# In the Supreme Court of the State of California

**THE PEOPLE OF THE STATE OF CALIFORNIA,**

**Plaintiff and Respondent,**

**v.**

**VINCE BRYAN SMITH,**

**Defendant and Appellant.**

Case No. S210898



Fourth Appellate District Division One, Case No. D060317
Riverside County Superior Court, Case No. BAF004719
The Honorable Patrick F. Magers, Judge

## RESPONDENT'S BRIEF

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## ISSUE FOR REVIEW

In granting review, this court limited the issue to the following: was appellant properly convicted under the natural and probable consequences theory of aiding and abetting?

## INTRODUCTION

The two murders at issue in this case occurred during a planned fight involving members of three different gangs: the Gateway Posse Crips, to which appellant belonged; the Young Ass Hustlers ("YAH") squad, a developing gang with ties to more established Bloods-affiliated gangs and to which appellant's younger brother, Robert McMorris, belonged; and the Pueblo Bishop Bloods, to which the likely shooter belonged. Appellant wanted his younger brother out of YAH, which had become increasingly dominated by the Bloods. It was appellant who made the necessary arrangements with leaders of YAH and the Pueblo Bishop Bloods, including Deshawn "Mister" Littleton and Tovey "TK" Moody, to have his brother "jumped out."[1]

As a result of the arrangements between appellant, Mister, and TK, and despite the longstanding rivalry between Crips and Bloods-affiliated gangs, a group of about 15–20 Crips, Bloods, and YAH squad members planned to meet at an apartment complex for a single purpose: to have McMorris jumped out of the YAH squad. Because of the rivalry, however, as events unfolded in the days leading up to the jump out, it became clear this would not be a "typical" jump out in which YAH squad members would beat up McMorris in exchange for his exit from the gang.

Knowing that the already anticipated violence of the jump out would likely escalate, appellant vowed to bring "back up" with him to the fight,

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[1] A "jump out" refers to the beating up of a gang member in order to allow him to leave the gang. (28 RT 5444–5445; 38 RT 7452.)

and he kept his word. Accompanying appellant and McMorris to the jump out were four Crips-affiliated gang members. The YAH squad prepared similarly, making sure not only its members were in attendance, but also higher-ranking members of the Pueblo Bishops Bloods gang. Both groups came armed with guns.

The jump out began, with YAH squad members at the center of the fight to jump out McMorris. Like seconds to a duel, the Crips and Bloods gang members stood nearby, ready to intervene if necessary. It did not take long before such intervention was needed, as appellant quickly grew angry at seeing his younger brother on the losing end of the fight. He grabbed McMorris to pull him out of the fight, swung at another YAH member, and pointed his gun at the crowd. Melee ensued after that; some immediately fled while others, including Mister and TK, responded with gunfire. Multiple gunshots were fired, several of them striking and killing two members of appellant's backup crew.

Appellant was convicted of second degree murder for the deaths of his two backups under the natural and probable consequences theory of aiding and abetting. He now claims that he cannot be held liable because, even though he anticipated that the jump out could lead to deadly violence, the fatal shots were not fired by either his brother or the specific gang members who actually threw punches at his brother during the jump out – people appellant labels as the "direct perpetrators" of the target offense and the only people appellant claims to have aided and abetted. Because the evidence suggests the fatal shots were fired by one or more of the Bloods-affiliated gang members who were – like appellant – acting as seconds, appellant claims the nontarget murders are beyond the reach of the natural and probable consequences doctrine and he cannot be held liable.

Appellant's argument cannot withstand scrutiny, as it relies upon contrived distinctions between direct perpetrators and aiders and abettors in

order to improperly constrict the reach of the natural and probable consequences doctrine. Rather, because appellant was a principal in the jump out, and because another principal to the jump out committed a reasonably foreseeable offense, appellant may properly be held liable for the murders under the natural and probable consequences doctrine and his convictions should be upheld.

But even under appellant's proposed limitations on the natural and probable consequences doctrine, he was still liable because both he and the shooter were, in fact, direct perpetrators in the target offense. As such, even if appellant's position is correct that one may only be held liable for the reasonably foreseeable crimes committed by the direct perpetrator of the target offense, appellant's convictions are still proper.

## STATEMENT OF THE FACTS AND CASE

**Background: the gangs and key players.** The two murders at issue here occurred during a planned fight involving members of three separate gangs: the YAH squad, the Pueblo Bishop Bloods, and the Gateway Posse Crips. As is the case with all Bloods and Crips affiliated gangs, the Pueblo Bishop Bloods and the Gateway Posse Crips were rivals. (38 RT 7427, 7448.) The YAH squad started out as unaffiliated with either the Bloods or the Crips, and there were YAH squad members with familial ties to both Bloods gangs and Crips gangs. (40 RT 8072.) However, by the time of the murders, the YAH squad had seemingly chosen sides and affiliated with the Bloods. (38 RT 7653; 40 RT 8070.)

The YAH squad was mostly comprised of teenage boys. (37 RT 7379; 38 RT 7521.) YAH started out as a dance crew but later became involved in selling marijuana and fighting rival gangs. (29 RT 5800; 40 RT 8070.) It was normal for YAH squad members to carry guns. (39 RT

7852.) Several of the YAH squad members were related to each other, including Deshawn "Mister" Littleton ("Mister[2]"), Lavert Littleton, Reggie Moore, and Wealton Moody. (29 RT 5624–5628, 5645; 37 RT 7380, 7384.) Many members of the Littleton family are involved in Bloods-affiliated gangs. (40 RT 7976.) Mister, the presumed shooter in this case, grew up in the Pueblo Los Rio Projects in Los Angeles – home turf of the Pueblo Bishop Bloods. Some of Mister's cousins, including Tovey "TK" Moody and Wealton "Tiny" Moody, are full-fledged Pueblo Bishop Bloods members who were in attendance at the jump out. (35 RT 7002; 37 RT 7399.) Mister was a member of both YAH and the Pueblo Bishop Bloods. (29 RT 5811; 35 RT 7002.) Because many of Mister's family members live in or frequently visit the apartment complex where the murders took place, the complex is commonly referred to as the "Pueblos." (28 RT 5313, 29 RT 5810–5811.)

Robert McMorris had recently joined the YAH squad, but shortly thereafter he decided he wanted to get out of the gang. (33 RT 6696, 6706, 6730–6731.) McMorris was supposed to be "disciplined" by YAH for not "representing the hood." (37 RT 7281–7282.) His brother, appellant, a member of the Gateway Posse Crips, also wanted him out of the YAH squad and took steps to make sure that would happen. (33 RT 6694, 6727, 6748; 35 RT 7003.)

**Events leading up to the jump out: conflict builds between appellant and YAH.** A few days before the jump out, appellant approached a group of YAH squad members, including Edward Scott ("Ed") and Mister, at a liquor store and told them that he wanted his brother

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[2] To maintain consistency with the testimony received at trial, respondent refers to the witnesses and defendants by the name predominantly used at trial.

out of YAH. (35 RT 6975–6977.) Appellant was angry and told Ed, "I'll kill one of you niggers over my brother." (35 RT 6975–6976; 38 RT 7565.) Ed told appellant it would not be a problem for McMorris to leave YAH. (35 RT 6977.) As he left, appellant flashed a "G" sign to show his affiliation with the Gateway Posse Crips. (38 RT 7568.) After appellant left, Ed and Mister were angry with appellant for disrespecting them. (35 RT 6980–6981.) Mister pounded his fists and repeatedly threatened to "beat the fuck" out of McMorris. (35 RT 6983–6984.)

