SUPREME COURT
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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	Case No. S210898
Plaintiff and Respondent,	)	Court of Appeal No. D060317
v.	)	Superior Court No. BAF004719
VINCE BRYAN SMITH,	)	
Defendant and Petitioner.	)	

OPENING BRIEF ON THE MERITS

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QUESTIONS PRESENTED

On July 17, 2013, the Court granted petitioner's petition for review. The Court limited the issues on review to whether petitioner properly was convicted of murder under the natural and probable consequences theory of aiding and abetting. Petitioner respectfully submits that resolution of that question will require this Court to determine the following:

1. Whether sufficient evidence was adduced during trial to demonstrate that the killings were committed by anyone aided and abetted by petitioner.

2. Whether, under the English common law as incorporated in Penal Code section 31, aiding and abetting liability for murder under a natural and probable consequences theory was permitted when the killing in question was committed by a person who was not one of the direct perpetrators aided and abetted by petitioner.

3. Whether extension of aiding and abetting liability under the natural and probable consequences doctrine to acts by persons other than the direct perpetrator being aided and abetted by a defendant can be justified based on the principles underlying accomplice liability.

STATEMENT OF THE CASE

Petitioner Vince Bryan Smith was convicted by jury of two counts of second degree murder (Pen. Code, § 187, subd. (a), counts one and two). The jury found true an allegation that the offenses were committed for the benefit of, at the direction of or in association with a criminal street gang with the specific intent to promote, further or assist in criminal conduct by gang members (Pen. Code, § 186.22, subd. (b)). The jury also convicted petitioner of being an active member of a criminal street gang (Pen. Code, § 186.22, subd. (a), count three). (19 CT 4084-4091, 4102-4103; 42 RT 8523-8529.)

The trial court sentenced petitioner to 15 years to life in state prison on count one (Pen. Code, § 187, subd. (a)). The court imposed and stayed a consecutive 10-year term pursuant to Penal Code section 186.22, subdivision (b). The court imposed a concurrent term of 15 years to life on count two and stayed the enhancement. The court imposed a concurrent two-year term on count three (Pen. Code, § 186.22, subd. (a)). (19 CT 4249-4250; 1 AUG RT 61-65.) Petitioner timely filed a notice of appeal. (19 CT 4273.)

On June 8, 2012, Division One of the Court of Appeal for the Fourth Appellate District issued an opinion in which it reduced petitioner's court security fees and struck an enhancement pursuant to Penal Code section

186.22, subdivision (b)(1). The court otherwise affirmed petitioner's conviction and sentence.

On June 29, 2012, the Court of Appeal summarily denied petitioner's petition for rehearing. On September 12, 2012, this Court granted petitioner's petition for review and transferred the matter back to the Court of Appeal with directions to reconsider its decision in light of *People v. Mesa* (2012) 54 Cal.4th 191.

On April 15, 2013, the Court of Appeal again issued an opinion, in which the court stayed sentence on count three, reduced petitioner's court security fees to $30 per count and struck the enhancement pursuant to Penal Code section 186.22, subdivision (b)(1). The court again otherwise affirmed petitioner's conviction and sentence.

On July 17, 2013, this Court again granted review but limited the issue to the question whether petitioner properly was convicted of murder under the natural and probable consequences theory of aiding and abetting.

STATEMENT OF FACTS

Introduction

At a very basic level, the facts in this case are relatively simple. Robert M. -- petitioner Vince Smith's younger brother -- joined a Banning area dance crew called the YAH Squad (YAH) sometime around Thanksgiving in 2005. On February 7, 2006, Robert was to be jumped out of YAH at an apartment complex located at 655 E. Williams in Banning.

Unsurprisingly, the jump out was attended by a number of people. For the purposes of this brief, petitioner submits that it is helpful to place these people into three distinct groups. The first group consists of members of the YAH squad who were present but did not directly participate in the actual fight. The second group is comprised of Robert and the people he fought during his jump out. The third group is comprised of petitioner and the three or four people he brought to the jump out to help him make sure Robert was not hurt too badly in the fight.

Two of the people petitioner brought to the fight, Demetrius Hunt and Vincent McCarthy, were killed when gunfire erupted at the end of the fight. The record does not reveal who fired the fatal shots, but it is clear that the shots were not fired by petitioner, the direct perpetrators of the fight, or anyone directly aided or abetted by petitioner.

The prosecutor below tried petitioner for murder on the theory that he was liable for the killing as an aider and abettor under a natural and probable consequences theory, based on the supposition that whoever fired the fatal shots was a principal in the target offense by virtue of the fact that that person also aided and abetted Robert and the people he fought with.

655 E. Williams: The YAH Squad

In 2006, LaRuth Littleton lived in an apartment located at 655 E. Williams in Banning. (29 RT 5620-5621.) Littleton had at least 41 grandchildren, including Tovey M., Wealton M., Lavert L., Deshawn L. and Reggie M.[1] (29 RT 5622, 5624-5629; 38 RT 7539.) Deshawn, Reggie and Lavert were members of a group that called themselves the YAH Squad (YAH).[2] (33 RT 6596; 38 RT 7539, 7541.) Other members of YAH included Lamarr S., Jermarr S., Dalton D., Lonnie W., Aaron L., Ed S., Demontre C., Clayton W. and Jesus H. (33 RT 6582, 6585, 6591; 35 RT 6969-6971; 38 RT 7516-7517, 7533-7534, 7523, 7536-7537, 7562; 39 RT 7685.)

YAH was described by several of its members as being a clique or a dance crew as opposed to a gang. (29 RT 5800, 5842; 32 RT 6405; 33 RT

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[1] Petitioner will refer to the players by their first names out of an abundance of caution because many of these individuals clearly were minors, while the age of others was not clearly stated in the record.

[2] "YAH" stands for Young Ass Hustlers. (29 RT 5800, 5842; 35 RT 6948; 38 RT 7521; 40 RT 8070.)

6696, 6698; 34 RT 6835, 6855, 6873; 35 RT 6947, 6962-6963, 6991, 7002, 7093-7094; 37 RT 7274; 38 RT 7543, 7653; 39 RT 7772-7773.) Anyone who wanted to join YAH had to be jumped in. (35 RT 6949, 7096.) Members of YAH who wanted out of the group had to be beaten out. (35 RT 6978.)

Considerable evidence was introduced to show that Deshawn, Lavert, Tovey and other members of the Littleton clan were affiliated with Blood gangs in addition to their membership in YAH. (29 RT 5622-5623, 5754-5756; 33 RT 6586, 6597; 35 RT 7002, 7100; 37 RT 7396-7400; 38 RT 7545-7547, 7653; 39 RT 7831-7835, 7889-7891, 7898; 40 RT 7931, 7950-7952, 7956-7957, 7976, 8010-8011, 8016-8017, 8025.) Other members of YAH, however, had social and family ties to Crip gangs. (18 CT 3944-3945, 3967; 33 RT 6704-6705, 6709; 35 RT 6988; 38 RT 7508, 7511, 7431, 7447, 7550-7551, 7591; 39 RT 7763; 40 RT 8088-8091, 8119, 8174.) Petitioner was identified by several witnesses as being a member of the Gateway Posse Crips. (18 CT 3944-3945, 3967; 35 RT 7003; 36 RT 7141; 37 RT 7359; 40 RT 8096.)

