IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	**CASE NO. S202724**
Plaintiff and Respondent,	**DCA CASE NO. C063913**
vs.	**Sacramento County Case No. 03F08566**
BOBBY CHIU,	
Defendants and Appellants.	

SUPREME COURT
FILED

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Frank A. McGuire Clerk

Deputy

ANSWER BRIEF ON THE MERITS

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT
COUNTY OF SACRAMENTO
THE HONORABLE LLOYD G. CONNELLY, JUDGE

AFTER DECISION BY THE COURT OF APPEAL
THIRD APPELLATE DISTRICT

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APPELLANT'S ANSWER BRIEF ON THE MERITS

ISSUE PRESENTED

"In order for an aider and abettor to be convicted of first degree premeditated murder by application of the natural and probable consequences doctrine, must a premeditated murder have been a reasonably foreseeable consequence of the target offense, or is it sufficient that a murder would be reasonably foreseeable?"

STATEMENT OF THE CASE

On April 11, 2005, an amended information was filed in Sacramento Superior Court, charging appellant and a co-defendant (Tony Hoong) with the murder of Roberto Treadway, in violation of Penal Code section 187, subdivision (a).

It was further alleged that the crime was committed for the benefit of, at the direction of, and in association with a criminal street gang, to wit "HOP SING," with the specific intent to promote, further and assist in criminal conduct by gang members, pursuant to Penal Code section 186.22, subdivisions (b)(1) and (b)(5).

It was further alleged that a principal in the offense intentionally discharged and personally used a firearm, and proximately caused great bodily injury as defined by Penal Code section 12022.7, in violation of Penal Code section 12022.53, subdivisions (b)(c)(d) and (e)(1). (1Supp. CT 29-30.)

On June 20, 2005, following trial by jury, appellant was convicted of first degree murder and the special allegations were sustained. On July 29, 2005, appellant was sentenced to a term of 25 years to life for first degree murder with a consecutive term of 25 years to life for the firearm enhancement. (1Supp. CT 31-32.)

On November 12, 2008, the judgment was reversed and remanded for new trial, except for the firearm use enhancement, which was reversed for insufficient evidence with retrial barred. (1CT 10-53.)

On August 26, 2009, the information was orally amended by striking the firearm use allegation and replacing it with an allegation alleging that in the commission and attempted commission of the offense, a principal in said offense was armed with a firearm, to wit, a handgun, said arming not being an element of the above offense, within the meaning of Penal Code Section 12022, subdivision (a)(1). (1RT 17; 10CT 2842.)

On October 27, 2009, following trial by jury appellant was convicted of first degree murder and the special allegations were sustained. On December 11, 2009, appellant was sentenced to a term of 25 years to life for first degree murder with a consecutive term of one year for the firearm enhancement. (10CT 2957-2958.)

STATEMENT OF FACTS

1. Sarn's threat to Mackinson.

(a) Testimony of Sarn Saeteurn.

In 2003, Sarn Saeteurn, age 13 or 14, was a member of Mien youth gang called Outlaw Crips. (1RT 245-247, 266.) On September 29, 2003, Sarn learned about a fight between two girls named April and Phan. (1RT 242.) Sarn was a friend of April and he knew that Phan was a friend of Mackinson Sihabouth. (1RT 243.) Sarn was upset about the fight between the two girls and blamed Mackinson. He sent Mackinson a text message that night to call him out for a fight after school the next day: "I am going to beat you up. I am calling you out. We're going to have a fight. Meet me after school out in front of Famous Pizza" (1RT 250-251.) Sarn also threatened to bring his "crew" (which was a reference to fellow gang members) and wrote, "if your dad comes out of that shop and tries to break up this fight, I'm going to cap him," and "[i]f you chicken out, partner, I may cap you too." (1RT 252-254.) This was meant to scare Mackinson. (1RT 253.)

The next day, April warned Sarn that the Hop Sing gang would be there. Sarn heard that Hop Sing had a reputation for being a serious, violent gang. Because Sarn could not get enough of his own people to back him up and because he was afraid that he would be outnumbered by Hop Sing, he did not go to the pizza parlor to fight Mackinson. (1RT 257-258.) As he told police, "I didn't show up because Hop Sing are crazy and they kill people." (1RT 259.)

(b) Testimony of Mackinson Sihabouth.

Mackinson Sihabouth was a high school student at McClatchy High School. His parents owned Famous Pizza, located near the high school, at the corner of Freeport Boulevard and Fifth Avenue. (1RT 274.)

Mackinson witnessed the fight between April and Phan that occurred near the pizza parlor. The two girls briefly exchanged blows before the fight was broken up. (1RT 277-278.) That evening, Mackinson discussed the fight with his friend, Sarn Saeteurn, using AOL instant text messaging. (1RT 278-279.) Sarn was angry with Mackinson for failing to take April's side in the fight. (2RT 318-320.) Sarn challenged Mackinson to fight at the pizza parlor. (1RT 285.) He also threatened to shoot Mackinson if he did not show up and he threatened to shoot Mackinson's father. (1RT 286-288.) Mackinson knew that Sarn was in a gang called OLC. (1RT 286.)

After Mackinson received the text challenging him to fight, he contacted two friends, William and Simon. (1RT 290.) Mackinson told detectives that the reason he called Simon was to ask for back up. (1RT 295-298.)

Mackinson knew Simon as someone who hung-out playing video games at the internet cafe called the E-Channel, which was the business next door to his father's pizzeria. Simon hangs out there with "heavyset Tony" (Tony Hoong) and appellant. (1RT 292, 323, 383-384.)

The next day, Mackinson waited at the pizza parlor for Sarn to show up for the fight, but Sarn did not show. Instead, a crowd assembled out in front of the pizza parlor to watch the fight, which included about 20 Nortenos. (2RT 302-305, 312.) Mackinson thought it was unusual to see the Nortenos there. (2RT 326-327.) He decided to leave and got a ride from the pizza delivery person. (1RT 277, 300.) When they passed a number of emergency vehicles going in the opposite direction with lights and sirens, Mackinson became worried that maybe his father had been shot. He returned to the pizza parlor to find that the area had been taped off. (2RT 305-307, 326.)

(c) Testimony of Troang Tran.

Troang Tran was a student at American Legion High School who knew both Simon and appellant. (2RT 532-533, 543.) He spoke to appellant at school on September 30, 2003. Appellant invited him to watch a fight after school where someone might get shot. (2RT 537-538.) He said that two guys would be fighting over a girl. (2RT 554.) As Troang told the detective, appellant asked: "You wanna go see a fight? ... You wanna come with me to see a fight?" Troang said no, and appellant added, "He might get shot." When Troang said he did not believe it, appellant said that his friend might shoot, "if he ... gets pressured, he will." (9CT 2661.)

Troang suspected that Simon and appellant were Hop Sing because they hung out with Hop Sing boys. (2RT 544.) When he asked Simon if he was Hop Sing, Simon said, "If I am, I am, if I'm not, I'm not." (2RT 544; 9CT 2664.) When he asked appellant if he was Hop Sing, appellant first said no and later said yes. (2RT 548; 9CT 2665.) But the fight on September 30th was not supposed to be a Hop Sing fight. It was just two guys fighting over a girl. (2RT 554.)

2. The brawl.

(a) Testimony of Simon Nim.

Simon Nim was at the E-Channel to play video games and watch the fight. Once McClatchy High School let out, a large crowd began to gather in the area around Famous Pizza and the E-Channel. (2RT 424, 441.) Simon saw appellant outside the E-Channel. (2RT 397.)

Simon recognized a girl he knew from middle school named Teresa and said hello. (2RT 442-443, 499.) Simon did not hear appellant say anything to her. (2RT 499.) A boy from the crowd named Antonio appeared to be angry at appellant. He walked up to appellant in an aggressive manner and assumed an aggressive stance in front of

him. Antonio's friends gathered around. (2RT 461, 500-501.) Antonio swung first and the two began to fight. (2RT 462.) Simon tried to intercede and was struck in the face by two individuals from the crowd. (2RT 503.) Simon saw appellant fall to the ground. His shirt was pulled up over his face. Appellant was surrounded by a group of three or more who were hitting and kicking him. (2RT 503-504.) Simon also saw Tony Hoong and Rickie Che fighting in the brawl. (2RT 504-505.) A gunshot rang out, and the crowd scattered. (2RT 505, 508.) Simon helped appellant to his feet and they followed Rickie to his car. Simon saw, for the first time, that Rickie had a handgun. (2RT 505- 506.)

The prosecutor confronted Simon with prior statements where he claimed that Antonio and Teresa were together when appellant said something insulting to Teresa. (2RT 446, 451.) In Simon's prior statement, he said that Antonio confronted appellant aggressively, saying "quit treating her like a kid." Appellant responded: "Like if you are going to do something, do it and let's do it." (2RT 453.) Appellant swung first. (2RT 457, 462.) After the shooting, the four of them ran to Rickie's car. Simon, who was trailing, had to yell for Rickie to wait up. (2RT 512.)

(b) Testimony of Teresa Nguyen.

When Teresa Nguyen arrived at that location, her boyfriend (Antonio Gonzales) met up with her and gave her a hug and kiss. She then called out to a friend to ask if she knew the whereabouts of her little sister. (3RT 645, 648.) Four Asian boys were sitting on the trunk of a car, and Teresa got the impression that they were mocking her. She turned to them and said, 'Are you mocking me?' They started laughing, and she told them to shut up. (3RT 649.)

