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**THE NATURAL AND PROBABLE CONSEQUENCES
DOCTRINE**

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**NATURAL AND PROBABLE
CONSEQUENCES:
THE ROLLER COASTER RIDE
OF CALIFORNIA LAW**

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INTRODUCTION

More than one commentator has posited that a majority of murder, and other violent crimes, in California are gang related with extensive allegations of gang affiliation. Due to the nature of such crimes - - multiple individuals and lack of physical or testimonial evidence - - the prosecution nearly always relies upon aider and abettor theories of criminal liability.

Under a “traditional” aider and abettor theory, defendants can be convicted if they merely assist, encourage, or facilitate a crime. They do not have to be the actual perpetrator of the physical crime against the victim, but they must share the perpetrator’s intent to commit that crime. However, California also recognizes another form of aiding-abetting in which defendant’s intent and actions have a much more attenuated connection to the ultimate crime. A defendant can be convicted if he or she aided a "target" crime, which naturally and foreseeably could have led to a more violent crime -- like murder.

These materials are intended to provide a background on the aiding and abetting doctrine as well as an overview of noteworthy developments in California natural and probable consequences law over the past 2-3 years.¹

¹ This discussion relies extensively on materials prepared by FDAP Assistant Director J. Bradley O’Connell for presentations before California Attorneys for Criminal Justice in 2010, 2012 and 2014.

TRADITIONAL AIDING AND ABETTING, NOT INVOLVING NATURAL AND PROBABLE CONSEQUENCES DOCTRINE

- According to the traditional aiding/abetting theory, the aider shares the perpetrator's intent to commit the charged crime. One of the most noteworthy trends in 21st century California homicide jurisprudence has been the de-coupling of the culpability levels of direct perpetrators and aider-abettors:

- **Aider/abettor may be guilty of greater degree of offense than direct perpetrator.**

- ***People v. McCoy* (2001) 25 Cal.4th 1111.**
Aider's level of guilt depends upon own level of culpability. Where multiple participants are involved jointly in committing or causing a killing "the individual mental states or levels of guilt of the joint participants are permitted to float free and are not tied to each other in any way." (Quoting Dressler treatise.) Consequently, an aider/abettor can be guilty of greater degree of offense than actual perpetrator. E.g., Aider may be guilty of murder though actual perpetrator's offense is lesser due to heat-of-passion or imperfect self-defense (as in *McCoy* opinion's Othello example).

- **Conversely, aider/abettor may be guilty of lesser degree of offense than direct perpetrator.**

- ***People v. Nero* (2010) 181 Cal.App.4th 504.** CALCRIM and CALJIC aiding/abetting instructions stating that all principals are equally guilty are misleading. They fail to require jurors to assess aider's distinct mental state and fail to inform them of possibility that aider may be guilty of greater or lesser offense than direct perpetrator. Error prejudicial, where jurors could have found that aider/abettor acted under provocation and heat-of-passion.

NATURAL AND PROBABLE CONSEQUENCES

Some Good News for a Change, Preceded and Followed by Bad News

For at least two decades, the California Supreme Court has pushed the envelope in expanding aider-abettor liability under the “natural and probable consequences” doctrine. Unlike traditional aiding-abetting liability, which requires that the aider share the perpetrator’s intent to commit the charged crime, the NPC doctrine allows an aider who intended only a relatively minor crime to be held vicariously liable for a much greater crime, such as murder, on the theory that it was foreseeable as a “natural and probable consequence” of the “target offense.”

The California courts have allowed even minor target offenses, such as misdemeanor assault or battery, to serve as bases for NPC liability for murder and other crimes of extreme violence, especially in gang-related confrontations.

- **Natural and probable consequences – simple assault as target crime.**
 - *People v Gonzales (2011) 52 Cal.4th 254.*
 - Upholds first-degree murder convictions on natural and probable consequences theory. Gonzales “knew and shared [perpetrator’s] intent to murder [two rival gang members] or, alternatively, knew and shared [perpetrator’s] intent to assault [the victims] with a deadly weapon. Under either theory, Gonzales acted to encourage the shootings by providing armed backup to [perpetrator].” *Gonzales* at 295.
 - In instructing on aiding/abetting and natural and probable consequences theory, through CALJIC 3.02, the court identified the target crime as “assault” and instructed on the definition of simple assault. “Although

the trial court might properly have identified and described the target crime more specifically as assault,” Supreme Court finds no error. “The trial court’s “instruction with a general definition of assault encompassed the circumstances of the assault described by the evidence,” which showed “only the single scenario that [the perpetrator] assaulted [the victims] with his gun.” *Gonzales* at 300.

