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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. LEONARD MITCHELL, Defendant and Appellant.	B237000 (Los Angeles County Super. Ct. No. BA350939)

APPEAL from a judgment of the Superior Court of Los Angeles County. William C. Ryan, Judge. Affirmed.

Edward H. Schulman, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Mary Sanchez and Jonathan M. Krauss, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Leonard Mitchell was convicted, following a jury trial, of the first degree murders of Adriana Pizarro and Alexander Castro (Alex), in violation of Penal Code section 187, subdivision (a).[1] The jury found true the allegations that appellant personally used and intentionally discharged a handgun within the meaning of section 12022.53, subdivisions (b) through (d). The jury also found true the special circumstance allegation that appellant was convicted in this proceeding of more than one offense of murder within the meaning of section 190.2, subdivision (a)(3). The trial court sentenced appellant to life without the possibility of parole on both counts. The court imposed an additional term of 25 years to life onto each sentence pursuant to section 12022.53.

Appellant appeals from the judgment of conviction, contending there is insufficient evidence to support the jury's finding of first degree murder and the trial court erred in failing to instruct, sua sponte, on sudden quarrel and heat of passion. He contends that if he has forfeited the instructional claim through counsel's inaction, he received ineffective assistance of counsel. Appellant further contends that the imposition of a section 12022.53 enhancement term in a murder conviction violates California law, and federal double jeopardy principles. We affirm the judgment of conviction.

Facts

On the night of December 20, 2008, about 9:15 p.m., Cathy Chavez and her aunt, Adriana Pizarro, were walking out the front gate of Chavez's house at 1152 East 50th Street, when Pizarro said, "[C]an you hear that? There's gunshots." Chavez looked east toward the sound and saw "sparks." Pizarro suddenly fell to the ground. Cathy realized that Pizarro had been shot. Cathy called 911, and paramedics came and took Pizarro away. Pizarro later died from her wounds.

Los Angeles Police Department (LAPD) Sergeant Scotty Stevens was on duty in the area, and heard a radio call regarding a shooting on East 50th Street. As he arrived at the location, he saw a traffic collision, which ended with a gray Nissan Pathfinder

[1] All further statutory references are to the Penal Code unless otherwise indicated.

"parked on the back" of a white Volkswagen with its engine still running. The Pathfinder appeared to have sideswiped several cars parked on the south side of the street, before crashing into the Volkswagen. Sergeant Stevens approached the Pathfinder and saw Alex slumped over in the driver seat. Sergeant Stevens saw that Alex had what appeared to be gunshot wounds to his throat and his chin, and believed that he was dead. The sergeant also noticed that there were two bullet holes in the windshield. He did not find any weapons on Alex's person, or anywhere else in the vehicle. When paramedics arrived, they pronounced Alex dead at the scene.

LAPD Homicide Detective Kelle Baitx came to the scene of the collision and discovered that shots were fired from 1218 East 50th Street. In the area in front of that house, he found a bullet, as well as numerous bullet fragments and nine expended shell casings. Based on his training and experience, he believed that a nine-millimeter semi-automatic handgun had been used in close vicinity of where the casings were recovered, and that all of the casings had been fired by the same gun. He discovered 17 impact marks from bullets on the Pathfinder, and determined that the bullets that hit the windshield had come directly from the left of the driver's door. Based on the position of the bullet holes throughout the car, Detective Baitx determined that the shooter "pied" the car, meaning that he circled in front of the car while firing at it. The shooter standing at 1218 East 50th Street also fired the shot that killed Pizarro. Detective Baitx determined that the shooter was 436 feet away from Pizarro at the time. There was no evidence to suggest that Pizarro was an intended target of the shooter.