One of the Asians (appellant) asked Antonio, "Is that your girl?" Antonio said, "Yeah, that's my girl." (3RT 650, 678.) Appellant got down from the car. (3RT

653.) Antonio took off his backpack. (3RT 689.) Antonio's friend, Roberto Treadway, told Antonio, "I got your back, and Antonio and Roberto touched hands. (3RT 681, 689.) Antonio then met appellant in the street, where Antonio said, "What's up?" Teresa understood this as a challenge to fight. (3RT 679.) The two stood facing each other in a stare-down contest. It did not look like there would be a fight, but then Roberto suddenly lunged forward, as if he were hit by something, and fighting erupted everywhere. (3RT 656, 659, 692.) Everyone in the crowd of about 20 to 25 began fighting, with Mexicans on one side and Asians on the other. (3RT 663-664.)

Teresa focused her attention on Antonio's fight. Appellant had Antonio down when Antonio's cousin Angel (a large girl) hit appellant in the back of the head, causing him to go limp. Antonio was then able to gain the advantage over appellant. (3RT 660-662, 685-687, 690-691.)

A few minutes into the fight, someone yelled out "gun." Everyone scattered and then there was the sound of a gunshot. (3RT 665, 668.) Teresa ran to the light rail station where she later met up with Antonio. (3RT 668-670.)

(c) Testimony of Antonio Gonzales.

Antonio Gonzales was a student at American Legion High School. Teresa Nguyen was his girlfriend and he was friends with Roberto Treadway. (3RT 694-696.) He claimed not to be Norteno, but he knew that Roberto was associated with Nortenos. (4RT 969.)

Antonio usually met Teresa after school around Famous Pizza. (3RT 695.) On September 30, when he met her there, three Asians who were sitting atop a Honda said something to Teresa which caused her to say "shut up" in response. Antonio later identified the three as Tony, Rickie, and appellant. (3RT 697-700.) Antonio made eye

contact with appellant and the two of them exchanged "fighting words," *i.e.*, "[w]e pretty much were calling each other out. What's up. Hey, what do you want to do? He called me -- I believe he called me a bitch and then so it became a personal matter. It was no longer about my girlfriend." (3RT 701.) Antonio felt that he would look like a coward if backed down in front of his girl. (3RT 701-702.) Teresa, however, was telling him to just walk away. (3RT 729.) Appellant and Antonio walked towards each other. Tony and Rickie got off the car and stood with appellant. (3RT 703.)

Antonio said to appellant, "What's up?" He meant this as a challenge to fight. (3RT 726.) Roberto walked up alongside Antonio and said, "Come on, I got your back." (3RT 703-705, 728.) Rickie Che punched Roberto, and the fight was on. (3RT 708.) Antonio's friends joined the fight because "they had my back." (3RT 728.) Ten to fifteen people were fighting. (3RT 710.)

Antonio was focused on his own fight with appellant. It began when appellant swung at Antonio and missed, and Antonio swung back and missed, and then punches started to connect. (3RT 708.) Appellant grabbed Antonio and threw him to the ground, and was punching him from above. (3RT 709.) A big girl smashed appellant in the head, and Antonio then bloodied appellant's nose by kneeing him in the face. (3RT 710-711, 728.) They both got to their feet and then wrestled each other to the ground again. (3RT 711-712.) Antonio was yelling "fighting words" while wrestling with appellant. "I was just talking a whole lot of smack just you 'Get off me. I'll kick your ass,'" (3RT 713.) He did not hear appellant say anything during the fight. (3RT 714.)

Someone yelled "gun," and they both pushed each other away. Antonio stood up and saw Rickie Che pointing a gun at him. (3RT 713-715.) Rickie said, "Run now,

bitch, run," and Antonio took off running. Three to four seconds later, he heard a gunshot. (3RT 716, 730.) He turned and saw the three Asians run to the car and drive off. (3RT 718.) Although he could no longer recall, Antonio stated in prior testimony that appellant was driving. (3RT 718-719.)

Antonio saw Roberto on the ground with a gunshot wound to his head. (3RT 717.) He did not stay with his wounded friend because he figured he was dead. (3RT 720.) Antonio went to the light rail station where he met up with Teresa, and he took the light rail home. (3RT 721.)

(d) Testimony of Angelina Hernandez.

Angelina Hernandez was a McClatchy High School senior, a cousin to Antonio Gonzales, and best friends with Roberto Treadway. (3RT 772-773.) She insisted that neither of them were Norteno. (3RT 805.)

On September 30, Angelina was chit-chatting with friends outside the E-channel when she noticed an incident involving Teresa and Antonio. (3RT 776.) Teresa, who is Asian herself, was being bothered by a group of "preppy" Asians who were hitting on her and asking her to hang out with them. She told them no and used the f-word, and urged Antonio to fight to defend her honor. (3RT 776-777; 803, 807-809.) Antonio walked up to appellant and the two exchanged words. Appellant had a friend standing next to him. Roberto stood next to Antonio. (3RT 779-780.) Appellant's friend (Rickie Che) "sucker punched" Roberto in the jaw and he fell to the ground, and then everyone started fighting. (3RT 784.) It did not appear to be a gang fight. (3RT 802-804, 806-807.) When appellant threw Antonio to the ground and was punching him from above, Angelina (who described herself as "pretty good size") jumped in and hit appellant in the back of the head "a good eight or nine times," while yelling and swearing, "get off my cousin." (3RT 785-786, 812.) She backed off when

Antonio was able to get up. A friend named Reyes then moved in to help Antonio fight appellant, and Reyes got in one solid punch. (3RT 791.)

Angelina looked around and saw a riot going on between Hispanics and Asians. (3RT 787, 792.) She ran over and hit an Asian who was fighting with Roberto, and then "I basically just ran around the fight hitting random people that were fighting my friends." (3RT 793.) She saw a fat Asian (Tony) swinging a knife around, while another Asian (Rickie) ran toward a Honda car. (3RT 794-793.) When Antonio yelled, "gun," she looked back and saw Rickie waving a gun around. A voice in the crowd, coming from the direction of the Pizza parlor, yelled "shoot, shoot, shoot," and the gun went off. Roberto was hit. Everyone ran off. Angelina saw the Asians who were fighting run toward the Honda car. (3RT 799-801.)

(e) Testimony of Joshua Bartholomew.

Joshua Bartholomew was a student at McClatchy High School and was a cousin to Roberto Treadway by marriage and was a good friend of Antonio Gonzales. (3RT 734, 738.) He acknowledged that Roberto was Norteno, but was not sure about Antonio. He denied gang involvement himself. (3RT 757-758.)

After school on September 30, he walked to the corner of Bidwell and Freeport where he saw a crowd gathering up the street. He walked over and made his way through the crowd where he saw Antonio and appellant engaged in an argument. (3RT 737.) Roberto was standing to the right of Antonio. (3RT 741.) Joshua saw Rickie Che "mean mugging" Roberto. (3RT 740.) Roberto said to Rickie, "Don't be looking at me like that." Rickie then punched Roberto, and appellant and Antonio started fighting. (3RT 743.) The fight between appellant and Antonio spun into the street. (3RT 743.) A riot broke out and the fight was "them versus us." (3RT 744.)

Nortenos usually help each other in a fight rather than fight one-on-one. (3RT 761.) Appellant was on top of Antonio, so Joshua hit appellant "pretty hard" in the head. Appellant cried out for help: "Grab the gun." (3RT 743, 746, 761-762.)

Joshua then looked back and saw Tony and Roberto fighting 30 to 40 feet away. (3RT 743.) Tony was on top of Roberto and looked to be hurting him. (3RT 746, 748.) Joshua ran to help Roberto. Tony left Roberto and went to where appellant and Antonio were fighting. (3RT 748.) Joshua and Roberto ran back to where Antonio was fighting to urge his friends to get out of there. (3RT 738.) Tony intercepted them, pulled out a three-inch pocket knife and stabbed Roberto in the arm. (3RT 749-750.) Someone shouted out, "He's got a gun." (3RT 749.) Joshua looked back and saw Rickie aiming the gun at them. (3RT 752.) Joshua heard someone say, "you better run, bitch." (3RT 765.) He and Roberto turned to run. He heard the sound of a gunshot and Roberto fell. (3RT 763.)

(f) Testimony of Lareina Montes.

Lareina Montes was a McClatchy High School student who normally walks by Famous Pizza on her way home from school. (3RT 819.)

On September 30, she saw a crowd gathered out in front of Famous Pizza. It looked like a group of her friends from high school were arguing with a group of "preppy" Asians. By "preppy," she meant that they did not look like street fighters. (3RT 819-823.) A fight broke out just as she arrived. She tried to restrain Antonio by pulling him back, but he broke free and went back to fighting. (3RT 825.) Over a dozen were fighting, and the fight appeared to be evenly matched on both sides. (3RT 826.) It looked to be 10 to 15 Asians against 10 on her side. (3RT 847.) At one point, she saw Roberto beating up Rickie. (3RT 839.) At another point in time, Roberto yelled out that he had been stabbed. (3RT 848.)

