In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **BOBBY CHIU,** **Defendant and Appellant.**	Case No. S202724

Appellate District, Case No. C063913
Sacramento County Superior Court, Case No.
The Honorable Lloyd G. Connelly, Judge

RESPONDENT'S REPLY BRIEF ON THE MERITS

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
MICHAEL P. FARRELL
Senior Assistant Attorney General
ERIC L. CHRISTOFFERSEN
Supervising Deputy Attorney General
JENNEVEE H. DE GUZMAN
Deputy Attorney General
State Bar No. 197817
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 327-1145
Fax: (916) 324-2960
Email:
Jennevee.DeGuzman@doj.ca.gov
Attorneys for Plaintiff and Respondent

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

COURT RULES

OTHER AUTHORITIES

RESPONDENT'S REPLY BRIEF ON THE MERITS

INTRODUCTION

Before this Court is the issue of whether, in order for an aider and abettor (aider) to be convicted of first degree premeditated murder by application of the natural and probable consequences doctrine (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 doctrine's underlying policy considerations are crucial to the determination of this issue.

In the opening brief, respondent argued that only a murder would have to be reasonably foreseeable in order for an aider to be convicted of first degree premeditated murder by application of the doctrine. The doctrine is rooted in equity and compels derivative liability based on causation and foreseeability. The policy underlying this doctrine "is simply to extend criminal liability to one who knowingly and intentionally encourages, assists, or influences a criminal act of another, if the latter's crime is naturally and probably caused by the criminal act so encouraged, assisted, or influenced." (*People v. Brigham* (1989) 216 Cal.App.3d 1039, 1052-1053; accord *People v. Karapetyan* (2006) 140 Cal.App.4th 1172, 1178.) Accordingly, such an aider should be liable for the ultimate result of engaging in conduct dangerous to society, even if that 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.)

In the unique context of murder, respondent argued that the application of the doctrine should turn on the foreseeability of whether an unlawful homicide was a reasonably foreseeable consequence of the target crime. "If so, then an aider and abettor of the target crime would be held

criminally liable for the death and share[] the guilt of the actual perpetrator." (*People v. Prettyman* (1996) 14 Cal.4th 248, 259.) Because the purpose of the doctrine is to punish aiders for the foreseeable harms that directly result from their actions, to assign liability strictly based on the foreseeability of a specific unintended crime goes against this purpose and defeats the vicarious nature of the doctrine. For example, in shooting death cases, such as the one before this Court, that involve an aider who methodically takes affirmative and aggressive steps in causing a foreseeable homicide, the analysis should focus on whether a fatal shooting of the victim was foreseeable. If so, the aider is vicariously liable, and could be vicariously liable for first-degree murder, as long as a shooting death was reasonably foreseeable.

Appellant argues, inter alia, the opposite, submitting that a non-killer cannot be convicted of first-degree murder based on the doctrine unless the jury specifically finds that first-degree murder is the natural and probable consequence of the target offense. (ABM[1] 20.) Appellant primarily relies on the test set forth in Prettyman:

> [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 at p. 262 see ABM 20.) Based on this test, appellant argues that a jury must find that the "charged crime" was reasonably foreseeable. (ABM 21.) Because first and second degree

---

[1] Answer Brief on the Merits.

murder are two different offenses, he argues "it is for the jury to decide whether first degree murder is the natural an [sic] probable consequences of a target offense." (ABM 22, citing *People v. Woods* (1992) 8 Cal.App.4th 1570.)

As set forth in greater detail below, respondent's line of reasoning is consistent with and promotes the underlying policy considerations of the doctrine. While the test makes reference to "an offense," in cases involving a homicide, it is proper to reference the offense of murder and then to allow the jury to determine the degree after it has found that murder was a reasonably foreseeable offense.

ARGUMENT

I. WHERE MURDER IS A FORESEEABLE CONSEQUENCE OF A TARGET CRIME, THEN LIABILITY FOR FIRST DEGREE MURDER BASED ON PREMEDITATION MAY BE PROPERLY IMPOSED ON ONE WHO AIDS AND ABETS THE TARGET CRIME

Appellant, adopting the rationale in *People v. Woods, supra*, 8 Cal.App.4th 1570, argues that the doctrine requires a jury to find that first-degree murder was a natural and foreseeable consequence of the intented crime in order for an aider to be liable for first-degree murder. (ABM 19-23.) Specifically, he argues that

> ... 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.

