b)-(c)), that Carney personally discharged a firearm proximately causing great bodily injury or death (Pen. Code, § 12022.53, subd. (d)), and that Jones personally discharged a firearm proximately causing great bodily injury and death (Pen. Code, § 12022.52, subds. (d) & (e)(1)), personally discharged a firearm (Pen. Code, § 12022.53, subds. (c) & (e)(1)), and personally used a firearm (Pen. Code, § 12022.53, subds. (b) & (e)(1)). (1 CT 32–33.) The information further alleged that Carney and Jones committed the murder for the benefit of a criminal street gang (Pen. Code, § 186.22, subd. (b)(1)). (1 CT 33.)

Carney, Jones, and the Mitchells pled not guilty and denied the allegations. (1 CT 10; 1 SCT 9; 2 CT 334.)[3]

The prosecution argued that the defendants were each guilty of first degree murder under the substantial concurrent causation doctrine articulated in *Sanchez*, because the conduct of each was a substantial factor in causing Monique's death. (18 RT 5122–5124.) In support of the first degree murder charges, the prosecution argued that each defendant premeditated and deliberated a killing. (18 RT 5120–5121.) The prosecution also argued that the defendants each aided and abetted one another in the shootout. (18 RT 5065–5066, 5123; 19 RT 5409.) All four defendants argued they had acted in self-defense, claiming the other side shot first as the aggressors. (18 RT 5156; 19 RT 5208, 5322, 5327–29, 5358–5360.)[4]

As relevant here, the trial court instructed the jury on aiding and abetting principles, both as to direct and indirect aiding and abetting. (18 RT 5021–5023 [CALCRIM Nos. 400, 401, 402].)

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[3] Charles Barksdale and Lott initially pled not guilty, but later changed their pleas. The trial court sentenced them each to 21 years in state prison for voluntary manslaughter, with a firearm enhancement as to Lott, and a gang enhancement as to Charles Barksdale. (1 CT 10, 109.)

[4] Counsel also argued that if there is an unintended killing or unintended assault because of a shootout, "it falls on the [p]eople who started it . . . [n]ot necessarily on the person who actually inflicted the injury." (19 RT 5364.)

Given this Court's recent opinion *Chiu*[5] and based on arguments from counsel relating to the limits of aiding and abetting in murder cases, it modified the instruction on murder (CALCRIM No. 520) to add, "Murder under natural and probable consequences is murder of the second degree." (18 RT 5036.) The trial court further modified CALCRIM No. 520 to reflect the proximate cause instruction that the prosecution requested—an instruction identical to the instruction given in *Sanchez*. (18 RT 5034–5036.) Specifically, the jurors were instructed:

> 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 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.

(18 RT 5035.)

In August 2014, the jury found each Mitchell brother guilty of first degree murder with a true finding on the firearm allegation, and guilty of additional counts not relevant to this

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[5] This Court issued its opinion in *Chiu* on June 2, 2014, just three weeks before the Mitchells' jury was sworn. (1 CT 23; 3 RT 668.)

appeal. (2 CT 570–574.) The jury found Carney not guilty of murder but guilty of voluntary manslaughter, with a true finding for the firearm-use allegation and a not true finding on the gang allegation. (2 CT 565–568.) The jury found Carney not guilty of the remaining charges, and found Jones not guilty on all counts. (2 CT 565–570.)

The trial court sentenced Lonnie Mitchell to an aggregate term of 53 years 4 months to life in state prison, and Louis Mitchell to an aggregate term of 52 years 8 months to life in state prison. (2 SCT 322–325, 519–522.) It sentenced Carney to 21 years in state prison. (3 CT 679–680.)

Carney and the Mitchells appealed.[6] (2 SCT 320, 517.) The Mitchells filed a joint brief, contending, inter alia, that their murder convictions should be vacated because the prosecutor's aiding and abetting theory was invalid and that there was no valid theory of liability under which they could be found culpable for Carney's shooting of Monique N., including, as they argued in a supplemental brief, under the natural and probable consequences doctrine. (Opn. 27–32.)

The Court of Appeal affirmed the convictions. (Opn. 2, 35, 36.) It held, as is relevant here, that the Mitchells' convictions were valid under the proximate cause theory articulated by this Court in *Sanchez*, *supra*, 26 Cal.4th 834. (Opn. 27–32.) Under

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[6] Because the Court of Appeal rejected Carney's arguments and because this Court denied his petition for review, the People include in this summary of the case only those issues raised by the Mitchells in the Court of Appeal that are relevant to this Court's inquiry.

Sanchez, the act of each Mitchell brother in engaging in a gun battle with Carney, among others, combined with each brother's premeditation, deliberation, and malice aforethought, constituted sufficient grounds for the jury to convict each of them of first degree murder. (Opn. 27.) Noting that the rule of *Sanchez* is not one of aiding and abetting, and that "natural and probable consequences" is a notion not limited to aiding and abetting (opn. 29), the Court of Appeal rejected the Mitchells' contention that the prosecution presented no viable theory of liability. (Opn. 31–32.)

The Court of Appeal recognized the prosecutor also argued the defendants each aided and abetted one another in the shootout. (Opn. 30; 18 RT 5065–5066, 5123; 19 RT 5409.) It noted the prosecutor's argument "did not always clearly separate out the aiding and abetting principle from proximate causation based on the Mitchells' own malice." (Opn. 30 [highlighting the prosecutor's closing and rebuttal arguments].)[7] The argument did, however, "adequately cover[]" the *Sanchez* principles: that a defendant's actions must be a proximate cause of the death and

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[7] See also 18 RT 5121–5122 [arguing the Mitchells thought about the "weapons of war" they brought with them to the barbershop, as well as the time they had to think about their actions]; 18 RT 5123 [arguing "if they are each shooting and they are a substantial factor in those events, they are all guilty" and comparing the facts of this case to the street race in *People v. Kemp* (1957) 150 Cal.App.2d 654]; 19 RT 5409 [clarifying the Mitchells did not aid and abet Carney's attempts to kill them, but that the defendants "worked together to create an explosive environment" that inevitably led to the victim's death].

the defendants must have premeditated and deliberated a killing to be guilty of first degree murder. (Opn. 30.)