A day or two later, there was a second confrontation at the Peppertree Apartments, a neighboring complex to the "Pueblos." (38 RT 7583–7587.) Tovey "TK" Moody, Mister's cousin and a Bloods member, believed appellant had disrespected Mister during the liquor store incident. (29 RT 5819; 33 RT 6596; 35 RT 7014; 36 RT 7184.) Appellant explained that he wanted McMorris out of the YAH squad, and TK told him there was "no problem with that." (35 RT 7015.) Appellant told TK he planned on bringing "some of [his] homies" with him "to make sure none of this shit pops off." (35 RT 7015.) TK responded, "I know you're not talking about gun play." (35 RT 7016.)

**The jump out.** On February 7, 2006, appellant told McMorris that he was taking him to get jumped out of the YAH squad. (33 RT 6736, 6748.) Because of the growing tension between appellant and the YAH squad, appellant and McMorris stopped to pick up backup on the way to the jump out. Vincent McCarthy, a Gateway "shot caller," and former leader in Gateway, Demetrius Hunt, a Gateway associate and appellant's cousin, and Julian McKee, a Crips-affiliated gang member, all arrived with appellant and McMorris. (28 RT 5386; 29 RT 5673–5674, 5795; 32 RT 6393–6394, 6407, 6480; 33 RT 6614–6615, 6752; 38 RT 7433, 7463; 18 CT 3945–3948.) Andre Denman, another Crips-affiliated gang member, arrived in a second car. (29 RT 5656; 32 RT 6388.) Appellant was worried that things

might get out of hand, and he wanted backup to ensure that McMorris got jumped out, but that there was not a beat down. (18 CT 3901, 3906, 3971.) McCarthy and appellant both came armed with guns; they planned to use them in case they were shot at first. (18 CT 3971–3972, 3979; 28 RT 5535–5538, 5551, 5558.)

A large group of YAH squad and Pueblo Bishop Bloods members were waiting at the apartment complex where the jump out was to take place. (32 RT 6447, 6499; 33 RT 6603; 37 RT 7293; 38 RT 7603.) Mister told the YAH squad that they were going to "fight Gateway little homies." (38 RT 7600.) Several of them had armed themselves with weapons in preparation for the jump out. (40 RT 7937–7940, 7946–7947.) It looked like TK had two guns, one of which he handed to Mister. (35 RT 7041; 37 RT 7245–7246, 7361.) As appellant's car pulled up, the group backed up to allow appellant's group onto the property. (35 RT 7044–7045.) When McCarthy got out of the car, he started "mad dogging"[3] Mister. (39 RT 7789.)

The group decided the jump out would take place in the field next to the apartment complex. (28 RT 5360; 38 RT 7617; 39 RT 7673.) The two groups–appellant and his cohorts, and the YAH and Bloods-affiliated members–walked separately over to the field. (28 RT 5368–5369; 33 RT 6619, 6769–6770; 38 RT 7616; 39 RT 7738.) Appellant's group had about four people; the other group had about ten. (28 RT 5368.) Once there, appellant asked McMorris who jumped him in to YAH then pointed at two YAH squad members, Ed and Aaron Lee ("Aaron"), and told them he wanted them to fight his brother. (33 RT 6763; 38 RT 7615.) Appellant also attempted to dictate the rules of the jump out, which did not "sit well"

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[3] Mad dogging means looking at someone in a challenging or threatening manner. (39 RT 7789.)

with the YAH squad members. (33 RT 6765–6766; 38 RT 7654; 39 RT 7670, 7787.) Mister told Ed and Aaron, "you guys know what you guys got to do." (33 RT 6771, 6773.)

Ed, Aaron, and McMorris squared off on the grass. (33 RT 6773.) Appellant, McCarthy, and Hunt stood nearby – a few feet away. (33 RT 6774–6776.) Various YAH squad members, including Mister, also positioned themselves nearby. (33 RT 6776–6777; 34 RT 6849, 6884.) The fight began and Ed, Aaron, and McMorris all started throwing punches. (33 RT 6778, 6780; 35 RT 7061.) Mister and two other YAH squad members were also hitting McMorris. (35 RT 7059–7060.) After five or ten minutes, McMorris was knocked to the ground. (33 RT 6781; 38 RT 7629.) McMorris was lying on the ground covering his head. (37 RT 7309.) Appellant stepped in to grab McMorris and pull him out of the fight. (33 RT 6782–6784.)

**Violence breaks out and the victims are murdered.** After appellant pulled McMorris from the fight, fighting broke out among the gang members. There was "pandemonium." (34 RT 6850.) Appellant swung at one of the YAH squad members. (33 RT 6785–6787; 38 RT 7633.) Then, appellant yelled out, "Fuck this shit," and pulled out a gun. (35 RT 7063; 37 RT 7309–7310.) After that, Mister pulled out his gun and started shooting. (33 RT 6791, 6798.) Once the shooting started, some members ran away. (32 RT 6458; 33 RT 6620, 6799; 34 RT 6807, 6854; 39 RT 7756.) As many as eight or nine gunshots were heard. (28 RT 5340; 29 RT 5664, 5697, 5762; 32 RT 6423.) The shots were separated only by a few seconds. (29 RT 5697.) Several witnesses testified to seeing Mister fire multiple shots while others saw TK pointing a gun. (34 RT 6806–6807, 6853, 6864; 35 RT 7065.)

Hunt and McCarthy were both shot. Hunt was shot four times and died at the scene from multiple gunshot wounds. (30 RT 5864, 5879, 5883,

5902.) One of the bullets entered through his shoulder and exited through his neck. (30 RT 5865–5870, 5878–5879.) This wound would have killed him within a minute or two. (30 RT 5882–5883.) McCarthy was shot twice. (30 RT 5907.) One of the bullets traveled through his spinal cord and rendered him immediately paralyzed. (30 RT 5913–5914.)

After the shooting, Mister ran into his grandmother's apartment and told her he needed to "get out of there." (29 RT 5763–5764.) He seemed nervous. (29 RT 5763–5764.) Mister then called his mom to pick him up; he still sounded nervous.[4] (38 RT 7403–7404.)

**The police arrive.** Police arrived at the scene within a few minutes of the shooting; a neighbor had called 911 immediately upon hearing the gunshots. (29 RT 5580; 32 RT 6456, 6461.) When the police arrived, appellant, McMorris, and Denman were still there tending to the victims. (29 RT 5587, 5711; 32 RT 6335–6337.) They were crying and upset. (32 RT 6335–6337.) Paramedics arrived and transported both victims to the hospital, where McCarthy later died. (29 RT 5601; 30 RT 5917.)

**Forensics.** The forensic evidence recovered at the scene included a Berretta pistol, a Smith and Wesson .22 caliber pistol, six expended nine-millimeter casings, three expended .40 caliber casings, one .40 caliber live round, one .22 caliber live round, a magazine containing four .40 caliber rounds, and another magazine containing nine .22 caliber rounds. (30 RT 5997, 6000, 6018–6019; 31 RT 6178, 6214.) The bullets removed from Hunt's shoulder and McCarthy's spinal cord appeared to be nine-millimeter bullets. (30 RT 5886, 5925; 31 RT 6256–6257, 6260–6262.) Both bullets were fired from a gun with a polygonal rifled barrel; it is difficult to match bullets fired through such a gun. (30 RT 5886, 5916; 31 RT 6261–6262,

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[4] The next day, Mister's mom took Mister and his brother to Washington. (38 RT 7413–7414.)