Robert M. Joins and Then Decides to Quit the YAH Squad

Sometime around Thanksgiving 2005, petitioner's brother Robert was "jumped in" to the YAH Squad. (33 RT 6693-6696, 6698, 6706, 6715-6720; 34 RT 6835, 6855, 6868, 6873.) Not long after he was jumped in,

Robert realized that joining YAH had not been a good idea. (34 RT 6874.) Robert decided that he wanted out of YAH after Aaron told him he wanted to beat his ass. (33 RT 6732-6734; 34 RT 6860, 6868.) Robert believed Aaron was angry because Robert had not been spending much time "with these guys." (33 RT 6733; 34 RT 6868-6869.) Robert had to be jumped out. Otherwise, he would get beaten up for disrespecting them every time he refused to have anything to do with members of YAH. (34 RT 6876.)

Demetrius Hunt came to live with Robert three or four days before the shootings. (33 RT 6745.) Hunt told petitioner that Robert had problems with the YAH Squad. (34 RT 6875.) Petitioner told Robert, "We need to get you out of that." (33 RT 6727-6728; 34 RT 6877.) Petitioner told Robert several times "not to be hanging around with them like that." (33 RT 6728-6730.)

The Incident at the Sportsman's Liquor Store

Demontre C. and Lonnie both had heard that Robert was going to be disciplined because he wasn't representing YAH. He wasn't hanging out with YAH members, wasn't representing the hood and was missing meetings or gatherings. Demontre understood that to mean that there was going to be a fight. (37 RT 7277-7278, 7281-7282, 7360, 7374; 39 RT 7709.) Lonnie told Demetrius Hunt that Robert was going to be disciplined by Deshawn. (38 RT 7552-7553, 7556., 7559) Ed also spoke to Hunt about

the pending discipline. (38 RT 7554.)

A couple of days before February 6, 2006, Demontre, Deshawn, Ed and Lonnie waited outside a liquor store, hoping to find someone who would be willing to buy "blunts" for them. (35 RT 6952-6954, 6959-6960; 36 RT 7165.) Petitioner drove up, got out of his car and called Ed over. Petitioner asked Ed who was supposed to put their hands on petitioner's little brother.[3] (35 RT 6961, 6974-6976; 36 RT 7165-7168; 38 RT 7563; 39 RT 7729-7730, 7760.) Ed asked petitioner who was his brother. When petitioner identified Robert, Ed told him that no one was supposed to put their hands on him. (35 RT 6976; 36 RT 7168-7169; 38 RT 7565-7567; 39 RT 7761.) Petitioner said, "I want my brother off of that shit," meaning he wanted Robert out of the YAH Squad. (35 RT 6977-6978, 7010; 36 RT 7169; 37 RT 7282-7283, 7375.) Ed responded, "That's no problem." (35 RT 6977.) Petitioner said, "I'll kill one of you little niggers over my brother." (38 RT 7565-7566; 39 RT 7783.)

Petitioner then walked into the liquor store before leaving the scene. (35 RT 6977.) Petitioner was not showing any emotion when he left. (36 RT 7171.) As petitioner drove away, he threw up a finger gesture that looked to Lonnie like the letter "G." (38 RT 7568.)

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[3] Demontre C. testified that petitioner was really mad. (35 RT 6975-6976.)

Ed was angry after petitioner left. He said that petitioner came up at him foul. (35 RT 6980-6981; 36 RT 7171.) Deshawn also was upset. He also said that petitioner came up at him foul. (35 RT 6980-6981, 6985; 36 RT 7172.) Deshawn said, more than once, that he was "going to beat the fuck out of that nigger." (35 RT 6983-6985.) Deshawn talked about calling Tovey and began to hit his open palm with his fist. (38 RT 7569-7570.)

The Incident at the Peppertree Apartments

A couple of days before the shooting, petitioner became embroiled in a dispute with Tovey and others at an apartment complex near 655 E. Williams. Several other members of the Littleton clan were present, including Deshawn, Lavert, Wealton and Reggie. (29 RT 5816, 5819-5820; 36 RT 7182-7183; 38 RT 7582-7583; 39 RT 7705-7706.) Petitioner and Tovey argued about what had happened at the liquor store. (29 RT 5818-5819, 5822, 5826-5828, 5845-5846; 35 RT 7013-7018; 36 RT 7183-7186; 38 RT 7583-7584, 7586, 7661-7662; 39 RT 7686-7687, 7706, 7786.) The confrontation was broken up before petitioner and Tovey could fight. (29 RT 5822-5824, 5826, 5836-5837, 5845-5847; 35 RT 7015, 7018-7019.)

During the confrontation, petitioner told Tovey that he did not want his brother "in that shit." (35 RT 7015.) Tovey responded that it was no problem with that. (35 RT 7015.) Petitioner said something like, "Well, like let me make sure. I'm going to bring some of my homies to make sure none

of this shit pop off." (35 RT 7015-7016; 36 RT 7186-7187.) Tovey responded, "I know you're not talking about gunplay." (35 RT 7016.)

February 7, 2006: The YAH Squad Assembles for the Jump Out

On February 7, 2006, members of YAH were present at the apartment complex at 655 E. Williams when petitioner arrived for the jump out. Petitioner and the people who arrived with him walked down the driveway toward the lawn at the front of the complex, followed by Deshawn, Jermarr, Aaron, Ed and Wealton. (18 CT 3937-3942; 28 RT 5368-5369; 33 RT 6602-6603, 6611-6619, 6641, 6650-6655, 6748, 6762, 6769-6770; 35 RT 7043-7049; 36 RT 7201, 7207-7212, 7215-7216, 7229; 37 RT 7295-7296, 7344-7246, 7296, 7299; 38 RT 7608-7609, 7612-7616; 39 RT 7735-7738, 7779, 7813.) Lonnie and Jesus also were there. (33 RT 6761, 6771; 34 RT 6861, 6881, 6900.)

Tovey and Lavert were there with the others. (35 RT 7034-7035, 7074; 36 RT 7197.) At some point in time, either before or after petitioner and his group arrived, Demontre saw Tovey give what appeared to be a gun to Deshawn. (35 RT 7040-7041; 37 RT 7246-7247, 7345-7348, 7361-7365-7369.)

Robert M.'s Version of How They Went to 655 E. Williams the Day of the Shootings

Robert testified that he and petitioner picked up Demetrius Hunt and Vincent McCarthy and petitioner drove them all to 655 East Williams. (33

RT 6735, 6746-6748, 6752-6753; 34 RT 6861, 6880.) Earlier that day, petitioner told Robert they were going there so that Robert could be jumped out of YAH. (33 RT 6736, 6748-6750, 6756; 34 RT 6843-6844, 6874, 6915.)

Julian McKee also accompanied petitioner and the others to 655 E. Williams. McKee told police officers that petitioner asked him to accompany them to the scene of the fight to help petitioner ensure that Robert was not beaten too badly during the fight. (18 CT 3896-3899, 3901-3903, 3906; 3930-3932; 3939-3940, 3945-3948, 3957, 3967, 3971.) McCarthy was supposed to be packing. They were going to shoot if the other gang shot at them. (18 CT 3971-3972.) District Attorney Investigator Casey testified that McKee told her petitioner also had a gun. The interview was audio and video recorded but McKee's statement did not appear in the recording and Casey did not remember whether McKee's response was oral or physical. (18 CT 3993-3994; 28 RT 5516-5517, 5564-5565; 29 RT 5573.)

The Fight

After they arrived at the scene, petitioner asked Robert who had jumped him in. Robert pointed to Aaron and Ed. (33 RT 6763-6764; 34 RT 6862, 6881-6882.) Petitioner said that they should not do it in the parking lot because someone could get their head busted on the concrete. He

suggested that they go to the first apartment. (33 RT 6765-6766, 6769.)