Carney, Louis Mitchell, and Lonnie Mitchell each filed a petition for review. The Mitchells' petitions raised identical issues. This Court granted the Mitchells' petitions for review in part and denied Carney's petition in whole.

ARGUMENT

I. THE RULE OF *SANCHEZ* PERMITS A FIRST DEGREE MURDER CONVICTION EVEN WHEN IT IS KNOWN THE DEFENDANT DID NOT FIRE THE FATAL SHOT

A participant in a shootout on a public street can be guilty of first degree murder, where the gun battle results in the death of an innocent bystander. The rule of *Sanchez* authorizes a murder conviction where the defendant's conduct proximately caused a death and the defendant acted with malice aforethought. (*Sanchez*, *supra*, 26 Cal.4th at pp. 845–846; see also Pen. Code, § 188, subd. (a).) That conviction may rise to the level of first degree murder when the defendant premeditated and deliberated about a killing or otherwise acted in a manner consistent with Penal Code section 189. (*Sanchez*, *supra*, at p. 849; see also Pen. Code, § 189, subd. (a).) As this Court explained, a defendant's participation in a mutual gun battle that results in the death of an innocent bystander proximately causes that bystander's death, as that participation is a substantial concurrent cause of the death. (*Sanchez*, *supra*, at pp. 848–849.) So long as the defendant acted with the required mens rea, e.g., premeditation and deliberation of a killing with malice aforethought, he is guilty of first degree murder. (*Id.* at pp. 850–851.)

While in *Sanchez* it was unknown which of the gun battle participants fired the fatal shot, the rule applies equally in cases where the evidence conclusively shows the defendant did not fire the fatal shot. This is because *Sanchez* turned not on any problem with identifying the direct cause of the killing, but rather on the effect of the defendant's actions as they relate to the killing and that defendant's personal culpability. *Sanchez* does not ask whether the defendant himself fired the fatal shot, but instead focuses on (a) the causal link between the defendant's actions and the death, and (b) his personal mens rea. Because here the evidence showed the Mitchells' actions of participating in a shootout on a public street proximately caused Monique N.'s death, and they took those actions with premeditation, deliberation, and an intent to kill, their first degree murder convictions must stand.

The relevant facts in *Sanchez* are analogous. There, the defendant, a gang member, rode in a car past the home of a rival gang member, Gonzalez. (*Sanchez*, *supra*, 26 Cal.4th at p. 840.) On Sanchez's third pass by Gonzalez's house, Sanchez and Gonzalez engaged one another in a gun battle—Gonzalez from his front yard, Sanchez from the moving vehicle. (*Id.* at pp. 840–841.) A single bullet from that gun battle struck and killed an innocent bystander who had been working on his truck in his son's driveway nearby. (*Id.* at p. 841.) Neither of the defendants' weapons was recovered, and the evidence did not otherwise establish which defendant fired the fatal shot. (*Id.* at p. 842.)

Both Sanchez and Gonzalez were charged with and convicted of first degree murder. (*Id.* at p. 843.)

In upholding Sanchez's conviction, the Court applied a two-prong analysis: (1) proximate causation in the form of the substantial concurrent causation doctrine; and (2) subjective mens rea (malice aforethought with premeditation and deliberation). To establish proximate cause under the *Sanchez* rule, the prosecution must prove "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.) Separately and additionally, to prove first degree murder, the prosecution must establish that the defendant personally acted with malice aforethought and that he premeditated and deliberated a killing.[8] (*Id.* at p. 849.) In other words:

> If a jury finds that a defendant proximately caused a death, either solely through his own conduct or through the actions of others where his conduct is shown to be a substantial concurrent cause of death, and the defendant did so with a premeditated intent to kill, then the defendant is guilty of *first degree* murder. (§ 189 ['All murder which is perpetrated . . . by any . . . kind of willful, deliberate and premeditated killing . . . is murder of the first degree.']; see also [*Commonwealth v.*] *Gaynor*[(1994) 538 Pa. 258,] 648 A.2d [295,] 298–299.)

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[8] While *Sanchez* also involved an alternate theory of first degree murder liability—intentionally discharging a firearm from a vehicle with intent to kill—the Mitchells' jury was presented with only one theory of first degree murder—premeditation and deliberation. (18 RT 5036–5037.) The People, therefore, limit this analysis to premeditation and deliberation, except where otherwise noted.

(*Id.* at p. 849, original italics.) This is because "it is proximate causation, not actual or direct causation, which, together with the requisite mens rea (malice), determines defendant's liability for murder." (*Id.* at p. 845.)

Whether or not Sanchez fired the fatal shot in the single-fatal-bullet murder was irrelevant to the *Sanchez* holding. (*Sanchez*, *supra*, 26 Cal.4th at pp. 848, 850, fn. 9 ["it does not matter whether defendant himself fired the shot or instead induced or provoked another to do so"]; *id.* at p. 856 (conc. opn. of Kennard, J.) [same].) As the Court held, "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." (*Id.* at p. 845.) And a defendant's participation in a gun battle in a public place that results in the death of an innocent bystander is a substantial concurrent cause of that death, i.e., a proximate cause of that death. (*Id.* at p. 848.)

This conclusion makes sense, for the death of an innocent bystander is imminently foreseeable as a result of a shootout on a crowded public street, and proximate cause is based in part on the idea of foreseeability. (See e.g., *People v. Roberts* (1992) 2 Cal.4th 271, 321–322 [discussing foreseeability as a factor to consider in determining the proximate cause element of an offense].) The actions of each of the participants in such a shootout are inherently deadly. As a result, and as Justice Kennard explained in her concurrence, any death—even of an

innocent bystander—is "a harm that both in kind and degree was within the risk that [the adversaries] must have expected." (*Sanchez*, *supra*, 26 Cal.4th at p. 855 (conc. opn. of Kennard, J.).) Where a shootout participant "expected and intended a death to occur, and a death did occur in a manner that was entirely foreseeable, it does not matter, for purposes of determining proximate or legal cause under criminal law, that the person killed was not the precise object of their lethal intent." (*Id.* at pp. 855–856 (conc. opn. of Kennard, J.).) In such circumstances, their actions constitute a proximate cause of the bystander's death.

