In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **MILDRED DELGADO,** Defendant and Appellant.	Case No. S192704

Second Appellate District, Case No. B220174
Los Angeles County Superior Court, Case No. BA337662
The Honorable Ronald Rose, Judge

RESPONDENT'S BRIEF

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
LANCE E. WINTERS
Senior Assistant Attorney General
LAWRENCE M. DANIELS
Supervising Deputy Attorney General
STEVEN D. MATTHEWS
Supervising Deputy Attorney General
DAVID F. GLASSMAN
Deputy Attorney General
State Bar No. 115664
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-2355
Fax: (213) 897-6496
Email: DocketingLAAWT@doj.ca.gov
Attorneys for Respondent

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1. Did the trial court have a duty to instruct on its own motion on an aiding and abetting theory of liability when defendant personally performed some elements of the charged offense and another person performed the remaining elements required to complete the crime?[1]

2. If so, did the Court of Appeal correctly conclude that the trial court's failure to instruct on aiding and abetting was harmless error?

STATEMENT OF THE CASE

A. The Criminal Charges and the Trial Evidence

Appellant was charged with kidnapping Melvin Perez to commit robbery and with robbing Perez (Pen. Code, §§ 209(b)(1), 211; counts 1 and 2). He was also charged with second-degree robbery and with assault with a deadly weapon against a separate victim in a separate incident (§§ 211, 245(1);counts 3 and 4). (CT 89.) Further, the criminal information alleged that appellant personally had inflicted great bodily injury (§ 12022.7(a); counts 1-4) and had used a deadly weapon (§ 12022(b)(1); counts 1-3). The issue in this case relates to the kidnapping in count 1.

1. The Prosecution's Kidnapping Case

Appellant approached Melvin Perez outside a laundry in Los Angeles. Appellant insisted that he knew Perez, but Perez told him, "I don't know you." Nonetheless, the two walked along together and entered a bar. Perez, who already had drunk six beers at home, offered to buy appellant a beer. (2RT 630, 663.) As the men drank, appellant asked Perez to follow him to a friend's house, where appellant was going to get $100. Perez said no; he did not need money. Appellant offered him drugs; but

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[1] As respondent will show, there was substantial evidence that appellant personally performed *all* elements of the crime.

Perez refused. Appellant asked him to accompany him to a friend's house. Perez refused again, so appellant left. (2RT 631.)

A woman at the bar, noticing that appellant had been staring at Perez, summoned Perez's cousin. By the time his cousin got to the bar, Perez was drunk. (2RT 635.) Perez declined his cousin's offer of a ride home. But Perez gave the watch and jewelry he was wearing to his cousin, saying he was concerned about it. The cousin took Perez's watch and jewelry home with him for safekeeping. (2RT 633-634.)

By the time Perez left the bar three hours later, at 2 a.m., he had drunk about eight beers at the bar in addition to the six he had drunk before leaving home. Appellant was outside the bar. (2RT 632.) He was with a woman, who was behind the wheel of a car. They asked Perez if he needed a ride and if he wanted to go drinking with them. Perez said no. (2RT 635-637.)

Appellant grabbed Perez by the shoulder and said, "Come on, let's go in." As Perez later explained, "And since I was drunk, I said, 'Fine.'" Appellant opened the rear passenger door for him. (2RT 637.)

With appellant and the woman in the front seat and Perez in the back, they drove for a few blocks. The woman stopped the car. Appellant got into the back seat. (2RT 638.) Perez asked what was going on. Appellant told him to shut up. When Perez tried to get out of the car, the driver "child-locked" the doors. (2RT 643.)

Appellant asked where Perez had put his jewelry. Appellant started searching Perez's pockets. Then appellant displayed a knife. The woman started driving as the men struggled in the back seat. (2RT 645-646.) Appellant kept insisting that Perez still had his jewelry. He took Perez's wallet, containing $100 or $150. Then, appellant cut Perez near the left eyebrow and along the ribs on his left side. At that point, Perez lost consciousness. (2RT 647-648.)

The next thing Perez remembered, he was about half a block from where he lived. He staggered and wondered where he was. Neighbors saw that he was bloody, and called the police. (2RT 649-650.) Paramedics transported Perez to the hospital, where he spent about eight hours. (2RT 653-654.)

About 10 days later, Perez saw appellant near the bar again. He summoned appellant and said, "Hey! You're the guy who robbed me, huh?" Appellant responded, "Yeah, so what?" and then attempted a kick. Two police cars pulled up. Perez identified appellant to the officers as the person who had robbed him. (2RT 656-657.)

In her search of appellant incident to his arrest, Officer Darin Jarutirasan discovered a knife in appellant's right rear pants pocket. The knife was booked into evidence at the police station. (2RT 711.)

Detective Joe Barragan interviewed appellant at the station. (2RT 912.) During the course of the interview, appellant gave Detective Barragan several versions of events on the night Perez was robbed. However, the detective was able to identify and ultimately locate the car used in the robbery, a black Isuzu Trooper. (2RT 912-915.)

When Detective Barragan inspected the car, he saw what looked like bloodstains on the left rear door panel. (2RT 916.) There was a calendar in the car's center console with "Mildred and Myra" written on it. Mildred is appellant Delgado's first name. (2RT 918.) The registered owner of the trooper was Myra Gonzalez of 549 North Heliotrope Drive, Los Angeles. (2RT 919-920.)