(ABM 21.) He further argues that respondent's argument is contrary to established case law and thus respondent is "left to argue that 'policy concerns' and 'equity' supports the expansion of criminal liability that respondent proposes." (ABM 31.) Not so.

> The natural and probable consequences doctrine is a creature of common law. "At common law, a person encouraging or facilitating the commission of a crime could be held criminally liable not only for that crime [the target offense], but for any other offense [a nontarget offense] that was a 'natural and probable consequence' of the crime aided and abetted. [Citation.]"

(*People v. Favor* (2012) 54 Cal.4th 868, 881, quoting *People v. Prettyman*, supra, 14 Cal.4th at p. 260; *People v. Croy* (1985) 41 Cal.3d 1, 12, fn. 5.) The doctrine is an "'established rule' of American Jurisprudence." (*Prettyman*, at p. 260.) "It 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." (*Ibid.*) The *Prettyman* court noted *People v. Kauffman* (1907) 152 Cal. 331, as the first California decision to embrace the doctrine. The facts in *Kauffman* are as follows:

> ...the defendant and six friends planned to break into a safe at a cemetery. Armed with guns, a bottle of nitroglycerin (to blow open the safe), and burglary tools, they went to the cemetery, where they found an armed guard by the safe. They turned back. On their way home, an encounter with a police officer led to a gunfight in which the officer was killed. The defendant, who had been carrying the nitroglycerin, was unarmed and did not participate in the shooting, but he was charged with and convicted of the officer's murder.

(Prettyman, at p. 260, citing *People v. Kauffman, supra*, 152 Cal. at pp. 332-334.) In affirming the conviction, the *Kauffman* court concluded as follows:

> based on the evidence presented, the jury could reasonably find that the plan in which the defendant had conspired included not only breaking into the safe at the cemetery, but also protecting all members of the group from arrest or detection while going to and returning from the scene of the proposed burglary, and *that the policeman's death was a natural and probable consequence of this unlawful enterprise.*

(*Prettyman*, at p. 261, citing *People v. Kauffman, supra*, 152 Cal. at pp. 335-337, emphasis added.)

The *Prettyman* court also noted that *People v. Croy* (1985) 41 Cal.3d 1, further clarified the principles of the doctrine as follows:

> It follows that a defendant whose liability is predicated on his status as an aider and abettor need not have intended to encourage or facilitate the particular offense ultimately committed by the perpetrator. His knowledge that an act which is criminal was intended, and his action taken with the intent that the act be encouraged or facilitated, are sufficient to impose liability on him for any reasonably foreseeable offense committed as a consequence by the perpetrator. It is the intent to encourage and bring about conduct that is criminal, not the specific intent that is an element of the target offense, which ... must be found by the jury."

(*People v. Prettyman*, 14 Cal.4th at p. 261, citing *People v. Croy, supra*, 41 Cal.3d at p. 12, fn. 5.) With respect to murder, the *Prettyman* court stated as follows:

> Until quite recently, the decisions involving application of the "natural and probable consequences" doctrine in aiding and abetting situations were limited to a consideration of whether the evidence was sufficient under the doctrine to support the defendant's conviction. These decisions most commonly involved situations in which a defendant assisted or encouraged a confederate to commit an assault with a deadly weapon or with potentially deadly force, and the confederate not only assaulted but also murdered the victim. In those instances, the courts generally had no difficulty in upholding a murder conviction, reasoning that the jury could *reasonably conclude that the killing of the victim* [] was a "natural and probable consequence" of the assault that the defendant aided and abetted. [Citations.]

(*Prettyman*, at p. 262.)

Appellant suggests that respondent is asking this Court to adopt a new and different test for application of the doctrine by having "the jury simply determine whether the "harm" or "actus reus" of the charged offense was reasonably foreseeable, leaving mens rea out of the equation." (ABM 18.)