As the fighting began to die down, she saw Rickie run toward a car and come back with a gun. (3RT 826-828.) He was holding it sideways and was waving it back and forth, kind of aiming it everywhere. (3RT 833.) Roberto stopped fighting and walked away. (3RT 836.) An unknown voice in the crowd yelled, "Shoot him, shoot him, shoot him," and Roberto was shot. (3RT 827.)

(g) Testimony of Anthony Montes.

Anthony Montes was a freshman at McClatchy High School. (3RT 852.) On the morning of September 30, while in PE class, Mackinson told him that he would be in a fight after school with a group that had a gun, and that he had his own friends with a gun. (3RT 856, 867.)

Anthony went to watch the fight after school. (3RT 856.) Instead of seeing a fight involving Mackinson, Anthony saw a fight break out between his own friends and a group of Asians. The fight started when Antonio's girlfriend started yelling at the Asians. A large group of Asians jumped Antonio, and Anthony's friends jumped in to help Antonio, and then everybody was fighting. (3RT 857-860.)

Anthony saw one Asian (Rickie) go to a green car and retrieve a gun from the trunk. Rickie then went to the middle of 5th Street and pointed the gun at Roberto. He hesitated. Two voices yelled, "shoot him, shoot him," and the gunman fired. Then Rickie and the two who had yelled for him to shoot ran to the green car and drove off, with Rickie in a rear passenger seat. (3RT 859-863, 867.)

(h) Testimony of Nhuc Chong.

Nhuc Chong (formerly known as Hua Zhong) testified that he was playing video games at E-Channel before the shooting occurred. He did not know there was going to be a fight that day. When his game ended, he went outside and saw appellant on the ground, being beaten badly by a group of six or seven Mexicans. (2RT 586,

591-593, 602-603.) He did not see appellant hitting back, except for trying to block punches and strike back defensively. (2RT 597-599, 606, 608.)

Nhuc was standing near Tony, who was also fighting. He did not see what Simon and Rickie were doing. (3RT 609-610.) When a gunshot went off, Nhuc fell to the ground and was accidentally stabbed by Tony's knife. (2RT 593, 604, 606.) Afterwards, he went inside, cleaned his wound, and left before police arrived. (3RT 608.)

(i) Testimony of Mark Egeland.

Mark Egeland, a uniformed resource officer at McClatchy High School, was alerted that there had been a shooting north of the school, at the intersection of Freeport and 5th Avenue. Egeland made his way through heavy vehicle traffic and a crowd of students to find Treadway lying on the sidewalk with a single bullet wound to his head. (1RT 184-191.) Efforts to administer CPR were not successful. (1RT 195-197.) Egeland was advised by a campus monitor that a vehicle with a license plate of 3ES783 may have been involved in the shooting. (1RT 197-198.)

3. Aftermath.

At the scene, police found a man's wallet with a high school identification card issued to Roberto Treadway. (1RT 218-219.) An ejected .40 caliber shell casing was found in the street along the curb line. (1RT 219-220.)

The pathologist who conducted the autopsy of Roberto Treadway determined the cause of death to be a gunshot wound to the head. (3RT 614.) He had bruises and abrasions consistent with a fall to the ground. (3RT 624-625.) Treadway also had a non-fatal stab wound, three inches deep, to his left bicep. (3RT 622.) Bruises and contusions were found on his knuckles and on his face, consistent with fist fighting.

`(3RT 623, 625-626.) It looked like he was in a "rather serious brawl before the fatal wound was inflicted." (3RT 629.)

The prosecution introduced appellant's prior testimony, where he described how after the shooting, two friends of Rickie came to his home and took him to a house somewhere out of town. Appellant later learned that the two men were Hop Sing. Tony arrived at the house as well. After several days, appellant contacted his family and an attorney and made arrangements to return to Sacramento to turn himself in. (5RT 1272-1278.)

4. Gang Evidence.

In September 2003, Officer Egeland investigated a report that a car with three students associated with a Norteno gang assaulted a Sureno student in front of the campus. The occupants of the Norteno car shouted Norteno gang taunts at the other student, flashed gang signs, and threw things at him. One of students in the Norteno car was identified as Roberto Treadway. Officer Egeland interviewed Treadway and observed that he had Norteno graffiti written on his text book. He wrote a report documenting Treadway as a gang member. (1RT 193-195.)

Prosecution gang experts testified that Chinese and Vietnamese gangs are criminally sophisticated, unlike Hmong, Mien, African-American and Hispanic gangs, who operate on stupid machismo. (4RT 954-955; 979.)

The Hop Sing gang is especially sophisticated. (4RT 1019.) In 2004, there were 40 members. (4RT 1008.) Their primary activities are crimes of financial gain, such as extortion, illegal gambling, and commercial burglary, although they also engage in assaultive conduct. (4RT 921-923, 935, 1014-1015.) Among other Asian gangs, the Hop Sing are known as "feared killers." (4RT 1060.)

Hop Sing members are much less likely to engage in pointless violence than Nortenos and Surenos. Hop Sing members "usually don't engage in conflicts out in the open where there is a lot of witnesses usually. And they try to keep their criminal activity within their own set, and they don't try to display it out in the open." (4RT 1072.)

Hop Sing's enemy is Kong Zong Tong (KZT), and Hop Sing and KZT were at war between 1997 and 1999. (4RT 956.) There was no known gang rivalry between Hop Sing and Hispanic gangs. (4RT 987.)

Hop Sing members do not "flaunt their gang." (4RT 1072.) They dress "preppy," have no colors or gang signals, and avoid tattoos. (4RT 961, 1007, 1018.)

Prosecution experts opined that Rickie Che, Tony Hoong, and appellant were Hop Sing gang members. (4RT 1042, 1047, 1056.)

5. Defense.

Appellant testified in his own defense. He claimed that the fight between Mackinson and Sarn was only supposed to be a fist fight over a girl between the little brothers of two of his friends. (5RT 1414-1417, 1474.) Appellant denied that Mackinson asked him to be there for back up. (5RT 1476.)

Appellant did not believe rumors that Sarn might bring a weapon, and was unaware that Rickie Che had a gun in his car. (5RT 1418.) Appellant did not know Rickie well, and did not know him as someone who usually carries a gun. (5RT 1419.) Appellant denied telling Toang Trang that his friend had a gun and that he may use it if pressured. (5RT 1475-1476.)

Appellant was smoking with friends on the trunk of the car. Sarn did not show up for the fight. (5RT 1421, 1481-1482.) When appellant saw Teresa, he tried to flirt with her by mocking her in a "girlie kind of voice." Teresa responded by telling him

to "Shut the F up." He then noticed Antonio Gonzales coming at him in an aggressive manner, saying "are you talking to my girl?" (5RT 1422.) Appellant tried to ignore him, but Antonio persisted. Appellant jumped down from the car to confront him. (5RT 1423-1424.)

Appellant denied that he mocked Teresa with the intent to start a fight. (5RT 1484-1485.) He did not think that his remarks would lead to fighting. (5RT 1492.)

Appellant and Antonio squared off against each other, and a crowd formed around them. Appellant's attention was so focused on Antonio that he was unaware of what others were doing around him. (5RT 1425.)

Antonio seemed to get less hostile as they talked, and appellant thought that the confrontation would die down. (5RT 1425, 1429.) Appellant was not aware that his friends were standing beside him. (5RT 1485.) When appellant saw someone throw a punch out of the corner of his eye, he and Antonio instinctively started swinging at one another. (5RT 1427-1429.)

Appellant took Antonio to the ground and had the superior position at first, but he then began receiving continuous punches to the back and side of his head. (5RT 1429- 1430.) He was not aware of what was going on around him "because all I felt like the blows never stop." (5RT 1431.) A blow to the face made him go weak, and he started bleeding from the nose. (5RT 1431.) He was in physical pain (5RT 1455), and feared that he might pass out. (5RT 1433.) He grabbed a hold of Antonio's collar and tried to pull himself up, while trying to regain consciousness. He and Antonio spun in circles, and they ended up in the middle of the street. (5RT 1432.)

Antonio suddenly broke free and tried to get away. (5RT 1433.) Appellant realized that Antonio was trying to get away because Rickie had pulled a gun. (5RT 1435.)

Appellant did not expect Rickie to pull a gun and did want him to do that. He denied calling for anyone to get a gun while fighting. (5RT 1434-1435, 1486, 1493.) Rickie fired and a shot Roberto, which was something that appellant did not intend. (5RT 1435-1436.) Appellant did not yell out for Rickie to shoot. (5RT 1487.)

After the shooting, Rickie took off running. Appellant was afraid that the victim's friends would get revenge against him if he was left behind, so he ran to the car. Appellant, Rickie, Tony, and Simon left in the car. (5RT 1437-1438.)

Appellant testified that he did not consider Hop Sing to be a gang, and he was not a member of Hop Sing. (5RT 1420-1421.)

ARGUMENT

IN ORDER FOR AN AIDER AND ABETTOR TO BE CONVICTED OF FIRST DEGREE PREMEDITATED MURDER BY APPLICATION OF THE NATURAL AND PROBABLE CONSEQUENCE DOCTRINE, THE TRIER OF FACT MUST FIND THAT PREMEDITATED MURDER WAS A REASONABLY FORESEEABLE CONSEQUENCE OF THE TARGET OFFENSE.