Because proximate cause alone is insufficient to attach criminal liability, however, the *Sanchez* Court next turned to the question of mens rea. The evidence showed that, "at least as of the time the first shots rang out," Sanchez premeditated and deliberated Gonzalez's death. (*Sanchez*, *supra*, 26 Cal.4th at p. 849.) Applying the doctrine of transferred intent (by which Sanchez's intent to kill Gonzalez was transferred to the innocent bystander), the Court held the evidence supported the first degree murder conviction. (*Id.* at p. 850, fn. 9, citing *People v. Scott* (1996) 14 Cal.4th 544, 549; *id.* at p. 856 (conc. opn. of Kennard, J.).) It did not matter "whether [Sanchez] fired the fatal shot or instead induced or provoked another to do so . . . ." (*Id.* at p. 850, fn. 9, quoting *id.* at p. 856 (conc. opn. of Kennard, J.).) For so long as Sanchez intended to kill, his "culpable mental state is determined as if the person harmed were the person [Sanchez] intended to harm." (*Ibid.*)

Similarly here, the evidence established both the causal link between the Mitchells' conduct and the victim's death, as well as their premeditation and deliberation of a killing. The Mitchells actively participated in the gun battle in a public place—a proximate cause of Monique's death. After arming themselves and entering an establishment known as a hangout of their rivals, the Mitchells openly discussed shooting up the place. (5 RT 1466, 1468–1470, 1474–1475; 6 RT 1532–1534, 1557–1558.) Their behavior prompted Jones to call Carney to ask him for a ride home for himself, his friend, and his friend's son. (7 RT 1889–1890; 8 RT 2259, 2268, 2334; 14 RT 3813–3816, 3877; 16 RT 4383–4389.) When Carney and other armed G-Mobb members arrived and approached the barbershop, the Mitchells stepped outside and began shooting, resulting in Monique N.'s death (as well as Barksdale's)—an imminently foreseeable result of their actions. (3 RT 679, 688, 691–695, 697, 713–714, 725, 727–729; 5 RT 1402–1403, 1486–1487; 6 RT 1543–1544, 1568; 7 RT 1892–1894, 1869, 1900–1901; 15 RT 4057.)

The evidence further supported the jury's finding that the Mitchells premeditated and deliberated a killing, just as Sanchez had. Louis Mitchell threatened to kill Barksdale a week earlier (a threat on which he made good when he shot Barksdale in the chest, killing him). (5 RT 1201, 1258–1262, 1292–1297, 1330; 14 RT 3716.) Lonnie paced angrily in the barbershop, with a TEC-9 draped around his neck, discussing with someone on the phone that he wanted to shoot the place up. (5 RT 1470, 1474–1475; 6 RT 1532–1534.) Additionally, after the shootout on the

street, the Mitchells returned inside the barbershop where one of them shot at Jones who was trying to escape through the back of the shop, narrowly missing him and shooting holes in his coat instead.[9] (16 RT 4393–4395, 4399–4400.) One of the Mitchells, using multiple guns including an automatic weapon, also shot four other individuals (not gang members) inside the barbershop—some of whom were hiding beneath and behind furniture—before running to a waiting vehicle and fleeing the scene. (4 RT 956–960, 1010, 1040–1041, 1056–1057, 1078–1079, 1085; 5 RT 1399, 1407–1409; 10 RT 2887.)

This evidence supports the jury's finding that the Mitchells, while premeditating and deliberating a killing, proximately caused the victim's death. Just as in *Sanchez*, their first degree murder convictions were proper. It is of no legal moment that the identity of the fatal shooter here is known—and is not one of the Mitchell brothers—whereas in *Sanchez* it was not known whether Sanchez's bullet killed the bystander. The reasoning of the *Sanchez* decision did not turn on the identity of the person who fired the fatal shot; for even if Sanchez had been known *not* to be the shooter, the result would have been the same. "[I]t has long been recognized that there may be multiple proximate causes of a homicide, even where there is only one known actual or direct cause of death." (*Sanchez*, *supra*, 26 Cal.4th at p. 846.) In support of this conclusion, this Court cited with approval cases in which the defendant was known not to have inflicted the fatal

[9] As the Mitchells fired shots inside the shop, Jones fired back. (16 RT 4393–4395.)

injury, including *People v. Kemp* (1957) 150 Cal.App.2d 654. (*Ibid.*)

Kemp was a vehicular homicide case involving two defendants who entered into a car race on a public street. (*Kemp*, *supra*, 150 Cal.App.2d at p. 656.) As the defendants approached a blind intersection at a high rate of speed, Kemp was able to avoid another vehicle in the intersection, while his codefendant was not. (*Ibid.*) A passenger in the third vehicle died after the collision, and both Kemp and his codefendant were convicted of vehicular homicide under Penal Code section 192. (*Ibid.*) Kemp challenged his conviction arguing that "there was no showing of anything attributable to him which was a proximate cause of the death . . . ." (*Id.* at p. 658.) The *Kemp* court rejected his argument because "the acts of both [drivers] led directly to and were a proximate cause of the result, and the fact that the appellant happened to narrowly escape the actual collision is not the controlling element." (*Id.* at p. 659.) The defendants "were not acting independently of each other, and . . . they were jointly engaged in a series of acts which led directly to the collision." (*Ibid.*) Determining Kemp's actions proximately caused the death, the court upheld his conviction. (*Ibid.*)

The same is true here. While Carney fired the shot that directly killed Monique, "the acts of both [Carney and the Mitchells] led directly to and were the proximate cause of" Monique's death. (See *Kemp*, *supra*, 150 Cal.App.2d at p. 659; *Sanchez*, *supra*, 26 Cal.4th at p. 846.) Just as the defendants in *Kemp* created a situation deadly to bystanders (engaging in a

drag race on a public street), so too did the Mitchells and their rivals (engaging in a shootout on a public street). The Mitchells were "jointly engaged" with Carney and other G-Mobb gang members and associates "in a series of acts which led directly to" Monique's death. (See *Kemp*, *supra*, at p. 659.) "It was by the merest chance that" the Mitchells' shots avoided striking Monique but Carney's did not. (See *ibid*.)