Lonnie testified that petitioner appeared to be directing the jump out. (39 RT 7670.) The jump out was supposed to be about YAH and Lonnie expected Deshawn to be the one to direct what happened. Petitioner was confronting Deshawn's authority when he gave directions to the others. Deshawn already had said that there would be no guns. (38 RT 7654-7655.) Lonnie claimed that it was unusual for someone outside YAH to be giving direction to YAH members. (38 RT 7654; 39 RT 7787.)

Upon reaching the lawn at the front of the complex, someone suggested that they do it right there. (38 RT 7617; 39 RT 7673.) The people on the lawn moved back to give petitioner and Robert room to come in. (35 RT 7044-7045; 36 RT 7213-7215, 7229; 37 RT 7344.) Deshawn said to Aaron and Ed, "You guys know what you guys got to do." (33 RT 6771-6773, 6800.)

Robert, Aaron and Ed squared off on the grass. (33 RT 6773.) Petitioner stood by the white picket fence, roughly three feet from Robert. (33 RT 6774-6776.) McCarthy stood by some plants, roughly opposite of petitioner. (33 RT 6775.) Hunt stood behind Robert. (33 RT 6775-6776.) Lonnie and Jermarr stood by some concrete at the tip of the grass. (33 RT 6776-6777.) Deshawn leaned against a brick wall behind Lonnie. (33 RT 6777; 34 RT 6849; 38 RT 7623; 39 RT 7801.) Jesus stood next to

petitioner. (33 RT 6777; 34 RT 6884.) Jesus was not involved in the fight, but he acted as though he was upset. (38 RT 7623.)

As the fight was about to start, petitioner twice said that he did not want anyone to kick his brother in the head. (38 RT 7626; 39 RT 7739.) Robert threw the first punch at Aaron and the three of them began to fight. (33 RT 6777-6779; 34 RT 6844, 6862-6863, 6887-6888, 6908; 35 RT 7052, 7054; 36 RT 7230; 37 RT 7300-7301; 38 RT 7628; 39 RT 7673, 7769, 7717-7718, 7769-7770.) Aaron got the better of Robert, knocking him to the ground. (33 RT 6779-6780; 38 RT 7629; 39 RT 7717-7718, 7739, 7754.) They continued to hit Robert while he was on the ground. (36 RT 7231; 37 RT 7302, 7305-7307; 38 RT 7630; 39 RT 7740.) Robert stopped fighting, lay on his side and attempted to cover up. (37 RT 7302, 7307, 7309.)

Petitioner went to Robert and picked him up off the ground. (18 CT 3952, 3972, 3989-3990; 33 RT 6781-6782, 6784-6785; 34 RT 6864, 6885; 38 RT 7629-7631; 39 RT 7718, 7754.) Jesus became angry and yelled out, "Fuck that JR.[4] He got put on by four people." (38 RT 7631; 39 RT 7718.) Petitioner responded, "Fuck you." (38 RT 7632.) Petitioner walked over to Jesus and took a swing at him. Jesus blocked the punch. (33 RT 6785-6790; 34 RT 6884; 38 RT 7633-7635; 39 RT 7718-7719, 7755, 7797-7798,

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[4] Petitioner is called "JR." (33 RT 6694, 6721.)

7810.) Petitioner's right hand was in his pocket. (38 RT 7634.)

Lonnie testified that Curlee Mitchell ran over to petitioner, grabbed him and told him to calm down. (38 RT 7636-7637; 39 RT 7754-7755, 7810-7811.) Lonnie heard a gunshot as Mitchell told petitioner to calm down. (38 RT 7637-7638; 39 RT 7755-7756, 7798, 7811.) Lonnie testified that the shot came from where Deshawn was standing. Only Deshawn was there. (39 RT 7756, 7801.) Lonnie did not see petitioner pull a gun or fire a gun. (39 RT 7719-7720.) Nor did Lonnie see Hunt or McCarthy pull a gun. (39 RT 7720.)

Demontre C. testified that petitioner pulled a gun and said, "Fuck this shit." (35 RT 7063-7064; 37 RT 7240-7241, 7303, 7307-7309, 7329, 7354.) Petitioner pointed his gun at the group that still was beating Robert. (37 RT 7310.) Tovey and Deshawn also pulled guns. (35 RT 7065; 37 RT 7242-7245; 37 RT 7245, 7309-7310, 7331, 7354, 7368.) Demontre admitted telling the police that Tovey fired first but claimed he did not see Tovey fire first. (37 RT 7242, 7349-7350, 7369-7370.) Demontre denied telling the police that Deshawn fired several shots. (37 RT 7244.)

Considerable evidence was adduced to show that Demontre was not truthful in his testimony. Robert and Lonnie both testified that Demontre wasn't at the scene of the fight. (33 RT 6762-6763; 39 RT 7771.) That Demontre may not have been present during the fight also is suggested by

the fact that Demontre claimed that Robert and Deshawn fought before the others joined in. (36 RT 7232, 7235; 37 RT 7301-7302.) Demontre was the only witness who testified that Deshawn was involved in the fight. Demontre also was the only witness to testify that petitioner pulled a gun during the fight.

Demontre testified that he ditched school the day of the shootings, and spent much of the day at Darien H.'s apartment. (35 RT 7090-7092; 36 RT 7188; 37 RT 7284-7286.) Demontre testified that Darien was there the entire time. (37 RT 7289.) Darien testified that Demontre did not spend the day of the shootings at Darien's apartment. Darien spent the day in juvenile court and did not return home until after the shootings. (29 RT 5834-5835.)

Robert M.'s Testimony Regarding the Shootings

Robert testified that Deshawn "hopped off" the wall he had been leaning against, pulled a gun and started shooting. (33 RT 6791, 6793-6799; 34 RT 6806-6807, 6849, 6853, 6863-6864, 6885.) Robert saw at least three or four muzzle flashes and heard three or four shots. (34 RT 6807, 6853, 6886.)

After almost everyone else ran from the scene, petitioner was observed sitting on the lawn, holding Hunt. (31 RT 6337; 34 RT 6815-6816, 6889-6890.) Hunt appeared to be dead. (31 RT 6337-6338; 34 RT 6817.) McCarthy was lying on the ground. He told Denman he couldn't

move his legs and needed help breathing. He told Denman that he was going to pass away. (31 RT 6343-6344, 6349.)

Medical Evidence

Demetrius Hunt suffered four gunshot wounds and died. (30 RT 5864-5870, 5878-5883, 5896, 5902, 5925-5926.) McCarthy suffered two gunshot wounds, including a fatal wound to his torso. (30 RT 5907-5912, 5913-5917, 5922.) The wounds were consistent with bullets from a medium to large caliber weapon. (30 RT 5946.)

Physical Evidence

Two guns, five expended 9mm casings and two expended .40-caliber casings were recovered from the scene of the shootings. (30 RT 5964, 5967, 6018, 6045-6046; 31 RT 6212-6214.) One of the pistols was a Beretta pistol with a magazine and four live rounds, including a round in the chamber. (30 RT 5997-6000, 6018-6019, 6026.) The other pistol was a .22-caliber Smith and Wesson semiautomatic pistol. (30 RT 6000-6001, 6098.)

The 9mm casings recovered at the scene of the shootings were Luger cartridge casings. (30 RT 5985-5990, 5993.) The .40-caliber casings were S&W casings. (30 RT 5995-5996.) A .22-caliber cartridge case was recovered from the ground north of apartment A in the parking lot. (30 RT 6008.) A live .40-caliber Smith & Wesson Wolf shell was found near the

[illegible] between apartment B and the empty lot. (30 RT 6007-6008.) A .22-caliber magazine with nine cartridges was found in the field. (30 RT 6015-6019.)