A. INTRODUCTION.

Review was granted on the People's petition to address the following issue: "In order for an aider and abettor to be convicted of first degree premeditated murder by application of the natural and probable consequences doctrine, must a premeditated murder have been a reasonably foreseeable consequence of the target offense, or is it sufficient that a murder would be reasonably foreseeable?" The answer is well settled. "[T]o impose liability under the natural and probable consequence theory, the trier of fact must find ... the *offense* committed by the confederate was a natural and probable consequence of the target crime that the defendant aided and abetted." (*People v. Prettyman* (1996) 14 Cal.4th 248, 262, emphasis added.) Under that formula, when the *offense* committed by the perpetrator is first degree deliberate and premeditated murder, to convict an aider and abettor, the jury must find that the offense of first degree premeditated murder was a reasonably foreseeable consequence. (*People v. Woods* (1992) 8 Cal.App.4th 1570, 1589 (*Woods*).)

Respondent argues for the adoption of a new and different test. Rather than have the jury determine whether the commission of the charged *offense* was reasonably foreseeable, respondent would have the jury simply determine whether the "harm" or "*actus reus*" of the charged offense was reasonably foreseeable, leaving *mens rea* out of the equation. The only support in the case law for this position comes from the dissenting opinion in *Woods*. Despite lack of support in the case law, respondent

argues that considerations of policy and equity compel that approach. As shall be demonstrated below, respondent's argument is unsound and should be rejected.

Given that respondent is suggesting a departure from existing law, and is proposing a new test for determining liability under the natural and probable consequence doctrine, should that new test be adopted, it should only be given prospective effect. "If a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect." (*Bouie v. City of Columbia* (1964) 378 U.S. 347, 354.)

Finally, as a fall back position, respondent argues that the Court of Appeal erred in its harmless error analysis by failing to find instructional error harmless beyond a reasonable doubt. This argument should be rejected because the issue of harmless error was not raised by the People in the Court of Appeal and is not "fairly included" in the issue upon which the People's petition for review was granted. (Cal. Rules of Court, rule 8.516(b)(1).) And in any event, as is demonstrated below, the People have failed to sustain their burden of proving the error harmless beyond a reasonable doubt.

B. TO ESTABLISH LIABILITY UNDER THE NATURAL AND PROBABLE CONSEQUENCE DOCTRINE, THE TRIER OF FACT MUST FIND THAT THE OFFENSE COMMITTED BY THE CONFEDERATE WAS A NATURAL AND PROBABLE CONSEQUENCE OF THE TARGET OFFENSE THAT THE DEFENDANT AIDED AND ABETTED.

The natural and probable consequence instruction given in this case allowed the jury to convict appellant of *murder* based on his guilt of simple assault or breach of peace. The instructions, however, did not require the jury to find that *first degree murder* was a natural and probable consequence of either of those target offenses. Instead, CALCRIM No. 403 required the jury to simply find that *murder* was the

natural and probable consequence of a target offense, without specifying the degree. Once the jury made that finding, CALCRIM No. 521 directed jurors to determine the degree of the murder, not by asking whether first degree murder was a natural and probable consequence of aiding and abetting target offenses, but by asking whether the *perpetrator* was guilty of first degree murder, by acting willfully, deliberately, and with premeditation.

A non-killer cannot be convicted of first degree murder based on a natural and probable consequence theory unless the jury finds, as a matter of fact, that first degree murder is the natural and probable consequence of the target offense. Because these instructions gave the jury a route to convict appellant of first degree murder without finding that first degree murder is the natural and probable consequence of a target offense, the instructions were in error.

Whether the charged crime was a "natural and probable consequence" of a target offense, and the "extent of defendant's knowledge" in that regard, are questions of fact for the jury to decide. (*People v. Durham* (1969) 70 Cal.2d 171, 181; *People v. Croy* (1985) 41 Cal.3d 1, 12, fn. 5.)

"[T]he *trier of fact must find* that the defendant, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of a predicate or target offense; (3) by act or advice aided, promoted, encouraged or instigated the commission of the target crime. But the trier of fact must also find that (4) the defendant's confederate committed an offense other than the target crime; and (5) *the offense committed by the confederate was a natural and probable consequence of the target crime that the defendant aided and abetted.*" (*People v. Prettyman, supra,* 14 Cal.4th 248, 262, emphasis added.) In short, "[t]he *jury must decide* whether ... the *offense* committed

by the confederate was a natural and probable consequence of the target crime(s) that the defendant encouraged or facilitated." (*Id.* at p. 267, emphasis added.)

According to this test, the jury must find that the *charged crime* (not "harm" or "*actus reus*") was reasonably foreseeable. Subsequent cases have repeated this test: "[T]he natural and probable consequences rule ... extends accomplice liability to the perpetrator's reasonably foreseeable *crimes* regardless of whether the defendant personally harbored the specific intent required for commission of the charged, nontarget offense." (*People v. Pearson* (2012) 53 Cal.4th 306, 321, emphasis added.) "'Liability under the natural and probable consequences doctrine "is measured by whether a reasonable person in the defendant's position would have or should have known that the *charged offense* was a reasonably foreseeable consequence of the act aided and abetted."'" (*People v. Favor* (2012) 54 Cal.4th 868, 874, emphasis added, citing *People v. Medina* (2009) 46 Cal.4th 913, 920, citing *People v. Nguyen* (1993) 21 Cal.App.4th 518, 535.)

A "crime" or "offense" includes both a criminal act and a culpable mental state. "In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence." (Pen. Code, § 20.) "As a general rule, no crime is committed unless there is a union of act and either wrongful intent or criminal negligence." (*People v. King* (2006) 38 Cal.4th 617, 622.) Thus, when the test governing the natural and probable consequence doctrine requires that the "crime" or "offense" committed by the confederate must be a natural and probable consequence of the target crime, it means that both the criminal act and the requisite mental state must be reasonably foreseeable.

In this case, first degree murder was the charged offense, in that the People were seeking a conviction for that specific offense. (*People v. Valentine* (1946) 28 Cal.2d

121, 134 [`first degree murder is the "offense charged" when the charge is murder and it is "claimed by the prosecution to be murder of the first degree"].) First and second degree murder are considered different offenses, in that first degree murder is considered a greater offense and second degree murder a lesser included offense. (*People v. Prince* (2007) 40 Cal.4th 1179, 1270.) When first degree murder is charged, the court cannot accept a guilty verdict on second degree murder unless the jury first unanimously finds the defendant not guilty of first degree murder. (*People v. Nakahara* (2003) 30 Cal.4th 705, 715.) The two offenses are distinguished by differing mental states, with first degree murder requiring a "heightened mental state." (*People v. Rogers* (2006) 39 Cal.4th 826, 874.)

When the defendant is charged with first degree murder on a natural and probable consequence theory, it is for the jury to decide whether *first degree murder* is the natural an probable consequence of a target offense. (*People v. Woods, supra*, 8 Cal.App.4th 1570.) As the *Woods* majority explained, "the jury must determine whether other crimes and *degrees of crimes* charged against the aider and abettor were committed by the perpetrator. If so, the jury must determine whether *those crimes*, although not necessarily contemplated at the outset, were reasonably foreseeable consequences of the original criminal acts encouraged or facilitated by the aider and abettor." (*Id.* at p. 1586, emphasis added.) "Windham properly recognizes that his liability as an aider and abettor for the killing of Chmelik depended on a factual determination that, not only was the killing a reasonably foreseeable consequence of the offense originally contemplated, but that the gravity of the killing, i.e., the *degree of the murder*, was such a consequence." (*Id.* at p. 1589, original emphasis.)

Here, the Court of Appeal was correct in finding instructional error. The natural and probable consequence instruction allowed the jury to convict appellant of *first*

degree murder based on his guilt of target offenses (simple assault or breach of peace) without requiring the jury to find that the charged crime of *first degree murder* was a natural and probable consequence of either of those target offenses. The jury could rely on CALCRIM No. 403 to find that simple "murder" was the natural and probable consequence of a target offense, and then apply CALCRIM No. 521 to determine the degree of the murder by asking whether the *perpetrator* was guilty of first degree murder. This enabled the jury to convict appellant of first degree murder on a natural and probable consequence theory, based only on the view that murder was foreseeable, without finding that first degree murder was foreseeable as a natural and probable consequence of aiding and abetting target offenses.

C. RESPONDENT'S ARGUMENT IS CONTRARY TO ESTABLISHED CASE LAW AND FAILS TO STATE A COMPELLING REASON TO DEPART FROM ESTABLISHED CASE LAW.

Respondent proposes a fundamental rewrite of the natural and probable consequence test. Rather than have the jury determine the foreseeability of the *crime* that is charged, which is what existing case law requires, respondent would have the jury determine the foreseeability of the "harm." In a murder case, "death" is said to be the harm. Thus, as respondent sees it, "[i]f a jury finds that the resulting *death* was a natural and probable consequence of the intended offense, then the aider's liability under the doctrine is strictly vicarious and is therefore guilty of the same degree of murder as the perpetrator." (Respondent's Brief on the Merits (RBoM), at p. 11, emphasis added.) This approach finds no support in the case law.

