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.	

REPLY BRIEF ON THE MERITS

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INTRODUCTION

The issue before the Court in this matter really is nothing more than statutory interpretation based on the intent of the Legislature in enacting the statutory scheme that became effective in 1872. This Court should begin its analysis by taking note of what is not really in dispute following the filing of respondent's answer brief on the merits.

First, respondent does not challenge petitioner's exposition of the history and parameters of the common law of aiding and abetting. Respondent characterizes petitioner's conclusions about the scope and limitation of the common law rules as being a "restrictive interpretation of the natural and probable consequences doctrine" (RB 15), but respondent really makes no effort whatsoever to show that petitioner's analysis of the common law is flawed or incorrect.

Respondent's failure to challenge petitioner's view of what the common law was in 1872 should be deemed by this Court to be a concession that the "restrictive" interpretation forwarded by petitioner is in fact a correct exposition of the state of the common law of accessory liability as of 1872. Under the common law, an accessory's liability for the acts of the direct perpetrator was based on a quasi-agency relationship between the two. That liability was limited to the scope of the command or inducement, and to acts by the direct perpetrator that were the natural and

probable consequences of the act counseled or commanded.

Because Penal Code section 31 has been amended only once -- and that amendment only eliminated a couple of politically incorrect words -- the only remaining question regarding the state of the law is whether the Legislature, by enacting Penal Code section 971, intended to extend the application of the natural and probable consequences doctrine to all principals without regard to whether they are principals by virtue of being a direct perpetrator or by virtue of being an aider and abettor.

ARGUMENT AND AUTHORITY

I.

PETITIONER CANNOT BE HELD LIABLE FOR A MURDER AS AN AIDER AND ABETTOR WHEN THE IDENTITY OF THE DIRECT PERPETRATOR OF THE MURDER IS NOT KNOWN

Respondent also does not dispute the fact that the identity of the killer or killers still is not known. Respondent indirectly acknowledged this first in respondent's discussion of the gang ties of the people who attended the fight. Respondent noted that petitioner was a member of a crip gang and argued that YAH had ties to "the Pueblo Bishop Bloods, *to which the likely shooter belonged.*" (RB 1, emphasis added.) Respondent also wrote that "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." (RB 2.) Respondent later narrowed that claim somewhat by asserting that others, including both Tovey M. (TK) and Deshawn L. (Mister) fired weapons (RB 2), but conceded that "the forensics examination did not reveal who fired the fatal shots." (RB 9.)

A. The Physical Evidence Recovered From the Scene of the Shootings

Respondent's concession that the identity of the shooters is unknown is well taken. There was substantial evidence indicating that several people fired guns at the conclusion of the fight. 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; 31 RT 6212-6214.) One of the pistols was a Beretta pistol with four live rounds in the magazine and one live 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 bulk of the evidence was found on the front lawn where the fight took place and in the empty lot next to the apartment complex. (39 RT 6041-6042.) The .40-caliber casings and the magazine for the .22-caliber weapon were found in the empty lot. (30 RT 6045-6046.) The 9mm casings were found on the lawn. (30 RT 6045.) A .22-caliber cartridge case was recovered from the ground north of unit A in the parking lot. (30 RT 6008.) A live .40-caliber Smith & Wesson shell was found near the fence between unit B and the adjacent lot. (30 RT 6007-6008.) A .22-caliber magazine with nine cartridges was found in the adjacent lot. (30 RT 6015-6016.) A metal fragment was recovered from the street. (People's Exhibit No. 127; 30 RT 5978, 5991-5992.)

Department of Justice firearms examiner Nichols examined the bullets recovered during the autopsies. The bullet removed from Demetrius Hunt's right shoulder had a full metal jacket and the weight and appearance of a 9mm bullet. It had been fired from a weapon with a polygonal rifled

barrel.[1] (People's Exhibit No. 124; Vol. 31 RT 6261-6262.) The bullet removed from Hunt's lower back had a full metal jacket and the weight and appearance of a 9mm. It also had been fired from a weapon with a polygonal rifled barrel. (People's Exhibit No. 121; Vol. 31 RT 6262-6263.) The metal found in Hunt's undershirt was determined to be a portion of bullet jacket from a 9mm bullet that had been fired from a weapon with a polygonal rifled barrel. (People's Exhibit No. 125; Vol. 31 RT 6260-6261, 6285.) Nichols examined six 9mm casings, all of which could have been fired from the same weapon or from as many as four different weapons. (Vol. 31 RT 6266-6267, 6286-6288.)

The projectile taken from McCarthy's spinal column was a full brass-jacketed bullet with the weight and appearance of a .40-caliber bullet. It too was fired from a gun with a polygonal rifled barrel. (People's Exhibit No. 122; Vol. 30 RT 5916; Vol. 31 RT 6256-6257.) Nichols was able to determine that the bullet fragment recovered from the street was fired from a .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 a .40-caliber Beretta. (People's Exhibit No. 239; 31 RT 6300-6301.) Nichols was not able to determine whether all of

[1] 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. (Vol. 31 RT 6258.)

the .40-caliber casings were fired from the same weapon. (31 RT 6268.)