Department of Justice firearms examiner Nichols was unable to match any of the .40-caliber casings recovered at the scene to bullets test-fired from the .40-caliber Beretta. (31 RT 6234-6242, 6245-6246.) Nichols also attempted to test-fire a Smith & Wesson model .22A semiautomatic .22-caliber handgun, but the weapon misfired and did not correctly eject the rounds. (31 RT 6247-6252.)

The bullets removed from Hunt's back and right shoulder had full metal jackets and the weight and appearance of a 9mm bullet. (30 RT 5886; 31 RT 5888, 6261-6262, 31 RT 6262-6263.) Both bullets had been fired from a weapon with a polygonal rifled barrel. (People's Exhibit No. 121; 30 RT 5888.) The metal found in Hunt's undershirt was determined to be a portion of bullet jacket from a 9mm bullet. It also had been fired from a weapon with a polygonal rifled barrel. (30 RT 5888-5889; 31 RT 6260-6261, 6285.) The projectile taken from McCarthy's spinal column was a full brass jacketed bullet with the weight and appearance of being a .40-caliber bullet. It too was fired from a gun with a polygonal rifled barrel. (30 RT 5916; 31 RT 6256-6257.) Nichols testified that it is very difficult to match bullets fired through a polygonal rifled barrel. Nichols had never

been able to make a match. (31 RT 6258.)

Nichols was able to determine that the bullet fragment recovered from the street was fired from the .40-caliber Beretta. (People's Exhibit No. 127; 30 RT 5991-5992; 31 RT 6298-6300.) Nichols also was able to determine that a bullet recovered from the lawn was fired from the .40-caliber Beretta. (31 RT 6300-6301.) Nichols could not match any of the other bullets or casings to any of the guns. (31 RT 6284.) Nichols examined six 9mm casings, all of them Winchester. They all could have been fired from the same weapon, or from as many as four weapons. (31 RT 6266-6267, 6286-6288.) Nichols was not able to determine whether all of the .40-caliber casings were fired from the same weapon. (31 RT 6268.)

Nichols testified that a 9mm Glock 17 handgun has polygonal rifling. (31 RT 6258-6259, 6287.) One of the casings recovered from the scene of the shootings was fired from a Glock. (31 RT 6287-6288.) Domenic B. had seen Deshawn with a Glock. (39 RT 7854-7855.) Domenic had seen Deshawn in possession of a gun -- either a .38-caliber or a .380-caliber -- on five or more occasions. (39 RT 7842-7843, 7851.)

ARGUMENT AND AUTHORITY

I.

PETITIONER'S MURDER CONVICTIONS MUST BE REVERSED BECAUSE THE PROSECUTION DID NOT PROVE BY CONSTITUTIONALLY SUFFICIENT EVIDENCE THAT THE FATAL SHOTS IN THIS MATTER WERE FIRED BY ANYONE WHO WAS AIDED AND ABETTED BY PETITIONER

This case presents a distinct and different variation on the typical fact pattern involving the natural and probable consequences theory of aiding and abetting liability. The target offenses elected by the prosecutor in this matter were fighting in public, simple assault and battery. (19 CT 4140-4145; 41 RT 8282-8286.) Those offenses were to be committed by three young men: Robert, Ed and Aaron. (33 RT 6763-6764; 34 RT 6862, 6881-6882.)

After the fight ended, gunfire erupted and two of the three or four people petitioner brought to the scene -- petitioner's friends -- were killed. The identity of the killer or killers was not clearly shown, but Demontre C. testified that both Deshawn L. and Tovey M. pulled guns just before the shooting erupted. Demontre told a police officer that Tovey shot first. (35 RT 7065; 37 RT 7242-7245; 37 RT 7245, 7309-7310, 7331, 7349-7350, 7354, 7368-7370.) Demontre admitted telling the police that Tovey fired first but claimed he did not see Tovey fire first. (37 RT 7242, 7349-7350, 7369-7370.) Demontre denied telling the police that Deshawn fired several

shots. (37 RT 7244.)

Robert testified that he saw Deshawn pull a gun and start shooting. (33 RT 6791, 6793-6799; 34 RT 6806-6807, 6849, 6853, 6863-6864, 6885.) Robert saw at least three or four muzzle flashes and heard three or four shots. (34 RT 6807, 6853, 6886.) Lonnie W. heard gunshots but did not see who fired the shots. He nonetheless testified that the gunfire came from the location where Deshawn, and only Deshawn, had been standing. (38 RT 7637-7638; 39 RT 7755-7756, 7798, 7801, 7811; 39 RT 7756, 7801.) Lonnie did not see petitioner pull a gun or fire a gun. (39 RT 7719-7720.) Nor did Lonnie see Hunt or McCarthy pull a gun. (39 RT 7720.)

There was no evidence suggesting that Hunt and McCarthy were killed either by petitioner or by any of the actual participants in the fight. The prosecutor argued that petitioner aided and abetted the target offenses by driving his group to the scene of the jump out and getting out of the car. (42 RT 8435-8437, 8451-8453.) The prosecutor suggested that arrangements had been made prior to the fight because the people at 655 E. Williams would not otherwise have permitted petitioner and his group to enter the property. The prosecutor also noted that petitioner designated who was going to fight with Robert. (42 RT 8454, 8511.)

Proceeding on the theory that Deshawn fired the fatal shots, the prosecutor argued in closing that petitioner was responsible for the killings

of McCarthy and Hunt under an aiding and abetting theory as the natural and probable consequence of the fight between Robert, Aaron and Ed. (42 RT 8427, 8444, 8447, 8452.) The prosecutor noted that principals include anyone who is actively committing a crime and anyone who aids and abets in the commission of the crime. (42 RT 8453.) The prosecutor argued that each principal is equally guilty regardless of the extent of the participation in that crime. (42 RT 8453.)

Petitioner's conviction must be reversed because the evidence was constitutionally insufficient to prove either who fired the fatal shots or that petitioner did anything to aid or encourage the acts of the shooter with the intent that the shooter commit the offenses. (*People v. Beeman* (1984) 35 Cal.3d 547, 560.) The prosecution bears the burden in every criminal case to prove every element of a crime beyond a reasonable doubt. (*In re Winship* (1970) 397 U.S. 358, 364 [90 S.Ct. 1068, 25 L.Ed.2d 368]; *Jackson v. Virginia* (1979) 443 U.S. 307, 315-319 [99 S.Ct. 2781, 61 L.Ed.2d 560].) The prosecution failed to meet that burden in this matter. Petitioner's murder convictions must be reversed.

II.

PETITIONER'S MURDER CONVICTIONS CANNOT BE SUSTAINED UNDER A NATURAL AND PROBABLE CONSEQUENCES THEORY OF AIDING AND ABETTING BECAUSE THE ENGLISH COMMON LAW, AS INCORPORATED IN PENAL CODE SECTION 31, WOULD NOT EXTEND ACCESSORY LIABILITY TO THE ACTS OF A PERSON WHO WAS NOT DIRECTLY AIDED AND ABETTED BY THE ACCESSORY

In *People v. Prettyman* (1996) 14 Cal.4th 248, this Court held that "[u]nder California law, a person who aids and abets *a confederate* in the commission of a criminal act is liable not only for that crime (the target crime), but also for any other offense (nontarget crime) committed by *the confederate* as a 'natural and probable consequence' of the crime originally aided and abetted." (*Id.* at p. 254, emphasis added.) The Court also held that...