The blood sample from the Isuzu door panel matched Melvin Perez's blood. (2RT 925.) Tests confirmed that the blood on the knife came from Mauro Ramirez, as did the bloodstains on appellant's pants and shoes. (2RT 924-925.)

2. The Defense Case

Appellant testified in his own behalf that he went to the Salsa L.A. bar about two blocks from his home at Beverly and Alexandria, on the evening of March 2, 2008. He had seen Perez in the neighborhood two or three times before that evening, so when he saw him that night, he decided to talk to him. They said hello to one another, and then Perez said that he would buy appellant some beers. Appellant refused. Perez insisted they should go have some beers and Perez would pay for it. Finally, appellant went with Perez for drinks at El Charo. (2RT 933.)

After appellant had drinks with Perez at El Charo, he decided to go home because he was tired from his day at work. Perez did not want him to leave – he wanted him to stay and have more beers. Appellant said he was heading home. Perez said, "No, do not go," but appellant did not pay any attention and left. Appellant told Perez that if he did not believe appellant was going straight home, he should go with him and see for himself. Perez said he was feeling good at the bar and would stay. Appellant left the bar. (2RT 934.)

Appellant returned to El Charo at about 1:30 a.m., because he and Perez had agreed that they would go back to Perez's house and have more beers. He went into El Charo and asked one of the women working there if Perez was still at the bar. (2RT 934.)

Perez was there. He was very drunk. Appellant said, "I'm back. I've arrived. I'm ready. Let's go." Perez followed appellant from the bar. Once outside, appellant saw a woman he had seen two or three times before, waiting in a car. Perez got in the car first. Appellant got a phone call, which he took outside the car. When he finished his call, he got in the front passenger seat. Perez gave the woman his address; she and appellant were just going to drop Perez off at home. (2RT 935.)

Appellant looked in the back seat and saw Perez swigging from a bottle of beer he had carried out of the bar in his pants pocket. Appellant told him to drink the beer fast and throw out the container. They were driving near the new school at Vermont and First, and appellant was concerned that there might be police officers parked there. Perez told appellant that he was a big "scardy-cat," that he was "gay." (2RT 936.)

Appellant got in the back seat with Perez and told Perez to calm down. He turned away for a second, and Perez hit him in the head with the beer bottle. Appellant turned back toward Perez and hit him in the nose. (2RT 936-937.)

Appellant never used a knife to try to stab Perez. He just took the knife out of his pocket because Perez was attacking him with the bottle. (2RT 937.) The injury to Perez's face was not a result of appellant cutting Perez with his knife. Perez got the injury when he hit himself against the corner of the car door frame during the struggle. Perez ran into appellant's knife and injured himself in the rib area. It was never appellant's intention to rob Perez. (2RT 938.) Perez got out of the Trooper after appellant hit him in the nose and he split his forehead on the door frame. (2RT 946.)

At trial, appellant did not remember if he told Detective Barragan during their interview that on the night Perez was robbed, he had told him, "Now . . . you need to be careful. You're gonna die." Appellant asserted, rather, that he was drunk when the detective was interviewing him. He did not tell Detective Barragan that Perez had hit him with a beer bottle because he was drunk. (2RT 952-953.) He did not tell the detective he had been drinking, but Detective Barragan should have smelled the alcohol on his breath and known that he was drunk. (2RT 954.)

Appellant only vaguely remembered that he had first told the detective that he left to go get something to eat, and that while he was gone, his friends might have done something to Perez. He did not remember

telling the detective that he and Perez got into a black car to go drink at Perez's house, and that Perez got mad and got out of the car. He did remember at trial that he told Detective Barragan that he was going to go drink with Perez, that Perez started insulting him, and that they "had problems." (2RT 955.)

But, again, he was drunk. He did not remember telling Detective Barragan that he asked Perez for money to buy beer, or that Perez believed he was being robbed and punched him in the mouth. At trial, he did remember that Perez gave him about $5 dollars to get a couple of beers for the two of them before they went to the bar. (2RT 956.) Appellant did not even know why he was being accused of anything. (2RT 961.)

3. Rebuttal Evidence

Detective Barragan spent about an hour and a half with appellant on the day he was taken into custody. He did not smell alcohol on appellant's breath. (2RT 964.) In appellant's final explanation to the detective the day of the interview, he told Detective Barragan that he planned to rob Perez, take his wallet, and just get rid of him. (2RT 967.)

B. Verdict, Sentence and Appeal

A jury convicted appellant of all counts, and found all enhancements to be true. (CT 130.) The trial court sentenced appellant to state prison for a total prison term of life plus 13 years.

Appellant appealed his conviction. The Court of Appeal, Second Appellate District, Division One, held that the trial court failed to instruct, sua sponte, on aiding and abetting as to the kidnapping offense, but further held the error was harmless. The Court of Appeal affirmed the judgment. (Slip Opinion at pp. 8-10.)