As part of his investigation, Detective Baitx discovered that a Taurus with a broken window was parked in front of 1218 East 50th Street. He later learned that the Taurus belonged to Jesse Charles (Jesse). Jesse lived at that address with Taffy Franklin (Taffy) and their daughter. Appellant was a longtime friend of the couple, and was frequently at the house. Taffy described appellant as being like a brother to both her and Jesse. Taffy said that appellant did "a lot of things for my family. Yes, he would pick my daughter up from school sometimes. He would go to the store for me. He would wash my car. He would . . . mow the lawns . . . ."

On December 29, 2008, LAPD Homicide Detective Richard Arciniega picked Taffy up from work and brought her to the station for questioning. Taffy told Detective Arciniega that on the night of December 20, she was home with Jesse and their daughter playing dominoes. Alex called Jesse on his cell phone and asked to speak with Taffy. Alex told Taffy that he was tired of Jesse "messing around" with Alex's girlfriend, Gabby. This was how Taffy learned that Jesse was having an affair. Alex said that he wanted to come over and fight Jesse, but Taffy told Alex, "[C]atch him on the street. You will not bring this crap to my house." Alex then started "gang banging" on Taffy, saying that he was going to come over. In order to make Jesse jealous, Taffy made it seem to Jesse like she and Alex were going to go out. Jesse then left to go to the store, and shortly thereafter Taffy heard gunshots and went outside into the front yard. She then saw appellant running through the gate on the side of the house carrying a gun. Appellant had come by twice earlier in the day in order to feed their dogs and bring them beer and other items. Taffy said that she did not think that Jesse was the type of person that would shoot somebody; he did not own a gun and she had never seen him with a gun. Taffy later signed a written summary of this conversation, indicating that what she said was true.

On June 17, 2009, Taffy contacted Detective Arciniega and told him that she wanted to provide more information about the murders. In her statement, Taffy said that she and Jesse were inside the house playing dominoes when they heard a noise outside. They went outside and saw that Alex had broken the windows of their Taurus and was driving away. Appellant came to the house and went inside with Jesse. When Taffy went inside, she saw Jesse handing appellant a gun and saying "You know what to do." Jesse and appellant went outside and when Jesse came back in he handed Taffy his cell phone on speaker, with Alex on the phone. Alex told Taffy about the affair. Jesse then told appellant "I know where he's at," and the two men left the house.

Taffy heard Jesse pulling his car out of the driveway, and then she thought she heard appellant yell, "Put it back. Put it back in. Here he comes." Taffy then heard five to ten gunshots, and when she went outside she saw Jesse crouched next to his Tundra

and Alex seated slumped over in his car. Appellant was standing towards the front of Alex's car pointing the gun towards Alex's car. Jesse and appellant then ran to the house. Appellant asked Jesse for some money, and Jesse gave some folded bills to appellant. Appellant ran out the back door and went over the fence into the alley. Taffy also told the police that Jesse and appellant were going out to find Alex, and that they figured out that Alex was likely at his mother's bakery.[2] She told the police that Jesse and appellant were going to get Alex, but Alex arrived at their house before they could leave to find him.

After speaking with the police, Taffy returned to the station several days later to look over a statement form summarizing what she had told police. She signed her initials at the bottom of the form indicating that the information contained in the statement was true.

At trial, Taffy recanted parts of her statements to police as they related to Jesse. She testified that when she spoke with Detective Arciniega, she was "very under the influence of marijuana and probably some alcohol too."[3] She was also pretty angry with Jesse for cheating on her, and explained, "I might have said anything at that point. I don't recall, but if I said anything, it was definitely out of anger." She said that some of the details on the recording of her interview with police were not correct.

Taffy also testified that when she spoke with the police in June, she "was really trying to get Jesse in trouble for real because I was really hurt and angry, and at that time I got – like I said, we had really broken off our relationship, and he had moved on with the girl." She was not telling the officers the truth. Taffy could not recall much of what

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[2] Several nights after the murders, Alex's uncle, Edwin Valdivia, reviewed the security tape from his restaurant and he saw that at 9:00 p.m. on the night Alex was killed, Alex arrived at the restaurant, walked in and talked to the cooks, and then left. He returned shortly thereafter, picked up the business phone, and walked out while still on the phone.