6256–6258.) None of the bullets or casings recovered from the victims could be definitely matched to any of the guns that were recovered. (31 RT 6284.)

**The charges and convictions.** As a result of appellant's role in aiding and abetting the target jump out, appellant was charged with two counts of first degree murder under the natural and probable consequences doctrine of aiding and abetting. While the forensics examination did not reveal who fired the fatal shots; both the prosecutor and defense counsel operated under the theory that Mister was the killer. The target crimes were fighting in public, assault, and battery. (41 RT 8283.) The prosecutor argued appellant was responsible under the natural and probable consequences theory because appellant aided and abetted the group assault, and the circumstances of the assault demonstrated that it was foreseeable for one or more of the participants to use deadly violence. (42 RT 8447–8452.) In response, appellant's trial counsel argued that either (1) the target crimes were not committed; (2) the murder was not a reasonably foreseeable result of the jump out; or (3) if the murder was foreseeable, the shooter (Mister) was acting in unreasonable self-defense or under heat of passion such that appellant could only be guilty of voluntary manslaughter. (42 RT 8741–8744.) The jury convicted appellant of two counts of second degree murder. The trial court sentenced appellant to 15 years to life in state prison for each murder conviction, with the sentences to run concurrently. (Aug. RT 61–62.)

**The appeal and subsequent proceedings.** Appellant appealed, claiming, among other things, that he could not be convicted under the natural and probable consequences doctrine because the murders were not committed by a "confederate" of appellant. Appellant reasoned his "confederates" were limited to those in attendance who were essentially on "his side." Division One of the Fourth District Court of Appeal disagreed

and affirmed appellant's murder convictions. The court held that the natural and probable consequences doctrine applied regardless of whether the nontarget crime was committed by a "confederate." (*People v. Smith* (June 8, 2012, D060317) 206 Cal.App.4th 1081.)

Appellant first raised the issue presented here – that the natural and probable consequences doctrine only applies to nontarget crimes committed by the "direct perpetrator" of the target crime – in his reply brief. He then re-raised the issue in a petition for rehearing, which the Court of Appeal denied.

Appellant petitioned for review on this issue and several others; this court initially granted and remanded on an unrelated sentencing issue. When the Court of Appeal issued its modified opinion affirming appellant's murder convictions, appellant again petitioned for review. He raised several issues, including the allegations that he was improperly convicted under the natural and probable consequences doctrine and that insufficient evidence supported his conviction because there was no evidence demonstrating who fired the fatal shots. On July 17, 2013, this court granted review, limiting the issue to that set forth above.

## ARGUMENT

### I. APPELLANT WAS PROPERLY CONVICTED UNDER THE NATURAL AND PROBABLE CONSEQUENCES THEORY OF AIDING AND ABETTING

This case turns on the extent of liability under the natural and probable consequences doctrine. The question is whether, under the natural and probable consequences doctrine, any principal in a target offense can be held liable for the reasonable and foreseeable nontarget crimes committed by another principal. The answer is yes. All principals are liable for the reasonable and foreseeable nontarget offenses committed by

any of them because the purpose of the doctrine is to hold principals responsible for the crimes they set in motion.

In arguing otherwise, appellant attempts to limit the reach of the natural and probable consequences doctrine by arguing it should only apply where the defendant aids and abets the "direct perpetrator" in the target offense, and that person goes on to commit the nontarget offense. As will be demonstrated below, appellant's claim fails at the outset even under this restrictive interpretation. Appellant was properly convicted because there was sufficient evidence he aided and abetted Mister, a direct perpetrator in the target offense, who then committed a foreseeable nontarget murder. Additionally, even if Mister was not a direct perpetrator in the target offense, there was sufficient evidence appellant was. As a direct perpetrator in the target offense, appellant is liable for the foreseeable nontarget crimes committed by another principal.

But even if appellant could show that both he and the shooter were solely aiders and abettors, appellant's claim fails for a more fundamental reason. The natural and probable consequences doctrine holds all principals, including aiders and abettors, liable for the foreseeable crimes committed by any principal. This court should reject appellant's contention to the contrary because it forces courts to make difficult and often arbitrary distinctions among participants to a crime; it fails to account for the many varied ways an unintended crime can result from an intended crime and thereby fails to serve the goal of the natural and probable consequences doctrine; and the existing limitations to the doctrine properly and adequately confine liability.

### A. The doctrines at issue: aiding and abetting and natural and probable consequences

As this case involves the application of the doctrines of aiding and abetting and natural and probable consequences, a brief examination of each doctrine is necessary.

#### 1. Aiding and abetting

The doctrine of aiding and abetting extends criminal liability to all principals. Penal Code section 31 governs aiding and abetting liability and provides that "[a]ll persons concerned in the commission of a crime," and all those who "aid and abet in its commission" are principals in any crime so committed. (Pen. Code, § 31.) Because of aiding and abetting liability, a person who aids and abets a crime is guilty of that crime even if someone else committed some or all of the criminal acts. (*People v. Prettyman* (1996) 14 Cal.4th 248, 259–260 (*Prettyman*).)

The underlying rationale for holding the aiding and abetting defendant liable is that he or she has forfeited the right to be treated as an individual by choosing to take part in the criminal activity of another. (*Prettyman, supra*, 14 Cal.4th at p. 259.) "[W]hen an accomplice chooses to become a part of the criminal activity of another, she says in essence, 'your acts are my acts,' and forfeits her personal identity." (*Ibid.,* citing Dressler, Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem (1985) 37 Hastings L.J. 91, 111, fn. omitted.)

This court established the guiding principles of aiding and abetting liability in *People v. Beeman* (1984) 35 Cal.3d 547 (*Beeman*). There, this court held that an aider and abettor must act with (1) knowledge of the criminal purpose of the perpetrator and (2) with an intent or purpose of committing, or of encouraging or facilitating commission of the offense. (*Beeman, supra*, 35 Cal.3d at p. 560.) Additionally, the aider and abettor must engage in conduct that actually aids, promotes, encourages, or

instigates the commission of the crime. (*Prettyman*, *supra*, 14 Cal.4th at p. 259; *People v. Perez* (2005) 35 Cal.4th 1219, 1225 (*Perez*).) All in all, proof of aider and abettor liability "requires proof in three distinct areas: (a) the direct perpetrator's actus reus – a crime committed by the direct perpetrator, (b) the aider and abettor's mens rea – knowledge of the direct perpetrator's unlawful intent and an intent to assist in achieving those unlawful ends, and (c) the aider and abettor's actus reus – conduct by the aider and abettor that in fact assists the achievement of the crime." (*Perez*, *supra*, 35 Cal.4th at p. 1225.) Upon such proof, the aider and abettor becomes a principal to the crime and may be punished as such, even if he or she was not present during the commission of the offense. (*Beeman*, *supra*, 35 Cal.3d at p. 554.)

**2. The natural and probable consequences doctrine**

While the doctrine of aiding and abetting allows for all principals to be convicted of a crime, regardless of the extent of each one's involvement, the doctrine – standing alone – only holds principals liable for the crime actually aided and abetted. However, under the natural and probable consequences doctrine, "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." (*Prettyman*, *supra*, 14 Cal.4th at p. 254.)

To be guilty under the natural and probable consequences doctrine, the prosecution must prove that (1) the defendant aided and abetted the commission of the target crime; (2) the defendant's confederate committed an offense other than the target crime; and (3) the nontarget offense perpetrated by the confederate was a "natural and probable consequence" of the target crime that the defendant assisted or encouraged. (*Prettyman*, *supra*, 14 Cal.4th at p. 254.)