It is also of no concern that, in this case, the defendant who fired the fatal shot (Carney) was convicted of manslaughter and not murder (as were the Mitchells), whereas both defendants in *Sanchez* were convicted of first degree murder. (See *Sanchez*, supra, 26 Cal.4th at p. 843.) The rule in *Sanchez* makes clear that each defendant's culpability is dependent upon his own intent, not upon intent imputed from any other actor. (*Id*. at pp. 849–851; accord, *People v. McCoy* (2001) 25 Cal.4th 1111, 1118 [a "person's mental state is her own; she is liable for her mens rea, not the other person's"].) While *Sanchez* noted that the evidence established both Sanchez and Gonzalez had mutually planned each other's murder, Sanchez's conviction was not dependent upon Gonzalez's intent to kill. (*Sanchez*, *supra*, at pp. 849–851.) The *Sanchez* inquiry focuses on each defendant's own personal intent; so if two actors proximately cause the death, their individual culpability depends on their individual mental state.

This Court has recognized the individual nature of a defendant's mental state in other contexts, as well. For example, a person

> "may be convicted of first-degree murder, even though the primary party is convicted of second-degree murder

> or of voluntary manslaughter. This outcome follows, for example, if the secondary party, premeditatedly, soberly and calmly, assists in a homicide, while the primary party kills unpremeditatedly, drunkenly, or in provocation. Likewise, it is possible for a primary party to negligently kill another (and, thus, be guilty of involuntary manslaughter), while the secondary party is guilty of murder, because he encouraged the primary actor's negligent conduct, with the intent that it result in the victim's death." (Dressler, Understanding Criminal Law [(2d ed. 1995)] § 30.06[C], p. 450.)

(*McCoy*, *supra*, 25 Cal.4th at p. 1119; see also *People v. Amezcua and Flores* (2019) 6 Cal.5th 886, 917–918, citing *id.* at p. 1120.) In other words, where there are multiple actors whose conduct proximately causes a victim's death, their criminal culpability depends on their personal mental state when so acting.

The premise that each actor's culpability is determined individually in *Sanchez* is underscored by the fact that the Court held Sanchez's first degree murder conviction was also valid under the prosecution's alternate theory: discharging a firearm from a motor vehicle with the intent to kill. (*Sanchez*, *supra*, 26 Cal.4th at p. 850, 851, fn. 10 ["even without a further showing of premeditation, and regardless of the fact that an *unintended* victim was killed, defendant's act of shooting at Gonzalez from the vehicle established the requisite mental state for conviction of first degree murder under section 189."].) That theory did not relate to Gonzalez's mental state, as only Sanchez fired from a car; Gonzalez fired his weapon from a front yard. The Court held Sanchez's first degree murder conviction was valid, therefore, based on his own mental state, notwithstanding Gonzalez's mental state.

The Mitchells of course cannot avoid liability simply because they did not have a specific intent to shoot and kill bystander Monique. Under the doctrine of transferred intent, as the Court in *Sanchez* held, a "defendant's culpable mental state is determined as if the person harmed were the person *defendant meant* to harm." (*Sanchez*, *supra*, 26 Cal.4th at. p. 850, fn. 9, italics added, quoting *id.* at p. 856 (conc. opn. of Kennard, J.); see also *People v. Bland* (2002) 28 Cal.4th 313, 319, fn. 1 [under the doctrine of transferred intent, "[s]omeone who premeditates a killing but kills the wrong person is guilty of a premeditated, not just intentional, murder"].) Indeed, as this Court later reasoned, "assuming legal causation, a person maliciously intending to kill is guilty of the murder of all persons actually killed. If the intent is premeditated, the murder or murders are first degree." (*People v. Bland*, *supra*, at pp. 323–324.) The Mitchell brothers' premeditation, deliberation, and intent to kill Carney and their other rivals attaches to their actions that proximately caused the death of bystander Monique.[10]

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[10] Some commentators characterize the doctrine of transferred intent as relevant to the causation analysis. (See e.g., LaFave, Subst. Crim. L., § 5.2, subd. (c).) This Court and others, however, have regularly applied it in murder cases to the mens rea analysis. (See e.g., *Sanchez*, *supra*, 26 Cal.4th at p. 850, fn. 9 [applying the transferred intent doctrine in its mens rea analysis]; *People v. Bland, supra,* 28 Cal.4th at p. 319 ["*assuming legal causation*, a person maliciously intending to kill is guilty of the murder of all persons actually killed. If the intent is premeditated, the murder or murders are first degree," italics added]; *People v. Scott* (1996) 14 Cal.4th 544, 552–553 [where a defendant attempts to kill one person, resulting in the death of

(continued…)

The verdicts as to each defendant here—acquittal, voluntary manslaughter, and first degree murder—show that the jury understood the requirement to determine each defendant's own mental state and render the appropriate verdicts accordingly. The Mitchells' first degree murder convictions show the jury rejected their claims of self-defense and determined that they acted with premeditation, deliberation, and intent to kill, as they were not convicted of second degree murder. Carney's voluntary manslaughter conviction shows the jury accepted that he acted either by provocation or in unreasonable self-defense or defense of another. Finally, Jones's acquittal shows the jury accepted that he acted in self-defense. Finding a different level of culpability to each defendant, the jury clearly understood that culpability rested individually with each defendant, based on his own personal mental state, as instructed by the court.