This evidence makes it quite evident both that at least two different guns were discharged at the end of the fight and that Hunt and McCarthy were killed by different caliber bullets. All that really is known about the identity of the killers is that Hunt and McCarthy were not shot to death either by petitioner or by any of the direct perpetrators of the fight. Given that, this Court must ask how petitioner can be found to have aided and abetted the individuals who fired the fatal shots when the identity of those individuals is not known.

B. Demontre C.'s Testimony

Despite respondent's concession that the identity of the killer or killers still is unknown, respondent nonetheless argued that petitioner's murder convictions were proper "because there was sufficient evidence he aided and abetted Mister [Deshawn L.], a direct perpetrator in the target offense, who then committed a foreseeable nontarget murder." (RB 11.) Respondent bases that claim on testimony by Demontre C.[2] indicating that Deshawn actually took part in the fistfight:

> Once the fighting began, there was sufficient evidence from which the jury could find that Mister [Deshawn] was one of

[2] Demontre's preliminary hearing testimony was read to the jurors because Demontre died prior to trial. (People's Exhibit No. 417; Vol. 34 RT 6924-6925.) Demontre was 14-years-old both at the time of the incident and when he testified at the preliminary hearing. (Vol. 35 RT 6937; Vol. 37 RT 7376.)

> the participants actually throwing punches at [Robert M.] during the fight. (35 RT 7059-7060.)

(RB 18.)

Demontre's assertion that Deshawn actually threw punches during the fight was not echoed or otherwise confirmed by any other witnesses during this trial. Demontre was the only witness who testified that Deshawn actually threw punches during the fight. Robert M. and Lonnie W. both testified that the fight was between Robert M., Aaron L. and Ed S. (Vol. 33 RT 6773; Vol. 38 RT 7628; Vol. 39 RT 7673, 7717-7718, 7769-7770.)

Demontre was a very flawed witness. During his testimony, he admitted lying repeatedly about the incident to police officers. (Vol. 35 RT 7087.) Those lies included a claim that he was at Darien H.'s apartment when the shooting occurred (Vol. 35 RT 7080-7082), that prior to the fight he heard Tovey M. tell Deshawn L. to hold a gun (Vol. 37 RT 7246-7247, 7345-7348, 7361-7369), that Lavert L. was involved in the fight (Vol. 36 RT 7234-7236) and that Tovey fired the first shot (Vol. 37 RT 7242-7244, 7349-7350, 7369-7370).

The jury actually had good reason, over and above those lies, to doubt that Demontre actually was present during the incident. Demontre provided detailed testimony about spending much of the day at Darien H.'s apartment, leaving and then returning to the apartment on several occasions. (Vol. 35 RT 7024, 7033, 7072-7073; Vol. 36 RT 7190-7201;

Vol. 37 RT 7254-7255, 7259-7266, 7270 7284-7299, 7314.) Demontre testified that Darien was there the entire time. (Vol. 37 RT 7289.)

Darien H. contradicted that testimony, testifying instead that he was in juvenile court the day of the shooting. (Vol. 29 RT 5829, 5834.) Darien testified that they stopped and ate at a relative's house after juvenile court and did not return home until after the sun had set. (Vol. 29 RT 5834.) It was dark when Darien returned home. Darien saw flares glowing on the ground and they had to take a circuitous route to get home because the police had blocked off the road. (Vol. 29 RT 5829-5830, 5834.)

Petitioner acknowledges that the jury was entitled to find Demontre credible despite this considerable evidence to the contrary, but the Court must recognize that all the evidence from this flawed witness could possibly establish is that Deshawn threw a punch during the fight. Demontre's testimony did not establish, in any way, that Deshawn or anyone else fired the fatal shots.

To the contrary, Demontre's testimony actually decreased the likelihood that the actual killers could be identified. Demontre testified that he dropped to the ground when he saw guns being pulled, and that he heard gunshots as he was going to the ground. (35 RT 7066.) He did not see who fired the first shot and he could not tell where the shots were coming from or even if the shots were coming from "the same area." (Vol. 35 RT 7066;

37 RT 7239, 7350.) Demontre testified that the gunshots "came from everywhere." (35 RT 7065.)

Demontre also testified that he heard more than five gunshots. (Vol. 35 RT 7066.) When pressed on how many shots he heard, Demontre first testified that he heard several and then testified that he heard "a lot" of gunshots. (37 RT 7239.) Demontre subsequently agreed that he heard "a whole bunch of gunfire." (37 RT 7350.)

Respondent has identified a single piece of evidence, offered by a very flawed witness, that arguably tends to prove that Deshawn L. may have been a direct perpetrator of the target offenses. Even if this Court accepts that premise, the fact remains that the prosecution failed to prove who fired the fatal shots and, because of that failure, did not prove that the fatal shots were fired by anyone aided and abetted by petitioner.

II.