[3] Detective Arciniega testified that when he spoke with Taffy she did not smell of alcohol or marijuana, and she did not seem to be under the influence.

happened the night of the shooting or what she told police because "[i]t's kind of hard to remember a lie." She maintained that Jesse was a coward, and that she did not think that he was the type of person to fight his own fights, and that he would not confront Alex on his own. At the preliminary hearing, Taffy said that after Jesse left the house, she heard appellant say "Alex is coming," but at trial she could not recall saying that.

Appellant did not testify at trial, but his earlier statements to police were admitted. Appellant spoke with Detective Arciniega on December 30. The conversation took place at the police station, after appellant waived his *Miranda* rights and agreed to speak with the detective. This conversation was recorded, though much of it was inaudible. Appellant told Detective Arciniega that when Alex drove up, he was carrying a gun, and had another gun on the passenger seat of his car. Appellant admitted that he fired several shots at Alex, and that as he was shooting he moved around the front of the car.

Appellant took Detective Arciniega to the alley between East 50th and 51st Streets, between Hooper and Central Avenue, where he threw the gun after fleeing the scene of the murders. Appellant indicated that after the shootings, he ran from the street, ran down the driveway of Jesse and Taffy's home, hopped a fence and ran eastbound toward Hooper. He pointed out the house where he tossed the gun over the fence as he ran away, but the gun was never recovered.

Detective Arciniega spoke with appellant again in July 2009, after being contacted by appellant's attorney. This conversation took place at the county jail where appellant was incarcerated. This meeting was also recorded. Appellant, in the presence of his attorney, gave Detective Arciniega and another detective a two-part statement. In the first part, appellant said that the shooting was committed by Jesse. He told Detective Arciniega that he was present during the shooting and that Jesse gave him the gun after the shooting to hide. Appellant explained that he had taken the blame for the crime because he and his family were being threatened. At one point, appellant's attorney interrupted appellant and told him that the police did not believe him because his story was "inconsistent." Appellant then spoke privately with his attorney, before returning to give Detective Arciniega the second part of his statement.

Detective Arciniega testified that in the second part of the statement, appellant admitted to shooting Alex and then running through the house with the murder weapon. Appellant told Detective Arciniega: "That night we was playing dominoes. We heard the glass break. Everybody gets up. Taffy goes to the door. She opened the door. Alex stand out in the front talking crazy and he drives off. [Jesse] runs in his room, get his gun. Get out in the front. He hands me the gun. Alex pulled back up and he talking. (Unintelligible) put it like that. I wasn't tripping off him but when he jumped out me, I just popped and just kept going." Appellant admitted that after he heard the window glass in the Taurus break, he was the first one outside and that he "was really, really the leader." He acknowledged that Jesse gave him a gun and told him "Man, help me out."

When Alex drove up to Jesse and Taffy's house, appellant was across the street. Appellant was coming back across the street and was roughly six feet from the Pathfinder when Alex opened his car and jumped out. He explained that when Alex did this "he just scared the hell out of me." Appellant then "popped one cap" into Alex because he "didn't know what he was doing." Appellant added, "Then I walked back and then he just – he still was getting out and I'm like damn and it just kept going and I'm just telling you the truth. [The gun] just kept going off. I didn't try to do nothing. I didn't – I just didn't know what to do." Appellant said he believed that Alex had a gun because when he was in the house, he heard Alex break a car window, and "[i]t looked like a revolver when he broke the glass." Appellant said that he had seen Alex carry a gun in the past and pull it out on people.

According to Detective Arciniega, at no point during either of these statements did appellant indicate that he actually saw Alex holding a gun or with a gun in his car, or that Alex fired a gun at appellant. Detective Arciniega believed that appellant's final statement was consistent with all the other evidence in this case, including the physical evidence of gunshot trajectories gathered at the scene.