> The jury must also find that *the defendant's confederate* committed an offense other than the target crime, and that the nontarget offense perpetrated *by the confederate* was a 'natural and probable consequence' of the target crime that the defendant assisted or encouraged.

(*Ibid.*, emphasis added; see also *People v. Lucas* (1997) 55 Cal.App.4th 721, 727.)

The issue before the Court essentially asks whether *Prettyman* correctly limited the application of liability under the natural and probable consequences theory of aiding and abetting to actions by the direct

perpetrator of the target offense being aided and abetted by an accomplice. The issue involves an unusual fact pattern in which the killings were not committed by any of the direct perpetrators of the target offenses aided and abetted by petitioner -- fighting in public, simple assault and simple battery. The killings were instead caused by a third party who also was in attendance at the fight.

Under *Prettyman*, there would be little or no doubt but that the natural and probable consequences doctrine would have potential application had the killings been committed by any of the direct perpetrators of the target offense. Here, the question is whether the natural and probable consequences doctrine has any application when a killing is committed by a third party rather than by the direct perpetrators of the target offense aided and abetted by petitioner.

The issue arose in this matter because the trial court instructed the jurors that petitioner could be guilty of murder if the killing was done by a "co-participant" in the target offenses as a natural and probable consequence of the commission of the target offenses. The court also instructed the jury that "[a] co-participant in a crime is the perpetrator or anyone who aided and abetted the perpetrator." (41 RT 8282-8283.) These instructions had the effect of extending liability under the natural and probable consequences doctrine to persons other than the direct perpetrators

of the target offense based on the fact that that third party may also have aided and abetted the direct perpetrators of the target offense. Under this scenario, the jury was not required to find that petitioner aided and abetted the third party -- and there is no evidence suggesting that petitioner was in such a relationship with the shooter -- but was instead only required to find that the shooter had the same relationship with the direct perpetrators that petitioner independently shared with those direct perpetrators.

As discussed more fully below, petitioner contends that his convictions were improper because the natural and probable consequences theory of aiding and abetting is limited to acts committed by a direct perpetrator of the target offense being procured or encouraged by petitioner. As will be seen, resolution of this issue will depend upon whether a defendant could have been convicted under these circumstances under the English common law.

A. The Common-Law Source of Criminal Liability in California Under the Natural and Probable Consequences Theory of Aiding and Abetting

Penal Code section 31, the statutory source for aiding and abetting liability, was enacted in 1872. It has been amended only once, in 2007, and that amendment did nothing more than replace an offensive clause in the code section referring to "lunatics or idiots" with a more sensitive and respectful clause referring to "persons who are mentally incapacitated."

(Stats. 2007, Ch. 31, Sec. 4. Effective January 1, 2008].)[5] Of necessity, that means the version of section 31 in effect at the time of the incident in this matter was the version enacted roughly 134 years before the incident. That version was as follows:

> All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, and all persons counseling, advising, or encouraging children under the age of fourteen years, lunatics or idiots, to commit any crime, or who, by fraud, contrivance, or force, occasion the drunkenness of another for the purpose of causing him to commit any crime, or who, by threats, menaces, command, or coercion, compel another to commit any crime, are principals in any crime so committed.

It is noteworthy that Penal Code section 31 does not contain any explicit reference to the natural and probable consequences theory of aiding and abetting liability. This Court nonetheless has held that the theory derives from the common law. "At common law, a person encouraging or facilitating the commission of a crime could be held criminally liable not only for that crime, but for any other offense that was a 'natural and probable consequence' of the crime aided and abetted." (*People v.*

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[5] The original California statute governing aider and abettor liability provided: "An accessory is he or she who stands by and aids, abets, or assists; or who not being present aiding, abetting, or assisting, hath advised and encouraged the perpetration of the crime. He or she who thus aids, abets or assists, advises or encourages, shall be deemed and considered as principal, and punished accordingly." (Stats. 1850, ch. 99, § 11, p. 230; *People v. Woods* (1992) 8 Cal.App.4th 1570, 1581, fn. 2.)

Prettyman, *supra*, 14 Cal.4th at p. 260, quoting 1 Wharton's Criminal Law (15th ed. 1993) Parties, § 35, p. 207; see also *People v. Favor* (2012) 54 Cal.4th 868, 881, dis. opn. of Liu, J. [The natural and probable consequences theory of aiding and abetting liability also is a creature of common law].) In *People v. Laster* (1997) 52 Cal.App.4th 1450, the Court of Appeal noted that the historical development of the natural and probable theory of liability indicated that it "originated in the 'legal fiction' that one intends the natural and probable consequences of his own acts. (*Id.* at p. 1465.)

Because Penal Code section 31 had not been amended prior to the offense in this matter, this Court's analysis must be guided by the intent of the Legislature when it enacted the section in 1872. (*People v. Woods* (1992) 8 Cal.App.4th 1570, 1581, citing *Keeler v. Superior Court* (1970) 2 Cal.3d 619, 624 [requiring evaluation of the intent of the Legislature when it enacted Penal Code section 187 in 1872].) It must be "presumed that, in enacting section 31, the Legislature 'was familiar with the relevant rules of common law, and, when it couches its enactments in common law language, that its intent was to continue those rules in statutory form.'" (*People v. Woods*, *supra*, 8 Cal.App.4th at p. 1581, quoting *Keeler v. Superior Court*, *supra*, 2 Cal.3d at p. 625.)

Professor Dressler has written that the "theoretical explanation for why we punish accomplices" is "difficult to uncover." Dressler asserted that "[m]any nineteenth and early twentieth-century treatises describe, but do not justify accomplice accountability doctrine." (Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem* (1985) 37 Hastings L.J. 91, 96, fn. 21; hereafter Dressler.) Dressler is correct, of course, because English common law -- the source of California's law regarding accomplice liability -- essentially is law found or created by a judge in response to a particular fact pattern. The result of this, as noted by Dressler, is that we are left with discerning what the law is from analysis of what the law previously has been found to be.

Perhaps the most definitive and influential analysis of what the common law was at the time Penal Code section 31 was enacted is the treatise published by Professor Sayre in 1930, roughly 58 years after section 31 was enacted. (Sayre, *Criminal Responsibility for the Acts of Another* (1930) 43 Harv.L.Rev. 689 (hereafter Sayre). Sayre wrote that "an elaborate structure of common law rules, regarded even down into the nineteenth century as fundamental," was built upon an "early criminal law conception of principal and accessory." The concept identified by Sayre was that an accessory before the fact who commanded, procured or counseled the commission of a felony through a guilty agent but who was

himself not present at the crime still could be punished. (Sayre, *supra*, at pp. 694-695.)

Sayre wrote that, "From the beginning there has never been the slightest doubt that one who commands, counsel or procures another to commit a crime is himself guilty of the crime." (Sayre, *supra*, at p. 695.) It is when the agent's acts do not fall within the precise scope of the other's express commands or procurement that difficulties arise. (Sayre, *supra*, at p. 696.) Citing and quoting well-known commentators from the 17th and 18th centuries, Sayre noted that formulations of the law regarding accomplice liability by Staunford and Plowden in the 16th century remained the law "with surprisingly little change thorough the barren centuries following." (Sayre, *supra*, at pp. 699-700.)

Review of the cases relied upon by Staunford and Plowden in reaching those formulations demonstrates that accomplice liability under the English common law at the time Penal Code section 31 was enacted would not have extended liability to petitioner on the particular facts in this matter. Sayre wrote that the "law of the day" in the late 16th century narrowly restricted criminal liability "within the scope of the express command or procurement of the accessory." (Sayre, *supra*, at p. 697.)