This doctrine, which has been in existence since the common law, is based on the recognition that "aiders and abettors should be responsible for the criminal harms they have naturally, probably and foreseeably put in motion." (*Prettyman, supra*, 14 Cal.4th at p. 260, citing *People v. Luparello* (1986) 187 Cal.App.3d 410, 439.) The focus is on foreseeability and whether the nontarget offense was a foreseeable consequence of the target offense. Accordingly, aider and abettor liability under the natural and probable consequences doctrine is "not founded on the aider and abettor's subjective view of what might occur. Rather, liability is based on an 'objective analysis of causation'; i.e., whether a reasonable person under like circumstances would recognize that the crime was a reasonably foreseeable consequence of the act aided and abetted." (*People v. Woods* (1992) 8 Cal.App.4th 1570, 1587; see also *People v. Godinez* (1992) 2 Cal.App.4th 492, 501, fn. 3 ["The only requirement is that defendant share the intent to facilitate the target criminal act and that the crime committed be a foreseeable consequence of the target act"].)

Because the natural and probable consequences doctrine allows for aiders and abettors to be criminally liable for acts not their own, cases have described their liability as "vicarious." (E.g., *People v. Croy* (1985) 41 Cal.3d 1, 12, fn. 5.) As this court has since clarified, however, "the aider and abettor's guilt for the intended crime is not entirely vicarious. Rather, that guilt is based on a combination of the direct perpetrator's acts and the aider and abettor's *own* acts and *own* mental state." (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117 (*McCoy*), italics in original.) As such, "an aider and abettor's liability for criminal conduct is of two kinds. First, an aider and abettor with the necessary mental state is guilty of the intended crime. Second, under the natural and probable consequences doctrine, an aider and abettor is guilty not only of the intended crime, but also 'for any other offense that was a "natural and probable consequence" of the crime

aided and abetted.'" (*Ibid.*) Thus, "if a person aids and abets only an intended assault, but a murder results, that person may be guilty of that murder even if unintended, if it is a natural and probable consequence of the intended assault." (*Ibid.*, citing *Prettyman*, *supra*, 14 Cal.4th at p. 267.)

### B. Sufficient evidence supports appellant's conviction under the natural and probable consequences doctrine because the direct perpetrator of the nontarget offense was a direct perpetrator in the target offense or because appellant was a direct perpetrator in the target offense

Appellant first argues insufficient evidence supports his convictions because there was no evidence the victims were killed by any of the "actual participants" in the target crime and no evidence he aided and abetted anyone who fired the fatal shots. (ABOM 19–21.) According to appellant, the natural and probable consequences doctrine would only apply if appellant aided and abetted a direct perpetrator in the target offense, who then committed a foreseeable nontarget offense. (ABOM 20, 23.)

At the outset, appellant's claim fails because, even under his restrictive interpretation of the natural and probable consequences doctrine, appellant's convictions were proper. First, Mister – the person both parties argued was the presumed shooter – was a direct perpetrator in both the target offense and the nontarget murder. Appellant – at a minimum – aided and abetted Mister in facilitating the target offense. As such, there was sufficient evidence from which the jury could find appellant aided and abetted a direct perpetrator of the target offense who then committed a foreseeable nontarget crime. Second, even if Mister was not a direct perpetrator in the target offense, appellant was. As a direct perpetrator, appellant is liable for the reasonably foreseeable nontarget offenses committed by another principal. (*People v. Olguin* (1994) 31 Cal.App.4th

1355, 1376 (*Olguin*).) Either way, appellant was properly convicted under the natural and probable consequences doctrine.

### 1. Appellant aided and abetted the direct perpetrator of the target offense who then committed the foreseeable nontarget murder

In claiming his convictions were improper, appellant contends both he and the shooter were aiders and abettors to the target offense rather than direct perpetrators. (ABOM 23–24.) He contends because the jury was only asked to find that the nontarget offense was committed by a principal, rather than a direct perpetrator, the 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 [the shooter] may have also aided and abetted the direct perpetrators of the target offense." (ABOM 23–24.) This claim relies on a misunderstanding of what constitutes an aider and abettor versus a direct perpetrator.

In *McCoy*, *supra*, 25 Cal.4th 1111, this court analyzed aiding and abetting liability as compared to liability as a direct perpetrator and found the potential for substantial overlap between the two. In *McCoy*, two defendants – McCoy and Lakey – were convicted of first degree murder and two counts of attempted murder after both defendants shot at a group of people during a drive-by shooting. (*Id.* at p. 1115.) Both defendants fired guns, but the evidence showed McCoy fired the fatal shots. (*Ibid.*) McCoy's convictions were later reversed after the Court of Appeal found that the trial court prejudicially misinstructed the jury regarding McCoy's claim of unreasonable self defense. (*Ibid.*) The Court of Appeal likewise reversed Lakey's convictions, reasoning that, as an aider and abettor, Lakey could not be convicted of an offense greater than that of which the actual perpetrator was convicted. (*Ibid.*)

The question for this court was whether the Court of Appeal was required to reverse Lakey's convictions. (*McCoy*, *supra*, 25 Cal.4th at p. 1116.) Ultimately, the court answered that question in the negative, reasoning that an aider and abettor's guilt was based on his or her own mens rea, which might be more or less culpable than that of the actual perpetrator. (*Id.* at p. 1122.)

In reaching this conclusion, this court observed it is frequently unclear when a person acts as an aider and abettor as opposed to a direct perpetrator:

> [T]he dividing line between the actual perpetrator and the aider and abettor is often blurred. It is often an oversimplification to describe one person as the actual perpetrator and the other as the aider and abettor. When two or more persons commit a crime together, both may act in part as the actual perpetrator *and* in part as the aider and abettor of the other, who also acts in part as an actual perpetrator.

(*McCoy*, *supra*, 25 Cal.4th at p. 1120, italics in original.)

The court went on to give examples of potential "blurred line" scenarios, noting, "In another shooting case, one person might lure the victim into a trap while another fires the gun; in a stabbing case, one person might restrain the victim while the other does the stabbing. In either case, *both participants would be direct perpetrators* as well as aiders and abettors of the other." (*McCoy*, *supra*, 25 Cal.4th at p. 1120, italics added.) Ultimately, there is no need to determine whether an actor in such a situation was, in fact, an aider and abettor or a direct perpetrator: "The aider and abettor doctrine merely makes aiders and abettors liable for their accomplices' actions as well as their own. It obviates the necessity to decide who was the aider and abettor and who the direct perpetrator or to what extent each played which role." (*Ibid.*) Applying that analysis to the facts in *McCoy*, the court held that McCoy and Lakey were "to some extent both actual perpetrators and aiders and abettors," as both defendants had

fired handguns, even though only one of them was found to have fired the fatal shots. (*Id.* at p. 1122.) The court reasoned that once the jury found that Lakey had the requisite mens rea, "it could find him liable for both his and McCoy's acts, without having to distinguish between them." (*Ibid.*)

Applied to the instant facts, the jury could find that Mister was a direct perpetrator in both the target offenses (fighting in public, assault, and battery) and the nontarget offense (murder). Just like the hypothetical defendant in *McCoy* who lures a victim to the scene, Mister helped coordinate the fight with appellant and he made sure the other YAH members attended, telling them they had to fight "Gateway little homies." (35 RT 6975–6977; 38 RT 7600.) At the jump out, Mister told Ed and Aaron to start the fight, telling them, "you guys know what you guys got to do." (33 RT 6771, 6773.) Once the fighting began, there was sufficient evidence from which the jury could find that Mister was one of the participants actually throwing punches at McMorris during the fight. (35 RT 7059–7060.)