THE LEGISLATURE DID NOT, BY ENACTING PENAL CODE SECTIONS 31 AND 971, INTEND TO EXTEND LIABILITY UNDER THE NATURAL AND PROBABLE CONSEQUENCES DOCTRINE TO UNINTENDED ACTS COMMITTED BY A PERSON WHO WAS NOT A DIRECT PERPETRATOR OF THE TARGET OFFENSE AIDED AND ABETTED BY THE DEFENDANT

Respondent has paraphrased the rule set forth in *People v. Prettyman* (1996) 14 Cal.4th 248, explaining the operation of the natural and probable consequences doctrine. (RB 13.) Respondent first noted that *Prettyman* provided:

> 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.)

(RB 13.) This first iteration of the rule commendably acknowledges that Justice Kennard used the word "confederate" in *Prettyman*, but respondent's second iteration of the rule, quoting *People v. McCoy* (2001) 25 Cal.4th 1111, did not:

> 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.

(RB 14, citing *People v. McCoy*, *supra*, 25 Cal.4th at p. 1117.)

McCoy, of course, was not a natural and probable consequences case. In fact, Justice Chin wrote that "[n]othing we say in this opinion necessarily applies to an aider and abettor's guilt of an unintended crime under the natural and probable consequences doctrine." (*People v. McCoy*, *supra*, 25 Cal.4th at p. 1117.)

The reason respondent has chosen to rely on *McCoy* does not become obvious until the portion of respondent's argument in which respondent argues that petitioner was a direct perpetrator. (RB 20-22.) Respondent's position was mystifying at first, as direct perpetrators are directly liable for their own acts, not vicariously liable. Respondent's argument becomes clear only when respondent cites *People v. Olguin* (1994) 31 Cal.App.4th 1355, for the following proposition:

> 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.

(RB 21, citing *People v. Olguin*, *supra*, 31 Cal.App.4th at p. 1376.)

Respondent's attempt to characterize petitioner as a direct perpetrator makes sense only if this Court concludes that by enacting Penal Code sections 31 and 971 the Legislature intended to modify the common law to extend the concept of vicarious liability to direct perpetrators. Respondent is correct that *Olguin* based its conclusion on the fact that the Legislature enacted Penal Code section 971, abolishing some of the

common law distinctions between principals in the first degree, principals in the second degree and accessories before the fact. (*People v. Olguin*, *supra*, 31 Cal.App.4th at p. 1376.) Respondent also correctly acknowledged, however, that this Court previously has held that "[t]he major purpose and effect of this abrogation of the common law distinction between parties to crime apparently has been to alleviate certain procedural difficulties." (RB 25, citing *People v. Beeman* (1984) 35 Cal.3d 547, 555, fn. 2.) Respondent nonetheless argues now that the enactment of Penal Code section 971 effected a radical change in vicarious criminal liability under the common law.

This Court needs only to review the "distinctions" that have been litigated to understand that the enactment of Penal Code section 971 did not do what respondent asserts. This Court identified several of these distinctions in *Beeman*. Under the common law, jurisdiction over the offense varied depending upon the factual predicate to liability; whether the person was guilty as an accessory or a direct perpetrator. An accessory could not be tried before the principal had been convicted. A person charged as an accessory could not be convicted as a principal, and vice versa. (*People v. Beeman*, *supra*, 35 Cal.3d at p. 555, fn. 2.)

Most of those "distinctions" probably were the result of one aspect of the common law. At early common law, the punishment was the same

for direct perpetrators of felonies and their accessories. Both were put to death. (*People v. Woods* (1992) 8 Cal.App.4th 1570, 1584-1585; Perkins & Boyce, Criminal Law (3d ed. 1982) Parties to Crime, ch. 6, § 8, p. 757.) Dissatisfaction with the extension of the death penalty to all felonies prompted the creation of "various devices for the purpose of avoiding an excessive number of executions in felony cases," including "technicalities in jurisdiction, pleading, trial and degree of guilt." (*People v. Woods*, *supra*, 8 Cal.App.4th at p. 1585, citing Perkins & Boyce, *supra*, at pp. 730-731, 751-758, and LaFave & Scott, Substantive Criminal Law (1986) Parties to Crime, ch. 6, § 6.6, pp. 130-132.)

That the enactment of Penal Code section 971 addressed procedural matters rather than the factual predicate necessary to accessory liability is borne out in case law preceding 1872, as that legislative scheme was not the first statutory scheme found by this Court to have "abolished" certain aspects of the common law of accomplice liability. In *People v. Bearss* (1858) 10 Cal. 68, Whithurst, Bearss and Roberts were indicted for first degree murder. All were charged as principals, but the facts alleged in the indictment identified Whithurst as the direct perpetrator and Bearss and Roberts as aiders and abettors. The indictment specifically alleged that Bearss and Roberts were "accessories before the fact, and thereby became principals," but this Court held that Bearss actually was treated as a

principal in the second degree.[3] (*People v. Bearss*, *supra*, 10 Cal. at p. 68.)