In *Pleas of the Crown*, published in 1557, Staunford wrote that the person who commands or procures the taking of a person is not guilty of a

robbery by an agent who robs the victim in addition to taking him because the agent exceeded the command, which could have been accomplished without the robbery. Staunford contrasted this with the situation in which a killing resulted even though the offense commanded was a beating, in which case the aider and abettor would be liable: "For it is difficult to beat a man in such wise that one can be sure that he will not die of the beating; and so in such a case I am accessory to him who killed him." (Sayre, *supra*, at p. 696.)

Sayre relied upon "the famous case of *Regina v. Saunders*, decided in 1575," in support of his assertion that the "law of the day" in the late 16th century narrowly restricted criminal liability "within the scope of the express command or procurement of the accessory." In *Saunders*, the accessory counseled Saunders to poison Saunders' wife and gave Saunders the poison necessary to accomplish the deed. Saunders gave the poison to his wife in a roasted apple, but his wife gave the apple to Saunders' daughter, who died. Saunders was convicted of murder, but the court concluded the accessory could not be convicted:

> For the Offense which Archer [the accessory] committed was the Aid and Advice which he gave to Saunders, and that was only to kill his Wife, and no other," reads the report. "Archer did not precisely procure her Death, nor advise him to kill her, and therefore whether or no he should be Accessary to this Murder which happened by a Thing consequential to the first Act, seemed . . . doubtful.

(Sayre, *supra*, at pp. 696-697, citing and quoting *Regina v. Saunders* (1575) 2 Plowd. 473, 475.)

The judges in *Saunders* concluded that Archer could not be convicted[6] because Archer's "assent cannot be drawn further than he gave it, for the poisoning of the Daughter is a distinct Thing from that to which he was privy, and therefore he shall not be adjudged Accessary to it." (Sayre, *supra*, at p. 697, citing and quoting *Regina v. Saunders*, 2 Plowd. at p. 475.) Plowden approved this result "because the poisoning of the Daughter was a distinct fact, to which Archer gave no Advice nor counsel, and whose Death he did not procure." (Sayre, *supra*, at p. 698, fn. 37.)

Professor Sayre pointed to a note Plowden appended to the end of his report of the case of *Regina v. Saunders* as furnishing "the foundations of the criminal law upon the subject with comparatively little change even to our own day."[7] (Sayre, *supra*, at p. 698.) Plowden's note consisted of a number of hypothetical fact patterns with Plowden's conclusions regarding the liability of the accessory in each pattern. (Sayre, *supra*, at p. 698, fn.

[6] According to Sayre, the judges apparently did not want to acquit Archer and thereby set a precedent that would permit someone as blameworthy as Archer to escape conviction, so the judges continued the matter to another session so that Archer could "purchase his Pardon, and by that Means be set at Liberty." (Sayre, *supra*, at p. 697, fn. 34, citing and quoting *Regina v. Saunders*, 2 Plowd. at p. 475.)

[7] "Our own day," of course, was 1930, when Professor Sayre's treatise was published.

37.) Plowden's fact patterns and conclusions were as follows:

Fact Pattern No. 1. The accessory commands the perpetrator to rob a man, who is killed by the perpetrator while resisting the attempted robbery. Plowden wrote that the accessory should be guilty of murder because the murder was committed in pursuit of the express command.

Fact Pattern No. 2. The accessory commands the perpetrator to beat the victim, who dies as a consequence of the beating. Plowden believed the accessory should be liable for murder because it was a consequence of the command and because the command "naturally tended to endanger the Life of the other."

Fact Pattern No. 3. The accessory commands the perpetrator to burn a house. The perpetrator burns the house in question, but the fire also burns the adjacent house. Plowden believed the accessory should be guilty of burning the second house "inasmuch as the burning of the second House followed from [the accessory's] command."

Fact Pattern No. 4. The accessory commands the perpetrator to burn a specific house, which house is well known to the perpetrator, but the perpetrator instead burns a different house. Plowden did not believe criminal liability should extend to the accessory under these facts "because it is another distinct Thing, to which I gave no Assent nor command, but wholly different from my Command."

Fact Pattern No. 5. This point actually was illustrated by two fact patterns. (1) The accessory commands the perpetrator to steal a horse, but the perpetrator instead steals an ox. (2) The accessory commands the perpetrator to steal a white horse but the perpetrator instead steals a yellow horse. Plowden did not believe the accessory should be criminally liable in either situation because "this differs directly from my Command, and my Consent cannot be carried over to it, for there is not the least Connection or Affinity between this Act and my Command."

Fact Pattern No. 6. The accessory commands the perpetrator to "rob such a Goldsmith of his Plate" in a specific location, but the perpetrator instead burglarizes the goldsmith's home to commit the theft. Plowden would not hold the accessory liable for the burglary "because it is a Felony of another Kind from that which I

commanded."

Fact Pattern No. 7. This actually reflects three different fact patterns in which the perpetrator commits the offense commanded by the accessory, but does so in a manner different than was commanded: (1) The accessory commands the perpetrator to kill by poison but the perpetrator instead kills by sword. (2) The accessory commands the perpetrator to kill someone at a specific location but the accessory instead kills the victim in a different location. (3) The accessory commands the perpetrator to kill the victim on a specific day, but the perpetrator instead kills the victim on a different day.

Plowden would hold the accessory criminally liable in all three scenarios "because Death is the principal Matter, which has followed from my Command, and the Place, Instrument, Time, and the like, are but the Manner and Form how the Death of the Party shall be effected, and not the Substance of the Matter, and a Variance in the formal part of the Execution of the Command shall not discharge a Man from being Accessary."

(Sayre, *supra*, at p. 698, fn. 37.)

Sayre distilled "the early law as laid down by Staunford and Plowden" as follows:

> *A* was liable if, having commanded or procured *B* to commit a crime, *B* committed the crime designated although by a different method, at a different time, or in a different place, or if he committed a crime different from the one directed, but a natural and probable consequence flowing out of it. Conversely, *A* was not criminally liable for such crimes of *B* as were not ordered and were not the probable consequence of those ordered, even if committed within the scope of *B*'s employment or in the course of *A's* business.

(Sayre, *supra*, at p. 699.) Sayre used three examples to demonstrate what he perceived to be the law as of 1930:

First Example: When a defendant counsels, procures, commands, incites, authorizes or encourages "the particular act which forms the

subject of the prosecution," all courts will hold the defendant guilty even though the "agent committed the act through a different instrumentality, or at a different time, or in a different place from that ordered or authorized.

Second Example: When a defendant has authorized the general business in the course of which the act is committed, but has not authorized or consented to the particular criminal act, the defendant may be liable in a civil action but not, other than as set forth in the third example below, in a criminal action.

Third Example: When the defendant has not authorized or consented to the particular criminal act, the defendant still may be criminally liable if the act "grows out of and is the proximate consequence of one that has been authorized or procured." This is so "whether or not the agent is acting in the course of the defendant's business."

(Sayre, *supra*, at pp. 702-704.)

The third example, above, is Sayre's formulation of the natural and probable consequences doctrine. Sayre used cases from California, North Carolina and South Carolina to illustrate the rule. In *People v. Keefer* (1884) 65 Cal. 232 [3 Pac. 818], Keefer was indicted for a murder committed by his accomplice, Chapman, while Chapman was tying up the victim. Although there was some evidence that Keefer incited Chapman to tie up the victim, this Court held that inciting Chapman to tie up the victim would not, in and of itself, make Keefer an accessory to the murder:

> In the case at bar, if defendant simply encouraged the tying of the deceased -- a misdemeanor which did not and probably could not cause death or any serious injury -- as the killing by Chapman was neither necessarily nor probably involved in the battery or false imprisonment, nor incidental to it, but was an independent and malicious act with which defendant had

> no connection, the jury were not authorized to find defendant guilty of the murder, or of manslaughter.