SUMMARY OF ARGUMENT

The Court of Appeal erred as a matter of fact when it determined that appellant did not personally commit the element of asportation required for a kidnapping, and based on that erroneous factual determination concluded that aiding and abetting instructions were required as to the offense of kidnapping for robbery. There was substantial evidence that appellant was an active participant in the asportation of the victim and participated in every element of the offense, as the Court of Appeal essentially recognized in other portions of its decision. One who engages in conduct that is an element of the charged crime is a direct perpetrator, not an aider and abettor, of the completed crime. In this case, because appellant performed all elements of the offense, the trial court was not obligated to instruct on aiding and abetting even if an accomplice performed other acts that also constituted elements of the offense.

As a result, this case does not require this Court to decide the question of whether aiding and abetting instructions are required when a defendant performed some but not all elements of the charged offense, because here appellant personally performed all elements of the charged offense. If, however, this Court determines that the question is presented by the facts of this case, the conclusion remains that aiding and abetting instructions would not be required. As this Court has previously recognized, there are cases in which multiple participants are involved in the actual and active perpetration of the crime. Those participants are direct perpetrators, and not merely aiders and abettors. This is such a case.

The Court of Appeal further erred in determining that the absence of aiding and abetting instructions here removed the element of asportation from the jury's consideration and thereby violated the state and federal Constitutions. The element of asportation was squarely presented to the jury and resolved against appellant with strong evidence. All elements of

the offense were proven against appellant, and there was no lessening of the burden of proof. As a result, and even assuming instructional error for the sake of argument, the Court of Appeal erred in applying a harmless error standard that requires that error be harmless beyond a reasonable doubt.

The Court of Appeal correctly recognized, however, that any error was harmless, even under the *Chapman* standard. The jury was instructed on the elements of the offense and the requirement of proof beyond a reasonable doubt. The evidence established that appellant and his crime partner waited for their victim pursuant to a joint plan to kidnap and rob him. Appellant grabbed the victim and ushered him into a waiting car. While appellant's confederate drove, appellant stabbed and robbed the victim. A rational jury would have found appellant guilty of kidnapping had aiding and abetting instructions been given, just as this jury convicted him without those instructions.

ARGUMENT

I. THE TRIAL COURT DID NOT HAVE A DUTY TO INSTRUCT ON AN AIDING AND ABETTING THEORY OF LIABILITY FOR KIDNAPPING WHEN THERE WAS SUBSTANTIAL EVIDENCE THAT APPELLANT PERSONALLY PERFORMED ALL ELEMENTS OF THE OFFENSE OF KIDNAPPING

Appellant, convicted of kidnapping to commit robbery and robbery, contends the trial court should have instructed the jury sua sponte on aiding and abetting principles as to the kidnapping offense. Because appellant did not drive the car in which the victim was transported during the crimes, appellant claims that, in the absence of aiding and abetting instructions, the jury might have convicted him of kidnapping without proof that he moved the victim or made him move a substantial distance by use of force or fear. (AOB 11-20.)

The Court of Appeal agreed with appellant that his jury should have been instructed on aiding and abetting as to the kidnapping offense. It

reasoned that, while there was evidence appellant "orchestrated" the crimes against victim Melvin Perez, the record did not reflect that appellant had personally moved or caused the victim to move a substantial distance. Consequently, in the Court of Appeal's view, appellant could not properly be found guilty of kidnapping as the direct perpetrator under the instructions given in this case, and it was error (albeit harmless beyond a reasonable doubt) not to further instruct the jury on aiding and abetting.

The Court of Appeal's determination of error was incorrect, factually and legally.

Appellant's jury was properly instructed on the elements of kidnapping for purposes of robbery, in relevant part as follows:

> To prove that the defendant is guilty of this crime, the People must prove that:
>
> 1. The defendant intended to commit robbery;
>
> 2. Acting with that intent, the defendant took, held, or detained another person by using force or by instilling a reasonable fear.
>
> 3. Using that force or fear, the defendant moved the other person or made the other person move a substantial distance;
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> 4. The other person was moved or made to move a distance beyond that merely incidental to the commission of a robbery;
>
> 5. When that movement began, the defendant already intended to commit robbery;
>
> AND
>
> 6. The other person did not consent to the movement.
>
> As used here, substantial distance means more than a slight or trivial distance. The movement must have substantially increased the risk of physical or psychological harm to the person beyond that necessarily present in the robbery. In

deciding whether movement was sufficient, consider all the circumstances relating to the movement.

(CT 119-120.)

That jury was also instructed as follows:

To prove that the defendant is guilty of the crime of Kidnapping, the People must prove that:

1. The defendant took, held, or detained another person by using force or by instilling reasonable fear;

2. Using that force or fear, the defendant moved the other person or made the other person move a substantial distance.

3. The other person did not consent to the movement;

AND

4. The defendant did not actually and reasonably believe that the other person consented to the movement.

(CT 121.)

At trial, there was ample evidence to support the jury's finding that appellant committed asportation. The victim testified appellant "grabbed" him by the shoulder and said, "Come on, let's go in." The victim also testified that appellant "didn't exactly push me in, but, he kind of tried to and, you know, I went in . . . . " (2RT 637.) Clearly, then, the victim was "moved or made to move" by appellant, and was moved from a public street to a waiting vehicle. Appellant also participated in the asportation by preventing any escape: appellant told the victim to shut up after the victim asked what was happening, and, after the victim tried to get out of the car, appellant struggled with the victim as the car was driving away, and ultimately stabbed and robbed the victim during the drive. (2RT 643, 645-648.) The jury was adequately instructed on the elements of asportation. Nothing more was required to establish his guilt of asportation, and the record supports the jury's finding of asportation.