Whithurst was tried separately and convicted of second degree murder. (*People v. Bearss*, *supra*, 10 Cal. at p. 68.) During Bearss' trial, the record of Whithurst's conviction was admitted as presumptive evidence of Whithurst's guilt of second degree murder, and the trial court instructed the jurors that appellant was guilty of the same offense if he "stood by, aided, abetted, and assisted in its commission." The jury convicted Bearss of manslaughter. (*Ibid.*) This Court reversed Bearss' conviction because the proof of Whithurst's conviction was not relevant to any issues in Bearss' trial and could only serve to prejudice Bearss. (*Id.* at p. 70.)

Having held that Bearss was charged as an accessory before the fact but was treated as a principal in the second degree, the Court's evaluation of the relevance of the proof of Whithurst's conviction required the Court to examine the issue from both perspectives. The key distinction between liability as a principal in the second degree and an accessory before the fact was the question whether the direct perpetrator had to be convicted before the accessory before the fact could be convicted. Under the common law, accessories before the fact could not be convicted unless the "chief perpetrator" -- the direct perpetrator -- first was tried and convicted. The

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[3] Justice Field actually called principals in the second degree "present aiders and abettors" and referred to the direct perpetrator of the offense as the "chief perpetrator." (*People v. Bearss*, *supra*, 10 Cal. at p. 69.)

acquittal or death of the chief perpetrator served to bar trial and conviction of the accessory before the fact. (*People v. Bearss*, *supra*, 10 Cal. at pp. 69-70.) No equivalent rule applied when the accessory was charged and tried as a principal in the second degree. (*Id.* at p. 70.) Because of this distinction, proof of Whithurst's conviction would have been relevant to prove that Bearss was an accessory before the fact under the common law, but it would not have been relevant had Bearss been tried as a principal in the second degree.

This Court held that this distinction between the proof required for conviction was "abolished" by the Legislature in "the eleventh section of the Act concerning Crimes and Punishments." (*People v. Bearss*, *supra*, 10 Cal. at p. 69.) The Court held that after section 11 of the Act Concerning Crimes and Punishments was enacted, accessories before the fact and principals in the second degree could be tried together or separately and could be convicted or acquitted without reference to the previous conviction of the other. (*Ibid.*) Proof of Whithurst's conviction thus was not relevant under either theory of liability -- principal in the second degree or accessory before the fact -- and the prejudice from proof of the conviction required the reversal of Bearss' conviction. (*Id.* at p. 70.)

Bearss must be understood as holding only that the Legislature had abrogated one "distinction" between accessories before the fact and

principals in the second degree; the need for proof that the direct perpetrator had been convicted. *Bearss* did not address, or affect, the common law rule limiting accessory liability to the scope of the act "commanded" by the accessory and those acts committed by the direct perpetrator as a natural and probable consequence of the act commanded by the accessory.

In *People v. Hodges* (1865) 27 Cal. 340, the Court held that section 255 of the Criminal Practice Act abolished the distinctions between a principal and an accessory before the fact and the distinctions between principals in the first degree and principals in the second degree. (*Id.* at p. 341.) Close examination of *Hodges*, however, demonstrates again that all that was found to have been abrogated by the Legislature were procedural in nature.

Hodges was charged by indictment with the murder of Joseph Staples in El Dorado County. The indictment alleged that Hodges "incited, counselled, hired and commanded" Thomas Poole and others to commit the murder. (*People v. Hodges*, *supra*, 27 Cal. at p. 340.) The indictment alleged that Hodges' acts occurred within El Dorado County, but the proof at trial showed that Hodges' acts actually occurred in Santa Clara County, roughly 200 miles away. (*Id.* at pp. 340-341.)

After Hodges was tried and convicted in El Dorado County, he sought reversal of his conviction based on his claim that the court in which he had been tried and convicted had no jurisdiction over the offense. (*People v. Hodges*, *supra*, 27 Cal. at pp. 340-341.) This Court agreed and reversed his conviction. (*Id.* at p. 342.) The Court acknowledged that "the common law distinction between principal and accessory is in the main obliterated," but held that the obliteration did not include venue because section 93 of the Criminal Practice Act provided that jurisdiction in the case of an accessory before the fact vested "in that county where the offense of the accessory was committed, notwithstanding the principal offense was committed in another county." (*Id.* at p. 341.) The Court rejected the People's suggestion that Hodges was a principal in the second degree -- which would have required a different result -- because the evidence did not establish that Hodges was "at such convenient distance as to be able to come to the immediate assistance of his associates if required, or to watch to prevent surprise, or the like." (*Id.* at p. 342, citing Arch.Cr.Pr. 11.)

Hodges and *Bearss* are important in that they show that the kinds of common law distinctions that were abrogated by Penal Code section 971 relate to the manner of pleading and proof rather than to the underlying factual predicate for accessory liability -- aiding and abetting by act or advice with knowledge of the direct perpetrator's purpose and an intent to

further that purpose. *Bearss* held that the Legislature abrogated the common law requirement of proof that the direct perpetrator had been convicted. *Hodges* held that the Legislature had not abrogated the distinction between accessories and principals in the second degree with regard to venue. Neither case changed, or even addressed, the factual predicates necessary for liability as a direct perpetrator or for derivative liability as an aider and abettor.