It is said that the natural and probable consequence doctrine derives from common law. (*People v. Prettyman, supra*, 14 Cal.4th 248, 260.) But because "[i]n California all crimes are statutory and there are no common law crimes" and "[o]nly the

Legislature and not the courts may make conduct criminal" (*In re Brown* (1973) 9 Cal.3d 612, 623; Pen. Code, § 6), the authority to impose vicarious liability on a natural and probable consequence theory must ultimately derive from statute. Penal Code 31 is said to provide the statutory basis for the doctrine. (*People v. Woods, supra*, 8 Cal.App.4th 1570, 1598.) That code section provides: "All persons concerned in the commission *of a crime* .... are principals in any crime so committed. (Pen. Code, § 31, emphasis added.) If an unintended crime is a natural and foreseeable consequence of an intended crime that a person aids and abets, then the aider and abettor is "concerned" in the commission of that unintended crime, and is thus liable as a principal. (*People v. Woods, supra*, 8 Cal.App.4th 1570, 529-530.)

It is significant that Penal Code section 31 imposes vicarious liability based on a defendant being "concerned in the commission *of a crime*," rather than (as respondent posits) being concerned in the infliction of "harm." To be concerned in the commission of a crime, it is not enough to say that some form of "harm" was reasonably foreseeable. Instead, to be concerned in the commission of a certain "crime," the commission of that particular "crime" must reasonably foreseeable.

Respondent acknowledges that case law supports that test: "Liability under the natural and probable consequences doctrine 'is measured by whether a reasonable person in the defendant's position would have or should have known that the charged *offense* was a reasonably foreseeable consequence of the act aided and abetted.'" (RBoM, at p. 13, emphasis added, citing *People v. Medina, supra*, 46 Cal.4th 913, 920.) Under that test, liability is determined by the forseeablility of the "charged offense," not the formability of "harm" or "death."

For a different result, respondent relies on the dissenting opinion of Justice Sparks in *People v. Woods, supra*, 8 Cal.App.4th 1570, 1596-1604, specifically:

> "What is crucial is that the aider and abettor either knew or should have known that a killing was a likely result of this abetted criminal rampage, not whether this foreseeable killing might constitute first degree murder as opposed to second degree murder or some variety of manslaughter. Aiders and abettors are not lawyers and their liability should not turn on the abstruse distinctions between the various types of criminal homicide. 'A primary rationale for punishing aiders and abettors as principals—to deter them from aiding or encouraging the commission of offenses' (*People v. Cooper* [1991] 53 Cal.3d [1158,] 1168), would not be advanced by engrafting such rarefied distinctions on the derivative liability of accomplices." (RBoM, at pp. 15-16, citing *Woods*, at p. 1602, dissenting opinion.)

Needless to say, "dissenting opinions are not binding precedent." (*People v. Lopez* (2012) 55 Cal.4th 569, 585.) "The statements in the dissenting or concurring opinions of individual justices which do not have the concurrence of a majority of the justices are not precedent, and constitute only the personal views of the writer." (*People v. Superior Court (Persons)* (1976) 56 Cal.App.3d 191, 194.)

Nor is the *Woods* dissent persuasive. Justice Sparks acknowledged that under the applicable test, "if the ultimate, *charged crime* is not a natural, probable, reasonable and foreseeable consequence of the abetted, target crime, then the aider is simply not guilty of the charged crime." (*Woods*, at p. 1601, [dissent], emphasis added.) That statement acknowledges that it is the "charged crime" that must be reasonably foreseeable, and if it is not, the aider is not guilty of the "charged crime" on a natural and probable consequence theory. According to that formula, if first degree murder is the "charged crime," and the jury finds that first degree murder is not a natural, probable, reasonable and foreseeable consequence of the abetted, target crime, then the aider is simply not guilty of first degree murder.

Justice Sparks goes on to say, however, that "it is not necessary that [the aider and abettor] foresee the precise manner or method of the execution of the charged crime."

`(*Id.* at p. 1602.) He explained: "As applied to homicide, it is enough that an *unlawful killing* was a likely consequence of the target crime. Stated another way, it is not necessary that the aider and abettor precisely foresee that the killing might be a premeditated one to prevent detection rather than an unpremeditated, panicked reaction to witnesses appearing on the scene." (*Id.* at p. 1603, emphasis added.) If "homicide was a foreseeable consequence ... that ought to end the matter." (*Id.* at p. 1604.) The flaw in this analysis is that neither "unlawful killing" nor "homicide" is a specific "crime." Those terms refer to a family of differing crimes that are specifically defined by statute, with gradations in liability depending upon the gravity of the unlawful killing.

It may be true that the aider and abettor need not foresee "the precise manner or method of the execution of the charged crime," in the sense that manner or method in which the perpetrator commits first degree murder need not be foreseeable. But if the "charged crime" is first degree murder, then some form of first degree murder must be foreseeable.

As for the observation that "[a]iders and abettors are not lawyers," whether they are lawyers or not is of no moment, because we "'require citizens to apprise themselves not only of statutory language, but also of legislative history, subsequent judicial construction, and underlying legislative purposes.'" (*People v. Heitzman* (1994) 9 Cal.4th 189, 200.) The observation that "[a]iders and abettors are not lawyers" also overlooks the fact that the foreseeability of the charged offense is determined objectively. The fact that aiders and abettors may not be schooled in the law, and might not subjectively appreciate "abstruse distinctions between the various types of criminal homicide" does not mean that the reasonable foreseeability of first degree murder cannot be determined objectively.

Respondent looks next to language in *People v. Medina, supra,* 46 Cal.4th 913. Respondent notes that "when analyzing the sufficiency of the evidence, this Court did not evaluate whether the evidence was sufficient to support a finding that a *first-degree* murder was foreseeable. Rather, this Court focused on the extent that a 'shooting of the victim' was foreseeable. This Court therefore demonstrated that, at least in the context of an assault that leads to a first-degree murder, the appropriate inquiry is whether a 'shooting' or 'escalation of the confrontation to a deadly level' was foreseeable." (RBoM, at p. 18.)

Respondent's reliance on *Medina* is misplaced. Before reviewing the sufficiency of the evidence to meet the applicable test, the *Medina* court identified that test: "Liability under the natural and probable consequences doctrine 'is measured by whether a reasonable person in the defendant's position would have or should have known that the *charged offense* was a reasonably foreseeable consequence of the act aided and abetted." (*People v. Medina, supra,* 46 Cal.4th 913, 920, emphasis added.) The fact that the court went on to explain how the evidence was sufficient for the jury to find that the "shooting of the victim" was foreseeable was not meant to alter the applicable test. The court focused on the foreseeability of the shooting because that was the asserted deficiency in the evidence.[1/] At no time did the court suggest that the foreseeability of a shooting alone, as opposed to the foreseeability of the charged offense, was the test.

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1 As the court explained, "Here, the Court of Appeal held there was insufficient evidence to support a finding that Medina's act of firing a gun was a reasonably foreseeable consequence of the gang attack in which defendants Marron and Vallejo participated." (*Id.* at p. 920.)

The same is true of *People v. Gonzales* (2001) 87 Cal.App.4th 1, which is cited by respondent for the same point. There again, the court began by citing the applicable test: "A person who knowingly aids and abets criminal conduct is guilty of not only the intended crime but also of any other *crime* the perpetrator actually commits that is a natural and probable consequence of the intended crime. The latter question is not whether the aider and abettor actually foresaw the additional *crime*, but whether, judged objectively, *it* was reasonably foreseeable." (*Id.* at p. 9, emphasis added, citing *People v. Mendoza* (1998) 18 Cal.4th 1114, 1133, citing *People v. Prettyman, supra,* 14 Cal.4th at pp. 260-262.) That means that it is the foreseeability of the "crime the perpetrator actually commits" that is controlling. The court then went on to address the defendant's specific claim, which was "that the evidence is insufficient to sustain his conviction for aiding and abetting the murder of Llamas on the natural and probable consequences theory, because there was no evidence that he knew Jimenez was armed or intended to use a firearm in the fistfight." (*Id.* at p. 7.) The court rejected the claim, finding "sufficient evidence from which the jury could conclude that it was reasonably foreseeable when the three defendants left the car that a fatal shooting would be the natural and probable consequence of the fight between the groups of young men." (*Id.* at p. 10.) Here again, the fact that the court focused on that asserted deficiency in the evidence was not meant to alter the applicable test. At no time did the court suggest that the foreseeability of a shooting alone, as opposed to the foreseeability of the offense, was the test.

Respondent argues that "[t]he Court of Appeals' approach in the instant case undermined the 'derivative' liability intended by the natural and probable consequences doctrine by allowing the aider and abettor's liability to be reduced if he

could foresee the perpetrator's actus reus, but not the specific mens rea involved." (RBoM, at p. 19.) Actually, however, the Court of Appeal found that the instructions were in error, because they allowed the jury to elevate the aider and abettor's liability to first degree murder, using a natural and probable consequence theory, without finding that first degree murder was a natural and probable consequence.

There is no authority to support respondent's suggestion that the non-target offense should be defined only in terms of *actus reus*, while ignoring *mens rea*. As previously explained, a crime includes both *actus reus* and *mens rea*. (Pen. Code, § 20.) If only the *actus reus* of a particular offense is reasonably foreseeable, but the *mens rea* is not, then the commission of that particular offense is not reasonably foreseeable. A lesser offense -- one that does not require the same *mens rea* as the greater offense -- may be reasonably foreseeable, but the greater offense is not.

