KAMALA D. HARRIS
Attorney General

State of California
DEPARTMENT OF JUSTICE

110 WEST A STREET, SUITE 1100
SAN DIEGO, CA 92101
P.O. BOX 85266
SAN DIEGO, CA 92186-5266

Public: (619) 645-2001
Telephone: (619) 645-2106
Facsimile: (619) 645-2191
E-Mail: Kathryn.Kirschbaum@doj.ca.gov

June 13, 2014

Frank A. McGuire
Court Administrator and Clerk
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

RE: ***People v. Vince Bryan Smith***
California Supreme Court, Case No. S210898
Fourth Appellate District, Division One, Case No. D060317
Riverside County Superior Court, Case No. BAF004719

Dear Mr. McGuire:

On May 14, 2014, this court ordered the parties to file simultaneous letter briefs addressing the following two issues: whether the instruction to the jury that "[i]f the murder or voluntary manslaughter was committed for a reason independent of the common plan to commit the disturbing the peace or assault or battery, then the commission of murder or voluntary manslaughter was not a natural and probable consequence of disturbing the peace or assault or battery" was a correct statement of the law; and if so, whether there was evidence in the record to support a jury finding that the murders were not committed for a reason independent of the common plan to commit the disturbing the peace or assault or battery.

As set forth in more detail below, the instruction is an incorrect statement of law because it improperly restricts application of the natural and probable consequences doctrine in cases where a nontarget offense was committed for an independent, but foreseeable, reason and improperly requires evidence of motive. The error in giving the instruction, however, inured to appellant's benefit, as it added an unnecessary requirement. Further, there was ample evidence in the record that the murders were not committed for a reason independent of the common plan to commit the target offenses. Appellant's convictions should be affirmed.

I. THE INSTRUCTION AT ISSUE IS AN INCORRECT STATEMENT OF LAW

The instruction at issue is an incorrect statement of the law because it improperly restricts the natural and probable consequences doctrine by precluding liability for certain reasonably

foreseeable harms based upon the underlying motivation for the nontarget offense. Further, the instruction adds a new and unnecessary requirement to the natural and probable consequences doctrine; namely, the requirement that the nontarget offense was not committed for a reason independent of the common plan to commit the target offenses. As will be explained below, this requirement imposes a difficult burden on the prosecution to essentially prove "motive," something that is generally not required. By exempting from liability those who engage in target offenses in which it is reasonably foreseeable that a nontarget offense will be committed for an independent reason and by requiring proof of motive evidence in all natural and probable consequences cases, the instruction frustrates the policy considerations of deterrence and culpability which are at the core of the natural and probable consequences doctrine.

A. The Natural and Probable Consequences Doctrine

Penal Code section 31 provides that "[a]ll persons concerned in the commission of a crime, . . . whether they directly commit the act constituting the offense, or aid and abet in its commission, . . . are principals in any crime so committed." Accordingly, an aider and abettor to an offense "shares the guilt of the actual perpetrator." (*People v. Prettyman* (1996) 14 Cal.4th 248, 259 (*Prettyman*); see also *People v. Mendoza* (1998) 18 Cal.4th 1114, 1122.) A person aids and abets the commission of a crime when he or she, (1) with knowledge of the unlawful purpose of the perpetrator, (2) and with the intent or purpose of committing, facilitating, or encouraging commission of the crime, (3) by act or advice, aids, promotes, encourages or instigates the commission of the crime. (*People v. Cooper* (1991) 53 Cal.3d 1158, 1164.) Under the natural and probable consequences doctrine, an aider and abettor can be held liable "not only for that crime (the target crime), but also for any other offense (nontarget crime) committed by the confederate as a 'natural and probable consequence' of the crime originally aided and abetted." (*People v. Gonzales* (2011) 52 Cal.4th 254, 298–299, quoting *Prettyman*, *supra*, 14 Cal.4th at p. 254.) To convict a defendant under this doctrine, the prosecution must prove that "the defendant (1) with knowledge of the confederate's unlawful purpose; and (2) the intent of committing, encouraging, or facilitating the commission of any target crime(s); (3) aided, promoted, encouraged, or instigated the commission of the target crime(s); (4) the defendant's confederate committed an offense other than the target crime(s); and . . . (5) the offense committed by the confederate was a natural and probable consequence of the target crime(s) that the defendant encouraged or facilitated." (*Prettyman*, *supra*, 14 Cal.4th at p. 271.)