Appellant is wrong. The doctrine, a theory of vicarious liability adopted from common law, is clear in its intent: "It 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." (*People v. Prettyman, supra*, 14 Cal.4th at p. 260.) In a case such as this, where the non-target crime involves an unlawful death, i.e., first degree murder, the variation of the language used by different courts has left unclear precisely which offense or crime a jury must find as the non-target offense. (See, e.g., *People v. Medina* (2009) 46 Cal.4th 913, 920, 927 ["charged offense," "a reasonable consequence," and "shooting"]; *People v. Prettyman, supra*, 14 Cal.4th at p. 260 ["criminal harms" and "offense*"]; People v. Croy, supra*, 41 Cal.3d at p. 12, fn. 5 ["reasonably foreseeable offense"]; *People v. Kauffman, supra*, 152 Cal. at p. 334 ["common design"]; *People v. Ayala* (2010) 181 Cal.App.4th 1440, 1450 ["shooting death"]; *People v. Gonzalez* (2001) 87 Cal.App.4th 1, 10 ["fatal shooting"]; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1378 ["shooting"]; *People v. Brigham* (1989) 216 Cal.App.3d 1039, 1052-1053 ["crime"]; *People v. King* (1938) 30 Cal.App.2d 185, 201 ["homicide"]; *People v. Wheaton* (1923) 64 Cal.App. 58, 68 ["murder"].) Accordingly, the test is not as clear as appellant suggests and continues to evolve in unique cases such as murder, which is an offense that can be divided into degrees.

What is clear, however, is that a review of *Kauffman, Croy*, and *Prettyman* support the proposition that, where murder is a foreseeable consequence of a target crime, then liability for first degree murder based on premeditation may be properly imposed on one who aides and abets the target crime. The test for the doctrine is well-established:

> To apply the "natural and probable consequences" doctrine to aiders and abettors is not an easy task. The jury must decide whether 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); whether (4) the defendant's confederate committed an offense other than the target crime(s); and whether (5) *the offense* committed by the confederate was a natural and probable consequence of the target crime(s) that the defendant encouraged or facilitated. Instructions describing each step in this process ensure proper application by the jury of the "natural and probable consequences" doctrine.

(*People v. Prettyman, supra*, 14 Cal.4th at p. 267, emphasis added.) In applying the doctrine to a case where the non-target offense involves a homicide, it is necessary only for the jury to conclude that the unlawful killing of the victim was a natural and probable consequence of the target offense. (*Prettyman*, at p. 262.) As set forth in more detail in the Opening Brief on the Merits, if a jury finds that the resulting unlawful 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. This is true because the doctrine calls for vicarious liability and is primarily concerned with the actual consequence or end result rather than whether the aider could foresee the specific manner and degree with which the perpetrator would commit the criminal act.

Appellant argues that strict liability is generally disfavored. (ABM 32-34.) While this may be true, it is equally true that, although the doctrine has also been subject to substantial criticism, it is "an 'established rule' of American jurisprudence." (*People v. Prettyman, supra*, 14 Cal.4th at p. 260, citing Dressler, Understanding Criminal Law (1987) § 30.05, p. 427; see also 2 LaFave & Scott, Substantive Criminal Law (1986) § 6.8, pp. 158-159.) In the context of murder, the objective of the doctrine would be frustrated if the jury were forced to determine whether the foreseeable killing was "first degree murder as opposed to second degree murder or

some variety of manslaughter." (*People v. Woods* (1992) 8 Cal.App.4th 1570, 1603 (dis. opn. of Sparks, J.).) The objective of the doctrine would be frustrated because "[i]t 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*, at p. 260, emphasis added; see *People v. Karapetyan* (2006) 140 Cal.App.4th 1172, 1178 [doctrine is a "theory of liability for murder that applies when the assault has the foreseeable result of death]".) Indeed,

> [t]he ultimate factual question to be determined on the issue of an aider and abettor's derivative liability has always been held by the Supreme Court to be the test of whether the perpetrator's criminal act, on which the aider and abettor's derivative criminal liability is based, was the 'probable and natural' [citation], the 'natural and reasonable' [citation], or the 'reasonably foreseeable' [citation] consequence of a criminal act encouraged or facilitated by the aider and abetter.

(*People v. Brigham* (1989) 216 Cal.App.3d 1039, 1050.) Accordingly, the jury's determination should be the foreseeability of whether the perpetrator's act would result in a killing and thus commiting the crime of murder.