In sum, therefore, *Sanchez* sets forth two key propositions relevant to cases involving the death of an innocent bystander as a result of a shootout: (1) that a person's participation in a gun battle on a public street can be a proximate cause of any resulting

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(…continued)
an innocent bystander, courts "have uniformly applied the common law doctrine of transferred intent to assign a defendant's criminal liability for the killing of the unintended victim" and "have uniformly rejected the defendants' argument that their convictions were based on insufficient evidence of *intent to kill*." italics added]; see also *Harvey v. State* (1996) 111 Md.App. 401, 681 A.2d 628, 637 [applying the doctrine of transferred intent in the context of mens rea, separate from any analysis regarding actus reus].)

shooting death of an innocent bystander; and (2) the level of that person's criminal liability, if any, is based on his own personal, subjective mens rea when engaging in that gun battle. Neither of those propositions precludes the Mitchells' first degree murder convictions, despite evidence that Carney, not either of the Mitchells, fired the fatal shot. Because *Sanchez* remains good law, see *post*, and because the Mitchells do not otherwise challenge the sufficiency of the evidence of their convictions under that rule, the Mitchells' convictions must stand.

II. THE REFORMS IN *PEOPLE V. CHIU* AND SENATE BILL NO. 1437 RELATE TO SUBJECTIVE CULPABILITY AND DO NOT AFFECT THE RULE OF *SANCHEZ*

In the past few years, this Court and the Legislature have limited the applicability of vicarious liability theories to murder, including indirect aiding and abetting under the natural and probable consequences rule. In *Chiu*, *supra*, 59 Cal.4th 155, this Court barred the use of indirect aiding and abetting as a basis for first degree murder; in Senate Bill No. 1437, the Legislature expanded that restriction to second degree murder.[11] The concerns underlying *Chiu* and Senate Bill No. 1437 were the same—the unfairness of penalizing a defendant at a level not commensurate with his personal level of culpability. The concerns highlighted by this Court's decision in *Chiu* and the Legislature in Senate Bill No. 1437 relate to penalizing a defendant by *assuming* a defendant's mental state based on

[11] Though not relevant to the analysis here, Senate Bill No. 1437 also limited the application of the felony-murder rule in first degree murder cases. (See Pen. Code, § 189, subds. (e), (f).)

objective considerations or *imputing* the mental state of another person to the defendant. Because liability for murder does not attach under the rule of *Sanchez* absent an independent finding of the defendant's own mens rea, neither this Court's decision in *Chiu* nor the Legislature's enactment of Senate Bill No. 1437 has any impact on that rule.

A. *People v. Chiu* Precluded First Degree Murder Based on Indirect Aiding and Abetting But Did Not Affect *Sanchez*

In *Chiu*, *supra*, 59 Cal.4th 155, this Court held that a conviction of first degree premeditated murder may not be based on a theory that a homicide was the "natural and probable consequence" of aiding and abetting a different "non-target" crime. In so holding, *Chiu* examined the "two distinct forms of culpability for aiders and abettors": direct aiding and abetting liability and indirect aiding and abetting liability under the natural and probable consequences rule. (*Chiu*, *supra*, 59 Cal.4th at p. 158; see also *id.* at pp. 171–172 (conc. & dis. opn. of Kennard, J.).) Penal Code section 31 provides that not only direct perpetrators of a crime, but also those who "'. . . aid and abet in its commission . . . are principals in any crime so committed.'" (*Chiu*, *supra*, at p. 161, citing Pen. Code, § 31; see also *People v. McCoy*, *supra*, 25 Cal.4th at p. 1117 [one who "aids and abets a crime is guilty of that crime even if someone else committed some or all of the criminal acts"]; *People v. Mendoza* (1998) 18 Cal.4th 1114, 1122 [aider and abettor "'shares the guilt of the actual perpetrator'"], quoting *People v. Prettyman* (1995) 14 Cal.4th 248, 259.)

A direct aider and abettor is guilty of an offense if he "acts 'with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.' [Citation.]" (*Chiu*, *supra*, 59 Cal.4th at p. 161, italics in original.) While a person can *directly* aid and abet an offense, he may also *indirectly* aid and abet a crime under the natural and probable consequences rule. ""'A person who knowingly aids and abets criminal conduct is guilty not only of the intended crime [target offense] but also of any other crime the perpetrator actually commits [nontarget offense] that is a natural and probable consequence of the intended crime.'"" (*Ibid.*, citations omitted.) "A nontarget offense is a 'natural and probable consequence' of the target offense if, judged objectively, the additional offense was reasonably foreseeable." (*Ibid.*, citation omitted.) The standard is an objective, rather than subjective one. (*Id.* at p. 165.) "[L]iability "'is measured by whether a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted.'"" (*Id.* at p. 161, citation omitted.)

Liability for indirect aiding and abetting under the natural and probable consequences doctrine is vicarious. (*Chiu*, *supra*, 59 Cal.4th at p. 164, citing *People v. Garrison* (1989) 47 Cal.3d 746, 778, *People v. Croy* (1985) 41 Cal.3d 1, 12, fn. 5, and *People v. Brigham* (1989) 216 Cal.App.3d 1039, 1054; see *People v. Superior Court (Sparks)* (2010) 48 Cal.4th 1, 17 [liability for unintended crimes under the natural and probable consequences

doctrine is "true vicarious liability"].) As such, a defendant's liability

> "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. . . . 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."

(*Chiu*, *supra*, at p. 164, quoting *People v. Canizalez* (2011) 197 Cal.App.4th 832, 852; see *Chiu*, *supra*, at p. 165 [aider and abettor liability under the natural and probable consequences doctrine "does not require assistance with or actual knowledge and intent relating to the nontarget offense, nor subjective foreseeability of either that offense or the perpetrator's state of mind in committing it"], citation omitted.)