- In upholding the instruction, Supreme Court rejects argument “that, as a matter of law, simple assault cannot serve as the target offense for murder liability under the natural and probable consequences doctrine.” *Gonzales* at 300. Although *People v. Prettyman* (1996) 14 Cal.4th 248, 269, had “cautioned that a conviction for murder under the natural and probable consequences doctrine could not be based on ‘trivial’ activities, ... nowhere did we suggest that simple assault must be considered trivial for these purposes.” *Gonzales* at 299.
 - ***People v. Medina* (2009) 46 Cal.4th 913.**
- Scenario began with “verbal challenge” by members of defendants’ group – “Where are you from?” which, per testimony, meant “What gang are you from?”
- Dispositive question is “not whether the aider and abettor *actually* foresaw the additional crime, but whether, judged objectively, it was *reasonably* foreseeable.”
- “Given the gang-related purpose of the initial assault ..., the jury could reasonably have found that a person in defendants’ position (i.e., a gang member) would have or should have known that retaliation was likely to occur and that escalation of the confrontation to a deadly level was reasonably foreseeable...”

However, as discussed below, the California Supreme Court unexpectedly imposed policy-based limits on the scope of NPC and has flatly barred the theory's use as a basis for *first-degree* murder.

- **But First the Bad News – Attempted Murder with Premeditation.**

- ***People v. Favor* (2012) 54 Cal.4th 868.**

- An aider/abettor in another crime may be guilty of attempted murder if that offense was foreseeable as a natural and probable consequence of the target offense in which the aider assisted.
 - *But Favor holds that this foreseeability limitation does not apply to the premeditated character of the attempted murder.* Where an aider-abettor is found guilty of attempted murder under the natural and probable consequences doctrine, aider's potential liability for attempted murder *with premeditation and deliberation* (§ 664(a)) depends solely on whether the perpetrator acted with premeditation.
 - *Favor* relied on the odd structure of attempted premeditated murder in California. The base offense of attempted murder has a DSL sentencing triad (5, 7 or 9 years). However, section 664(a) prescribes an indeterminate life term for attempted murder with premeditation. Yet, because § 664(a) is nominally only a "penalty provision," there is no separate "offense" of attempted premeditated murder."
 - According to *Favor*, § 664(a) requires "only that the murder attempted was wilful, deliberate, and premeditated" – i.e., that the perpetrator premeditated. Where the jury finds that attempted murder was foreseeable as a natural and probable consequence of the aider's target offense, an aider is subject to a life term

under § 664(a). But no separate jury finding is required on the foreseeability of the premeditated character of the attempted murder.

- Note that *Favor* overrules *People v. Hart* (2009) 176 Cal.App.4th 662, by holding that the principle that aider can be guilty of lesser crime than direct perp doesn't apply to premeditated attempted murder, due to odd status of premeditation as enhancing fact rather than element of greater offense.

- **Now the Good News - NPC curtailed – *Chiu* bars NPC theory for *first-degree* murder.**
 - ***People v. Chiu* (2014) 59 Cal.4th 155.**
 - The Supreme Court granted review in *Chiu* just shortly after its opinion in *Favor*. As the issue on review was initially framed, it appeared that the Supreme Court was poised to address a parallel issue concerning the foreseeability of premeditation: “Does a conviction for first degree murder as an aider and abettor under the natural and probable consequences doctrine require that premeditated murder have been a reasonably foreseeable consequence of the target crimes or only that murder have been such a consequence?” (*People v. Chiu*, S202724 (AOC summary of issue).) Thus, *Chiu* appeared to present the risk that the Court could extend *Favor*’s reasoning to first-degree murder on the theory that the “offense” was murder and that premeditation only concerns the “degree.”

 - Ultimately, the *Chiu* Court did not decide the foreseeability issue at all, but decided the case on a much broader ground. ***Chiu* squarely holds that an aider-abettor may not be convicted of first-degree premeditated murder on an NPC theory.** *Chiu* at 166-167.

- The Court relied principally on the policy ground that NPC liability for premeditated murder simply pushed this theory of vicarious liability too far, in light of the “uniquely subjective and personal” mental state necessary for premeditation. “[T]he connection between the defendant’s culpability and the perpetrator’s premeditative state is too attenuated to impose aider and abettor liability for first-degree murder under the natural and probable consequences doctrine, especially in light of the severe penalty involved and the ... public policy concern of deterrence.” *Chiu* at 166.
- Consequently, an aider may be held vicariously liable for premeditated murder only on a “traditional” aiding and abetting theory: “[T]he prosecution must show that the defendant aided or encouraged the commission of the murder with knowledge of the unlawful purpose of the perpetrator and with the intent or purpose of committing, encouraging, or facilitating its commission.” *Chiu* at 167.
- The Court emphasized that this holding applied only to first-degree murder based on premeditation, not to felony murder liability, which is independent of the NPC doctrine. *Chiu* at 166.
- Because the first-degree theory in *Chiu* went to the jury on both a valid traditional aiding/abetting theory and an invalid NPC theory, the Court framed the prejudice test in terms of both *Chapman* and the *Green-Guiton-Chun* line of cases on invalid alternative theories: “Defendant’s first degree murder conviction must be reversed unless we conclude beyond a reasonable doubt that the jury based its verdict on the legally valid theory that defendant directly aided and abetted the premeditated murder.” *Chiu* at 167 (citing *People v. Chun* (2009) 45 Cal.4th 1172).