The underlying policy consideration of the doctrine is that a person should be liable for the result of engaging in conduct dangerous to society, even if the result is "worse than the bad result he intended." (LaFave & Scott, Criminal Law (1972) Crimes Against the Person, p. 560; Kadish, Complicity, Cause and Blame: A Study in the Interpretation of Doctrine, 73 Cal.L.Rev. (1985) pp. 352–353.) As this court has stated, the doctrine is "based on the recognition that 'aiders and abettors should be responsible for the criminal harms they have naturally, probably and foreseeably put in motion.'" (*Prettyman*, *supra*, 14 Cal.4th at p. 260, quoting *People v. Luparello* (1986) 187 Cal.App.3d 410, 439.) In this way, the doctrine serves as a means of punishing all those "concerned" in the target offense, so long as the jury determines that the

resulting nontarget offense was reasonably foreseeable under the circumstances. (Pen. Code, § 31; *People v. Medina* (2009) 46 Cal.4th 913, 920 (*Medina*).)

Under the natural and probable consequences doctrine, an aiding and abetting defendant can be held liable for any nontarget offense, with the exception of first degree premeditated murder, so long as the "actual resulting harm or the criminal act that caused that harm" was reasonably foreseeable. (*People v. Chiu* (June 2, 2014, S202724) __ Cal.4th __ (*Chiu*) [holding as a matter of policy that an aider and abettor may not be convicted of first degree premeditated murder under the natural and probable consequences doctrine].) The question is whether "under all of the circumstances presented, a reasonable person in the defendant's position would have or should have known that the nontarget offense was a reasonably foreseeable consequence of the act aided and abetted by the defendant." (*Id.* at p. 7.) Accordingly, where a defendant aids and abets a target offense, and a fatal shooting is a foreseeable harm of that offense, he or she can be held liable for second degree murder under the natural and probable consequences doctrine where a confederate to the target offense commits a fatal shooting. In extending liability to all those concerned in the target offense, the natural and probable consequences doctrine serves the "legitimate public policy concern of deterring aiders and abettors from aiding and encouraging the commission of offenses that would naturally, probably, and foreseeably result in an unlawful killing" and is "consistent with reasonable concepts of culpability." (*Id.* at pp. 11–12.)

B. The Instruction Given to Appellant's Jury Improperly Prevents Application of the Doctrine in Cases where the Nontarget Offense was Committed for an "Independent" Reason but was Nonetheless Foreseeable

The instruction at issue[1] here limits application of the natural and probable consequences doctrine to only those cases in which the prosecution can demonstrate that the nontarget offense was not committed for a reason independent of the common plan to commit the target offense.

---

[1] The language at issue is part of CALCRIM No. 402, which was introduced in 2006 without any citation to authority as to its origin. (See CALCRIM No. 402.) CALJIC No. 3.02, which predated the CALCRIM instruction, contained no comparable language. On the issue of determining whether a nontarget offense is a natural and probable consequence of the target offense, that instruction provides, in relevant part, "[In determining whether a consequence is 'natural and probable,' you must apply an objective test, based not on what the defendant actually intended, but on what a person of reasonable and ordinary prudence would have expected likely to occur. The issue is to be decided in light of all of the circumstances surrounding the incident. A "natural" consequence is one which is within the normal range of outcomes that may be reasonably expected to occur if nothing unusual has intervened.]" (CALJIC No. 3.02.)

In effect, this instruction dictates, as a matter of law, that nontarget offenses committed for independent reasons can never be reasonably foreseeable.

