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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

ANSWER TO PETITION FOR REVIEW

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Appellant **BOBBY CHIU** submits this Answer to Petition for Review filed by the People in the above cited case.

ISSUE PRESENTED.

The People posit the following issue for review:

> "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

1. Issue raised on appeal.

Appellant appealed his conviction for first degree murder by claim, *inter alia*, that the instructions on the natural and probable consequence doctrine failed to require that the jury find that the charged offense (first degree murder) was a natural and probable consequence of target offenses.

The natural and probable consequence instruction given in this case allowed the jury to convict appellant "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 aiding and abetting 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 examining whether the *perpetrator* was guilty of first degree murder, by acting willfully, deliberately, and with premeditation.

As appellant claimed on appeal, 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

aiding and abetting 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 aiding and abetting target offense, the instructions were in error.

2. Court of Appeal decision.

The Court of Appeal agreed with appellant on this issue. Applying *People v. Woods* (1992) 8 Cal.App.4th 1570, 1586-1587 and *People v. Hart* (2009) 176 Cal.App.4th 662, 673, the Court of Appeal held that:

> "...the instructions were deficient because they failed to inform the jury it needed to decide whether first degree murder, rather than just 'murder,' was a natural and probable consequence of the target offense. The absence of such an instruction means that if the jury used the natural and probable consequences theory to return the first degree murder conviction, the jury necessarily convicted defendant of first degree murder simply because that was the degree of murder the jury found the perpetrator committed, and the jury never determined whether a reasonable person in defendant's position would have known that premeditated murder (*i.e.*, first degree murder) was likely to happen (if nothing unusual intervened) as a consequence of either target offense. Because this possibility exists, we must reverse defendant's first degree murder conviction." (Slip Opinion, at p. 21.)

ARGUMENT OPPOSING PEOPLE'S PETITION FOR REVIEW

A. NO NEED TO SECURE UNIFORMITY OF DECISION.

Respondent posits the following issue for review: "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?"

That question has already been answered in *People v. Prettyman* (1996) 14 Cal.4th 248, where this Court declared that "to 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." (*Id.* at p. 262, emphasis added.) "The *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. Instructions describing each step in this process ensure proper application by the jury of the 'natural and probable consequences' doctrine." (*Id.* at p. 267, emphasis added.)

Here, the prosecution charged appellant with first degree murder, and urged a conviction on a natural and probable consequence theory. The prosecutor argued that the first degree murder committed by an accomplice should be charged to appellant because it was the natural and probable consequence of aiding and abetting an assault and/or breach of peace. Under that theory, "first degree murder" was "the offense committed" by the accomplice. Thus, as *Prettyman* requires, the jury should have been instructed to find that "the offense committed" (*i.e.*, first degree murder) "was a natural and probable consequence of the target crime that the defendant aided and abetted." (*Id.* at p. 262.)

An instruction directing the jury to find that simple "murder" is the natural and probable consequence of a target crime does not meet that requirement. The offense committed was "first degree murder," not just "murder." Because the prosecution sought to hold appellant liable for "first degree murder" on a natural and probable consequence theory, the jury should have been required to find that "first degree murder" was the natural and probable consequence of his actions. For the jury to find appellant guilty of "first degree murder" on that theory, it was not enough for the jury to find that simple "murder" was the natural and probable consequence of his actions. If appellant was to be found guilty of "first degree murder" on a natural and probable

consequence theory, the jury should have been instructed on the need to find that "first degree murder" was a natural and probable consequence.

In an attempt to demonstrate a need to secure uniformity of decision, the People identify an entirely different controversy in the case law. The People claim a conflict between *People v. Cummins* (2005) 127 Cal.App.4th 667 and *People v. Hart, supra,* 176 Cal.App.4th 662. The People also suggest that review should be granted because a related issue is pending in *People v. Favor* (2010) 190 Cal.App.4th 770 [review granted March 16, 2011, case number S189317], where the issue on review is: "In order for an aider and abettor to be convicted of attempted willful, deliberate and premeditated murder by application of the natural and probable consequences doctrine, must a premeditated attempt to murder have been a reasonably foreseeable consequence of the target offense, or is it sufficient that an attempted murder would be reasonably foreseeable?"