These actions are comparable to the "blurred line" situations in *McCoy*. Even removing from consideration the evidence that Mister directly punched McMorris, there is no meaningful difference between someone who lures a victim to the scene and someone who ensures that a fight will occur by getting everyone to the scene and directing others to start throwing punches. Appellant's suggestion that Mister was solely an aider and abettor is thus contrary to this court's analysis in *McCoy* and requires the sort of fine-toothed parsing among participants to a crime into mutually exclusive categories this court determined to be unnecessary. As this court recently reiterated in *People v. Delgado* (2013) 56 Cal.4th 480, "Whether or not the common law distinguished in [a] rigid manner between direct perpetrators and accomplices, our understanding of California law, as reflected in *McCoy*, is more nuanced. 'When two or more persons commit

a crime together, both may act in part as the actual perpetrator and in part as the aider and abettor of the other, who also acts in part as an actual perpetrator.'" (*Id.* at p. 489 [determining when a jury should be given instructions on aiding and abetting liability] citing *McCoy*, *supra*, 25 Cal.4th at p. 1120.)

Additionally, to the extent appellant argues there was insufficient evidence Mister was the direct perpetrator of the nontarget murder, this too must fail, as there was sufficient evidence Mister was the shooter, as both parties contended at trial. Mister was seen with a gun at the fight and multiple witnesses testified he pulled out his gun and started shooting directly after appellant intervened in the fight. (35 RT 7065; 39 RT 7755–7756, 7801.) One witness testified the shots came from where Mister, and only Mister, was standing. (39 RT 7756, 7801.) Even if, arguably, some of the shots were fired by TK, who was standing next to Mister and who was also seen firing a gun (35 RT 7063–7065), the same analysis would apply because TK was also a direct perpetrator in the target offense. Just like Mister, TK also arranged the target crime with appellant and, as a full-fledged Bloods member, TK provided critical backup for the younger YAH members. (29 RT 5819; 35 RT 7002, 7014–7016; 36 RT 7184.) TK came to the fight armed with two guns, one of which he handed to Mister. (35 RT 7041; 37 RT 7245–7246, 7361.) As with a second to a dual, the jump out would not have proceeded without the necessary presence of persons such as TK and Mister.

For his part, appellant – at a minimum – aided and abetted both Mister and TK. Appellant, Mister, and TK shared a common criminal purpose: the target jump out. Appellant facilitated that purpose by arranging the jump out with Mister and TK, by bringing his brother to the jump out, and by directing others to fight his brother.

Accordingly, appellant's initial contention regarding the sufficiency of the evidence is a nonstarter because even under appellant's limited application of the natural and probable consequences doctrine, appellant was properly convicted.

### 2. Appellant was also a direct perpetrator in the target offense

Appellant's claim also fails at the outset because, even if the shooter was not a direct perpetrator in the target offense and was instead solely an aider and abettor, as appellant contends, under *McCoy*, appellant himself was a direct perpetrator in the target offense. Appellant's actions mirrored those of Mister prior to the fight and are therefore equally comparable to those of the hypothetical defendants described in *McCoy*. Appellant arranged and coordinated the target assault with Mister and other members of YAH and the Bloods and made sure that the key players were there. (33 RT 6735–6736, 6748, 6752; 35 RT 6975–6977, 7015, 18 CT 3945–3948.) Once there, appellant told the participants where the assault should occur and he pointed out the individuals who should start off the fight. (33 RT 6763, 6776–6777; 38 RT 7615, 7654; 39 RT 7670, 7787.) Even if he did not throw a single punch, appellant's role in puppeteering the target assault rendered him, at least in part, a direct perpetrator under this court's reasoning in *McCoy*.

Appellant, however, did even more than just set the stage for the target crime. He became a direct participant when he interjected to pull his brother out of the fight, tried to swing at another participant, and pointed his gun at the crowd. (33 RT 6785–6787; 35 RT 7063; 37 RT 7309; 38 RT 7633.) In that way, appellant acted as a direct perpetrator by directly attempting to punch another participant. There seems to be no logical reason to arbitrarily "end" the target assault prior to appellant's involvement in it – the participants were certainly still committing the

target offenses of fighting in public, assault, and battery when appellant became "directly" involved.

That appellant was a direct perpetrator becomes even clearer when one considers the elements of one of the target offenses, fighting in public. As the jury was instructed, proof of that crime required the prosecution to show that (1) the defendant willfully and unlawfully fought or challenged someone else to fight and (2) the defendant and the other person were in a public place when the fight occurred or the challenge was made. (Pen. Code, § 415; CALCRIM No. 2688; 40 CT 4142.) Based on appellant's actions in coordinating the fight and attempting to swing at another participant, the jury could easily find appellant's "personal conduct" satisfied the elements of that target offense in that he "challenged" other participants to fight in public. (See *People v. Delgado*, *supra*, 56 Cal.4th at pp. 487–488 [whether jury instructions on aiding and abetting liability are required depends on whether the defendant satisfied the elements of an offense "directly by his own actions"].)

As a direct perpetrator in the target offenses of fighting in public, assault, and battery, appellant is liable for the reasonable and foreseeable nontarget offenses committed by another principal. (*Olguin*, *supra*, 31 Cal.App.4th at p. 1376.) In *Olguin*, Mora, a codefendant, was convicted of murder under the natural and probable consequences doctrine after he punched the victim and one of his fellow gang members – Olguin – shot and killed the victim. (*Id.* at p. 1366.) On appeal, Mora claimed he could not be convicted under the natural and probable consequences doctrine because he was the direct perpetrator of the target assault rather than someone who aided and abetted the direct perpetrator. (*Id.* at pp. 1375–1376.)

In rejecting this argument, the court held that "a perpetrator of an assault and an aider and abettor are *equally* liable for the natural and

foreseeable consequences of their crimes." (*Olguin, supra*, 31 Cal.App.4th at p. 1376, italics in original.) Accordingly, the court reasoned, because Mora conceded his role as the direct perpetrator of the target offense, "the only unresolved issue regarding his liability for the shooting was whether it was a natural and probable consequence of that punch." (*Ibid.*)

Under *Olguin*, even if the shooter was solely liable for the target offense as an aider and abettor – like Olguin – appellant was liable for the nontarget murder because he – like Mora – was a direct perpetrator in the target offense. Accordingly, appellant's convictions under the natural and probable consequences doctrine were proper.

### C. Even if appellant and the shooter were both aiders and abettors in the target offense, appellant was properly convicted under the natural and probable consequences doctrine because both appellant and the shooter were principals and all principals are liable for the reasonable and foreseeable crimes committed by any of them

Alternatively, even if appellant was only liable as an aider and abettor, the natural and probable consequence doctrine extends liability to aiders and abettors for the reasonable and foreseeable crimes committed by any principal to the target offense, including other aiders and abettors. This is so because both aiders and abettors and direct perpetrators are principals, and all principals are liable for the crimes committed by any of them. To hold otherwise would be unworkable, as it would require forced, bright-line distinctions between various participants in a crime, in contravention of Penal Code sections 31 and 971 and this court's reasoning in *McCoy*; such distinctions would also be unnecessary, as the natural and probable consequences doctrine already contains limitations that properly confine liability.

### 1. All principals to a crime are equally liable

Appellant and Mister were both – at a minimum – aiders and abettors to the target offense. As such, they were principals under Penal Code section 31, which provides that "[a]ll 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, . . . are principals in any crime so committed."