Chiu recognized that "[i]n the context of murder, the natural and probable consequences doctrine serves the legitimate public policy concern of deterring aiders and abettors from aiding or encouraging the commission of offenses that would naturally, probably, and foreseeably result in an unlawful killing." (*Chiu*, *supra*, 59 Cal.4th at p. 165.) A person could be guilty of murder under that doctrine if "under all of the circumstances presented, a reasonable person in the defendant's position would have or should have known that the nontarget offense was a reasonably foreseeable consequence of the act aided and abetted by the defendant." (*Id.* at p. 166.) In other words, the indirect aiding and abetting analysis ends with a finding of objective foreseeability, and a resulting conviction for the nontarget offense

does not take the defendant's subjective mens rea into consideration. Such a conviction rests solely on the policy determination that a defendant cannot escape liability for a nontarget offense that was objectively foreseeable.

In *Chiu*, the Court concluded the policy concern was not served by allowing a conviction for first degree premeditated murder based on indirect aiding and abetting. Recognizing that "aider and abettor liability under the natural and probable consequences doctrine does not require assistance with or actual knowledge and intent relating to the nontarget offense, nor subjective foreseeability of either that offense or the perpetrator's state of mind in committing it," the policy concerns that supported a second degree murder conviction did not extend to *first degree premeditated* murder. (*Chiu*, *supra*, 59 Cal.4th at pp. 165–166.) First degree premeditated murder contains a "uniquely subjective and personal" mental state. (*Id.* at p. 166.) "It requires more than a showing of intent to kill; the killer must act deliberately, carefully weighing the considerations for and against a choice to kill before he or she completes the acts that caused the death." (*Ibid.*) *Chiu* thus concluded that only the lesser "punishment for second degree murder is commensurate with a defendant's culpability for aiding and abetting a target crime that would naturally, probably, and foreseeably result in a murder under the natural and probable consequences doctrine." (*Ibid.*) The Court made it clear, however, that "[a]iders and abettors may still be convicted of first degree premeditated

murder based on direct aiding and abetting principles." (*Ibid.*)[12] In such cases, "the prosecution must show that the defendant aided or encouraged the commission of the murder with knowledge of the unlawful purpose of the perpetrator and with the intent or purpose of committing, encouraging, or facilitating its commission." (*Id.* at p. 167.)

Having rejected indirect aiding and abetting as a theory of liability for premediated first degree murder, the *Chiu* Court was troubled by the fact the record did not establish beyond a reasonable doubt whether the jury relied on the only remaining legally valid theory in the case—i.e., direct aiding and abetting. During deliberations, the jury reached a stalemate as to the degree of murder because one juror was "bothered by the principle of aiding and abetting and putting an aider and abettor in the shoes of the shooter." (*Chiu*, *supra*, 59 Cal.4th at p. 167.) After the trial court removed that juror, the recomposed jury found Chiu guilty of first degree premeditated murder. (*Ibid.*) The *Chiu* Court could not conclude beyond a reasonable doubt, therefore, that the jury relied on direct aiding and abetting as opposed to indirect aiding and abetting when convicting Chiu of first degree murder. (*Ibid.*) Unlike in *Chiu*, however, the Mitchells' jury was precluded from finding first degree murder under an indirect aiding and abetting theory, as the trial court

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[12] The Court also made clear that such liability under the natural and probable consequences doctrine "operates independently of the felony-murder rule." (*Chiu*, *supra*, 59 Cal.4th at p. 166.)

instructed that "murder under natural and probable consequences is murder of the second degree." (18 RT 5036.) The Mitchells' first degree murder convictions, therefore, establish beyond a reasonable doubt that the jury did not rely on indirect aiding and abetting when reaching those verdicts. (*People v. Frederickson* (2020) 8 Cal.5th 963, 1026 [a jury is presumed to understand and follow the instructions].)

Where—as in *Sanchez* and in this case—a defendant is convicted of murder based on his own harm-causing actions (participating in a gun battle in a public place) and his own culpable mental state (an intent to kill another with premeditation and deliberation), the concerns expressed by the Court in *Chiu* are not present.

B. Senate Bill No. 1437 Extended *Chiu*'s Holding to Second Degree Murder But Did Not Affect *Sanchez*

While *Chiu* explicitly limited its holding to first degree premeditated murder, the Legislature took steps to extend that holding to second degree murder. In September 2017—well after the Mitchells' convictions—the Senate, with the Assembly's concurrence, passed Senate Concurrent Resolution No. 48 in which it resolved to recognize the need for statutory reforms "to more equitably sentence offenders in accordance with their involvement in the crime." (Sen. Conc. Res. No. 48, Stats. 2017 (2017-2018 Reg. Sess.), res. ch. 175 [SCR 48].)

SCR 48 primarily addressed the Legislature's desire to reform the felony-murder rule, but it also addressed this Court's holding in *Chiu* and "aider and abettor liability for other criminal

matters, specifically the 'natural and probable' consequences doctrine, which also results in greater punishment for lesser culpability." (Stats. 2017, res. ch. 175 ["reform is needed in California to limit convictions and subsequent sentencing in both felony murder cases and aider and abettor matters prosecuted under 'natural and probable consequences' doctrine"].) It noted the natural and probable consequences doctrine as applied in aiding and abetting cases allowed first degree murder convictions for individuals who "lack[ed] the mens rea and culpability for murder . . . as if they were the ones who committed the fatal act." (*Ibid.*) The resolution further criticized the doctrine because, despite the fact that "'reasonable foreseeability can be a legitimate basis for assigning culpability,'" the concept of indirect aiding and abetting liability under the natural and probable consequences doctrine risks "overbroad application," given notions of "hindsight bias" and the tendency to "'overestimate the predictability of past events.'" (*Ibid.*, quoting *People v. Cruz-Santos*, review denied Mar. 25, 2016, S231292 (dis. opn. of Liu, J.).) The resolution posited that legislative action was necessary to ensure that in aiding and abetting cases, "natural and probable consequences liability—a judge made doctrine in tension with the usual mens rea requirement of the criminal law—is kept 'consistent with reasonable concepts of culpability.' (*People v. Chiu* (2014) 59 Cal.4th 155, 165.)" (Stats. 2017, res. ch. 175.)