The controversy that the People identify involves *attempted* murder as defined by Penal Code section 664, subdivision (a), which is an analytically different problem than the issue presented here. This is so because Penal Code section 664, subdivision (a), "does not create a greater degree of attempted murder, but rather constitutes a penalty provision..." (*People v. Lee* (2003) 31 Cal.4th 613, 404, citing *People v. Bright* (1996) 12 Cal.4th 652, 655-657.) *Prettyman*, which held that the jury must find that "the offense" committed by the confederate was a natural and probable consequence, does not necessarily compel the conclusion that the jury must likewise find that a "penalty provision" is a natural and probable consequence of a target offense. The resolution of that issue should no have a direct impact the resolution of this case.

First degree murder is not a "penalty provision" that elevates the penalty for murder. Nor is it correct to say that first degree murder and second degree murder are

merely different degrees of the crime of murder. 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.) *Prettyman* requires that the jury be instructed to find that "the offense committed" by the accomplice is a natural and probable consequence. When the People seek to use the natural and probable consequence doctrine to convict an aider and abettor of first degree murder based on a first degree murder committed by an accomplice, first degree murder is "the offense." The jury should be required to find that "the offense" of first degree murder is a natural and probable consequence. That concept is not controversial, nor is there any conflict in the case law on that point.

B. NO NEED TO SETTLE ISSUE OF LAW.

Because the People appear to be challenging settled law, there is no need to grant review to settle an issue of law. The point that the People challenge was settled in *Prettyman*, where this Court declared that "to 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, supra,* 14 Cal.4th 248, 262.)

The People claim that "the Third District's approach is a departure from this Court's jurisprudence regarding the doctrine of natural and probable consequences." (People's Petition for Review, p. 11.) The People emphasize that "the doctrine of natural and probable consequences 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.' [Citation.]" (*Ibid*, citing *People v. Prettyman, supra*, 14 Cal.4th at p. 260.) Although the general policy behind the natural and probable consequence doctrine is hold the aider and abetter responsible for

"harm," application of the doctrine requires a finding that the "offense" was a natural and probable consequence. (*People v. Prettyman, supra,* 14 Cal.4th 248, 262, 267.)

The People also cite *People v. Medina* (2009) 46 Cal.4th 913, 920-927, to argue that "in examining whether a charged offense was reasonably foreseeable, this Court has not analyzed the foreseebility of the charged offense element-by-element." (*Ibid.*) Respondent concludes that: "This Court's approach, which focuses on whether the ultimate outcome was foreseeable, does not support the Third District's approach, which teases out a particular element of the charged offense and requires that the jury find that isolated element to be foreseeable." (People's Petition for Review, p. 11.) The issue in *Medina*, however, involved the sufficiency of the evidence and the operation of the substantial evidence rule. *Medina* did not address the issue of jury instructions, and it does *Medina* support the People's claim that the jury need not find that the elements of the nontarget offense are foreseeable. Again, according to *Prettyman*, the jury must be instructed to find that "the offense" committed by the accomplice is a natural and probable consequence. (*People v. Prettyman, supra,* 14 Cal.4th 248, 262, 267.) Because the elements of the offense define the offense, the jury must find that the charged offense was a natural and probable consequence, as defined by the elements of the offense. If the defendant is to be convicted of first degree premeditated murder, the jury should be required to find that the offense of first degree premeditated murder (as defined by the elements) was a natural and probable consequence. A finding that some lesser included offense (such as second degree murder) was foreseeable as a natural and probable consequence does not serve as a finding that a greater offense (such as first degree murder) is a natural and probable consequence.

CONCLUSION

For the reasons set forth above, appellant requests that the People's Petition for Review be denied.

Respectfully Submitted,

Dated: 5/31/2012

Scott Concklin
Attorney for Appellant

WORD COUNT CERTIFICATION

This is to certify that this Petition for Review does not exceed 8,400 words, including footnotes. The computer word processing program that produced this document returned a word count of 2047 words.
Dated: 5/31/2012

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: 5/31/2012

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

ANSWER TO PETITION FOR REVIEW

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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