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June 25, 2014



Frank A. McGuire
Court Administrator and Clerk
350 McAllister Street
Supreme Court of California
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:

In its May 14, 2014 order, this court ordered the parties to submit simultaneous reply briefs to the supplemental letter briefs filed by the parties. In appellant's supplemental letter brief (ASLB), he argued: (1) the portion of CALCRIM No. 402 requiring the nontarget crime not to have been committed for a reason independent of the common plan to commit the target offenses is an incorrect statement of law (ASLB 2); (2) CALCRIM No. 402 as a whole is an incorrect statement of law to the extent that it allows an aiding and abetting defendant to be liable for the reasonably foreseeable nontarget crimes committed by any "co-participant" to the target offense (ASLB 11); and (3) the murders in this case may or may not have been committed for a reason independent of the common plan to commit the target offenses (ASLB 15).

Respondent agrees the jury should not have been required to find that the nontarget offense was not committed for an independent reason; however, the error did not prejudice appellant as it inured to his benefit. An analysis of the balance of CALCRIM No. 402 is outside of the scope of this court's order, but, in any event, appellant's concerns regarding the instruction as a whole are without merit. Finally, assuming the jury was correctly instructed, because the jury's finding that the murders were not committed for an independent reason was supported by the evidence, appellant's convictions should be affirmed.

With respect to the portion of CALCRIM No. 402 at issue, appellant and respondent both agree the jury was erroneously instructed that it must find the nontarget offense was committed for a reason independent of the common plan to commit the target offenses. Both parties agree that determining liability ultimately hinges on the foreseeability of the nontarget offense; the "reason" for committing that offense is, at most, one relevant factor toward that determination. As appellant notes, courts of appeal have rejected prior attempts by defendants to "engraft" language nearly identical to the language at issue here from jury instructions pertaining to conspiracy cases onto instructions pertaining to aiding and abetting. (ASLB 2, citing *People v. Brigham* (1989) 216 Cal.App.3d 1039 (*Brigham*).) As the *Brigham* court stated, in the context of aiding and abetting, such instructions are "foreign" to the law of aider and abettor liability because the "ultimate factual question" in determining liability is simply whether the nontarget offense was reasonably foreseeable. (*Brigham*, *supra*, 216 Cal.App.3d at p. 1050.) As the court succinctly stated, "A subjective inquiry as to whether the perpetrator's committed crime was the 'independent product' of his mind, so as to lead to exculpation of the aider and abettor on that basis, is improper because the ultimate factual determination of the jury as to the liability of an aider and abettor is based instead on an objective analysis of causation; i.e., whether the committed crime was the natural and probable consequence of the principal's criminal act the aider and abettor knowingly encouraged or facilitated." (*Id.* at p. 1051.)

While the parties agree the language at issue was incorrect, the issue of prejudice is disputed. Appellant argues reversal is necessary (see ASLB 10–11) but fails to explain how the erroneous instruction could not have inured to his benefit at trial, as it required the jury to make an unnecessary, additional finding before it could find him guilty. (See *People v. Santana* (2013) 56 Cal.4th 999, 1011; see also *People v. Dayan* (1995) 34 Cal.App.4th 707, 717 ["That the trial court here gave an instruction beneficial to the defendant does not provide him with a reason to complain on appeal"].) Here, in order to convict appellant, the jury had to find *not only* that the murders were reasonably foreseeable, but *also* that they were not committed for an independent reason. Because the erroneous language benefitted appellant, his convictions should be affirmed.

Appellant next argues CALCRIM No. 402, as a whole, misstates the law pertaining to the natural and probable consequences doctrine because it allowed the jury to convict him "if the fatal shots were fired by anyone in the crowd that assembled to watch the fight." (ASLB 11.) A consideration of CALCRIM No. 402, in its entirety, is outside the scope of the court's order for supplemental briefing. However, in any event, appellant's argument is incorrect. Under the instructions given to the jury, the jury could not have convicted appellant if the shots were fired by someone who was merely there to watch; rather, the shots must have been fired by a "co-principal," defined as either a

perpetrator or an aider and abettor to the target offense. (41 RT 8283.) Thus, the jury must have found that the shooter was not only there to watch, but was present with knowledge of the target crimes and with the intent to assist with, encourage, or facilitate the commission of those offenses. In short, the jury had to have found that the nontarget offense was committed by one who either directly committed, or aided and abetted in the commission of, the target offense; attending the fight "to watch" only, without the requisite intent, would have been insufficient.