The question of foreseeability, however, has always been a question of fact for the jury to determine. (See, e.g., *Medina*, *supra*, 46 Cal.4th at p. 920 [reasonable foreseeability "is a factual issue to be resolved by the jury"].) There are many instances in which a jury could find that a nontarget offense committed for a reason independent of the common plan to commit a target offense was nevertheless reasonably foreseeable. The facts of *People v. Nguyen* (1993) 21 Cal.App.4th 518, 525–527 (*Nguyen*) are illustrative. In *Nguyen*, a group of men committed two robberies in which the victims were not only robbed, but also sexually assaulted. (*Ibid.*) On appeal, some of the defendants argued they could not be held liable for the nontarget sexual offenses under the natural and probable consequences doctrine because those offenses could not be considered a reasonably foreseeable consequence of robbery. (*Id.* at pp. 528–529.) In rejecting that claim, the court looked to the specific facts and circumstances surrounding the robberies, including the sexual nature of the businesses, the degree of secrecy and control used by the perpetrators and, with respect to the second robbery, the occurrence of the sexual assaults during the first robbery, to hold that the sexual offenses were reasonably foreseeable. (*Id.* at p. 534.) The court reasoned, "Under these circumstances it will not do for defendants to assert that they were concerned only with robbery and bear no responsibility for the sexual assault." (*Ibid.*)

The defendant's liability in *Nguyen* did not hinge upon the reasons why the perpetrators committed the sexual assaults or whether those reasons were independent of the common plan to commit the robberies. Certainly sexual assault is not necessary to the commission of robbery and is independent of that endeavor to obtain money. As *Nguyen* demonstrates, the critical inquiry is whether the ultimate act was foreseeable. If it was foreseeable, then liability attaches to all those "concerned" in the commission of the robbery, regardless of the reason or motive behind the nontarget offense. (See *Nguyen*, *supra*, 21 Cal.App.4th at p. 530.)

C. The Instruction Given to Appellant's Jury Improperly Requires Proof of the "Reason" or Motive Underlying the Nontarget Offense

Aside from exempting persons who remain culpable based on the foreseeability of the harm, the instruction is also erroneous because it imposes a difficult burden on the prosecution: the burden of showing why a perpetrator acted. As a general rule, the prosecution is not required to establish motive. (CALJIC No. 2.51 ["Motive is not an element of the crime charged and need not be shown"]; CALCRIM No. 370 ["The People are not required to prove that the defendant had a motive to commit (any of the crimes/ the crime) charged"]; *People v. Hillhouse* (2002) 27 Cal.4th 469, 504 [defining motive as "the reason a person chooses to commit a crime" and holding that motive is not an element of murder].) Proof of a specific motivation is only required in certain limited instances where the Legislature has so designated. (See, e.g., *People v. Maurer*

(1995) 32 Cal.App.4th 1121, 1126 [describing Pen. Code, § 647.6,[2] which does require proof of motive, as a "strange beast"].) In those instances, proof of a particular motivation helps to differentiate between an otherwise noncriminal act (such as "annoying" a child) and a criminal one (annoying a child while motivated by an abnormal sexual interest in children).

Outside of these narrow circumstances, motive need not be proven, as a "bad" motive is not an element of the crime, and a "good" motive is not a defense. (1 Witkin & Epstein, Cal. Crim. Law (4th ed. 2012) § 4, p. 263.) In this way, one's motive to commit an offense differs from one's intent or mental state. Evidence of intent or mental state is necessary in order to show that a defendant's conduct was purposeful and as a means of determining his or her level of culpability. Evidence of motive, on the other hand, is superfluous to intent, which must be proven separately, and is unrelated to culpability, as one is guilty of criminal conduct regardless of his or her motive, or "emotional urge" for committing the crime. (1 Witkin & Epstein, Cal. Crim. Law (4th ed. 2012) § 4, p. 263.) Additionally, motive differs from intent or mental state evidence because the latter two can more easily be shown by way of circumstantial evidence. In murder cases, for example, the manner of death can often speak to a defendant's intent to cause death, but it may not reveal *why* that death was intended. Whether the killing was motivated by revenge, jealousy, hatred, fear, or some combination of the above, is often incapable of proof by either direct or circumstantial evidence.