(*Id.* at pp. 233-234; Sayre, *supra*, at p. 704, fn. 57.) The Court held that a different result would have been appropriate had the victim had been strangled by the cords with which Chapman tied the victim or if the victim had died because he had been tied up and left exposed to the elements. (*Id.* at p. 234; Sayre, *supra*, at p. 704, fn. 57.)

It is worth noting that the concept of natural and probable consequences in *Keefer*, handed down roughly 12 years after Penal Code section 31 was enacted, was entirely consistent with Professor Sayre's formulation of the English common law. The Court proceeded upon the assumption of a relationship between Keefer and Chapman, in which Keefer encouraged Chapman to follow and tie the victim. (*People v. Keefer*, *supra*, 65 Cal. at p. 233.) That relationship was not, however, sufficient in and of itself to establish accomplice liability under the natural and probable consequences doctrine. The Court also focused on the nature of the specific act encouraged -- the tying of the victim -- to determine the scope of liability. (*Id.* at pp. 233-234.)

In *State v. Davis* (1882) 87 N.C. 514, the North Carolina case cited by Sayre, Davis procured Church to steal Thompson's money. Davis watched Thompson's home until Thompson left, then told Church that the time was right to commit the theft. Church went to the Thompson home

and, over the objection of Thompson's daughter, took roughly $600. After Church left the home, he became concerned that Thompson's daughter could identify him so he returned to the home and killed Thompson's daughter with an axe. The trial court instructed the jurors that they could not convict Davis as an accessory if they found that Church committed the murder through his own malice, and not to conceal the robbery, even if they found that Davis procured Church to commit the robbery. Davis was convicted and the conviction was affirmed. (Sayre, *supra*, at p. 704, fn. 57, citing *State v. Davis*, *supra*, 87 N.C. 514.)

Davis is important in that it illustrates both the required relationship between the parties and the limitations on the concept of natural and probable consequences under the common law. The jury was required to find both that Davis procured Church to commit a robbery and that the killing was committed to conceal the robbery. Much the same as in *Keefer*, whether the killing was a natural and probable consequence depended upon, and flowed from, the manner in which the target offense was committed.

In the South Carolina case cited by Sayre, Kennedy incited the murder of Holland, but Ussery was instead killed by accident. (*State v. Kennedy* (1910) 85 S.C. 146, 147; Sayre, *supra*, at pp. 704-705, fn. 57.) The jury was instructed that:

> If one intends to murder another and misses the intended victim, and kills a third person, a bystander, he would be just

> as guilty as if he had killed the man whom he meant to kill. The same is true of the law of accessory before the fact or after the fact.

(*Id.* at p. 149.) Kennedy did not dispute the correctness of this instruction, but argued that the trial court should have applied the instruction only to an accessory who was present at the scene of the killing and not to a person who was an accessory before the fact. (*Ibid.*)

The court rejected Kennedy's claim, finding no reason to distinguish between an accessory before the fact and a person who aids in the commission of offense while at the scene of the offense. (*State v. Kennedy*, *supra*, 85 S.C. at p. 149.) The court stated the rule of accomplice liability as follows:

> In 3 Green. Ev. 44, the law is thus stated: "If the party employed to commit a felony on one person perpetrates it by mistake upon another, the party counseling is accessory to the crime actually committed. The authorities are unanimous on the point. If the principal varies totally or substantially from the solicitation, and commits an entirely different crime -- one which did not and could not have probably or naturally resulted from the effort to commit the crime incited -- the person who incited him would not be accessory to the crime committed, but where, as in this case, the principal in attempting to commit the crime to which he was incited, by mistake, accident, or design commits another crime, the person inciting is accessory to the crime actually committed. The law transfers the original wicked intent to the result."

(*Id.* at pp. 149-150; Sayre, *supra*, at pp. 704-705.)

Once again, *Kennedy* provides confirmation of Sayre's view of the common law. An accessory is not liable if the perpetrator deviates from the

offense solicited by the accessory and instead commits a different offense, but that same accessory is liable if the perpetrator commits a different offense while attempting to commit the offense solicited by the accessory. As was the case with *Keefer* and *Davis*, liability under *Kennedy* was deemed to flow from, and to depend on, how the target offense was committed.

B. Other Case Authority Applying the Natural and Probable Consequences Doctrine

Notwithstanding Sayre's discussion of *Keefer*, *People v. Kauffman* (1907) 152 Cal. 331 [92 P. 361], has been considered the first California case embracing the natural and probable consequences theory of aiding and abetting liability. *Kauffman* actually was a conspiracy case in which Kaufmann and five others planned to steal money from a safe at a cemetery in San Mateo County. They supplied themselves with nitroglycerin and burglar's tools for the crime, and all but Kauffman were armed with guns. (*Id.* at pp. 332-333.)

They abandoned their plan after finding the cemetery protected by an armed guard, and instead began to make their way back to San Francisco. (*People v. Kauffman*, *supra*, 152 Cal. at p. 333.) After riding a street car to the end of its line, the six men split up into two groups of three and continued their journey by walking, with one group of three trailing Kauffman and his two companions. As they were walking, Kauffman and

the two people with him were called back by the three trailing members of the conspiracy, who tried to convince Kauffman and the others to join them in burglarizing a coal yard. Kauffman and the others rejected that plan, and the two groups of three again split up and proceeded toward home with one of the groups trailing Kauffman's group. (*Ibid.*)

Kauffman and his companions turned and looked back toward the second group after they heard a call or yell. Two of the people in the trailing group were running toward them. One of those two people turned and fired a shot in the direction from which he had come and then jumped over a fence and disappeared. The other person joined Kauffman's group and indicated both that he had a gun and that he was not going to run. Kauffman still was in possession of nitroglycerin and a drill. A police officer then approached Kauffman's group and was mortally wounded in a shootout. (*People v. Kauffman*, *supra*, 152 Cal. at p. 333.)

Kauffman contended on appeal that his conviction under the natural and probable consequences theory of co-conspirator liability was invalid because the conspiracy had been abandoned upon the discovery of an armed guard at the cemetery. Kauffman argued that the criminal combination embraced no more than this contemplated burglary, and that the shooting of Robinson was not within the reasonable and probable consequences of the common unlawful design. (*People v. Kauffman*, *supra*,

152 Cal. at p. 335.)

The Court rejected that argument, finding the evidence sufficient to submit to the jury the question whether "the common plan or design in which Kauffman and his co-defendants had engaged included not only the breaking into the safe but also the protection of themselves and each other from arrest and detection while going to and coming from the scene of the proposed burglary, and that any act committed by any of them in the course of such going or coming for the purpose of resisting arrest and preventing consequent detection." (*People v. Kauffman*, *supra*, 152 Cal. at pp. 335, 337.) In reaching that conclusion, the Court made the following summary of the natural and probable consequences theory:

> There is no dispute about the rules of law governing the criminal liability of each of several parties engaging in an unlawful conspiracy or combination. An apt statement of them, abundantly supported by authority, is to be found in 8 Cyc. 641, in the following language: "The general rule is well settled that where several parties conspire or combine together to commit any unlawful act, each is criminally responsible for the acts of his associates or confederates committed in furtherance of any prosecution of the common design for which they combine. In contemplation of law the act of one is the act of all. Each is responsible for everything done by his confederates, which follows incidentally in the execution of the common design as one of its probable and natural consequences, even though it was not intended as a part of the original design or common plan. Nevertheless the act must be the ordinary and probable effect of the wrongful act specifically agreed on, so that the connection between them may be reasonably apparent, and not a fresh and independent product of the mind of one of the confederates outside of, or foreign to, the common design."