Nevertheless, the Court of Appeal made the factual finding that appellant did not commit the element of asportation merely because he did not drive the vehicle in which the victim was transported during the crimes. (Slip Opn. at p. 8.) But as the Court of Appeal elsewhere acknowledged, the evidence showed that appellant had "grabbed" the victim by the shoulder and "ushered" him into the waiting car. (Slip Opn. at p. 9.) Accordingly, the Court of Appeal's factual conclusion regarding asportation – that "the record does not reflect that [appellant] personally moved or caused [the victim] to move a substantial distance" (Slip Opn. at p. 8) is not only inconsistent with its own description of the events but is incorrect on the record.

The Court of Appeal's factual conclusion regarding asportation is also irreconcilable with its repeated description of the evidence elsewhere in the opinion. Specifically, the Court of Appeal stated that, when the victim initially declined to get into the waiting vehicle, appellant "opened up the rear passenger door, grabbed [the victim] by the shoulder and said, "come on in, let's go." (Slip Opn. at p. 3.) And, when deciding that the lack of aiding and abetting instructions was harmless beyond a reasonable doubt, the Court of Appeal acknowledged that appellant *had* caused the victim to be moved and observed that appellant had waited for the victim and "insisted" he get into a waiting car according to a preconceived plan between the perpetrators "that included asportation of the victim." (Slip Opn. at p. 10.)[2] For these reasons, the factual predicate of the Court's legal analysis is flawed.

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[2] Appellant is similarly wrong about the facts when he asserts in his opening brief in this Court that he "did not move the victim . . . ." (AOB 10.) Appellant moved the victim by causing him to be driven away.

The Court of Appeal's legal interpretation is also problematic. This Court recognized in *People v. McCoy* (2001) 25 Cal.4th 1111, that multiple active participants in an offense are often both direct perpetrators and aiders and abettors and that, while each active participant's criminal liability is based upon his own mens rea, the remaining elements of the crime may be established from the combined acts of all principals. This Court observed:

> [T]he dividing line between the actual perpetrator and the aider and abettor is often blurred. It is often an oversimplification to describe one person as the actual perpetrator and the other as the aider and abettor. When two or more persons commit a crime together, both may act in part as the actual perpetrator and in part as the aider and abettor of the other, who also acts in part as an actual perpetrator. Although Lakey was liable for McCoy's actions, he was an actor too. He was in the car and shooting his own gun, although it so happened that McCoy fired the fatal shots. Moreover, Lakey's guilt for attempted murder might be based entirely on his own actions in shooting at the attempted murder victims. In another shooting case, or in a stabbing case, one person might restrain the victim while the other does the stabbing. In either case, both participants would be direct perpetrators and aiders and abettors of the other. The aider and abettor doctrine merely makes aiders and abettors liable for their accomplices' actions as well as their own. It obviates the necessity to decide who was the aider and abettor and who the direct perpetrator or to what extent each played which role.

(*Id.* at p. 1120.)

That principle is vividly illustrated by the facts of appellant's case. The prosecution's evidence showed a coordinated, concerted action by appellant and his crime partner and established that, although each perpetrator committed different discrete acts, appellant orchestrated the kidnapping and robbery and actively participated in the underlying conduct. Appellant, along with his female associate, waited for the victim outside a bar at closing time. When the victim emerged, appellant grabbed him by the shoulder, ushering him into a waiting car driven by the woman. The woman proceeded to drive a block or so, stopped to allow appellant to

climb into the back seat with the victim, and immediately locked the doors to prevent the victim from escaping.[3] The driver then drove on silently while appellant robbed and stabbed the victim, and drove off with appellant after he pushed the victim out of the vehicle. (2RT 632-648.)

The Court of Appeal did not address *McCoy*, despite respondent's reliance on it. In these circumstances, as in *McCoy*, appellant was a direct perpetrator of kidnapping; not merely an aider and abettor. Appellant, not the driver, steered the victim into the waiting car. But for appellant's conduct, the victim would not have been moved a substantial distance. Appellant thereby actively and personally participated in the asportation, and the jury so found. The fact that appellant did not drive the car is not determinative under *McCoy* in evaluating his role as a direct perpetrator of kidnapping, and did not preclude him from participating in the asportation of the victim. In concluding otherwise, and finding that appellant did not cause the victim's movement, the Court of Appeal adopted an overly narrow view of the evidence, failed to afford deference to the jury's factual determination, and failed to account for *McCoy*.

In *People v. Cook* (1998) 61 Cal.App.4th 1364 (*Cook I*), a case decided before *McCoy*, the defendant stabbed the victim while his accomplice took a bag with beer away from the victim's immediate presence. The Court of Appeal in *Cook I* rejected the defendant's contention that the trial court should have instructed the jury on aiding and abetting robbery and robbery-murder. (*Id.* at p. 1368.) In holding that the defendant was a direct perpetrator of the robbery even though he did not physically deprive the victim of his property, the Court of Appeal cited

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[3] Only appellant – not the driver – used force to move the victim. Therefore, appellant's liability for the element of asportation was literally hands-on and personal.