Discussion

1. Sufficiency of the evidence

Appellant contends that there is insufficient evidence to support the jury's finding that appellant acted with premeditation and deliberation in the killing of Alex and Adriana.[4] There is substantial evidence to support the jury's finding.

"'In reviewing a challenge to the sufficiency of the evidence, we do not determine the facts ourselves. Rather, we "examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citations.] We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] The same standard of review applies to cases in which the prosecution relies primarily on circumstantial evidence and to special circumstance allegations. [Citation.] "[I]f the circumstances reasonably justify the jury's findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding." [Citation.] We do not reweigh evidence or reevaluate a witness's credibility. [Citation.]'" (*People v. Nelson* (2011) 51 Cal.4th 198, 210.)

In *People v. Anderson* (1968) 70 Cal.2d 15, our Supreme Court explained that: "The type of evidence which this court has found sufficient to sustain a finding of premeditation and deliberation falls into three basic categories: (1) facts about how and what defendant did *prior* to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing - what may be characterized as 'planning' activity; (2) facts about the defendant's *prior* relationship and/or conduct with the victim from which the jury could reasonably infer a 'motive' to

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[4] Appellant acknowledges that the evidence "appears" sufficient to support a conviction for second degree murder, but contends that the conviction as a whole must be reversed due to instructional error, and a new trial ordered. We discuss appellant's claim of instructional error in section 2, *post*.

kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that the killing was the result of 'a pre-existing reflection' and 'careful thought and weighing of considerations' rather than 'mere unconsidered or rash impulse hastily executed' [citation]; (3) facts about the nature of the killing from which the jury could infer that the *manner* of killing was so particular and exacting that the defendant must have intentionally killed according to a 'preconceived design' to take his victim's life in a particular way for a 'reason' which the jury can reasonably infer from facts of type (1) or (2)." (*Id*. at pp. 26-27.)

As our Supreme Court has made clear: "'The *Anderson* analysis was intended only as a framework to aid in appellate review; it did not propose to define the elements of first degree murder or alter the substantive law of murder in any way.' [Citation.] The *Anderson* guidelines were formulated as a synthesis of prior case law, and are not a definitive statement of the prerequisites for proving premeditation and deliberation in every case." (*People v. Hawkins* (1995) 10 Cal.4th 920, 957, overruled on other grounds by *People v. Lasko* (2000) 23 Cal.4th 101.)

In this case, by all accounts, appellant was very close to Taffy and Alex, and performed many tasks for them, including shopping for them, picking up their daughter from school, washing their car and mowing their lawn. According to Taffy, appellant arrived at her house almost immediately after the victim had broken the window of Jesse's car. Jesse handed appellant a handgun and said, "You know what to do." Then the victim called Taffy, apparently on Jesse's cell phone. Taffy put the cell phone on speaker, and the victim began talking about an affair between Jesse and the victim's girlfriend. At one point, the victim said that he did not want to talk in front of his mother. Jesse told appellant that he knew where the victim was. He said, "Come on. Let's go." The two men then left the house.

This account, if believed by the jury, shows a motive for Jesse to kill the victim. The victim had vandalized Jesse's car and revealed Jesse's affair. Appellant was Jesse's friend, and wanted to help Jesse retaliate.

The account also shows planning. Appellant had a loaded handgun with him when he left to look for the victim. (*People v. Lee* (2011) 51 Cal.4th 620, 636 [bringing a loaded gun indicated defendant had "considered the possibility of a violent encounter"].) As appellant and Jesse were pulling out of the driveway to go look for the victim, Taffy heard appellant yell, "Put it back. Put it back in. Here he comes." It was immediately after this that Alex arrived. Thus, appellant planned an encounter with Alex.

The manner of the killing also shows premeditation and deliberation. Appellant first shot Alex at close range, then appellant moved around the car, shooting Alex multiple times from different angles. Multiple gunshots at close range without evidence of provocation or a struggle supports an inference of premeditation and deliberation. (*People v. Gonzales* (2011) 52 Cal.4th 254, 295.)