Hodges is particularly important in that it makes clear that the legislative abrogation of the common law distinctions relates only to procedural matters. Although the text of section 255 of the Criminal Practice Act is not quoted in *Hodges*, the Court's exposition of section 255 indicates that section 255 actually was very similar in effect to Penal Code section 971. The Court described the effect of section 255 as follows:

> By section two hundred and fifty-five, all persons connected in the commission of a felony, whether they directly commit the act constituting the offense, or aid and assist in its commission, though not present, are to be indicted, tried, and punished, as principals. *To that extent* "all distinction between an accessory before the fact and a principal, and between principals in the first and second degree," is expressly abolished by the section.

(*People v. Hodges*, *supra*, 27 Cal. at p. 341, emphasis added.) That judicial construction is significant because the statute so construed was remarkably similar to Penal Code section 971, which provides as follows:

> 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 than are required in an accusatory pleading against a principal.

(Pen. Code, § 971.)

That Penal Code section 971 and section 255 are substantially the same is a fact of great importance, as this Court held in *Hodges* that section 255 "relates to the frame of the indictment against an accessory, the method of trial, and the measure of punishment." (*People v. Hodges*, *supra*, 27 Cal. at p. 341.) Because of this, and given the stark similarities between section 255 and Penal Code sections 31 and 971, it must be presumed that the Legislature adopted this Court's construction of section 255 when it enacted Penal Code sections 31 and 971. (See *People v. Harrison* (1989) 48 Cal.3d 321, 329 [Where a statute is framed in language of an earlier enactment on the same or an analogous subject, and that enactment has been judicially construed, the Legislature is presumed to have adopted that construction]; *People v. Modiri* (2006) 39 Cal.4th 481, 499; *People* v. *Belcher* (1999) 75 Cal.App.4th 150, 157.) This presumption finds support in the fact that the Legislature placed Penal Code section 971 in Part 2, of Criminal Procedure, Title 5, the Pleadings, Chapter 2, Rules of Pleading.

This means that any abrogation of the common law distinctions between accessories and direct perpetrators through the enactment of Penal Code sections 31 and 971 pertains to "the frame of the indictment against an accessory, the method of trial, and the measure of punishment." Neither *Bearss* nor *Hodges* had anything to do with the factual predicate for accessory liability, namely that the act of the accessory be done with knowledge of the direct perpetrator's purpose and with the intent that the direct perpetrator's purpose be actualized.

Bearss and *Hodges* instead make it clear that when the Legislature enacted the 1850 statutory scheme containing the criminal practice Act and the Act on Crimes and Punishments, it modified the common law so as to eliminate the "technicalities in jurisdiction, pleading, trial and degree of guilt" that had arisen in the common law. The factual predicates for liability as a direct perpetrator and accomplice liability were the same after 1850, and again after 1872, as they were at common law.

A. The *Olguin* Decision is Flawed Because it is Based on the Erroneous Supposition that Mora Was Not an Accessory in Addition to Being a Direct Perpetrator

Olguin should not be followed in any case because the reasoning in *Olguin* was based on a flawed and needless differentiation between a direct perpetrator and a principal in the second degree. Olguin, Mora and Hilario were members of the Southside F Troop street gang in Santa Ana. On

March 27, 1992, the three of them set out to find the person or persons who had defaced gang graffiti previously left on a wall by Olguin and marked the wall with graffiti identified to a defunct gang called Shelley Street. (*People v. Olguin*, *supra*, 31 Cal.App.4th at p. 1366.) They encountered Eugene Hernandez during their foray, and Hernandez told them that one of his relatives had crossed out Olguin's graffiti. (*Ibid.*)

Shortly after the Southside gang members walked away, Hernandez told his cousin John Ramirez about his contact with the Southside gang members. (*People v. Olguin*, *supra*, 31 Cal.App.4th at p. 1366.) Ramirez followed the Southside gang members, yelling "Shelley Street." (*Id.* at pp. 1366-1367.) Olguin, Mora and Hilario turned and walked back toward Ramirez, yelling "Southside." (*Id.* at p. 1367.) Ramirez confronted the three of them "at arm's length" and the parties argued about to whom the street belonged. After Olguin and Ramirez both clenched their fists, Mora struck Ramirez in the face and knocked him to the ground. Ramirez stood up and moved toward the three Southside gang members. Olguin pulled a gun and shot Ramirez in the chest, killing him. The three Southside gang members then ran away together. (*Ibid.*)

Olguin and Mora were convicted of second degree murder. (*People v. Olguin*, *supra*, 31 Cal.App.4th at p. 1366.) Mora argued on appeal that his murder conviction could not be sustained as "a reasonably foreseeable

consequence of other criminal conduct because he was the perpetrator -- not the aider and abettor -- of the only preshooting criminal conduct: the one-punch knockdown of Ramirez." (*Id.* at p. 1375.) Mora argued that because he was the direct perpetrator, the natural and probable consequences doctrine did not apply to him. (*Ibid.*)

