*Blailes and Wasisang v. ROP*, 5 ROP Intrm. 36 (1994)
**NORMAN BLAILES and CARLOS WASISANG,**
**Appellants,**

**v.**

**REPUBLIC OF PALAU,**
**Appellee.**

CRIMINAL APPEAL NO. 3-92
Criminal Case No. 92-92

Supreme Court, Appellate Division
Republic of Palau

Opinion
Decided: December 16, 1994

Attorney for Appellant Blailes: Oldiais Ngiraikelau

Attorney for Appellant Wasisang: Johnson Toribiong

Attorney for Appellee: Nicolas D. Mansfield, Attorney General

BEFORE: JEFFREY L. BEATTIE, Justice; LARRY W. MILLER, Justice; PETER T. HOFFMAN, Justice.

BEATTIE, Justice:

In the pre-dawn hours of January 26, 1992, appellants and two other men, one of whom was a juvenile, were involved in an altercation with a Japanese man. There is nothing in the record to indicate how or why the altercation started. During the altercation, which the trial court found lasted several minutes, appellants and the two other men were shoving and striking the Japanese man with their fists. At some point during this altercation, the juvenile left the group, entered a building, picked up a 2 x 3 piece of lumber about four feet long, returned to ⊥37 the altercation and, swinging the lumber like a baseball bat, hit the Japanese man on the head. At that point the Japanese man fell to the ground unconscious and the other men left. One of the men, not one of the appellants, returned to hit the man a couple more times. One of the others told him, "Leave him, he cannot do anything." The group then left. The victim suffered multiple skull fractures. Expert medical testimony showed that the kind of blow which created the skull fractures was capable of killing the victim. Fortunately, in this case the victim survived.

Appellants were convicted of attempted murder in the second degree. [1] Appellants contend that there was insufficient evidence to support their convictions. We agree and reverse.

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[1] Their two companions, including the juvenile who struck the victim with the lumber, were also convicted of attempted murder but did not appeal their convictions.

Leaving aside the felony-murder rule, which is not applicable here, a person commits the offense of murder in the second degree if he unlawfully takes the life of another with malice aforethought. 17 PNC § 1702. If a person attempts this offense but falls short of actual commission of the murder, he commits attempted murder in the second degree. 17 PNC § 104(b). "Malice aforethought" is the mental state required for second degree murder. Malice denotes various mental states, such as intent to kill, intent to cause great bodily harm, and intent to do an act so imminently dangerous to others as to evidence a disregard for human life. *Republic of Palau v. Ngiraboi*, 2 ROP Intrm. 257 (1991).[2]

The trial court found that appellants' conduct consisted of punching him with their fists. The trial judge found that the appellants acted with malice aforethought in punching the victim and "participated in concert and with one mind" with the juvenile who hit the victim in the head with the lumber.

⊥38 Malice is a state of mind, and one cannot look into another's mind to perceive his mental state. Instead, one must infer the accused's mental state from all the facts and circumstances surrounding his criminal conduct--his actions, his words, the type of weapon he used, if any, etc. There was clearly sufficient evidence to support an inference that the juvenile acted with intent to kill or with a disregard for human life when he hit the victim in the head with the lumber, using a full baseball bat type swing. However, the appellants' conduct was limited to pushing the victim and hitting him with their fists.

We start our analysis with the observation of numerous courts that blows with a fist ordinarily do not imply malice or an intent to kill. *Pine v. People* , 455 P.2d 868, 869 (Colo. 1969); Anno., 22 A.L.R.2d 854, 868 (1952) (malice will not ordinarily be inferred from blows with the fist). This is not a hard and fast rule, and under some circumstances an assault with mere fists may support an inference of malice. Some illustrative, but not exclusive, examples of circumstances that may well support an inference of malice are where the victim is a child, feeble, unconscious, or the beating continues to a brutal level after the victim has been rendered helpless. Here, the victim was of average size and was described as "muscular". The appellants and their companions pushed and hit the victim with their fists, but he had not been rendered helpless or become unconscious. Although the victim was knocked to the ground momentarily, he was able to get right back up and was not prevented from doing so. Until the blow with the lumber, the victim remained strong enough to make attempts to flee. Nothing from the circumstances in which the punches were thrown supports an inference that appellants acted with an intent to kill or a disregard for human life, and the punches were not shown to be the cause of