A year later, the Legislature passed Senate Bill No. 1437, effective January 1, 2019, which referenced SCR 48 and implemented statutory changes that the resolution had resolved

to make with respect to California's murder statutes. (Stats. 2018, ch. 1015.) As is relevant here, Senate Bill No. 1437 significantly changed California law as it relates to the application of the natural and probable consequences doctrine of liability in murder cases. The bill contained various statutory amendments designed to "amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (*Id*. at § 1, subd. (f).)

Intending to ensure that "a person should be punished for his or her actions according to his or her own level of individual culpability," Senate Bill No. 1437 amended Penal Code section 188 by requiring, except in cases of felony murder, that all principals to murder must act with express or implied malice to be convicted of that crime. (Stats. 2018, ch. 1015, § 1, subds. (b), (d), § 2; Pen. Code, § 188, subd. (a)(3).)[13] The amendments were

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[13] With respect to felony murder, Senate Bill No. 1437 amended Penal Code section 189 to require that, to be guilty of murder under a felony-murder theory, the defendant must have been the actual killer, a direct aider and abettor who acted with an intent to kill, or a major participant in the underlying felony who acted with reckless indifference to human life. (Pen. Code, § 189, subd. (e); Stats. 2018, ch. 1015, § 3.)

These new limitations "do not apply to a defendant when the victim is a peace officer who was killed while in the course of his or her duties, where the defendant knew or reasonably should

(continued…)

passed to ensure that "[a] person's culpability for murder [is] premised upon that person's own actions and subjective mens rea." (*Id*. at § 1, subd. (g).)

Murder in California is "the unlawful killing of a human being, or a fetus, with malice aforethought." (Pen. Code, § 187, subd. (a).) Penal Code section 188 defines the offense element of "malice." (Pen. Code, § 188.) As amended by Senate Bill No. 1437, that section now provides as follows:

> (a) For purposes of Section 187, malice may be express or implied.
>
> (1) Malice is express when there is manifested a deliberate intention to unlawfully take away the life of a fellow creature.
>
> (2) Malice is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.
>
> (3) Except as stated in subdivision (e) of Section 189, in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime.
>
> (b) If it is shown that the killing resulted from an intentional act with express or implied malice, as defined in subdivision (a), no other mental state need be shown to establish the mental state of malice aforethought. Neither an awareness of the obligation to act within the general body of laws regulating society nor acting despite that awareness is included within the definition of malice.

(…continued)
have known that the victim was a peace officer engaged in the performance of his or her duties." (Pen. Code, § 189, subd. (f).)

(Pen. Code, § 188.)

These amendments intended to, and did, eliminate indirect aiding and abetting under the natural and probable consequences doctrine as a basis for murder liability. (See *People v. Lee* (2020) 49 Cal.App.5th 254, 262, review granted Jul. 15, 2020, S262459 [stating that Senate Bill No. 1437 eliminated the natural and probable consequences doctrine of vicarious liability as it relates to murder].)[14] Penal Code section 188 now requires that all direct perpetrators and aiders and abettors alike act with malice to be guilty of murder. (Pen. Code, § 188, subd. (a)(3); see also *People v. Lopez* (2019) 38 Cal.App.5th 1087, 1103, review granted Nov. 13, 2019, S258175.) For those individuals convicted of felony murder or murder under an indirect aiding and abetting theory prior to the enactment of Senate Bill No. 1437, the bill added a petition process by which they can seek relief. (Stats. 2018, ch. 1015, § 4 [adding section 1170.95 to the Penal Code].)

Sanchez does not implicate the concerns addressed by Senate Bill No. 1437. Rather, it requires exactly what Senate Bill No. 1437 now requires all juries to do: assess the defendant's individual, subjective mens rea. (*Sanchez*, *supra*, 26 Cal.4th at p. 849.) The *Sanchez* rule, therefore, remains good law.

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[14] See also *People v. Verdugo* (2020) 44 Cal.App.5th 320, 323, review granted Mar. 18, 2020, S260493 [same]; *People v. Lewis* (2020) 43 Cal.App.5th 1128, 1134, review granted Mar. 18, 2020, S260598 [same]; *D.W. v. Superior Court* (2019) 43 Cal.App.5th 109, 113 [same].

C. The Reference in the *Sanchez*-based Jury Instructions to "Natural and Probable Consequences" Concerned Causation, Not Culpability

The Mitchells argue that they should benefit from the holding in *Chiu* and the legislative reforms in Senate Bill No. 1437, contending that "*Sanchez*'s 'substantial concurrent causation' theory is a type of natural and probable consequences liability," rejected by these judicial and legislative reforms. (Opening Brief on the Merits 16; see *id.* at 19.) That argument mistakenly assumes that the "natural and probable consequences" concept is limited in its application to a theory of aiding and abetting liability. This is error.[15]

The *Sanchez*-based instructions that the Mitchells' jury received referenced "natural and probable consequence[s]"—but in the context of instructions on whether a defendant's actions proximately caused the victim's death. The instruction on multiple and concurrent causes provided:

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[15] To be clear, because the case was tried prior to the passage of Senate Bill No. 1437, if the jury had convicted the Mitchells of second degree murder based on indirect aiding and abetting liability, they still would be required to seek relief through the petition process prescribed by Senate Bill No. 1437, not on direct appeal. (Pen. Code, § 1170.95 [setting forth the process by which defendants may seek retroactive relief]; see also *People v. Anthony* (2019) 32 Cal.App.5th 1102, 1147 [citing *People v. Conley* (2016) 63 Cal.4th 646 for the proposition that defendants must seek relief under Penal Code section 1170.95, including in cases not yet final on appeal], *People v. Martinez* (2019) 31 Cal.App.5th 719, 728–729 [same].)

> 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 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.

(*Sanchez*, *supra*, 26 Cal.4th at pp. 843, 845, italics added.)