Division Three of the Court of Appeal for the Fourth Appellate District found that Mora was the direct perpetrator of an assault, and not an aider and abettor. (*People v. Olguin*, *supra*, 31 Cal.App.4th at p. 1375.) Relying on *Bompensiero v. Superior Court* (1955) 44 Cal.2d 178, 186, the court nonetheless held that Mora was liable for the murder as a natural and probable consequence of his own action as a direct perpetrator because Penal Code section 971 "abolished" the distinctions between liability as an aider and abettor and liability as a direct perpetrator. (*Id.* at p. 1376.) The court held:

> In fact, this case aptly demonstrates the folly of Mora's position. If it were adopted, Hilario, who did nothing but stand by and watch, could be convicted of murder if the jury were convinced he was there to back up his homeboys and thereby encouraged Olguin and Mora in the assault on Ramirez. But Mora, who actually perpetrated the assault, would escape liability on the basis that he was the party who initiated the action.

(*Ibid.*)

Neither Hilario nor Mora merely stood by and watched. Olguin armed himself with a firearm and set out to confront and, presumably,

assault whoever had crossed out Olguin's graffiti. Olguin took Mora and Hilario with him for that purpose. (*People v. Olguin*, *supra*, 31 Cal.App.4th at p. 1366.) The three of them looked at the defaced graffiti together, and they confronted Hernandez together. (*Ibid.*) Mora asked Hernandez if he belonged to the Shelley Street gang. Mora also asked Hernandez who crossed out Southside's graffiti. (*Ibid.*) Mora and Hilario subsequently participated in a gang-related confrontation with Ramirez, during which Mora punched Ramirez and Olguin shot and killed Ramirez. (*Id.* at pp. 1366-1367.)

Given this evidence, the Court of Appeal's agreement that Mora was a direct perpetrator rather than an aider and abettor is difficult to reconcile. The evidence was more than sufficient to support a factual finding that Mora knew Olguin's intent to find and assault whoever had crossed out Olguin's graffiti, and that Mora did multiple acts -- including accompanying Olguin on his quest, confronting Hernandez and confronting and punching Ramirez -- with the intent of assisting and furthering Olguin in his quest.

The Court of Appeal was correct in finding that Mora was a direct perpetrator of an assault, but it was flatly incorrect in finding that Mora was not also an aider and abettor. Mora was both a direct perpetrator and an aider and abettor. (See *People v. McCoy*, *supra*, 25 Cal.4th at p. 1122.)

Olguin's finding that the natural and probable consequences doctrine extended to all principals thus was both unnecessary and historically inaccurate.

Olguin also is flawed because it expanded the holding in *Bompensiero*, *supra*, which addressed only a procedural limitation and provided virtually no discussion of the intent of the Legislature in enacting Penal Code sections 31 and 971. Bompensiero was charged with several offenses based on the allegation that he acted as a middle man in a scheme by which the District Liquor Control Administrator of San Diego and Imperial Counties extorted kickbacks in exchange for recommending authorization of applications for liquor licenses. (*Bompensiero v. Superior Court*, *supra*, 44 Cal.2d at pp. 180-181.)

Bompensiero came before this Court seeking the issuance of a writ of prohibition after the trial court overruled Bompensiero's demurrer and denied his motion to quash the indictment. (*Bompensiero v. Superior Court*, *supra*, 44 Cal.2d at p. 182.) Bompensiero asserted several claims in his writ petition, including the claim that one of the counts was barred by the statute of limitations. (*Id.* at pp. 182, 185.) Bompensiero argued that a three-year statute of limitations applied to the offense charged in count 10, which accused Bompensiero of asking for or agreeing to receive a bribe. The Attorney General argued that Bompensiero was subject to a six-year statute

of limitations that applied to acceptance of a bribe by a public official or employee. (*Id.* at p. 185.)

This Court rejected Bompensiero's claim regarding the statute of limitations. The Court's resolution of the issue turned on the fact that aiding and abetting in California does not state an independent crime. The Court noted that in jurisdictions holding that aiding and abetting is a distinct offense, the crime of aiding and abetting may be governed by a statute different than the statute governing the target offense. (*Bompensiero v. Superior Court*, *supra*, 44 Cal.2d at p. 186.) When aiding and abetting does not constitute a separate offense, however, the statute of limitations that controls is the statute applicable to the target offense. (*Ibid.*)

It should be abundantly clear to this Court that *Bompensiero* had absolutely nothing to do with the factual predicates necessary for criminal liability as an aider and abettor and for liability as a direct perpetrator, much less anything to do with the natural and probable consequences doctrine. The portion of *Bompensiero* relied upon by *Olguin* addressed only the procedural bar posed by the statute of limitations.