[2] Because the evidence was insufficient even to support a finding of malice as broadly defined, we need not decide whether it is, necessary to prove an intent to kill in order to convict for attempted murder in the second degree. See 2 Wharton's Criminal Law 743 ("[A]lthough a murder may be committed without an intent to kill, an attempt to commit murder requires a specific intent to kill"); W. LaFave and A. Scott Criminal Law § 59 at 429 (1972) ("[A]ttempted murder requires an intent to bring about that result described by the crime of murder (i.e., the death of another)").

the life threatening injuries suffered by the victim. [3] The expert medical testimony was that the skull fractures were consistent with a blow from a piece of lumber like the one used by the juvenile or a blow from another heavy and hard object. Under these circumstances the record is barren of evidence supporting an inference of malice on the part of appellants. Accordingly, the trial court's finding that the appellants acted with malice aforethought in punching the victim was clearly erroneous.

⊥39 II.

As an alternative ground for appellants' convictions, the trial court found that each of the appellants, with malice aforethought, aided and abetted the juvenile's attack with the lumber. Criminal liability as an aider and abetter is provided for in 17 PNC § 102, which provides in pertinent part that:

> Every person is punishable as a principal who commits an offense against the Republic or aids, abets, counsels, commands, induces, or procures its commission or who causes an act to be done, which, if directly performed by him, would be an offense against the Republic.

Palau's aiding and abetting statute is substantially similar to the United States' statute. See 18 U.S.C. § 2. Accordingly, the United States cases interpreting that statute are helpful in determining what the government must prove to obtain a conviction for aiding and abetting an offense. To be guilty of aiding and abetting, the defendant must participate in a criminal offense as something he wishes to bring about and must seek by some act to make it succeed. The defendant must "assist the perpetrator of the crime while sharing in the requisite criminal intent". *United States v. Schwartz*, 666 F.2d 461, 463 (11th Cir. 1982). Thus, the defendant is punishable as a principal if he "intentionally encourages or assists, in the sense that his purpose is to encourage or assist, another in the commission of a crime as to which the [aider and abetter] has the requisite mental state". W. LaFave & A. Scott, Criminal Law § 6.7 at 579 (2d ed. 1986) (hereinafter LaFave and Scott).

The evidence that the juvenile committed the substantive offense of attempted murder in the second degree is abundant. Further, there is evidence that appellants, in effect, assisted the juvenile in that the fracas they were involved in with the victim prevented his retreat. However, there is no evidence to support the inference that appellants performed these acts with the requisite mental state for second degree murder and with the purpose of assisting the juvenile in the commission of the offense of second degree murder. Without evidence that appellants knew the juvenile would hit the victim with the lumber, encouraged him to do so, or at least saw the juvenile approach the victim with the lumber and continued to prevent the victim from fleeing--that is, that they intended to aid, abet, counsel, command, procure or cause the juvenile to strike the victim with the lumber or to engage in some other conduct constituting attempted second

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[3] Although the dissent states that we ignore "damning evidence" that the fracas lasted up to 30 minutes, we are aware that there is conflicting evidence respecting the duration of the fracas. The trial court only found that the altercation lasted "several minutes", and the record supports that finding.

degree murder--the conviction cannot stand. The government conceded at oral argument that there is no such evidence. In similar fashion, the courts in ⊥40 the United States have generally reversed convictions for aiding and abetting the unlawful use of a firearm where there was no evidence that the defendant knew his companion in crime possessed a gun. *United States v. Morrow*, 923 F.2d 427 (6th Cir. 1991); *United States v. Hamblin* , 911 F.2d 551 (11th Cir. 1990), cert. denied, 111 S.Ct. 2241 (1991).