To support the claim that the perpetrator's *mens rea* in committing the charged offense need not be foreseeable, respondent relies on language from *Favor* that is taken out of context. The language cited states that "even in the case of aiders and abettors under the natural and probable consequences doctrine, punishment need not be finely calibrated to the criminal's mens rea." (RBoM, at p. 22, citing *People v. Favor, supra*, 54 Cal.4th at p. 878, quoting *People v. Lee* (2003) 31 Cal.4th 613, 627.) The issue being discussed in *Favor* and *Lee* concerned the proper construction of Penal Code section 644, subdivision (a). In *Lee*, the defendant invoked "the rule of avoidance of grave and doubtful constitutional questions" to argue that Penal Code section 644 should be construed to require that an aider and abettor of attempted premeditated murder have the mental state requires for premeditated murder. The defendant in *Lee* had argued that "an attempted murderer who is guilty as an aider and abettor, but who did not personally act with willfulness, deliberation, and

premeditation, is insufficiently blameworthy to be punished with life imprisonment..." (*Ibid.*) The *Lee* court rejected as "unsound" the "assumption that punishment must be finely calibrated to a criminal's mental state." (*Ibid.*) In *Favor*, the court applied that same concept to explain why the Legislature was justified in making Penal Code section 664, subdivision (a), applicable to "all aiders and abettors," even though an indirect aider and abettor, who is liable on a natural and probable consequence theory, may not be as blameworthy as a direct aider and abettor. (*Favor*, at p. 878.)

That concept is obviously inapplicable here, because this case is not governed by Penal Code section 664, subdivision (a), nor is there any other comparable statute. There is no statute that says that an indirect aider and abettor must be convicted of first degree murder, even if the commission of first degree murder is not reasonably foreseeable.

The reasoning in *Favor* actually favors appellant. There, the court reasoned that *unlike* murder, which is divided into degrees with first degree murder a greater offense and second degree murder a lesser included offense, "attempted premeditated murder and attempted unpremeditated murder are not separate offenses." (*Favor*, at p. 876.) "Attempted murder is not divided into different degrees." (*Ibid.*) As acknowledged in *Favor*, the test for liability under the natural and probable consequences doctrine "is measured by whether a reasonable person in the defendant's position would have or should have known that the *charged offense* was a reasonably foreseeable consequence of the act aided and abetted."'" (*Id.* at p. 874.) When attempted murder is the charged offense, that is the "charged offense," even if it is alleged that the attempted murder was committed with premeditation. This is so because "attempted premeditated murder and attempted unpremeditated murder are not separate offenses." (*Favor*, at p. 876.) Premeditation is a "penalty provision" for attempted murder,

which elevates the penalty without creating a separate offense. (*Id.* at p. 877.) But a different result obtains when first degree murder is the "charged offense," because first degree murder and second degree murder are separate offenses. When first degree murder is the charged offense, an aider and abettor is liable under the natural and probable consequences doctrine only if first degree murder was a reasonably foreseeable consequence of the act aided and abetted.

As respondent puts it, under the instructions that were given, the jury had to find that murder, *in other words a death*, was the natural and probable consequence of the target offenses of either assault or disturbing the peace." (RBoM, at p. 24, emphasis added.) The flaw in this statement is obvious. Death is not the same as murder. Death is not itself a crime. Under the natural and probable consequence doctrine, the jury must find that the charged crime is reasonably foreseeable, not just "death."

In the absence of any solid authority to support respondent's position, respondent is left to argue that "policy concerns" and "equity" supports the expansion of criminal liability that respondent proposes. (See RBoM, at pp. 14-15.)

Again, "[i]n California all crimes are statutory and there are no common law crimes. Only the Legislature and not the courts may make conduct criminal." (*In re Brown, supra*, 9 Cal.3d 612, 623, citing Pen. Code, § 6; *People v. Mosher* (1969) 1 Cal.3d 379, 385, fn. 1.) Thus, no matter how strong public policy might favor it, courts are not free to expand criminal liability provided by statute on policy grounds. (*People v. Tufunga* (1999) 21 Cal.4th 935, 939.) As previously set forth, Penal Code section 31 extends liability to "[a]ll persons concerned in the commission of a crime," and to be concerned in the commission of a certain "crime," the commission of that particular "crime" must reasonably foreseeable. (*People v. Woods, supra*, 8 Cal.App.4th 1570, 529-530.) Thus, to impose liability under the natural and probable

consequence doctrine, "the trier of fact must find that .... the *offense* committed by the confederate was a natural and probable consequence of the target crime that the defendant aided and abetted." (*People v. Prettyman, supra*, 14 Cal.4th 248, 262.) The court cannot eliminate the requirement that the *mens rea* of the charged crime be reasonably foreseeable, simply because it is deemed good policy to do so.

In any event, the expansion of criminal liability that respondent proposes is neither good policy, nor is it equitable.

"[T]he People have no legitimate interest in obtaining a conviction of a greater offense than that established by the evidence." (*People v. Breverman* (1998) 19 Cal.4th 142, 154-155.) If the evidence fails to establish that first degree murder was a natural and probable consequence of aiding and abetting a target offense, the People have no legitimate interest in obtaining a first degree murder conviction against the aider and abettor.

Respondent argues that policy concerns require *strict* vicarious liability, *i.e.*, the imposition of liability even when the specific charged offense, such as first degree murder, is not reasonably foreseeable. (RBoM, at pp. 11-12.) Strict criminal liability is "generally disfavored." (*People v. Simon* (1995) 9 Cal.4th 493, 520.) "The Supreme Court has indicated that regulatory or 'public welfare' offenses which dispense with any mens rea, scienter, or wrongful intent element are constitutionally permissible, but it has done so on the assumption that the conduct poses a threat to public health or safety, the penalty for those offenses is usually small, and the conviction does not do 'grave damage to an offender's reputation.'" (*Id.* at p. 519, citing *Morissette v. United States* (1952) 342 U.S. 246, 256.) First degree murder, which is potentially punishable by death, is the gravest of crimes.

"[T]he existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." (*Dennis v. United States* (1951) 341 U.S. 494, 500.) "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individuals to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory 'But I didn't mean to,' and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution." (*Morissette v. United States, supra*, 342 U.S. 246, 250.)

Respondent's argument fails to explain why it would be equitable and good penological policy to impose strict vicarious liability, by extending the natural and probable consequence doctrine to crimes that are not reasonably foreseeable. "A sentence lacking any legitimate penological justification is by its nature disproportionate to the offense." (*Graham v. Florida* (2010) 560 U.S. __, __ [130 S.Ct. 2011, 2028].) "The object of the criminal law is to deter the individual from committing acts that injure society by harming others, their property, or the public welfare, and to express society's condemnation of such acts by punishing them." (*People v. Roberts* (1992) 2 Cal.4th 271, 316.) " 'Modern penal law is founded on moral culpability. The law punishes a person for a criminal act only if he is morally responsible for it. To do otherwise would be both inhumane and unenlightened.'" (*Ibid.*)

Deterrence is not achieved by punishing the aider and abettor for an unintended crime that was not reasonably foreseeable, as a natural and probable consequence of

committing a lesser crime. When "murder" is the natural and probable consequence of aiding and abetting a target offense, punishment for second-degree murder serves as a deterrence. No additional deterrence is achieved by imposing a higher level of punishment for first-degree murder when the commission of first degree murder was not reasonably foreseeable.

Nor is society's interest in condemnation and retribution served by imposing punishment for first-degree murder when the commission of first-degree murder is not reasonably foreseeable. Society should seek retribution for first-degree murder from the perpetrator of first-degree murder. When the commission of first-degree murder is not reasonably foreseeable, the aider and abettor is less culpable than the perpetrator and deserves less condemnation and retribution from society

In sum, the answer to the question at hand is clear. In order for an aider and abettor to be convicted of first degree premeditated murder by application of the natural and probable consequences doctrine, the jury must find that premeditated murder was a reasonably foreseeable consequence of the target offense. There is no authority to support the People's argument that only the harm or *actus* reus need be foreseeable. Nor do concerns of policy and equity justify that approach.

D. BECAUSE RESPONDENT IS URGING A JUDICIAL CONSTRUCTION OF A CRIMINAL STATUTE THAT IS UNEXPECTED AND INDEFENSIBLE BY REFERENCE TO THE LAW WHICH HAD BEEN EXPRESSED PRIOR TO THE CONDUCT IN ISSUE, IF THAT JUDICIAL CONSTRUCTION IS ADOPTED, IT MUST NOT BE GIVEN RETROACTIVE EFFECT.

If respondent persuades this Court to expand natural and probable consequence liability in the manner respondent suggests, any such change in the law should be prospective. Any retroactive expansion of criminal liability would violate due process.

"If a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect." (*Bouie v. City of Columbia, supra,* 378 U.S. 347, 354; see also *Rose v. Locke* (1975) 423 U.S. 48, 50; *People v. Escobar* (1992) 3 Cal.4th 740, 752; *People v. Wharton* (1991) 53 Cal.3d 522, 586.) "[A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates in the same manner as an ex post facto law." (*People v. Davis* (1994) 7 Cal.4th 797, 811; also *People v. Morante* (1999) 20 Cal.4th 403, 431.) "[D]ue process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." (*United States v. Lanier* (1997) 520 U.S. 259, 266.) "Courts violate constitutional due process guarantees when they impose unexpected criminal penalties by construing existing laws in a manner that the accused could not have foreseen at the time of the alleged criminal conduct." (*People v. Rathert* (2000) 24 Cal.4th 200, 211.)