As an aider and abettor, appellant's liability for the target offense is "premised on the combined acts of *all the principals*, but on the aider and abettor's own mens rea." (*McCoy*, *supra*, 25 Cal.4th at p. 1120, italics added.) If appellant's liability as an aider an abettor is based on the combined acts of all of the principals – which would necessarily include all other aiders and abettors – it strains reason that appellant could only be liable for the nontarget offenses committed by *certain* of those principals, as he contends. (ABOM 23.)

Rather, liability must be premised on the combined acts of all principals because all principals are equally liable for the crime regardless of the specific actions taken by any one of them during the commission of the crime. The following hypothetical illustrates why this is the only logical conclusion. A group of criminally-minded individuals decides to commit vandalism. A encourages the commission of the crime and tells B to be the person to spray-paint the gang's name on a wall. C is to act as the look-out. When the time comes, B gets cold feet and hands the spray-paint to C, who then commits the vandalism as B acts as a look-out. The question is: should A be any less liable for the target crime simply because C wound up playing the role of the "direct perpetrator" rather than B, to whom A originally assigned that task? The answer must be no; A's liability as an aider and abettor should not hinge on the identity of the

person who commits the elements of the offense so long as A meets the requirements for aiding and abetting and the crime is ultimately carried out by a principal.

Carried through to the natural and probable consequences doctrine, it logically follows that a principal charged as an aider and abettor to the target offense is liable for the reasonably foreseeable nontarget offenses committed by any principal. Thus, in the hypothetical vandalism above, if either B or C wound up assaulting a passerby who tried to report the vandalism, A would be liable for the assault so long as it was reasonably foreseeable. The fact that A encouraged B (and not C) to commit the crime would not matter – A knew that C was involved as a principal and A was therefore choosing to engage in a criminal enterprise with both B and C. Nor would it matter if the nontarget assault were committed by B, who aided and abetted the target vandalism. As all three were principals, A should be liable for the reasonable and foreseeable crimes committed by either of them.

Applied to the facts of this case, as a principal to the target jump out, appellant's liability for the nontarget murder is not lessened simply because it was committed by Mister, another aider and abettor to the jump out, instead of by Ed, Aaron, or McMorris, the individuals appellant told to commit the jump out. Appellant willingly involved himself in a criminal undertaking with Mister, TK, and the other YAH and Bloods gang members, and he is therefore liable for the reasonably foreseeable crimes committed by any of them, as all were equally liable as principals.

Such was the holding in *People v. King* (1938) 30 Cal.App.2d 185 (*King*). In *King*, a group of men agreed to assault a victim, who was ultimately killed by two members of the group. King, who was a part of the group but who was not present during the attack, argued on appeal that the victim's murder was not a natural and probable consequence of the

intended assault. (*Id.* at pp. 193, 199–200.) In ruling otherwise, the court reasoned that all principals to a crime are treated equally under the law and are liable for the reasonable and foreseeable crimes committed by any of them. (*Id.* at p. 201.) The court held, "All who combined to commit the unlawful act of violence are equally guilty. The law makes no distinction between them and each is responsible for the act of any other of the party in the prosecution of the original design. All joining in the enterprise are as guilty of murder as the person who actually caused the death." (*Ibid.*)

Appellant, however, argues his conviction cannot stand because he could not have been convicted under the natural and probable consequences doctrine on these facts under the common law. (ABOM 28.) This argument is flawed for two reasons: first, Penal Code sections 31 and 971 expanded liability from the common law and second, early cases applying the doctrine do not limit it in the manner appellant suggests.

Prior to the enactment of Penal Code section 31 in 1872, guilty parties were divided into principals and accessories, and only the actual perpetrator of the crime was considered a principal. (*People v. Woods*, *supra*, 8 Cal.App.4th at pp. 1581-1582.) Other guilty parties were termed "accessories" and divided into three classes: (1) accessories before the fact; (2) accessories at the fact; and (3) accessories after the fact. (*Id.* at p. 1582.) Subsequently, the "accessory at the fact" became known as a principal in the second degree. (*Ibid.*)

In enacting Penal Code section 31, the Legislature "abolished the common law distinction between principals of the first and second degree and the distinction between principals and accessories before the fact." (*People v. Woods*, *supra*, 8 Cal.App.4th at p. 1583, citing *People v. Hodges* (1865) 27 Cal. 340, 341.) While the change was largely procedural (*Beeman*, *supra*, 35 Cal.3d at p. 555, fn. 2), the policy underlying Penal

Code section 31 is clear: all parties to a crime are principals and there is no need to distinguish among different levels of participation.

This policy was made explicit in Penal Code section 971, also enacted 1872, which provides: "The distinction between an accessory before the fact and a principal, and between principals in the first and second degree is abrogated; and all persons concerned in the commission of a crime, who by the operation of other provisions of this code are principals therein, shall hereafter be prosecuted, tried and punished as principals and no other facts need be alleged in any accusatory pleading against any such person that are required in an accusatory pleading against a principal." Reasonably construed, this section "expresses a legislative intent to abolish the distinctions made at common law as to the various types of participants in the commission of a crime and to make all of them subject to the same procedural and substantive limitations." (*Bompensiero v. Superior Court* (1955) 44 Cal.2d 178, 186.)

By requiring precise distinctions between direct perpetrators and aiders and abettors, appellant's interpretation of the natural and probable consequences doctrine contravenes the policy behind Penal Code sections 31 and 971. Under his interpretation, some principals to a crime – the direct perpetrators – are distinguished from other principals – aiders and abettors – in that an aiding and abetting defendant may be held liable for nontarget offenses committed by a direct perpetrator in the target offense but not by another aider and abettor. This court has repeatedly declined to engage in this sort of parsing among principals to a crime. (See, e.g., *People v. Calhoun* (2007) 40 Cal.4th 398, 402 [holding that both aiders and abettors and direct perpetrators can "commit" an offense for purposes of a vehicular manslaughter enhancement and refusing to "parse" defendant's involvement in the crime].) Additionally, although appellant argues he could not have been convicted under the natural and probable consequences

doctrine on these facts under the common law (ABOM 28), appellant fails to demonstrate the truth of that proposition. He cites to no case, and sets forth no hypothetical, in which the doctrine was rejected due to the *identity* of the person who commits the nontarget offense.

Moreover, early cases applying the natural and probable consequences doctrine do not limit it in the manner appellant now suggests. The first California case to recognize the natural and probable consequences doctrine was *People v. Kauffman* (1907) 152 Cal. 331 (*Kauffman*). In *Kauffman*, a group of defendants planned to rob a safe in a cemetery. (*Id.* at p. 862.) The group abandoned that plan after encountering an armed guard at the cemetery; however, after leaving the cemetery, certain members of the group wound up killing a police officer who came upon the group. (*Id.* at p. 333.) Kauffman, who did not kill the police officer, was convicted of murder along with his cohorts. (*Id.* at p. 334.) In challenging that conviction, Kauffman argued the murder was not a reasonably foreseeable consequence of the planned burglary. (*Id.* at p. 335.) In affirming the conviction, the court held that the question of foreseeability was a question of fact for the jury to decide. (*Kauffman*, *supra*, 152 Cal. at p. 335.)

*Kauffman* shows that even in cases decided not long after the passage of Penal Code section 31, the court did not apply the natural and probable consequences doctrine in the way appellant now urges this court to do. Absent from the analysis was any discussion of what *role* the shooter was intended to play in the target theft – a crime which was ultimately abandoned. It cannot be known whether the shooter was meant to be the person who broke open the safe, the person who took possession of the stolen money, or the person who stood by as a lookout. Because it is not known what role Kauffman was intended to play in the target offense, it cannot be said that the defendant in *Kauffman* was only liable for the

nontarget murder due to his having aided and abetted the direct perpetrator of the target offense.