B. *McCoy* Does not Stand for the Proposition Asserted by Respondent

That *Olguin* must be seen as a flawed decision based on an incorrect assessment of the facts is made particularly clear by *McCoy*, *supra*, a case cited by respondent in what appears to be an attempt to convince this Court

that it need not distinguish between direct perpetrators and aiders and abettors. Respondent specifically relies upon the Court's statement in *McCoy* that the dividing line between an aider and abettor and the direct perpetrator often is blurred. (RB 16.) This is a distortion of the holding in *McCoy*. What the Court actually held was that it is possible to act both as a direct perpetrator and as an aider and abettor, and that in some cases it is not necessary to distinguish between the acts of the direct perpetrator and the aider and abettor. (*People v. McCoy*, *supra*, 25 Cal.4th at p. 1116.)

The facts in *McCoy* were relatively straightforward. McCoy and Lakey both fired handguns from a vehicle and both were convicted of two counts of attempted murder and one count of first degree murder. The fatal shot was fired by McCoy. (*People v. McCoy*, *supra*, 25 Cal.4th at p. at p. 1115.) McCoy's murder and attempted murder convictions were reversed by the Court of Appeal for the Third Appellate District because the trial court's instruction on imperfect self-defense -- a defense available to McCoy, but not to Lakey -- was prejudicially flawed. (*Id.* at pp. 1115-1116.)

The Court of Appeal also reversed Lakey's convictions, but it did so both because the court could not conclude that the evidence showed either man acted with malice, and because the court concluded that an aider and abettor "cannot be convicted of an offense greater than that of which the

actual perpetrator is convicted, where the aider and abettor and the perpetrator are tried in the same trial upon the same evidence." (*People v. McCoy*, *supra*, 25 Cal.4th at p. at p. 1115.) It was the latter of those two issues -- whether an aider and abettor can be convicted of an offense greater than the direct perpetrator -- that was before this Court in *McCoy*. (*Id.* at p. 1116.)

McCoy resolved the issue before the Court by finding that an aider and abettor can, in some circumstances, be liable for a greater offense than the direct perpetrator based on the fact that the mens rea harbored by the aider and abettor may be different than the mens rea harbored by the direct perpetrator of the target offense. (*People v. McCoy*, *supra*, 25 Cal.4th at p. at pp. 1117-1120.) The Court noted that "[a]ider and abettor liability is premised on the combined acts of all the principals, but on the aider and abettor's own mens rea." (*Id.* at p. 1120.) The Court held:

> As applied here, Lakey and McCoy were to some extent both actual perpetrators and aiders and abettors. Both fired their handguns, although McCoy's gun inflicted the fatal wounds. Once the jury found, as it clearly did, that Lakey acted with the necessary mental state of an aider and abettor, it could find him liable for both his and McCoy's acts, without having to distinguish between them. But Lakey's guilt was also based on his own mental state, not McCoy's.

(*Id.* at p. 1122.)

McCoy does not hold that there is no need to distinguish between direct perpetrators and aiders and abettors. *McCoy* instead holds that there

is no reason to distinguish between the acts of the two when the prosecution proves that the aider and abettor is liable based on his own acts and his own mental state. *McCoy* did not do away with the need to distinguish between the factual predicates for liability as direct perpetrators and aiders and abettors. A direct perpetrator still is directly liable for his act, and the aider and abettor is derivatively liable for the act of the direct perpetrator by virtue of his own act being done with the requisite mental states.

That the factual predicates for liability as direct perpetrators and as aiders and abettors were not abrogated by the enactment of Penal Code section 971 also is demonstrated by this Court's decision in *People v. Calhoun* (2007) 40 Cal.4th 398. In support of its "blurred lines" approach, respondent relies upon *Calhoun* in support of its claim that this Court "has repeatedly declined to engage in this sort of parsing among principals to a crime." (RB 26, citing *People v. Calhoun*, *supra*, 40 Cal.4th at p. 402.)

Respondent has overstated the holding of this Court. Calhoun and Waller engaged in a drag race, during which Waller struck another car. Two occupants of that car were killed and a third was profoundly disabled. A passenger in Waller's car also suffered great bodily injury. (*People v. Calhoun*, *supra*, 40 Cal.4th at pp. 400-401.) Waller and Calhoun both were convicted of vehicular manslaughter with gross negligence and reckless driving causing bodily injury. Calhoun also was convicted of leaving the

scene of the accident. (*Id.* at p. 401.)

The relevant issue before this Court in *Calhoun* was whether the Court of Appeal was correct in concluding that Calhoun was not subject to a five-year enhancement pursuant to Vehicle Code section 20001, subdivision (c), because Calhoun did not collide with the victims' vehicle. (*People v. Calhoun*, *supra*, 40 Cal.4th at pp. 401-402.) Calhoun, who conceded that he was guilty of vehicular manslaughter as an aider and abettor, claimed that the words used by the Legislature in subdivision (c) -- "a person who flees the scene of the crime after committing a violation of . . . subdivision (c) of Section 192 . . . of, the Penal Code" -- demonstrated legislative intent that the enhancement apply only to direct perpetrators. (*Id.* at pp. 401-402.)