Thus, there is substantial evidence to support the premeditation and deliberation finding as to Alex. Since Adriana was hit and killed by one of the shots fired at Alex, appellant's intent in shooting Alex transfers to his shooting of Adriana. Thus, there is substantial evidence to support the premeditation and deliberation finding as to Adriana as well. (See *People v. Concha* (2009) 47 Cal.4th 653, 664 ["a defendant who shoots at an intended victim with intent to kill but misses and hits a bystander instead should be subject to the same criminal liability that would have been imposed had he hit his intended mark"].)

2. Failure to instruct on sudden quarrel or heat of passion

Appellant contends that the trial court erred in failing to instruct the jury, sua sponte, on the offense of voluntary manslaughter under a heat of passion theory, and also erred in failing to instruct the jury that heat of passion may negate malice and reduce a murder to second degree murder. He further contends that these errors violated his federal constitutional right to due process, including a reliable jury determination of his legal culpability beyond a reasonable doubt. He also contends that if these claims are

barred by his counsel's failure to request these instructions, he received ineffective assistance of counsel.[5]

A trial court normally must instruct the jury sua sponte on general principles of law that are closely and openly connected to the facts and that are necessary for the jury's understanding of the case. (*People v. Carter* (2003) 30 Cal.4th 1166, 1219.) Thus, a trial court has a sua sponte duty to instruct the jury on lesser included offenses when there is substantial evidence that the offense committed may have been less than the offense charged. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1008; *People v. Breverman* (1998) 19 Cal.4th 142, 154, 162.) Due process does not require more. (*Hopper v. Evans* (1982) 456 U.S. 605, 611.)

Voluntary manslaughter is a lesser included offense of murder. (*People v. Lewis* (2001) 25 Cal.4th 610, 645.) To establish voluntary manslaughter based on sudden quarrel or heat of passion, both adequate provocation and heat of passion must be shown. The provocation must be caused by the victim and be of such a character as to "cause an ordinary person of average disposition to act rashly or without due deliberation and reflection." (*People v. Lujan* (2001) 92 Cal.App.4th 1389, 1411-1412.) The defendant must actually, subjectively, kill under the heat of passion. (*People v. Steele* (2002) 27 Cal.4th 1230, 1252.)

Here, there was no substantial evidence of provocation. Appellant contends that the evidence showed "a continuum of provocation and rash behavior in which threats from Alex, both past and present, had been perceived by [appellant], and were readily apparent when Alex returned in his vehicle with his engine running." He also contends that he "had ever[y] reason to believe Alex [was] a real and present threat" because Alex

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[5] Respondent contends that these claims are barred by the doctrine of invited error. That doctrine requires more than mere inaction by trial counsel. (See *People v. Beames* (2007) 40 Cal.4th 907, 926 [defense counsel stated that defense understood that instruction on lesser included offenses were required to be given sua sponte but represented that defense did not want such instructions "as a matter of trial strategy"].) Simply failing to request an instruction on a lesser included offense, and then arguing complete innocence at trial does not invite trial court error.

returned after smashing in the window of Jesse's car and had previously threatened Jesse with a gun.

None of this evidence shows any activity by Alex which was directed at appellant. The conduct and threats were all directed at Jesse. A reasonable person in appellant's position would not have been provoked by this conduct against another, even against a good friend. (See *People v. Lee* (1999) 20 Cal.4th 47, 60.) Thus, the trial court did not err in failing to instruct sua sponte on voluntary manslaughter under a heat of passion theory.

Appellant also contends that the trial court should have instructed the jury that even if it found that the provocation was not sufficient under the reasonable person standard, the jury should still consider whether such provocation caused the defendant to kill without deliberation and premeditation, and thus mitigated the killing from first degree murder to second degree murder. Appellant has forfeited this claim.