(*Id.* at p. 334.)

It bears noting that the *Kauffman* decision, handed down approximately 35 years after Penal Code section 31 was enacted, used the word "confederate" in the same way the word was used in *Prettyman*. *Kauffman* also comports with the requirements of the common law as explained by Professor Sayre, as it required the existence of a relationship between an accomplice and a direct perpetrator. *Kauffman* also evaluated whether an act is a natural and probable consequence by reference to the nature of the crime and how the conspirators intended to effect the crime. The Court noted that "[p]istols are not used for breaking into a safe; their purpose is to kill those who interfere to prevent a burglary or arrest the perpetrators." (*People v. Kauffman*, *supra*, 152 Cal. at p. 336.)

C. The Leading Commentators on Accomplice Liability Would Not Extend Liability to an Accomplice Based on the Acts of a Person Other than the Person Procured by the Accomplice to Commit the Target Offense

The extension of liability beyond what was contemplated by the common law is not supported by the leading commentators on the issue of accomplice liability. In the Court's majority opinion in *Prettyman*, Justice Kennard briefly references treatises on the issue by Professors Kadish and Dressler, including a quote from Dressler analogizing the issue to agency doctrine and the concept that a person who acts through an agent forfeits his right to be treated individually. (*People v. Prettyman*, *supra*, 14 Cal.4th

at p. 259, citing and quoting Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine* (1985) 73 Cal.L.Rev. 323, 337 (hereafter Kadish) and Dressler, *supra*, at p. 111, fn. omitted (hereafter Dressler.)

The foundations of accomplice liability are somewhat uncertain. Dressler wrote that "theoretical explanation for why we punish accomplices" is "difficult to uncover." Dressler asserted that "[m]any nineteenth and early twentieth-century treatises describe, but do not justify accomplice accountability doctrine." (Dressler, *supra*, at p. 96, fn. 21.) Professor Rogers has written the scope of an accomplice's liability for crimes the accessory did not intend is the subject of a raging controversy. (Rogers, *Accomplice Liability for Unintentional Crimes: Remaining within the Constraints of Intent*, (1998) 31 Loy. L.A. L.Rev. 1351, 1360 (hereafter Rogers).

Notwithstanding the uncertain roots of accomplice liability, and much the same as the majority opinion in *Prettyman*, Sayre, Kadish and Dressler all relied on the similarities between civil agency law and accomplice law in explaining their conclusions about the scope of accomplice liability. Sayre wrote that there was no evidence of any general doctrine of *respondeat superior* in the modern sense of the concept prior to 1700. (Sayre, *supra*, at p. 692.) The recorded cases between 1300 and 1700 showed a growing recognition that a master's liability for the acts of a

servant should be limited to acts specifically commanded or authorized by the master, and to acts consented to by the master either before or after the act. (Sayre, *supra*, at p. 691.) Sayre wrote that the doctrine increasingly took shape after 1700, often supported by the maxim *qui facti per alium facit per se*.[8] (Sayre, *supra*, at p. 693.) In 1765, Blackstone wrote:

> As for those things which a servant may do on behalf of his master, they seem all to proceed upon this principle, that the master is answerable for the act of his servant, if done by his command, either expressly given, or implied: *nam, qui facti per alium facit per se*. Therefore, if the servant commit a trespass by the command or encouragement of his master, the master shall be guilty of it. . . . Whatever a servant is permitted to do in the usual course of his business, is equivalent to a general command.

(Sayre, *supra*, at p. 693.)

Professor Kadish believed that accomplice liability requires the accomplice to act intentionally to persuade or help the direct perpetrator (Kadish, *supra*, at p. 337), but Kadish struggled to find justification for his belief in the requirement of intentionality. (Kadish, *supra*, at p. 353 [The theory of the intentionality requirement is not obvious].) Kadish wrote that the requirement of intention may be found in agency theory, in which the liability of the principal rests on his consent to be bound by the actions of his agent, whom he vests with authority for that purpose. (Kadish, *supra*, at p. 354.) Kadish believed that because of the agency requirement of

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[8] He who acts through another does the act himself.

manifestation of consent to the acts of the agent, "the requirement of intention for complicity liability becomes more readily explicable." (Kadish, *supra*, at p. 354.) Kadish wrote:

> Obviously, in the context of the criminal law, literal consent to be criminally liable is irrelevant. But by intentionally acting to further the criminal actions of another, the secondary party voluntarily identifies himself with the principal party. The intention to further the acts of another, which creates liability under the criminal law, may be understood as equivalent to manifesting consent to liability under the civil law.

(Kadish, *supra*, at pp. 354-355.)

Professor Dressler believed that agency theory explained a great deal about why we feel justified in punishing an accomplice as though he is a direct perpetrator. (Dressler, *supra*, at p. 111.) Dressler argued that the feeling of justification "may be described better in terms of 'forfeited personal identity.'" (*Ibid.*) Quoting *Queen v. Saunders & Archer*, Dressler wrote:

> It follows, therefore, that "[s]he who advises or commands an unlawful thing to be done shall be adjudged accessory to *all that follows* from that same thing, but not from any other distinct thing that she has not authorized by advice or command."

(Dressler, *supra*, at p. 110, emphasis in original, quoting *Queen v. Saunders & Archer*, *supra*, 2 Plowd. at p. 475 [75 Eng.Rep.at p. 709].)

The use of agency principles to help explain the source of accomplice liability demonstrates that the use of the word "confederates" in

Prettyman was correct, and not merely inadvertent or imprecise. The scope of liability under accomplice theory obviously is different than under agency theory, but both theories require a relationship between the person procuring or commanding the act and the person who actually commits the act.

D. Conclusion

The use of the word "confederate" in *Prettyman* and other cases was not merely another instance of the imprecise or loose use of the word. Under the common law, petitioner would not have been held criminally liable for the deaths of his friends as the natural and probable consequences doctrine was limited to some, but not all, acts committed by the person who was commanded or procured by the accessory. As noted above, no such relationship existed between petitioner and the shooter in this matter. The direct perpetrators of the target offenses aided and abetted by petitioner were Robert M., Aaron L. and Ed S. -- the young men involved in the fist fight -- none of whom fired the fatal shots.

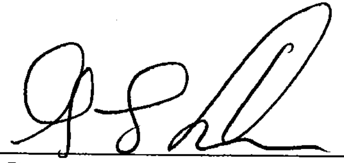
Extension of the common law principles so as to encompass acts by third parties who are not in a relationship with the accessory would be disfavored by the leading commentators on accomplice liability. Such an extension also would constitute a judge-made expansion of the law in violation of the separation of powers. This Court must reverse petitioner's

murder convictions.

Dated: October 17, 2013

Respectfully submitted,

Cannon & Harris
Attorneys at Law



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CERTIFICATION OF WORD COUNT

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Dated: October 17, 2013

Gregory L. Cannon
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I am over eighteen (18) years of age and not a party to the within action. My business address 6046 Cornerstone Court West, Suite 141, San Diego, California, 92121-4733. On October 17, 2013, I served the within

PETITIONER'S OPENING BRIEF ON THE MERITS

On each of the following, by placing a true copy thereof in a sealed envelope with postage fully prepaid, in the United States mail addressed as follows:

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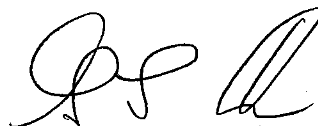
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: October 17, 2013



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