The Court disagreed with Calhoun, but it did so by evaluating the intent of the Legislature in enacting subdivision (c) of Vehicle Code section 20001, not the intent of the Legislature in enacting Penal Code section 971. The Court did mention the enactment of Penal Code section 971, and the Court acknowledged *McCoy*'s statement about the line between direct perpetrators and accessories often being blurred, but the Court's ruling depended upon the legislative intent it found from the language of Vehicle Code section 20001, subdivision (c). (*People v. Calhoun*, *supra*, 40 Cal.4th at p. 402.) The Court held:

> Here it is unnecessary to parse Calhoun's involvement. We conclude that by creating an enhancement for those who flee the scene after "committing" manslaughter, the Legislature intended the enhancement to apply to all principals, both aiders and abettors as well as direct perpetrators.

(*Id.* at pp. 402-403.)

Calhoun thus does not really support respondent's position in any way. *Calhoun* instead shows that the Legislature continued to recognize the difference between the factual predicates for liability as a direct perpetrator and liability as an aider and abettor when subdivision (c) was enacted in 1996, roughly 124 years after the enactment of Penal Code sections 31 and 971. (Stats. 1996, ch. 645, § 1.) There would be no need for the Legislature to intend the subdivision to apply both to direct perpetrators and to aiders and abettors if respondent is correct in its assertion that the Legislature intended to abolish all distinctions between direct perpetrators and aiders and abettors when it enacted Penal Code sections 31 and 971.

Citing *People v. Maciel* (2013) 57 Cal.4th 482, a case respondent acknowledges not to be on point (RB 33), respondent argues that principles of foreseeability and proximate causation should be the defining issue in this matter. (RB 33-36.) Respondent wrote:

> 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.

(RB 35.)

Respondent is mischaracterizing petitioner's arguments. The avoidance of unfair treatment of defendants obviously is a good policy, but this Court does not set policy. Resolution of the issue before the Court depends upon the policies expressed by the intent of the Legislature when it enacted Penal Code sections 31 and 971, not on what petitioner, respondent or this Court believes would be good policy.

Petitioner is not arguing that foreseeability has no place in the analysis. Petitioner is instead arguing that the foreseeability required for vicarious criminal liability must be the foreseeability that a person actually aided and abetted by the defendant in the commission of a target offense would also commit an unintended act. That was the rule under the common law, and it still is the rule today.

CONCLUSION

Under the common law as of 1872, an aider and abettor would be liable for the acts of the direct perpetrator that were counseled or aided by the aider and abettor. The aider and abettor also would be liable for some, but not all, unintended acts committed by the direct perpetrator of the target offense. The defining issue in determining which unintended acts could be attributed to the aider and abettor was whether those unintended acts were committed in pursuit of the express command or were the foreseeable result of the act by the direct perpetrator that was expressly commanded by the aider and abettor. (See ABOM 31-32.)

Respondent would have this Court announce a rule that would extend liability to an accessory based solely on foreseeability, without regard to whether the unintended act was committed by a person who directly commits the target offense. That was not the common law rule in 1872, and it never has been held to be the law in this state. The liability of a direct perpetrator under the common law always was direct, and not derivative. Derivative liability under the common law depended upon the nature and scope of the act commanded by the accessory. In the absence of a relationship between the accessory and the direct perpetrator that was somewhat akin to the master-servant relationship in tort, the accessory could not be held derivatively liable either for the intended offense or for

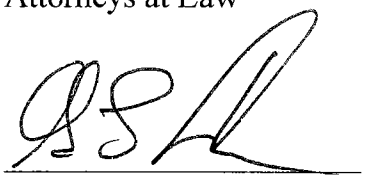
unintended acts by the direct perpetrator.

There were three direct perpetrators of the target offenses in this matter. The record does not reveal who fired the fatal shots, but it is clear that the persons who fired the shots that killed two of petitioner's friends were not direct perpetrators of the target offenses. Petitioner's murder convictions must be reversed.

Dated: February 20, 2014

Respectfully submitted,

Cannon & Harris
Attorneys at Law



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CERTIFICATION OF WORD COUNT

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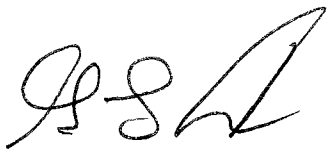
Dated: February 20, 2014



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PROOF OF SERVICE BY MAIL

I declare that 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 February 20, 2014, I served **APPELLANT'S REPLY BRIEF ON THE MERITS** on each of the following by placing a true copy thereof in a sealed envelope with postage fully prepaid to the remaining persons and entities addressed as follows:

Clerk of the Superior Court
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Furthermore, I declare that I electronically served from my electronic service address of Cannon135635@gmail.com the same document referenced above on the same date to the following entities as indicated:

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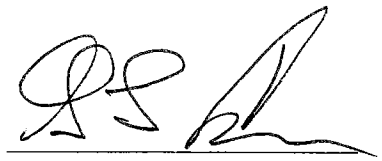
Attorney General: ADIEService@doj.ca.gov

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

Dated: February 20, 2014



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