People v. Talamantez (1985) 169 Cal.App.3d 443, and *People v. Rose* (1997) 56 Cal.App.4th 990, 994. In *Rose*, the defendant was held to be a direct perpetrator where she entered a store with another person intending to aid in the taking of a handbag but the other person took the handbag. (*People v. Cook, supra*, 61 Cal.App.4th at pp. 1369-1370.) The *Cook I* court held that because the defendant actually committed one of the elements of the robbery, he had been a direct perpetrator, and not only an aider and bettor:

> In this case, the uncontradicted evidence (apart from the identity issue) was that defendant provided the "force or fear" necessary to accomplish the robbery. As such, he was one of the direct perpetrators of the offense of robbery, even if he did not physically deprive the victim of his property. No aiding and abetting instruction was necessary. In determining that defendant actually committed the robbery, the jury necessarily found he had the specific intent to deprive [the victim] of the beer. There was no requirement that the jury also find that he had the specific intent or purpose to facilitate [the friend's] commission of the crime.

(*Id.* at p. 1371; see also *People v. Troy* (1985) 41 Cal.3d 1, 12.)

As the Court of Appeal observed in *Cook*, at common law, principals in a crime were divided into two degrees. A principal in the first degree "engages in *criminal conduct* by his own hand" or commits the crime through his constructive presence. (*People v. Cook (I), supra*, 61 Cal.App.4th at p. 1370, citing 1 Wharton's Criminal Law (15th ed. 1993) Parties, § 30, pp. 183-184, italics added.) In contrast, "a principal in the second degree is a person who is present at the scene of a crime, but *does not engage in the criminal conduct*; he merely aids and abets the principal in the first degree in committing the crime." (*Ibid; citing* 1 Wharton's Criminal Law at § 31, p. 186, italics added, fn. omitted.) An aider and abettor not present at the scene of the crime was known at common law as an accessory before the fact. (*Id.*) While section 971 abolished the

pleading and punishment distinctions among first degree principals, those of the second degree, and accessories, the former common law categories "make explicit" that one who engages in conduct that is an element of the charged crime is a perpetrator, not an aider and abettor, of the completed crime. (*Id.* at p. 1371.)

It is true that in *Cook v. Lamarque* (E.D. Cal. 2002) 239 F.Supp.2d 985, 996 (*Cook II*), a federal magistrate subsequently concluded that due process required aiding and abetting instructions in Cook's case because Cook had not personally committed all of the elements of the offense. The Court of Appeal below found *Cook II* better reasoned than *Cook I*. Respondent disagrees.

The federal magistrate judge who authored *Cook II*, like the Court of Appeal in the instant case, did not discuss *McCoy*.[4] The magistrate judge instead reasoned as follows:

> Petitioner correctly argues that the rule expressed in *Cook* [*I*] is unconstitutional. Due process requires that all elements of the offense be proven against the defendant. However, the *Cook* [*I*] rule allows the prosecution to prove an offense by establishing only one element as to a particular defendant, effectively removing the necessity of proving all required elements and thereby lessening the burden of proof. Pursuant to the *Cook*[*I*] rule, if a crime is completed, then the prosecution need only prove that a defendant committed one element in

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[4] In his opening brief in this Court, appellant briefly cites *McCoy* but does not discuss it. Appellant instead relies on *People v. Williams* (2008) 161 Cal.App.4th 705, as support for his claim that aiding and abetting instructions were required. But the issue in *Williams* was whether conspiracy instructions were required in a case in which the prosecution introduced evidence of a conspiracy and requested the instructions. Under those circumstances, the Court of Appeal held that conspiracy instructions were required. *Williams* is inapposite because, as argued at trial here, appellant was a direct participant in the crimes. The prosecution did not rely on an aiding and abetting theory or a conspiracy theory.

> order for the defendant to be found guilty of the entire crime, so long as another actor committed the remaining elements.

(*Cook II*, *supra*, 239 F.Supp.2d at p. 996.)

But the magistrate judge who authored *Cook II* misstated the rule in *Cook I* and, moreover, did not explain why Cook had not personally committed a robbery. Regardless, the *Cook II* magistrate's observations about the burden of proof are unquestionably inapplicable to *this* case, since appellant was tried as a direct perpetrator and the jury here was twice instructed that a conviction of kidnapping required proof beyond a reasonable doubt that "*the defendant* moved the other person or made the other person move a substantial distance." (CT 119, 121; emphasis added.) Therefore, contrary to the magistrate judge's observation in *Cook II*, this jury could *not* have convicted appellant without finding that he personally committed each element of the offense.

Instead of explaining how Cook was harmed by the alleged instructional error, the magistrate judge faulted the Fifth Appellate District's rationale in *Cook I* solely by reference to the following hypothetical, to illustrate that the state court's allegedly erroneous "formulation" could allow an improper conviction:

> The constitutional deficiencies of . . . [the *Cook I*] rule can be demonstrated by a simple hypothetical example. Consider two individuals who decide to frighten another individual. As part of the plan, one actor is to utilize a toy gun in a confrontation with the victim. Now, let us suppose the other actor decides he in fact wants to kill the victim, and he replaces the toy gun, unbeknownst to the first actor, with a real gun. When the first actor, thinking he is using a toy gun, pulls the trigger and kills the victim, is he guilty of murder? Under the *Cook* [*I*] rule, the answer is in the affirmative. Pursuant to Penal Code section 187, murder is defined as "the unlawful killing of a human being, or a fetus, with malice aforethought." Applying the *Cook* [*I*] rule, the first actor is guilty of murder even though he did not bear malice aforethought, because the crime was completed, he committed an unlawful killing, and the element of

> malice was completed by the other actor. This result is clearly unconstitutional, but it is entirely possible under the new rule announced in *Cook [I]*.