- The error was not harmless because the record (especially mid-deliberations juror questions) “indicate[d] that the jury may have been focusing on the natural and probable consequence theory.” *Chiu* at 168. Because the error went only to degree, the Court’s disposition “allow[ed] the People to accept a reduction of the conviction to second degree murder or to retry the greater offense.” *Chiu* at 168.
- **Likely retroactivity of *Chiu*.**
 - *Chiu*’s repudiation of NPC as a permissible theory of first-degree murder liability represents a significant departure from prior California law (although the opinion doesn’t explicitly acknowledge as much and doesn’t state that it is “overruling” any prior cases). Previous California cases (including Supreme Court opinions) endorsed NPC theories of first-degree murder liability. E.g., *People v Gonzales* (2011) 52 Cal.4th 254, 297-300. Consequently, *Chiu* represents a change in the law.
 - A ruling that narrows the substantive scope of a criminal offense, including one which repudiates a theory of liability, is ordinarily given full retroactive effect (in contrast to procedural rulings which usually apply only to cases not yet “final”). Two recent appellate opinions have applied that principle to another California Supreme Court opinion that significantly curtailed a formerly-recognized theory of murder liability – *People v. Chun* (2009) 54 Cal.4th 1172, which barred use of certain “assaultive” felonies (e.g., §§ 246, 246.3) as predicates for second-degree felony murder. *In re Lucero* (2011) 200 Cal.App.4th 38; *In re Hansen* (2014) 227 Cal.App.4th 906. (See also *In re Johnson* (1970) 3 Cal.3d 404, 410–411 [retroactivity of decisions announcing a new rule of law].)

- Both *Lucero* and *Hansen* found that *Chun* applied retroactively, even to cases which had become “final” long before the *Chun* opinion. The respective defendants were allowed to challenge the submission of the invalid felony-murder theory on habeas corpus. (The error was found prejudicial in *Hansen*, but harmless in *Lucero*.)
- **The reasoning of *Lucero* and *Hansen*, applying *Chun* retroactively on habeas, should apply equally to any case involving submission of a natural-and-probable consequences theory of first-degree murder liability.**
- Evaluating candidates for possible habeas petitions. In deciding whether a defendant might potentially benefit from *Chiu*, counsel should consider the following factors:
 - Verify that the instructions included NPC as one of the theories of first-degree murder liability. (This will likely be evident from the prior appellate opinion and/or the briefs.)
 - Check whether the verdicts, especially enhancement verdicts, indicate whether the jurors convicted on a direct-perpetrator or an aiding-abetting theory of some sort. Obviously, if the jurors found the defendant was the actual killer (for example, by returning a personal use finding under § 12022.53(d)), the submission of an invalid NPC aiding/abetting theory would be deemed harmless.
 - Confirm that the defendant wasn’t convicted on a felony-murder theory (e.g., a felony-murder special circumstance finding or a separate conviction of robbery or another predicate felony in the same incident).

- The hope was that Justice Chin’s opinion opened up the possibility that there may be other instances where an element of the non-target crime is so detached that the natural and probable consequence theory would not serve public policy. Other states do not apply the natural and probable consequences theory, so would it be possible that the California Supreme Court would withdraw, or at least curb, its unjust application?

- **That hope was dashed a mere five months later with the Supreme Court’s opinion in *Smith***
 - ***People v. Smith* (2014) 60 Cal.4th 603.**
 - Here the Supreme Court held that the natural and probable consequences doctrine may support liability for an offense committed for different reason than the target offense, and
 - murders of defendant's fellow gang members were natural and probable consequences of arranging for his brother to try to end his gang membership by undergoing a “jump out.”
 - As a result of the “jump out”, the target crimes were disturbing the peace and assault or battery. Even though the murder victims were defendant's cousin and a friend, and he never remotely intended their deaths, he was convicted of their murders under the natural and probable consequence doctrine. While the defendant, a Gateway Posse member, and members of the rival Pueblo Bishop gang (including the actual gunmen) were normally enemies, they cooperated in staging the jump out and, in so doing, aided and abetted each other in committing the target crimes.

- Defendant argued that the natural and probable consequence doctrine was misapplied in this case. He argues that not all principals in the target crime may be guilty of nontarget crimes, but only some. Specifically, he argues that "the English common law, as incorporated in Penal Code section 31, would not extend accessory liability to the acts of a person who was not directly aided and abetted by the accessory." The Court disagreed. The defendant's murder convictions did not require proof that the nontarget offenses of murder were committed for the same reason as the target offenses.
- The Court held that the last sentence of the pattern jury instruction, CALCRIM No. 402, stating that the natural and probable consequences doctrine does not apply when the nontarget offense is committed for a reason independent of the common plan to commit the target offense, does not correctly state the law of aider and abettor liability.
- The majority did not address the tension between the *Smith* holding and *Chiu*'s concerns that an expansive application of NPC may result in too much attenuation between the individual's own actions and "subjective" mental state and the much greater crime committed by someone else. Unless curbed or clarified by subsequent cases, *Smith* would seemingly allow *all* the participants in a pre-arranged brawl between gangs like the "jump out" to be convicted of murder, if anyone was killed.