Appellant's larger point appears to be that even if the nontarget crime was committed by a co-principal (as opposed to someone who did not aid and abet the target offense), he still should not be liable. (See ASLB 12.) This argument, which is essentially a reiteration of appellant's central claim from his Brief on the Merits, must also be rejected as a misunderstanding of the underpinnings of the natural and probable consequences doctrine.

While the natural and probable consequences doctrine may have common law origins, in California, the doctrine is irrefutably tethered to Penal Code section 31. (See *People v. Prettyman* (1996) 14 Cal.4th 248, 292 (*Prettyman*) [citing to Penal Code section 31 as the "statutory authority undergirding the natural and probable consequence theory of accomplice liability"].) Penal Code section 31 defines "principals" to a crime as "[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 . . . ." Penal Code section 31 thus answers the question of who should be held liable for a target crime in exceedingly broad terms: all those "concerned" are liable.

Despite this, appellant argues that in the context of the natural and probable consequences doctrine, a principal to the target offense should only be liable for the foreseeable nontarget crimes committed by *some*, but not all, of those concerned in the target offense. This argument, though, runs counter the underlying purpose of section 31, which is to ensure that liability attaches to all those concerned in the commission of a crime, and to the underlying purpose of the natural and probable consequences doctrine, which is to hold defendants liable "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.) Moreover, as set forth more fully in Respondent's Answer Brief on the Merits (RABOM), application of appellant's version of the natural and probable consequences doctrine would be unworkable because it would require the sort of fine-toothed parsing among participants to an offense this court has explicitly declared to be unnecessary when determining liability as a principal. (RABOM 26, 2933; *People v. McCoy* (2001) 25 Cal.4th 1111, 1120.) In short, appellant's jury was

properly instructed that if appellant was a principal to the target offense, he was liable for the reasonably foreseeable crimes committed by any other principal.

Appellant suggests more is required and argues there must be a "relationship" between the aider and abettor and the direct perpetrator in order for the one to be liable for the other's acts. (ASLB 5, 12, 14, 16–17.) But the requisite "relationship" in the context of the natural and probable consequences doctrine is that, as co-principals, both appellant and the shooter joined together for the purpose of committing the target crime. As such, each is liable for the other's acts so long as they are reasonably foreseeable.

Finally, with respect to the "independent reason" portion of the instruction, appellant posits that even if the instruction were correct, there was no way of knowing whether the murders were committed for an independent reason because there was no way of definitively knowing who fired the fatal shots. (ASLB 15.) Appellant, however, admits that there were "possible reasons why the shooting was connected to the 'common plan.'" (ASLB 15.)

This court's question was whether there was "evidence in the record to support a jury finding that the murders of this case were not committed for a reason independent of the common plan to commit the disturbing the peace or assault or battery." By acknowledging that there were possible reasons why the murders were connected to the common plan, appellant appears to concede such evidence was present. His additional contention that the ultimate "reason" for the shooting cannot be known because the identity of the shooter or shooters cannot be definitively known is of no avail. The bottom line is, the shots were fired by one or more of the gang members who assembled for the specific purpose of (at a minimum) facilitating, assisting with, or encouraging a battery. There was *no* evidence from any of the parties that the shots were fired by disinterested bystander or by anyone unconnected with the target jump out. Even if there were, the requirement that the murders were committed by a "co-principal" meant that the jury could not find appellant guilty if it found that the murders were committed by such an individual. Rather, the fact that all of the evidence indicated the shooter was a principal to the target crime combined with the timing of the shots – immediately after appellant pulled his brother from the fight and swung at another participant – serves as strong circumstantial evidence that the shooter's reason for firing was not "independent" but was instead directly related to the common plan to commit the target offenses.

Accordingly, appellant's convictions for second degree murder should be affirmed.

Sincerely,

Kathryn Kirschbaum

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Deputy Attorney General
State Bar No. 279694

For Kamala D. Harris
Attorney General

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

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

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

On June 27, 2014, I served the attached **REPLY BRIEF TO 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:

Paul Zellerbach
District Attorney – Riverside
3960 Orange Street
Riverside, CA 92501

Clerk of the Court
For the Honorable Patrick F. Magers
Riverside County Superior Court
4100 Main Street
Riverside, CA 92501

California Court of Appeal
Fourth Appellate District, Division Two
3389 12th Street
Riverside, CA 92501

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 27, 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 27, 2014, at San Diego, California.

D. Wallace
Declarant

D. Wallace
Signature

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