This court may have put it best long ago in *People v. Durrant* (1897) 116 Cal. 179, 208, stating:

> In every criminal case, proof of the moving cause is permissible, and oftentimes is valuable; but it is never essential. Where the perpetration of a crime has been brought home to a defendant, the motive for its commission becomes unimportant. Evidence of motive is sometimes of assistance in removing doubt, and completing proof which might otherwise be unsatisfactory, and that motive may either be shown by positive evidence, or gleaned from the facts and surroundings of the act. The motive then becomes a circumstance, but nothing more than a circumstance, to be considered by the jury, and its absence is equally a circumstance in favor of the accused, to be given such weight as it deems proper. But proof of motive is never indispensable to a conviction.

There is no principled reason why motive evidence should become "indispensable" in the natural and probable consequences context. In fact, motive evidence is even less significant in this context. "'Because the nontarget offense is unintended, the mens rea of the aider and abettor with respect to that offense is irrelevant and culpability is imposed simply because a reasonable

---

[2] Penal Code section 647.6 prohibits annoying or molesting any child under 18 years of age while motivated by an abnormal sexual interest in children. (*People v. Maurer*, *supra*, 32 Cal.App.4th at p. 1125.)

person could have foreseen the commission of the nontarget crime." (*People v. Canizalez* (2011) 197 Cal.App.4th 832, 852; *Chiu, supra*, at p. 10.) Thus, the culpability of the aiding and abetting defendant is entirely unaffected by the "emotional urge" that induced the commission of the nontarget offense. On a more basic level, proof of motive is all the more difficult in natural and probable consequences cases, where the perpetrator of the nontarget offense might not be a party to the trial and, in some cases, might not even be alive.

Moreover, even if the prosecution could demonstrate what the perpetrator was thinking, the question remains how the jury could possibly determine when those reasons became "independent" of the common plan to commit the target offense. On this point, the facts in *Medina* are helpful. There, members of separate gangs engaged in a fist fight that ultimately resulted in a fatal shooting. (*Medina, supra*, 46 Cal.4th at pp. 916–917.) In finding the nontarget offense reasonably foreseeable, this court listed several potential reasons why a gang-related fistfight could result in a fatal shooting: (1) natural escalation of the confrontation; (2) vengeance for perceived disrespect; (3) the participants' propensity for violence; or (4) a means for establishing a gang's dominance in the neighborhood. (*Id.* at p. 923.) This court, though, did not require the prosecution to prove which of these reasons motivated the shooting; it was sufficient that the jury could have found evidence of any of these reasons and therefore could have concluded that gun violence was foreseeable. (*Id.* at p. 925.) Under any motivation, there was "a close connection between the failed assault . . . and the murder" sufficient to impose liability under the natural and probable consequences doctrine. (*Ibid.*)

As *Medina* illustrates, a nontarget offense might be motivated by the common plan to commit the target offense, the shooter's desire to achieve notoriety, a longstanding animosity toward the victim, or a combination of all three. Determining the shooter's actual motives, and assessing at what point those reasons become "independent" of the common plan would often place an impossible burden on the prosecution and envelop the jury in an exercise in speculation. Often, there will be little direct evidence of the shooter's true motives. And even when there is some direct evidence, those motives may be intertwined. In *Medina*, the shooter may have fired the fatal shot because it was part of a common plan to commit assault, but also because he wanted to improve his reputation within the gang or the gang's reputation within the community, and perhaps secondarily because he simply had a propensity for violence. At what point would the shooter's motives for notoriety and propensity for violence render his reasons "independent" and how would the jury be able to assess how much weight the shooter attached to each motive? Even if such an assessment were possible, such reasons would not necessarily affect the foreseeability of the shooting.