Respondent's theory -- that changes the applicable test from the foreseeability of the charged crime to the foreseeability of harm or *actus reus* -- urges a novel construction of a criminal statute (Pen. Code, § 31) that imposes unexpected criminal penalties by construing existing laws in a manner that appellant could not have foreseen at the time of the alleged criminal conduct. Respondent's theory is so novel that the Attorney General did not even think to raise it in the Court of Appeal below.[2/] It was stated for the first time in the People's petition for review in this Court.

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[2] Respondent's Brief in the Court of Appeal did not dispute the premise of appellant's claim, which was that the jury should have been instructed to find that first degree murder (not just murder) was a natural and probable consequence. Instead, the Attorney General argued that the jury would understand, from the instructions as a whole, that the jury would understand the correct test: "The instructions informed the

At the time of the offense, liability under the natural and probable consequence doctrine was determined by the foreseeability of the charged offense. (*People v. Prettyman, supra,* 14 Cal.4th 248, 262.) When the charged offense was first-degree premeditated murder, the law required the jury to find that first degree murder was a natural and probable consequence of the non-target offense. (*People v. Woods, supra,* 8 Cal.App.4th 1570, 1589.) Nothing in the case law gave notice to citizens that the *Prettyman* test was questionable or controversial as too lenient, or that it could be changed in the manner that respondent suggests. If this Court is persuaded to adopt a new test based on the dissent in *Woods*, such would be "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." Any new test that might result must be prospective only, and cannot be applied to appellant's case.

E. RESPONDENT'S CLAIM OF HARMLESS ERROR MUST BE REJECTED.

1. Not raised below.

Appellant raised his claim of instructional error in Issue VIII of his opening brief filed in the Court of Appeal. (Appellant's Opening Brief (AOB), at pp. 136-145.) Appellant specifically argued the error could not be found harmless beyond a reasonable doubt. (AOB, at pp. 141-145.) Respondent's brief argued that the jury was properly instructed. (Respondent's Brief (RB), at pp. 69-71.) Respondent's brief made no attempt to argue harmless error as to this issue, not even as a fall-back position. Nor did respondent raise the issue of harmless error in petitioning for review. Because respondent "failed to raise this issue in the Court of Appeal, and also

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jury that it had to find appellant knew Che had intended to commit first degree murder, intended to aid and abet that crime, and did so." (RB, at p. 22.)

failed to petition for its review in this court, we decline to address it." (*Grosset v. Wenaas* (2008) 42 Cal.4th 1100, 1119, fn. 15.)

2. Not fairly included in the issue raised in the Petition for Review.

Respondent's claim of harmless error should also be rejected because the issue of harmless error is not "fairly included" in the issue upon which the People's petition for review was granted. (Cal. Rules of Court, rule 8.516(b)(1).)

The issue presented in the People's petition for review was as follows: "In order for an aider and abettor to be convicted of first degree premeditated murder by application of the natural and probable consequences doctrine, must a premeditated murder have been a reasonably foreseeable consequence of the target offense, or is it sufficient that a murder would be reasonably foreseeable?" (Respondent's Petition for Review (RPR), at p. 1.) In the body of the Petition for Review, respondent argued that the Court of Appeal resolved the issue incorrectly in finding instructional error. (*Id.* at pp. 11-12.)

Respondent's harmless error claim is not fairly *included* in that issue, but instead, it is at odds with it. A harmless error analysis acknowledges error, which is contrary to the position advanced in the People's petition for review, where the People argued that there was no error. If respondent believed that the Court of Appeal erred it its harmless error analysis, respondent should have raised that issue in the petition for review. It is not fairly included in the issue that the People did raise.

3. The People have failed in the burden of proving that the error was harmless beyond a reasonable doubt.

An instruction that omits a necessary element of an offense is federal constitutional error. (*Neder v. United States* (1999) 527 U.S. 1, 15.) It is federal constitutional error to instruct the jury with alternative theories, where one of those theories is legally

flawed. (*Stromberg v. California* (1931) 283 U.S. 359, 368; *Yates v. United States* (1957) 354 U.S. 298, 312.) Such error is subject to *Chapman* review. (*Hedgpeth v. Pulido* (2008) 555 U.S. ___ [129 S.Ct. 530, 532-533].) An erroneous instruction that allowed the jury to convict appellant of first degree murder on a natural and probable consequence theory, without actually finding that first degree murder is a natural and probable consequence, is federal constitutional error.

It is the People's burden to prove the federal constitutional error harmless beyond a reasonable doubt under the *Chapman* test. (*Chapman v. California* (1968) 386 U.S. 18, 24; *Fontaine v. California* (1968) 390 U.S. 593, 596.)[3/]

The *Chapman* test, as explained in *Yates v. Evatt* (1991) 500 U.S. 391, "is whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" (*Id.* at p. 402, quoting *Chapman v. California, supra*, 386 U.S. 18, 24.) "'To say that an error did not contribute to the verdict is ... to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.'" (*People v. Mayfield* (1997) 14 Cal.4th 668, 774, citing *Yates v. Evatt, supra*, 500 U.S. at p. 403.)

The *Chapman* test is not satisfied by simply emphasizing "overwhelming evidence," because that approach tends to neutralize the harmless error inquiry. Instead, the correct approach asks whether there is simply a *"reasonable possibility"* that the error "*might* have contributed to the conviction." (*Chapman v. California,*

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[3] "[I]t is the general rule for error under the United States Constitution that reversal requires prejudice and prejudice in turn is presumed unless the state shows that the defect was harmless beyond a reasonable doubt under *Chapman* ..." (*People* v. *Gordon* (1990) 50 Cal.3d 1223, 1267.)

supra, 386 U.S. 18, 24, emphasis added, citing *Fahy v. Connecticut* (1963) 375 U.S. 85, 86-87; see also *People v. Gonzalez* (2006) 38 Cal.4th 932, 960-961, & fn. 6.)

Unlike review for sufficiency of the evidence, which examines evidence in the light most favorable to the prosecution, harmless error analysis involves a "broader and more active consideration of the evidence. In appraising the prejudicial effect of trial court error, an appellate court does not halt on the rim of substantial evidence or ignore reasonable inferences favoring the appellant." (*People v. Butts* (1965) 236 Cal.App.2d 817, 832.) "We do examine and weigh the evidence with the objective of formulating an opinion as to the degree of probable influence which the error exerted on the jury." (*Id.* at p. 833, citing *People v. Dail* (1943) 22 Cal.2d 642, 659.)

"When the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand." (*People* v. *Green* (1980) 27 Cal.3d 1, 69.) A "legally incorrect theory" within the meaning of the *Green* rule refers "...specifically to *instructional error*, or a 'legally incorrect' theory of the case which, if relied upon by the jury, could not as a matter of law validly support a conviction of the charged offense." (*People* v. *Harris* (1994) 9 Cal.4th 407, 419, emphasis added.) "In such circumstances, reversal generally is required unless 'it is possible to determine from other portions of the verdict that the jury necessarily found the defendant guilty on a proper theory.'" (*People v. Perez* (2005) 35 Cal.4th 1219, 1233.) Reversal is required when "[n]othing in the record establishes that the jury necessarily rejected [the improper] theory and instead convicted on the [proper] theory..." (*Ibid.*)

Here, it is not possible to determine from other portions of the verdict that the jury necessarily found the defendant guilty of aiding and abetting first degree murder on a proper theory.

The special gang finding does not reveal whether the jury relied on direct aiding and abetting as opposed to a natural and probable consequence theory to find appellant guilty of first degree murder. The gang instruction told jurors to determine the gang allegation "[i]f you find the defendant guilty of the crime charged in Count One, first degree murder ..." (10CT 2875.) Because the gang allegation was applicable whichever route the jury used to find first degree murder, the gang finding does not demonstrate that the jury found first degree murder on a proper theory.

The same is true of the firearm allegation. The instruction on the firearm allegation told jurors to determine the firearm allegation "[i]f you find the defendant guilty of the crime charged..." (10CT 2880.) Because the firearm allegation was applicable whichever route the jury used to find first degree murder, the firearm finding does not demonstrate that the jury found first degree murder on a proper theory.

Respondent argues: "Given that the jury concluded that a murder (with express or implied malice) was a reasonably foreseeable result, it would defy logic to conclude that the jury would not have also determined that a premeditated murder was equally foreseeable." (RBoM, at p. 25.) Respondent explains that "appellant was aware that Che was armed and would use the firearm *if provoked.*" (RBoM, at p. 25, emphasis added.) But if appellant was aware the Che was the sort of person who might shoot someone *if provoked,* that would be consistent with second degree murder rather than first degree murder. Provocation may reduce murder from first to second degree. (*People v. Thomas* (1945) 25 Cal.2d 880, 903; *People v. Valentine, supra,* 28 Cal.2d 121, 132.) As the jury was instructed here: "If you conclude that the perpetrator

committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder." (CALCRIM No. 522; 10CT 2869.) To say that appellant could have or should have foreseen that Che was the sort of person who would kill *if provoked* means that Che could be viewed as a hot-head who would react rashly "if provoked," as opposed to a cold-blooded killer who would commit deliberate and premeditated murder.