The reference in this instruction to "natural and probable consequences" does not transform the theory into one of aiding and abetting liability where a jury assumes or imputes the defendant's mens rea. Rather in this context, a natural and probable consequence is an objectively foreseeable consequence. (*People v. Medina* (2009) 46 Cal.4th 913, 920 ["[A]lthough variations in phrasing are found in decisions addressing the [natural and probable consequences] doctrine . . . the ultimate question is one of foreseeability"].) An expression of foreseeability, the phrase "natural and probable consequences" appears in various legal contexts (both civil and criminal) where a proximate cause analysis is required. (See e.g., *People v. Soto* (2018) 4 Cal.4th 968, 974 [limiting the application of "natural and probable consequences" to the "physical component" of implied malice murder]; *Scott v. Shepherd* (1773) 96 Eng.Rep. 525 [finding injury to the plaintiff the "natural and probable

consequence of the act done by the defendant"]; *Prentice v. North Am. Title Guaranty Corp.* (1963) 59 Cal.2d 618, 621 [finding the plaintiff's injury the "natural and probable consequence" of the defendant's negligence]; *Salem v. Superior Court* (1989) 211 Cal.App.3d 595, 603 [application of natural and probable consequences rule to causation inquiry in dram shop wrongful death suit]; *Chaparkas v. Webb* (1960) 178 Cal.App.2d 257, 260 [to be liable for damages in tort, "the detriment inflicted on the plaintiff must still be the natural and probable result of the defendant's conduct"].)

Under an indirect aiding and abetting theory, liability attaches upon a finding of foreseeability without requiring an additional finding of the defendant's mental state. (*Chiu*, *supra*, 59 Cal.4th at pp. 161–162 ["liability "'is measured by whether a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted.'" [Citation.]"].) The additional mens rea element of the *Sanchez* analysis distinguishes it from indirect aiding and abetting liability. (*Sanchez*, *supra*, 26 Cal.4th at p. 849 [upon a finding of proximate cause, what "remain[s] to be proved [is] defendant's culpable mens rea"].) As a result, a guilty verdict based on a finding that a defendant personally acted with malice aforethought (for all murders) and personally premeditated and deliberated a killing (for first degree premeditated murder) insulates convictions under *Sanchez* from any concerns about

imposing a "greater punishment for lesser culpability." (Stats. 2017, res. ch. 175.)

The Court of Appeal here recognized these distinctions between the *Sanchez* rule and aiding and abetting theories. It first "paus[ed] to observe that [the proximate cause] instruction makes clear that 'natural and probable consequences' is not a notion limited to aiding and abetting liability, as is sometimes assumed, as for example in the Mitchells' supplemental brief." (Opn. at 29.) It later "observe[d] that [*Sanchez*] 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." (*Ibid*.) Because of these distinctions, the rule of *Sanchez* was unaffected by *Chiu* and Senate Bill No. 1437.

The jury here likewise understood this distinction, as seen by the Mitchells' first degree murder verdicts. Given the court's instruction that "[m]urder under natural and probable consequences is murder of the second degree" (18 RT 5036), and the presumption that a jury understands and follows the court's instructions (*People v. Frederickson*, *supra*, 8 Cal.5th at p. 1026), the verdicts illustrate that the jury's inquiry did not end with a determination that Monique's death was a natural and probable consequence of the Mitchells' participation in a gun battle. Instead, the jury's first degree murder finding necessarily means the jury inquired into subjective malice, premeditation, and

deliberation.[16] And the evidence overwhelmingly supports the finding that each brother possessed the intent required for first degree murder.

Given this subjective intent inquiry, a conviction for murder under the rule of *Sanchez*, including a heightened penalty for first degree premeditated murder, is commensurate with a defendant's "uniquely subjective and personal" level of culpability. (*Chiu*, *supra*, 59 Cal.4th at p. 166; accord Stats. 2018, ch. 1015, § 1, subd. (g) ["A person's culpability for murder must be premised on that person's own actions and subjective mens rea."].) The Mitchells' convictions under *Sanchez* are proper.

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[16] For these same reasons, the first degree murder verdicts establish beyond a reasonable doubt that the Mitchells suffered no prejudice from any error in the trial court's instruction on the now-abolished theory that "[m]urder under natural and probable consequences is murder of the second degree." (18 RT 5036; *Chiu*, *supra*, 59 Cal.4th at p. 167.)

CONCLUSION

The judgments should be affirmed.

Dated: September 29, 2020 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWER BRIEF ON THE MERITS uses a 13-point Century Schoolbook font and contains 9,073 words.

Dated: September 29, 2020

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DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

Case Name: **People v. Carney, et al.**
No.: **S260063**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On September 29, 2020, I electronically served the attached **ANSWER BRIEF ON THE MERITS** by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on September 29, 2020, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

Robert Joseph Beles
Attorney at Law
Law Offices of Beles & Beles
1 Kaiser Plaza, Suite 2300
Oakland, CA 94612-3616

Paul McCarthy
Attorney at Law
Law Offices of Beles & Beles
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The Honorable Anne Marie Schubert
District Attorney
Sacramento County District Attorney's Office
901 G Street
Sacramento, CA 95814

County of Sacramento
Superior Court of California
720 9th Street
Sacramento, CA 95814-1398

Court of Appeal
Third Appellate District
Via TrueFiling

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on September 29, 2020, at Sacramento, California.

/s/ *D. Boggess*
Declarant

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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. CARNEY**
Case Number: **S260063**
Lower Court Case Number: **C077558**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **kimberley.donohue@doj.ca.gov**

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

Title(s) of papers e-served:

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Kimberley Donohue Office of the Attorney General 247027	kimberley.donohue@doj.ca.gov	e-Serve	9/29/2020 9:57:13 AM
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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.

9/29/2020
Date

/s/Diane Boggess
Signature

Donohue, Kimberley (247027)

Last Name, First Name (PNum)

DOJ Sacramento/Fresno AWT Crim

Law Firm