This is not to say that the perpetrator's reasons for acting do not have any bearing upon the question of foreseeability. Where a perpetrator acts based on reasons independent of the common plan, and those reasons are unknown to the aider and abettor, it may be the case that his actions would not be reasonably foreseeable. But determining whether an aider and abettor could have foreseen the perpetrator's actions is decidedly different from limiting culpability where the perpetrator's reasons were independent. A jury instruction mandating, as a matter of law, that all

nontarget offenses committed for reasons independent of the common plan to commit a target offense are unforeseeable is overly inclusive and improper.

D. There are No Principled Reasons for Limiting the Natural and Probable Consequences Doctrine in the Manner Mandated by this Instruction and Doing So Would Effectively Frustrate the Policy Concerns of Deterrence and Culpability

Outside the first degree premeditated murder context, there is no reason to limit the full application of the natural and probable consequences doctrine. In *Chiu*, this court concluded that the public policy concerns underlying the natural and probable consequences doctrine lose force in the unique context of a defendant's liability as an aider and abettor of a first degree premeditated murder. In light of the "uniquely subjective and personal" mental state required for first degree premeditated murder, this court reasoned that the policy considerations of deterrence and culpability were best served by holding an aiding and abetting defendant liable for second degree murder rather than first degree, largely due to the heightened punishment for a first degree murder conviction. (*Chiu*, *supra*, at pp. 12–13.)

At issue here, however, is not whether an aiding and abetting defendant should be liable for first or second degree murder when a confederate commits a reasonably foreseeable nontarget murder, but whether that defendant should face any consequences at all. Under the instruction given to appellant's jury, an aiding and abetting defendant who facilitates a target offense in which it is reasonably foreseeable that someone will be fatally shot will face zero liability for the resulting death if the jury is convinced that the shooter acted for an "independent" reason such as personal animosity toward the victim. Such a rule would not only be inconsistent with the policy considerations of deterrence and culpability cited by this court in *Chiu*, it would utterly frustrate them. A defendant who sets in motion a series of events, the foreseeable end of which is murder, is no less culpable because the foreseeable murder was motivated – in whole or in part – by an "independent" reason. Whatever the reason for the foreseeable murder, the defendant still chose to involve himself in a target offense in which a murder, of some sort, was reasonably foreseeable. That he should suffer no consequences for that involvement flies in the face of "reasonable concepts of culpability." (See *Chiu*, *supra*, at p. 12.) Nor would it serve the policy of deterrence. In order to deter defendants from becoming involved in target offenses in which fatal shootings, or other detrimental consequences, are reasonably foreseeable, the aiding and abetting defendant must be held liable for those reasonably foreseeable consequences. The instruction at issue provides an escape from liability because it allows defendants to point to potential "independent" reasons for the nontarget murder. This is especially problematic in light of the difficulties discussed above pertaining to proving motive in general and the motivation of a non-party specifically.

Consequently, the instruction was incorrect because it added a new and unnecessary limitation on the natural and probable consequences doctrine based on the perpetrator's independent reasons for acting and because it frustrates the policy considerations underlying the

natural and probable consequences doctrine. That the instruction was incorrect, however, could only have inured to appellant's benefit by adding an additional requirement. Thus, his convictions should be affirmed notwithstanding the error. (See *People v. Santana* (2013) 56 Cal.4th 999, 1011 [defendant not prejudiced by an erroneous instruction that held the prosecution to an "arguably higher burden of proof"].) The instruction precluded the jury from determining, as it otherwise could have, that the murders were committed for an independent reason yet were nevertheless foreseeable. With the instruction, the jury was necessarily required to find that the murders were not committed for such an independent reason. Accordingly, even if the instruction was improper, appellant suffered no possible prejudice.