The prosecution maintained that Che was a member of the Hop Sing gang. The People's gang expert testified that Hop Sing values secrecy and avoids publicity. (4RT 954, 961, 1071.) Hop Sing members "usually don't engage in conflicts out in the open where there is a lot of witnesses usually. And they try to keep their criminal activity within their own set, and they don't try to display it out in the open." (4RT 1072.) A reasonable person in appellant's position could have believed that if Che had time for clear thinking and deliberation, he would have realized that killing a high school boy in public would have been against the gang's credo, and he would not have done it

Respondent further asserts: "It is *undisputed* that appellant personally instigated the altercation with Gonzales and Treadway by mocking Nguyen and *ordered Che to get the gun.*" (RBoM, at p. 25, emphasis added.) On the contrary, the claim that appellant ordered Che to get a gun was hotly contested. Only one witness made that claim. Joshua Bartholomew, who fought on the side of Nortenos, testified that he hit appellant "pretty hard" in the head while appellant was grappling with Gonzales, and appellant cried out for help: "Grab the gun." (3RT 743, 746, 761-762.)

Appellant denied that he called for anyone to get a gun while fighting. (5RT 1434-1435, 1486, 1493.) Simon Nim testified that he did not hear appellant call for a gun during the fight. (2RT 506-507.) Gonzales, who was the one fighting with

appellant in close quarters, did not hear appellant say anything at all during the fight. (3RT 714.)

Angelina Hernandez, who participated in the fight herself on the side of Gonzales, did not mention anything about appellant calling out for a gun in her testimony. Instead, she testified that Gonzales was the one who yelled out "gun" while fighting with appellant, and she was "very certain" of it. (3RT 797.)

Even if appellant did call for someone to get a gun, there was no evidence that Ricky Che was in earshot, or that he acted upon it. The fighting was spread out over a wide area -- Joshua Bartholomew described another fight between Tony Hoong and Roberto Treadway some 30 to 40 feet away. (3RT 763.) Lareina Montes testified that she saw Treadway beating up Che. (3RT 839.) That suggests that Che was engaged in a fight of his own up to 30 to 40 feet away from appellant, when appellant was supposed to have called for a gun.

Lareina Montes testified that Che did not run to the car to get the gun until the fight between appellant and Gonzales appeared to be winding down. (3RT 826-828.) This suggests a significant delay between the time that Bartholomew claimed he heard appellant call for a gun (a few seconds into his fight with Gonzales) and the time that Che went to get the gun (as the fight was winding down). It is questionable, therefore, whether Rickie Che was in a position to hear appellant call for a gun, if he ever did, and whether he got the gun from the car because of anything that appellant may have said.

Respondent claims that "Appellant then ordered Che to shoot, which he did." (RBoM, at p. 25.) That too was hotly contested. Appellant testified that he did not yell for Che to shoot. (5RT 1487.) Simon Nim testified that appellant did not yell "shoot him." (2RT 507.) No witness specifically claimed that appellant yelled that.

The only basis for the claim that appellant was the one who yelled for Che to shoot was the testimony of Anthony Montes, who claimed that two individuals yelled for Che to shoot and that he saw those same two individuals run with Che back to the car. (3RT 861-862.) Two other prosecution witnesses, however, contradicted the claim that there were two individuals yelling for Che to shoot.

Lareina Montes testified that only one person yelled, "shoot him, shoot him, shoot, him." (3RT 836-837.) Angelina Hernandez likewise testified that only one person yelled "shoot, shoot, shoot," and it came from someone in the direction of Famous Pizza. (3RT 799-800.) Contradiction by those two other prosecution witnesses (both of whom were friends with the victim) on that key point would give jurors pause to question whether Anthony Montes might have been mistaken about hearing two voices yelling to shoot.

Angelina's testimony about how the one voice she heard came from the direction of Famous Pizza suggests that it came from somebody standing behind Rickie Che. Appellant's fight with Antonio had spun into the middle of the street, and according to Anontio Gonzales, Che fired moments after he and appellant unclenched. (3RT 716, 730.) Because appellant was in the street when his fight with Gonzales unclenched, it is unlikely that appellant was the one that Angelina heard yelling from the pizza parlor.

In any event, even if Anthony Montes was correct in his claim that two individuals yelled for Che to shoot and then ran to the car, that does not prove that appellant was one of those two. Simon Nim testified that four of them (he, appellant, Hoong and Che) ran to Che's car after the shooting. (2RT 471, 509.) The two individuals that yelled for Rickie to shoot and then ran to the car could have been Nim and Hoong.

The prosecutor argued that the two who yelled for Rickie to shoot must have been appellant and Hoong, and that Simon could not have been one of the two because (according to his prior testimony) he trailed the other three, and had to chase after the car as it was leaving. (6RT 1624.) But Anthony Montes did not specify the order in which he saw them run back to the car. Nor did he say that the two ran to the car simultaneously. He simply said that he saw them run to the car. (See RT 862-863, 867.)

These facts show that the theory of direct aiding and abetting in a first degree murder was a much more difficult issue than respondent portrays. The natural and probable consequence theory gave the jury an easier route to conviction. If the jury believed that murder was the natural and probable consequence of appellant's participation in target offenses (assault and breach of peace), the instructions allowed the jury to bypass the more difficult issue of direct aiding and abetting, and find appellant guilty of first degree murder on a natural and probable consequence theory.

The manner in which the jury deliberated strongly suggests that the jury did just that. During deliberations, the court received a communication (Jury Request No.7) from the jury stating as follows: 'We are stuck on Murder I or Murder II due to personal views. What do we do?" (10CT 2895.) At 2:15 p.m. of the same day, a communication (Jury Request No. 8) was received from the jury as follows: "We are at a stalemate." (10CT 2898-2899.)

The trial court initiated an investigation that ultimately led to the removal of a hold-out juror. Other jurors accused the hold-out juror of refusing to follow the law. One juror (Juror No. 8) told the court that the hold-out juror said "something along the lines of not being able to put Bobby in Rickie's shoes as the shooter." (6RT 2098.) When the court asked the hold-out juror if she ever expressed the view that she "just

couldn't put the defendant in the perpetrator's shoes because the law ... because you object to this law, I just can't do it because I object to the law that the Judge has given to us," she answered in the affirmative, because "[i]t is kind of like it doesn't make sense to me." (7RT 2114-2115.) She stated that she was bothered by the idea "of aiding and abetting and putting an aider and abettor in the shoes of a perpetrator." (7RT 2115-2116.)

From what was revealed by notes from the jury and the court's inquiry, it appears that jurors believed that Rickie Che was guilty of first degree premeditated murder, but were deadlocked on whether appellant should be held guilty of first degree murder as well, or of second degree murder. The majority believed that because appellant "stood in the shoes" of the perpetrator, the law required that he be convicted of first degree murder the same way that the perpetrator would be convicted of first degree murder. Juror No. 1, on the other hand, did not accept the "in the shoes" theory, and believed that appellant could be found guilty of a lesser offense (*i.e.,* second degree murder), even if the perpetrator was deemed guilty of first degree murder.

This dispute indicates that the jury was probably relying on a natural and probable consequence theory of aiding and abetting, rather than direct aiding and abetting. If jurors were convinced that appellant actually encouraged Rickie Che to shoot Roberto, they would have no difficulty in finding him guilty of first degree murder based on direct aiding and abetting, and standing-in-shoes theory would not have been a problem. The fact that jurors were divided over the standing-in-shoes theory strongly suggests that the majority considered appellant responsible for the unintended consequences of aiding and abetting target offenses, on a theory that murder was the natural and probable consequence of appellant's breach of peace, and that appellant was guilty of first degree murder because he stood in Rickie's shoes.

A dispute over the concept of appellant standing in the shoes of the perpetrator goes directly to the heart of the instructional error.[4/] Most jurors apparently believed that if Rickie Che was guilty of first degree murder, appellant as an aider and abettor must be guilty of the same thing, because he stood in the shoes of the perpetrator. Juror No. 1 believed (correctly) that the law does not require that the aider and abettor must automatically receive the same conviction as the perpetrator. Because this appears to be the very issue that divided jurors, the instructional error cannot be found harmless under any standard.

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[4] Stand-in-shoes theory refers to the sort of strict vicarious liability that respondent is urging. (See *People v. Woods, supra,* 8 Cal.App.4th 1570, 1580, 1586 [rejecting argument that aider and abetter stands in the shoes of the perpetrator].)

CONCLUSION

For the reasons set forth above, appellant requests that the decision of the Court of Appeal be affirmed.

Respectfully Submitted,

Dated: 2/2/2013

Scott Concklin
Attorney for Appellant

WORD COUNT CERTIFICATION

This is to certify that this Petition for Review does not exceed 14,000 words, including footnotes. The computer word processing program that produced this document returned a word count of 13,936 words (exluding tables required under rule 8.204(a)(1), the cover information required under rule 8.204(b)(10), this certificate, signature blocks, and quotation of issues required by rule 8.520(b)(2).)

Dated: 2/2/2013

Scott Concklin
Attorney for Appellant

PROOF OF SERVICE BY MAIL
[CCP 1013a, 2015.5]

I declare that I am a resident of the County of Shasta, State of California. I am over the age of eighteen (18) years and I am not a party to the within entitled cause. My business address is: 2205 Hilltop Drive, No. PMB-116, Redding, California, 96002.

On the date of: 2/13/2013

I served the within copies, the exact title of which, are as follows:

ANSWER BRIEF ON THE MERITS

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I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct, and that this declaration was executed in Redding, California
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_____
Scott Concklin