Appellant further argues that respondent's reliance on *People v. Medina* (2009) 46 Cal.4th 913, and *People v. Gonzales* (2001) 87 Cal.App.4th 1, is misplaced. (ABM 27-28.) He asserts that the analysis conducted by each court was not intended to alter the doctrine's applicable test, but rather solely intended to consider the sufficiency of the evidence claim. Appellant states, "[t]he court focused on the foreseeability of the shooting because that was the asserted deficiency in the evidence." (ABM 27.) As clearly acknowledged by respondent, while sufficiency of the evidence was the issue pending before the *Medina* and *Gonzales* courts, the rationale was instructive. Indeed, the rationale was not only instructive, but on point with the current CALCRIM instructions. Here, the jury first

determined, pursuant to CALCRIM No. 403, that it was reasonable for a person in appellant's position to "have known that the commission of the crime of murder was a natural and probable consequence of the commission of the assault or disturbing the peace." (10 CT 2864-2865.) The jury was then instructed to determine whether appellant was guilty of murder (CALCRIM No. 520) and to then determine the degree of murder based on whether Che acted willfully, deliberately, and with premeditation. (10 CT 2867-2869.) Accordingly, the instructions properly instructed the jury to first determine whether the killing – the criminal harm - was foreseeable, to then determine whether appellant was guilty of murder, and to finally consider the degree. (See *Prettyman*, at p. 260.)

II. RETROACTIVE EFFECT IS NOT PROHIBITED BECAUSE THE JUDICIAL CONSTRUCTION IS CONSISTENT WITH THE CURRENT STATE OF THE LAW

Appellant argues that, to the extent this Court finds that liability for first degree murder based on premeditation may be properly imposed on one who aids and abets the target crime and where murder is a foreseeable consequence of the target crime, retroactive effect must not be given because such a construction would be unexpected and violate due process. (ABM 34-36.) Respondent disagrees.

The due process clause "bars retroactive application of a judicial construction of a criminal statute that is unexpected and indefensible by reference to the law expressed before the conduct in issue." (*People v. Crew* (2003) 31 Cal.4th 822, 853, citing *People v. Martinez* (1999) 20 Cal.4th 225, 238; see also *Bouie v. City of Columbia* (1964) 378 U.S. 347, 354.) Here, it cannot be said that liability for first degree murder based on premeditation may be properly imposed on one who aids and abets the target crime and where murder is a foreseeable consequence of the target crime is either unexpected or indefensible given the doctrine's objective.

As stated above, the doctrine seeks to make aiders responsible for the "criminal harms they have naturally, probably and foreseeably put in motion." (*Prettyman*, at p. 260.) In the context of murder, the standard instructions correctly instructed the jury to determine whether the murder was foreseeable, whether appellant was guilty of murder, and to finally determine the degree of murder. (*Ibid.*) Thus, a finding that an aider and abettor may be liable for first degree premeditated murder if a murder was reasonably foreseeable is neither unexpected nor indefensible.

III. RESPONDENT'S CLAIM OF HARMLESS ERROR IS PROPERLY BEFORE THIS COURT; ANY ERROR WAS HARMLESS

Appellant argues that the harmless error claim is not properly before this Court because it was not raised in the respondent's brief or in the Petition for Review and is not a fairly included issue on review. (ABM 36-37.) He also argues that the error was not harmless beyond a reasonable doubt. (ABM 37-46.) Again, respondent disagrees.

California Rules of Court, rule 8.516, subdivision (a)(1), provides as follows:

> On or after ordering review, the Supreme Court may specify the issues to be briefed and argued. Unless the court orders otherwise, the parties must limit their briefs and arguments to those issues and any issues fairly included in them.

Contrary to appellant's contention, a harmless error analysis is an issue fairly included within the issue that was briefed in this case, and this Court has the authority to consider it. A determination of whether the jury was correctly instructed on the doctrine may fairly include the consideration of whether, if the jury was not properly instructed, any error was harmless. (See, e.g., *People v. Perez* (2005) 35 Cal.4th 1219, 1228 [although not part of the People's petition for review, this Court considered it because "[t]he issue whether aiding and abetting liability requires proof that the elements

of the predicate offense were committed by another, as we have determined it does, necessarily includes the issue whether the court's error in instructing the jury on aiding and abetting in the absence of such evidence was harmless."].)