(*Cook II*, *supra*, 239 F.Supp. at p. 996.)

But the magistrate judge's hypothetical misapprends *Cook I*, which requires not only that the jury find that the defendant personally perform one of the elements, but that the defendant also have the requisite mens rea. (*Cook I, supra,* 61 Cal.App.4th at p. 1371.) The defendant in the mistaken-gun hypothetical of *Cook II* therefore would not be a perpetrator under the rule of *Cook I*. If, as in Cook's case, a defendant commits an act that is an element of the crime and does so with the intent required for the crime, and the crime is completed whether by the defendant alone or in combination with an active co-defendant, that defendant is an active perpetrator. *Cook I* recognizes that a participant who acts with intent and actively commits part of a completed crime is liable as a direct participant, rather than merely under an aider and abettor theory. *Cook I* is therefore consistent with this Court's observations in *McCoy*.

Both Cook's and appellant's case involve direct participants, not an involuntary accomplice as in the *Cook II* hypothetical. The criminal actor who stands guard outside a bank during a bank robbery is an aider and abettor only. But here, where co-perpetrators operate together to commit every element of a kidnapping for robbery, they can be, but are not necessarily only, aiders and abettors. They are direct perpetrators.

The magistrate judge in *Cook II* did not address this significant distinction, in which the defendant is actively involved in all aspects of the crime. And the magistrate judge's hypothetical clearly would not apply to the instant case, as demonstrated above.

The following hypothetical would be more instructive here: Consider two individuals who plan to kidnap and rob another individual.

They plan to do so by luring their victim into a waiting car and speeding away, so that the robbery of the trapped victim can commence inside the moving car. But both perpetrators cannot drive the car simultaneously. One will usher the victim into the car. The other will drive – and lock the doors. As the driver proceeds, her crime partner robs and stabs the victim. The plan is a joint plan, shared by both perpetrators. There is no evidence, and no claim at trial, that one criminal actor secretly planned and carried out a separate crime, unbeknownst to his confederate.

This scenario, unlike the *Cook II* magistrate's hypothetical, accounts for the shared intent and actions present in this case. In this hypothetical, consistent with the evidence in appellant's trial, the element of asportation necessary for a kidnapping is present in the conduct of both perpetrators. The driver has transported the victim by driving, and the stabber has transported the victim by placing him in the waiting car. The driver would have had no victim to asport but for appellant's initial asportation in physically ushering the victim into the car. Because appellant's own conduct was a necessary and active component of the victim's asportation, aiding and abetting instructions were not required to supply a missing element. As respondent observed in the Court of Appeal (with reference to a different hypothetical), a perpetrator who places a victim on an airplane is guilty of kidnapping without resort to instructing the jury at trial the perpetrator that it must also decide whether the pilot of the airplane was an aider and abettor.

The sole rationale provided by the federal magistrate in *Cook II* as a basis to grant habeas corpus relief was the example of a hypothetical, involving an unwitting accomplice, that has no application to the present case. In this case, appellant actively participated in the asportation of the victim and committed all the requisite elements of the crime of kidnapping for robbery. When the facts and circumstances of this case are properly

considered, along with this Court's observations in *McCoy*, it is evident the trial court here did not have a duty to instruct on aiding and abetting.

In conclusion, this case does not require the Court to decide the question of whether aiding and abetting instructions are required when a defendant performed some but not all elements of the charged offense, because here appellant personally performed all elements of the charged offense. If, however, this Court determines that the question is presented by the facts of this case, the conclusion remains that aiding and abetting instructions would not be required. As *McCoy* recognizes, there are factual situations in which multiple participants are involved in the actual and active perpetration of the crime. As *Cook I* further illustrates, each of those perpetrators is a direct participant even though one of them performs the final element that completes the crime. Under these factual circumstances, aiding and abetting instructions are not required.

If anything, the absence of aiding and abetting as a theory *increases* the burden on the prosecution because it requires the prosecutor to prove the defendant is guilty as an active participant in the offense, while potentially allowing the defendant to argue that he or she is not guilty because he or she did not personally commit all elements of the offense. Here, in arguing that aiding and abetting instructions were required, appellant is effectively contending that the prosecution should have been afforded an easier path to convict him.

II. ANY ERROR IN FAILING TO INSTRUCT ON AIDING AND ABETTING WAS HARMLESS

Regardless of whether the Court of Appeal was correct in determining that the trial court should have instructed on aiding and abetting, it was correct in concluding that any error in failing to so instruct was harmless.