Both Kauffman and the shooter were principals in the target crime and, as such, were equally liable for the nontarget murder. The court noted as much, stating: "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." (*Kauffman*, *supra*, 152 Cal. at p. 334.) Taken in context, the *Kauffman* court's reference to "associates" and "confederates" necessarily refers to all of the individuals who are involved in the crime – in other words, all principals.

Rather than focusing on whether the perpetrator of the murder was the intended perpetrator of the theft, the *Kauffman* court properly focused on whether the nontarget offense was foreseeable based on the circumstances of the target offense. In deciding this issue, the court analyzed the circumstances of the planned theft – including the fact that many of the principals were armed – and 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." (*Kauffman*, *supra*, 152 Cal. at p. 336.) Accordingly, the court reasoned that violence had been anticipated from the start.

The *Kauffman* analysis is equally applicable here. Just as the court held in *Kauffman* that all "confederates" are responsible for the acts of any other "confederate," here, all principals to the target offense – including appellant – should be responsible for the foreseeable acts committed by any other principal – including Mister, who both parties argued was the likely shooter in this case. In this way, appellant and Mister were "confederates"

because they both combined to aid and abet the commission of the target jump out.

Further, an analysis of the facts and circumstances of the target jump out demonstrates the foreseeability of the nontarget offense and thus triggers the application of the natural and probable consequences doctrine. As a gang member himself, appellant was well aware of the longstanding rivalry between members of Crips-affiliated gangs and members of Bloods-affiliated gangs. Knowing this, appellant brought backup to an planned assault that was already intended to be violent. He did this because he contemplated that additional violence could break out. He and his associates brought at least one gun with them and planned to use it if necessary. Just as the *Kauffman* court found that one does not need to bring a gun if only planning to steal from a safe, appellant's group did not need to bring a gun if they were not anticipating violence on a larger scale than that involved in the target jump out.

Accordingly, appellant was properly convicted under the natural and probable consequences doctrine because he was a principal in the target offense and the reasonable and foreseeable nontarget offense was committed by another principal. Appellant's argument that his conviction is contrary to the common law application of the doctrine should be rejected because applying the doctrine to all principals is in line with Penal Code section 31 and is supported by cases such as *Kauffman.*

**2. Limiting the natural and probable consequences doctrine as appellant suggests would be unworkable because it would require arbitrary distinctions among participants to a crime**

In arguing against the application of the natural and probable consequences doctrine under these facts, appellant contends the doctrine only applies to aiders and abettors who aid and abet the direct perpetrator of the target offense, who then goes on to commit the nontarget offense.

(ABOM 22–23.) This contention must be rejected because it is unworkable, in direct contradiction to this court's reasoning in *McCoy*, and would lead to undesirable consequences.

First, in order to apply the natural and probable consequences doctrine in the manner suggested by appellant, every participant to a crime would have to be labeled as either an aider and abettor or a direct perpetrator. The prosecutor would then have to prove that someone labeled as a direct perpetrator committed both the target offense and the nontarget offense. Then, the prosecutor would have to prove that someone labeled as an aider and abettor specifically intended to aid and abet that same person.

All of these bright-line distinctions are in direct contradiction to this court's reasoning in *McCoy* that the doctrine of aiding and abetting "obviates the necessity to decide who was the aider and abettor and who was the direct perpetrator and to what extent each played which role." (*McCoy*, *supra*, 25 Cal.4th at p. 1120.)

One only has to look at the facts of this case to understand why such distinctions would be arbitrary. Appellant readily refers to Ed S., one of the YAH squad members appellant told to jump out his brother, as a "direct perpetrator" of the target offense. However, there was evidence that Ed S. did not actually land any punches during the target assault and that the fighting was only between Aaron L. and McMorris. (34 RT 6888.) If this was the case and Ed S. did not actually punch McMorris, would Ed S. still qualify as a direct perpetrator? Should Ed S. be labeled differently than YAH member Lonnie W., who testified that he was expecting to participate in the fight and was prepared to do so, but did not actually wind up throwing any punches? (38 RT 7619.) Hypothetically speaking, if one of the participants had held McMorris down so that Ed or Aaron could land a punch more easily, would that person qualify as a direct perpetrator?

Under the reasoning in *McCoy*, it is not necessary to make such distinctions, but under appellant's interpretation it would be absolutely necessary to do so because liability under the natural and probable consequences doctrine would depend upon the label given to each participant. Only nontarget offenses committed by those participants with a "direct perpetrator" label would qualify; if a nontarget offense was committed by a participant with an "aider and abettor" label, other aiders and abettors to the target offense would have zero liability for the nontarget crime.

To give an example, under appellant's interpretation, if the direct perpetrator of a nontarget murder actually threw a punch during the target assault, an aiding and abetting defendant could be held liable for the nontarget offense, whereas if the direct perpetrator of the nontarget offense only held down the assault victim in the target offense so that another participant could throw a punch, the aiding and abetting defendant would not be liable for the nontarget offense. This sort of delineation would not make sense, as classifying the nontarget perpetrator as either a direct perpetrator or aider and abettor to the target offense should not affect the liability of any other principal to the target offense.

Difficulties would also arise because, as seen in *Kauffman*, *supra*, 152 Cal. 331, 333, a defendant may be convicted under the natural and probable consequences doctrine even where the target offense was not completed. (See also *People v. Ayala* (2010) 181 Cal.App.4th 1440, 1452; but see *Prettyman*, *supra*, 14 Cal.4th at p. 262, fn. 4 [leaving this issue undecided].) In those circumstances, appellant's argument would require the prosecution to prove that the person who ultimately committed the nontarget offense was the same person the defendant *intended* to commit the target offense, even though the target offense was not completed.

Similarly, in cases where the target offense was completed, the prosecution would be required to prove that the ultimate perpetrator of the nontarget offense was not only the person who committed the target offense, but also the person whom the defendant intended to commit the target offense. Not only would this be difficult to accomplish, as the defendant could always claim that he intended a different person to perpetrate the target crime, it would also be impractical.

Moreover, even if such labeling were possible, it would fail to account for the fact that, in many situations, the "direct perpetrator" of the target offense is not the likely person to commit a reasonably foreseeable nontarget offense. For example, in a hypothetical assault where Principal A is intended as the direct perpetrator and Principal B is intended as the lookout (and therefore an aider and abettor to the target crime of assault), it is Principle B – the lookout – who would be in the most likely position to commit an offense against a would-be witness who came upon the scene of the crime. Under appellant's analysis, Principal C, another aider and abettor who held down the victim during the assault, could not be liable for the nontarget offense committed upon the would-be victim by Principal B because it was not committed by Principal A – the direct perpetrator of the target offense. This result would be nonsensical, as all three individuals participated in the target offense and the nontarget offense was both reasonable and foreseeable.

Case law also demonstrates that nontarget offenses are not always committed by the direct perpetrator of the target offense and yet the nontarget offenses are nonetheless foreseeable. In *Olguin*, *supra*, 31 Cal.App.4th 1355, 1375, discussed above, the nontarget offense was committed by a fellow gang member who aided and abetted, but did not personally commit, the target assault. On appeal, the court affirmed the convictions of both the defendant who committed the target offense and the

codefendant who committed the nontarget offense, reasoning that both were "*equally* liable for the natural and foreseeable consequences of their crime." (*Id.* at p. 1376, emphasis in original.) The court continued, "Both the perpetrator and the aider and abettor are principals, and *all* principals are liable for the natural and reasonably foreseeable consequences of their crimes." (*Ibid.*, emphasis in original.)