Deliberate and premeditated first degree murder may be mitigated to second degree murder if the jury finds that the defendant "formed the intent to kill as a direct response to . . . provocation and . . . acted immediately" without deliberation or premeditation. (*People v. Wickersham* (1982) 32 Cal.3d 307, 329, disapproved on another ground by *People v. Barton* (1995) 12 Cal.4th 186.) Provocation sufficient to mitigate a murder to second degree murder requires only a finding that the defendant's subjective mental state was such that he did not deliberate and premeditate before deciding to kill. (*People v. Fitzpatrick* (1992) 2 Cal.App.4th 1285, 1295-1296.)

A trial court does not have a sua sponte duty to instruct the jury that provocation which is inadequate to reduce a killing from murder to manslaughter nonetheless may be sufficient to negate premeditation and deliberation, thus reducing the crime to second degree murder. (*People v. Rogers* (2006) 39 Cal.4th 826, 877-879 [rejecting claim that

court had sua sponte duty to give CALJIC No. 8.73, which tells the jury that evidence of provocation may be considered in determining degree of murder].)[6]

Appellant contends that if this claim is forfeited, his trial counsel was ineffective in failing to request such an instruction.

Appellant has the burden of proving ineffective assistance of counsel. (*People v. Pope* (1979) 23 Cal.3d 412, 425.) In order to establish such a claim, appellant must show that his counsel's performance fell below an objective standard of reasonableness, and that, but for counsel's error, a different result would have been reasonably probable. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 694; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 694.)

Here, there is no reasonable probability that appellant would have received a more favorable outcome if the instruction had been given. The significance of provocation is that it causes the defendant to act rashly, impulsively or without careful consideration. The jury was instructed with CALCRIM No. 521 which explains the degrees of murder. That instruction tells the jury that a "decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated." Thus, the jury was aware that if appellant acted rashly or impulsively, he was guilty of only second degree murder. The jury nevertheless convicted appellant of first degree murder, showing that the jurors did not believe that appellant acted rashly or impulsively. (See *People v. Chatman* (2006) 38 Cal.4th 344, 392 [error in failing to give lesser included offense instruction is necessarily

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[6] CALJIC No. 8.73 provides: "If the evidence establishes that there was provocation which played a part in inducing as unlawful killing of a human being, but the provocation was not sufficient to reduce the homicide to manslaughter, you should consider the provocation for the bearing it may have on whether the defendant killed with or without deliberation and premeditation."

harmless when jury necessarily decides the factual question posed by the omitted instructions adversely to defendant under other properly given instructions].)[7]

3. Section 12022.53, subdivision (d), enhancement

Appellant contends that the imposition of the section 12022.53, subdivision (d) enhancement for a defendant convicted of murder violates California's multiple conviction rule based on included conduct as well as federal double jeopardy principles. Appellant acknowledges that the California Supreme Court has ruled to the contrary in *People v. Sloan* (2007) 42 Cal.4th 110 and *People v. Izaguirre* (2007) 42 Cal.4th 126. Appellant contends that those cases are wrongly decided. That is an argument he must make to the Supreme Court, or in federal court. We are bound by the decisions in *Sloan* and *Izaguirre*.

Appellant also contends that recent decisions of the United States Supreme Court, "suggest" that federal double jeopardy principles should be applied to enhancements.[8] As appellant acknowledges, however, current decisions do not make such an application. (See *Hudson v. United States* (1997) 522 U.S. 93, 99; *Missouri v. Hunter* (1983) 459 U.S. 359, 368.) Again, we are bound by the decisions of the Supreme Court.

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[7] For this same reason, even assuming for the sake of argument that the trial court erred in failing to instruct on voluntary manslaughter under a heat of passion theory, the error would be harmless. By convicting appellant of first degree murder, the jury necessarily found that he did not act rashly, impulsively or without careful consideration.

[8] Appellant identifies these decisions as *Apprendi v. New Jersey* (2000) 530 U.S. 466 and *Sattazahn v. Pennsylvania* (2003) 537 U.S. 101.

Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ARMSTRONG, J.

We concur:

TURNER, P. J.

KRIEGLER, J.