The jury was instructed on the elements of kidnapping and on the reasonable doubt standard. (CT 99, 106-109.) As already explained, the evidence presented at trial established that appellant grabbed the victim and ushered him into a waiting car driven by a cohort and pursuant to a pre-conceived plan. (2RT 635-636, 644, 665-666.) The fact that the driver continued to drive the vehicle during appellant's attack on the victim is indicative that she knew the robbery would be taking place and was an active participant. The victim did not testify that the driver appeared surprised by appellant's conduct or came to the victim's aid or pulled over suddenly when the stabbing and robbery commenced or otherwise gave any indication she was unaware of appellant's planned attack. On the contrary, at no point did the driver say a word, much less protest. (2RT 676.)

The Court of Appeal appropriately concluded that these facts were strong indicators that the driver was not only aware of appellant's intention to rob the victim, but shared the same intention and facilitated the robbery by cooperating with appellant to execute a preconceived plan that included asportation of the victim. As already indicated, it is hard to imagine how an aiding and abetting instruction would have helped appellant, as it would have merely offered an alternative, additional means of establishing asportation without having to prove appellant took part in transporting the victim. On this record, a rational jury still would have found appellant guilty of kidnapping had aiding and abetting instructions been given. Indeed, the jury already *did* find beyond a reasonable doubt that appellant asported the victim, albeit under a theory that he personally asported the victim or caused him to be asported.

Appellant claims that this case involves a failure to instruct on an element of the offense, and further argues that a failure to instruct on an element of the offense cannot be harmless error "where at trial the defendant contested the omitted element and produced evidence sufficient

to support a contrary finding." (AOB 18.) But this case did not involve a failure to instruct on an element of kidnapping. Here the jury was instructed on all elements of the crime, including the element of asportation. (CT 119, 121.) Aiding and abetting is a theory of liability, and not an element of a crime.

A failure to instruct on an element of the offense is subject to the *Chapman v. California* (1967) 386 U.S. 18, standard of harmless error review when, despite the prosecution's reliance on an aiding and abetting theory at trial, instructions on aiding and abetting were inadequate. (*People v. Dyer* (1988) 45 Cal.3d 26, 64; see also *People v. Flood* (1998) 18 Cal.4th 470, 499 [failing to instruct on the elements of an offense "fall[s] within the broad category of trial errors subject to *Chapman* review on direct appeal"].)

For example, in *Dyer*, the instructions given at trial potentially allowed a conviction on an aiding and abetting theory even absent a jury finding that the defendant had the requisite intent. *Id.* at 64. Similarly, in a case where a prosecutor relies on the vicarious liability doctrine of natural and probable consequences, a trial court must instruct the jury on the doctrine. (*People v. Prettyman* (1996) 14 Cal.4th 248, 260.) In *Flood* (not an aiding and abetting case), instructional error was subject to the *Chapman* standard because the error removed an element of the crime from the jury's consideration. (*People v. Flood, supra*, 18 Cal 4th at p. 504.)

But here, as already emphasized, there was no reliance by the prosecution on an aiding and abetting theory and there was no failure to instruct on an element. Thus, *Chapman* does not apply.

Even if this case involved a failure to instruct on an element of the offense, triggering a *Chapman* harmless error analysis, appellant is not entitled to reversal of his conviction. When evaluating instructional error regarding an element of the crime, the proper error inquiry asks: "'Is it clear

beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?' (*Neder v. United States* (1999) 527 U.S. 1, 18 [144 L.Ed.2d 35, 119 S.Ct. 1827].)" (*People v. Geier* (2007) 41 Cal.4th 555, 608.) As Justice Baxter observed when concurring in *People v. Cross* (2008) 45 Cal.4th 58, 69-72:

> Neder argued that an instructional error could be harmless in only three situations -- (1) the defendant is acquitted of the offense on which the jury was improperly instructed, (2) the defendant admitted the element on which the jury was improperly instructed, or (3) other facts necessarily found by the jury are the functional equivalent of the omitted, misdescribed, or presumed element -- but the high court flatly rejected this construct. (*Neder, supra,* 527 U.S. at pp. 13-15, 119 S.Ct. 1827.) The proper test, as the court explained, "is whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" (*Id.* at p. 15, 119 S.Ct. 1827, quoting *Chapman, supra,* 386 U.S. at p. 24, 87 S.Ct. 824.) This test does not depend on proof that the jury *actually* rested its verdict on the proper ground (*Neder, supra,* at pp. 17-18, 119 S.Ct. 1827), but rather on proof beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. (*Id.* at p. 18, 119 S.Ct. 1827.) Although the former *can be* proof of the latter (see *id.* at p. 26, 119 S.Ct. 1827 (conc. opn. of Stevens, J.)), the *Neder* majority made clear that such a determination is not essential to a finding of harmlessness (*id.* at p. 16, fn. 1, 119 S.Ct. 1827), which instead "will often require that a reviewing court conduct a thorough examination of the record." (*Id.* at p. 19, 119 S.Ct. 1827.) Accordingly, an inability to show that the jurors unanimously found great bodily injury based on defendant's act of impregnating the victim, and that no juror relied solely on the abortion, is properly understood as a *predicate* for the application of the *Chapman* harmless-error standard, not (as defendant mistakenly believes) the harmless-error analysis itself).