For the reasons set forth in the Opening Brief on the Merits, respondent contends that error, if any, was harmless beyond a reasonable doubt. (BOM 24-26.) Appellant argues that "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 [direct aiding and abetting]." (ABM 40.) Appellant takes exception with respondent's argument that he was aware "that Che was armed and would use the firearm *if provoked*" because provocation is consistent with second degree murder. (ABM 40, emphasis in original.) While provocation may generally reduce murder from first to second degree, appellant's argument ignores the evidence in this case. When considering the evidence in the light most favorable to the verdict, Che was initially unarmed during the fight. He only became armed when appellant ordered him to get the gun. Che also only fired the gun when, after some consideration, appellant repeatedly ordered him to do so. (3 RT 712-717, 746, 749, 751-753, 797-800, 826-828, 836-837, 859-863; 10 CT 2719-2720, 2757-2758, 2787-2788.) Appellant certainly had the knowledge that Che would use the gun if provoked; however, the evidence demonstrates that Che fired the weapon with premeditation and deliberation at appellant's repeated commands.

Appellant also makes much of the jury's manner of deliberation and speculates that it demonstrates the jury convicted him by application of the doctrine. He argues that "[i]f 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 a direct aiding and

abetting, and standing-in-shoes theory would not have been a problem." (ABM 45.) The record belies this argument.

Following the close of evidence and the prosecution's opening argument, defense counsel argued the case in a manner found objectionable to both the court and prosecution because he asked for sympathy based on appellant's age and comparative fault. (6 RT 1684-1691.) Among other things, counsel argued that appellant should not be held responsible for the "idiot" Che's behavior and that it was unfair to "pin all of this on [appellant] just because he is the one that happens to be here." (6 RT 1664-1666, 1672-1674.) During its deliberations, the jury sent out a note stating, "We are stuck on Murder I or Murder II due to personal views. What do we do?" (10 CT 2895, 2898.) Approximately two hours later, while court and counsel were discussing the previous communication, the jury sent a follow-up communication: "We are at a stale mate." (10 CT 2895, 2898; 6 RT 2057.) After properly determining that just one juror, Juror No. 1, was unable to make a decision based on her inability to withstand the pressure from the other jurors and follow the law of aiding and abetting, Juror No. 1 was removed. (VI RT 2061- 2075, 2080- 2145.) The jury then continued with its deliberations. (ART 2-3.)

Contrary to appellant's argument, the record reveals a seemingly unanimous jury, with the only exception being Juror. No. 1, who found appellant guilty of first degree murder early in its deliberation. The foreman explained as follows:

> Well, she could not see Bobby stepping in. Basically, the way we explained it was Bobby stepping into Rickie Che's position as the murder happened, and she could not understand how he could be put into that position at that time with those circumstances that it happened after we had deliberated through what we thought was murder one or murder two which she went along with.

(6 RT 2074-2075.) This jury was not "deadlocked on whether appellant should be held guilty of first degree murder as well, or of second degree murder." Rather, the record shows that the jurors only deliberated between first and second degree murder because Juror No. 1 was willing to go "along with" second degree murder. The record also does not establish that the jurors "were divided over the standing-in-shoes theory." (ABM 45.) Appellant, therefore, has mistakenly attributed the beliefs of the sole holdout juror to the other remaining jurors. Appellant's argument is without merit.

CONCLUSION

For the foregoing reasons and the reasons set forth in the Opening Brief on the Merits, respondent respectfully asks this Court to reverse the judgment of the Court of Appeal and reinstate the judgment of conviction for first-degree murder against appellant.

Dated: March 14, 2013

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
MICHAEL P. FARRELL
Senior Assistant Attorney General
ERIC L. CHRISTOFFERSEN
Supervising Deputy Attorney General

JENNEVEE H. DE GUZMAN
Deputy Attorney General
Attorneys for Plaintiff and Respondent

SA2012306845
31641861.doc

CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S REPLY BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 3,955 words.

Dated: March 14, 2013

KAMALA D. HARRIS
Attorney General of California

JENNEVEE H. DE GUZMAN
Deputy Attorney General
Attorneys for Plaintiff and Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: People v. Chiu No.: **S202724**

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 with postage thereon fully prepaid that same day in the ordinary course of business.

On March 18, 2013, I served the attached **RESPONDENT'S REPLY BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

Scott Concklin
Attorney at Law
2205 Hilltop Drive, No. PMB 116
Redding, CA 96002

Central California Appellate Program
2407 J Street, Ste. 301
Sacramento, CA 95816

Court of Appeal
Third Appellate District
621 Capitol Mall, 10th Floor
Sacramento, CA 95814

Sacramento County District Attorney
901 G Street
Sacramento, CA 95814

Sacramento County Superior Court
720 9th Street
Sacramento, CA 95814

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 March 18, 2013, at Sacramento, California.

_____
Declarant

SA2012306845
31642353.doc