II. EVEN IF THE INSTRUCTION WERE A CORRECT STATEMENT OF LAW, THE JURY'S FINDING THAT THE NONTARGET OFFENSE WAS NOT COMMITTED FOR AN INDEPENDENT REASON WAS SUPPORTED BY THE EVIDENCE

Turning to the court's second question, assuming, arguendo, the jury instruction correctly informed the jury that a murder or voluntary manslaughter committed for a reason independent of the common plan to commit the crimes of assault, battery, or disturbing the peace would not be a natural and probable consequence of those offenses, the evidence supported the jury's finding that the murders in this case were not committed for such an independent reason.

The evidence established the murders were a direct result of the planned jump out involving groups of rival gang members. Multiple participants came to the jump out armed with guns, ready to use them should the need arise. Minutes after the jump out began, appellant – upset that his brother was on the losing end of the fight – interjected to pull his brother from the fray and punched one of the rival gang members. Immediately thereafter, shooting erupted and, ultimately, the two victims were killed.

There was no evidence the shots were fired for any purpose independent of the very reason why the guns were brought to the fight in the first place. The participants armed themselves prior to the fight with the realization that a planned assault involving rival gang members could lead to additional violence. The planned assault thus encompassed the plan to use additional force if necessary. (See *People v. Kauffman* (1907) 152 Cal. 331 [bringing weapons to a burglary indicated a plan to use force if necessary].) That the weapons brought by the participants were used to kill once the planned fight got out of hand was nothing more than the ordinary and probable effect of bringing guns to a planned gang fight involving members of long-time rival gangs. (See, e.g., *Medina*, *supra*, 46 Cal.4th at pp. 922, 928 ["shooting" or "escalation of the confrontation to a deadly level" was a foreseeable consequence of simple assault]; *People v. Ayala* (2010) 181 Cal.App.4th 1440, 1450 ["fatal shooting" was a natural and probable consequence of aiding and abetting an assault with a deadly weapon during a gang confrontation]; *People v. Gonzales* (2001) 87 Cal.App.4th 1, 10 ["fatal shooting" was a natural and probable consequence of a gang fight]; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1376, ["shooting" was a natural and probable consequence of assault and "escalation of this confrontation to a deadly level was much closer to inevitable than it was to unforeseeable"]; see

also *People v. Rogers* (1985) 172 Cal.App.3d 502, 515 [" 'the natural and probable consequences of any armed robbery are that someone may be hurt, someone may be shot, [an] innocent bystander may be hurt' "].) Accordingly, the jury properly found that the murders in this case were a reasonably foreseeable consequence of the target offenses and were not committed for an independent reason outside of that common plan.

Sincerely,

Kathryn Kirschbaum

KATHRYN KIRSCHBAUM
Deputy Attorney General

For KAMALA D. HARRIS
Attorney General

KK:dw
SD2013806623
80910820.doc

DECLARATION OF SERVICE BY U.S. MAIL & ELECTRONIC SERVICE

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

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

On June 13, 2014, I served the attached **SUPPLEMENTAL LETTER BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

Bonnie M. Dumanis
District Attorney - San Diego County
330 West Broadway, Suite 1300
San Diego, CA 92101-3826

Mike Roddy, Executive Officer
San Diego Superior Court
For the Honorable Patrick Magers
220 West Broadway
San Diego, CA 92101-3409

California Court of Appeal
Fourth Appellate District, Division One
750 B Street, Suite 300
San Diego, CA 92101

and, furthermore I declare, in compliance with California Rules of Court, rules 2.25(i)(1)(A)-(D) and 8.71 (f)(1)(A)-(D), I electronically served a copy of the above document from Office of the Attorney General's electronic service address ADIEService@doj.ca.gov on **June 13, 2014** to Appellate Defenders, Inc.'s electronic service address eservice-criminal@adi-sandiego.com and to Appellant's attorney Gregory L. Cannon's electronic service address by 5:00 p.m. on the close of business day at **cannon135635@gmail.com**.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 13, 2014, at San Diego, California.

D. Wallace
Declarant


Signature

SD2013806623
80910835.doc