Under the proper analysis, it is plain that any error here was harmless for the reasons discussed above. There was overwhelming evidence that appellant shared his crime partner's intent to rob the victim, and that he personally perpetrated the robbery on accordance with a

preconceived plan that including kidnapping the victim. The Court of Appeal so found, even when applying *Chapman*.

Citing *Neder*, appellant nevertheless maintains that reversal is required because appellant "contested the omitted element and raised evidence sufficient to support a contrary finding." (AOB 17, citing *Neder, supra*, 527 U.S. at p. 19.) It is true that, at trial, appellant contested the element of asportation. Indeed, that is exactly why there was no failure at trial either to present the element to the jury or to resolve the issue.

At trial, the jury was instructed that the third of six elements of the offense required the prosecution to prove that appellant "moved the other person or made the other person move a substantial distance . . . . " (3RT 1229.) In his opening argument, the prosecutor addressed the element of asportation:

> Number Three, using that force or fear, the defendant moved Melvin Perez or made the other person move a substantial distance. Well, in this case he made Melvin Perez move a substantial distance because he wasn't actually driving the vehicle. That was the female that did that, but in this case he did use that force or fear because he didn't let Melvin Perez exit the vehicle until he had his property.

(3RT 1252.)

Defense counsel in his summation addressed the element of asportation:

> Now, element number three, however, says using the force or fear, the defendant moved the other person and made the other person move a substantial distance. Well, Mr. Delgado did not move the car because he was not driving the car. Another person was driving the car. There's no evidence presented in this case that Mr. Delgado instructed or ordered the female driver to take off or drive the car. The robbery had already been committed.

(3RT 1270.)

The prosecutor's rebuttal argument included the following:

[BY THE PROSECUTOR]: Now, . . . [Defense Counsel] directed your attention to the kidnapping for robbery charge and made your job a little bit easier when we talk about moving a substantial distance, a distance beyond that's nearly incidental to the commission of robbery, and I think – actually, take that back. It was element number 4. He said – I believe he conceded the fact that Melvin Perez was moved or made to move – let me get this right. It was element number 3. I'm sorry. He conceded the fact that this defendant moved the other person or made the other person – well, actually, I forgot now.

So I'm not going to say what he conceded, but specifically he said of the specific intent crime, and that's true. But the intent that's required there is from element number 1, that the defendant intended to commit robbery. That's where the intent comes, not the other element he was talking about, and what he is arguing is the fact that the defendant wasn't driving a car, then he can't be guilty of kidnapping for robbery. Well, that's not what he says. Even if you look at that jury instruction at a technical level, that's not what it says there. You can read the jury instructions yourself. But more than anything, you look to common sense. I mean that that made any sense?

So if in any situation you have somebody else doing the driving, then you're not going to be guilty for robbery?

He was working with this other person. The other person was driving. It appears that during this robbery and the struggle for many blocks, this person continued to drive while the struggle was going on. That's not accurate. That's not an accurate interpretation of what the law says. That doesn't mean that Mr. Delgado isn't guilty of kidnapping for robbery. In fact, he is.

(3RT 1276.)

As the foregoing illustrates, the issue and element of asportation was contested at trial and squarely presented to the jury. The evidence of asportation was overwhelming, and the jury resolved the issue against appellant. No rational juror would have found that appellant did not participate in the asportation, nor would a reasonable juror have concluded that appellant acted alone in robbing the victim, without the driver's

knowledge and assistance. The Court of Appeal so found. In light of the clear proof that appellant ushered the victim into the waiting car pursuant to his kidnapping plan with the driver, and the absence of credible contrary evidence, the record here shows beyond a reasonable doubt that a rational jury would have found appellant guilty of kidnapping for robbery even in the absence of any asserted instructional error.

CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: February 13, 2012

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
LANCE E. WINTERS
Senior Assistant Attorney General
LAWRENCE M. DANIELS
Supervising Deputy Attorney General
STEVEN D. MATTHEWS
Supervising Deputy Attorney General

David F. Glassman (GDN)

DAVID F. GLASSMAN
Deputy Attorney General
Attorneys for Respondent

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 7,947 words.

Dated: February 13, 2012

KAMALA D. HARRIS
Attorney General of California

DAVID F. GLASSMAN
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE

Case Name: **People v. Mildred Delgado** No.: **S192704**

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 February 13, 2012, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

Robert Derham
Attorney at Law
769 Center Blvd., #175
Fairfax, CA 94930
(Counsel for Appellant) – 2 copies

Kabeh Faturechi
Deputy District Attorney
Los Angeles County
District Attorney's Office
210 West Temple Street, Suite 18000
Los Angeles, CA 90012-3210

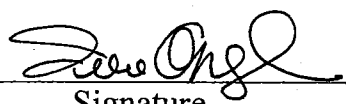
John A. Clarke
Clerk of the Court
Los Angeles County Superior Court
for delivery to:
Hon. Ronald Rose, Judge
111 N. Hill Street
Los Angeles, CA 90012

California Appellate Project (LA)
520 S. Grand Ave., 4th Floor
Los Angeles, CA 90071-2600

I mailed/hand delivered a copy of the **RESPONDENT'S BRIEF** to the Clerk of the Court of Appeal, Second Appellate District, Division One, 300 South Spring Street, Los Angeles, California 90013.

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 February 13, 2012, at Los Angeles, California.

M.I. Rangel
Declarant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