More recently, this court addressed another case in which a nontarget offense was committed by an aider and abettor to the target offense. In *People v. Maciel* (2013) 57 Cal.4th 482 (*Maciel*), two gang members were convicted of murdering five people. (*Id.* at pp. 488–489.) The target offense was the murder of only one individual; the four other victims were friends and family members who happened to be home during the murder. (*Id.* at p. 489.) The evidence demonstrated that one of the defendants was the direct perpetrator of the target offense as well as one of the other murders, while the second defendant was the direct perpetrator of the remaining three nontarget murders. (*Ibid.*) Thus, the direct perpetrator of three of the nontarget offenses – defendant 2 – could only have been an aider and abettor in the target offense. Despite this, both defendants were charged with and convicted of all five murders under the natural and probable consequences doctrine. In analyzing the defendant's sufficiency of the evidence challenge, this court looked only to whether or not the nontarget murders were foreseeable. (*Id.* at p. 520.)

To be sure, neither of these cases squarely addressed the specific issued raised here regarding whether the natural and probable consequences doctrine is properly limited only to the reasonable and foreseeable crimes committed by the direct perpetrator of the target offense. However, these cases demonstrate that nontarget offenses are often committed by someone other than the direct perpetrator of the target offense. Moreover, they underscore the fairness of holding all such persons responsible.

Appellant relies on *Prettyman* to support his contention that the natural and probable consequences doctrine only applies when one aids and abets the direct perpetrator to the target offense who goes on to commit the nontarget offense. (ABOM 22–23.) Specifically, appellant relies on the following language: "Under 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." (ABOM 22, citing *Prettyman*, *supra*, 14 Cal.4th at p. 254.)

The issue in *Prettyman*, however, was whether the court was required to instruct the jury as to the alleged target offenses. (*Prettyman*, *supra*, 14 Cal.4th at p. 254.) The court was not presented with the issue of whether liability under the natural and probable consequences doctrine extends to aiders and abettors for nontarget offenses committed by other aiders and abettors rather than by direct perpetrators of the target offense. Because the court was not dealing with this issue, the precise wording used by the court should not analyzed in a vacuum and used to resolve an issue not before the court at that time. In *Prettyman*, the nontarget offense was committed by the direct perpetrator of the target offense. However, *Prettyman* should not be used as a case establishing that this is the *only* proper application of the natural and probable consequences doctrine.

In fact, *Prettyman* cannot reasonably be read as such. The *Prettyman* court cited to *People v. Fagalilo* (1981) 123 Cal.App.3d 524 (*Fagalilo*) as an example of a case in which the jury could reasonably conclude that the nontarget crime was a natural and probable consequence of the target crime aided by the defendant. (*Prettyman*, *supra*, 14 Cal.4th at p. 263.) In *Fagalilo*, however, the defendant was the perpetrator of the target offense and the nontarget offense was committed by an accomplice. (*Fagalilo*,

*supra*, 123 Cal.App.3d at pp. 528-530.) If this court in *Prettyman* meant to limit liability under the natural and probable consequences doctrine in the way appellant suggests, the court likely would not have cited to cases such as *Fagalilo* approvingly.

### 3. Limiting the doctrine as appellant suggests is also unnecessary because existing limitations adequately and properly confine liability

Appellant's argument for limiting the extent of the natural and probable consequences doctrine is based on the belief that only nontarget offenses committed by the person a defendant actually aids and abets can be attributed to the aiding and abetting defendant. Appellant's argument is borne out of a concern that the natural and probable consequences doctrine will ensnare and punish defendants unfairly. Such a concern is unwarranted because the foreseeability requirement built in to the doctrine already imposes a practical and effective limitation on liability. Additional limitations are therefore unnecessary.

The court noted as much in *People v. Solis* (1993) 20 Cal.App.4th 264, 272–273, disapproved of on another point in *Prettyman*, *supra*, 14 Cal.4th 248, stating that while the natural and probable consequences doctrine may result in a defendant's being held liable for a very serious crime when the target offense contemplated by his aiding and abetting was less serious, liability was fair and reasonable because of "the existence of the safety valve provided by the requirement that the ultimate crime be a 'natural and reasonable consequence' of the predicate offense."" In other words, the foreseeability requirement acts as a natural stopping point cutting off liability. Similarly, this court has emphasized that "the ultimate factual question is one of reasonable foreseeability, to be evaluated under all the factual circumstances of the case." (*People v. Medina* (2009) 46 Cal.4th 913, 927.)

The examples included in appellant's opening brief demonstrate that the key inquiry is always on foreseeability. All of appellant's examples follow the format of A aids and abets B and B commits a nontarget offense. (ABOM 29–36.) In each case, the inquiry for the court is whether the nontarget offense was foreseeable. The cases relied upon by appellant do not turn on who committed the nontarget offense, but rather on whether or not the commission of the nontarget offense was foreseeable. To be sure, the identity of the perpetrator of the nontarget offense can be a factor taken into consideration in determining foreseeability, but the identity of the perpetrator should not preclude liability as a matter of law.

Moreover, the concept of proximate causation functions as an additional safeguard. If the nontarget offense was the a "fresh and independent product" of the mind of one of the participants, rather than a probable result of the target offense, liability may not be imposed on an aider and abettor such as appellant. (See *People v. Nguyen* (1993) 21 Cal.App.4th 518, 531.) But here, it was appellant's actions that led to the victims' deaths. Appellant brought the victims to the assault knowing violence was likely. The victims were killed by the very people (rival gang members) from whom the violence was expected. Appellant was the one who escalated the violence by throwing the first punch after pulling his brother out of the jump out and by drawing his gun. Courts have noted that the "real question" involved in applying the natural and probable consequences doctrine is "whether the charged crime was a consequence of the aider and abettor's facilitation of the target offense." (*People v. Laster* (1997) 52 Cal.App.4th 1450, 1465.) Here, the victims' murders were a direct consequence of the manner in which appellant chose to facilitate the target jump out, and his convictions under the natural and probable consequences doctrine should be affirmed.

## CONCLUSION

Rather than allowing the jury to determine whether the nontarget offense – regardless of who committed it – was a foreseeable result of the target offense aided and abetted, appellant asks this court to hold, as a matter of law, that an aiding and abetting defendant can never be held liable for a nontarget offense committed by another aider and abettor. This court should decline appellant's invitation to limit the natural and probable consequences doctrine in this manner and instead hold that any principal to the target offense may be held liable for nontarget crimes committed by any other principal, so long as the jury determines that the nontarget offense was reasonably foreseeable based on all of the facts and circumstances of the case. In any event, because both appellant and the presumed shooters were direct perpetrators in the target offense, appellant was properly convicted even under the limitations he would impose.

Dated: January 24, 2014

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains **12,189** words.

Dated: January 24, 2014

KAMALA D. HARRIS
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## DECLARATION OF SERVICE BY U.S. MAIL & ELECTRONIC SERVICE

Case Name: **People v. Smith** No.: **S210898**

I declare: I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On January 29, 2014, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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and I furthermore declare, I electronically served a copy of the above document from Office of the Attorney General's electronic notification address ADIEService@doj.ca.gov on **January 29, 2014,** to Appellate Defenders, Inc.'s electronic notification address eservice-criminal@adi-sandiego.com.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 29, 2014, at San Diego, California.

A. Brooks
Declarant

Signature

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