The government contends that it is unnecessary to prove either that the appellants sought by their acts to make the juvenile succeed in committing second degree murder or that they acted with malice. It is sufficient, according to the government, to prove that the juvenile's act of leaving the scene, entering a building and finding the lumber therein, and then returning to the scene and striking the victim with the lumber was the "natural and probable consequence" of appellants' pushing and punching the victim with their fists. In support of this contention, the government relies upon three cases, but in all of these cases the evidence supported an inference that the accomplice acted with the intent to facilitate the commission of the crime he aided and abetted and had the requisite mental state for that crime. In *People v. Durham* , 449 P.2d 198 (Cal. 1969), cert. denied, 395 U.S. 968 (1969) and 406 U.S. 971 (1972), the defendant and his companion committed a series of armed robberies. The defendant knew his companion had a gun and had seen him fire it at someone who had tried to apprehend them while they were fleeing. When a police officer stopped them, his companion shot and killed the police officer. Defendant was convicted of murder, as an aider and abetter. In *United States v. Jones* , 517 F.2d 176 (D.C. Cir. 1975), the defendant and his companion, each carrying a gun, entered a bank and robbed it. The companion used his gun. In addition to his armed robbery conviction, defendant was convicted of aiding and abetting an assault with a deadly weapon. In *State v. Shon*, 385 P.2d 830 (Haw. 1963), which is also relied upon by the dissent, the defendant purchased the bullets for his companion's gun the day before the armed robbery of a market. On the day of the robbery, he heard his companion make the final plans and saw him load his gun before they left for the market. The defendant was dropped off at a good lookout point and received a share of the proceeds of the robbery. Defendant was convicted as an aider and abetter of an armed robbery.

In all of these cases the defendant knew that his companion was carrying a gun during the criminal episode. That knowledge supported an inference that the defendant committed his act of assistance with the intent that the gun would be used if necessary. Thus, each of the defendants had the requisite mental state for the offense he aided and abetted. These cases stand in stark contrast to the instant case, where all participants entered ⊥41 the fray unarmed and one left to get a weapon, unbeknownst to the others so far as the record shows.

The dissent cites several other cases from jurisdictions that have adopted the natural and probable consequences rule. These cases too, with the exception of one imposing strict liability, all involve situations where there was sufficient evidence to support an inference that the defendant intended to assist another in the commission of an offense for which the defendant had the requisite mental state.

For example, in *People v. Bearslee* , 806 P.2d 1311 (Cal. 1991), the defendant and a

companion were involved in an attack on two victims during which the defendant's companion strangled one victim and shot another victim with a shotgun. Both victims died. During the attack, the defendant slashed the first victim's throat twice and shot the second victim twice with a shotgun. Defendant's convictions for aiding and abetting the two murders were upheld. Although his companion may have delivered the fatal blows, there was overwhelming evidence to support the inference that defendant's conduct was intended to assist his companion in committing the murders and that the defendant himself had the requisite intent to kill. Clearly, there was sufficient evidence to support his murder convictions even without the natural and probable consequences rule.

In *State v. Marchesano*, 783 P.2d 247 (Ariz. App. 1989) the defendant and his companion, each carrying a gun supplied by the defendant, robbed a restaurant. The companion shot the restaurant manager, and the defendant was convicted of aiding and abetting the attempted murder. That evidence that the defendant was carrying a gun, knew his companion possessed a gun, and had supplied the guns used in the robbery was ample evidence to support the inference that the defendant intended that the guns would be used. Thus, the evidence was sufficient to support his conviction even without the natural and probable consequences rule.

In *United States v. Austin* , 585 F.2d 1271 (5th Cir. 1978), upon which the dissent places heavy reliance, the court found that the evidence of the defendant's intent to misapply bank funds and his admissions that the bankers had to maneuver things in order to hide the transactions not only supported, but demanded, the inference that he conferred with his confederates regarding the false entries necessary to cover up the misapplication of funds. Thus, even absent the natural and probable consequences rule, there was abundant evidence to support an inference that the defendant had the intent that the false entries would be made by his confederates.

⊥42 This notion that the natural and probable consequences rule applies only where the second offense is so natural and probable that the evidence supports an inference that defendant intended the offense to be committed permeates the cases cited by the dissent. The reasoning of the courts is expressed in *United States v. Jones* , 517 F.2d 176, 181 (D.C. Cir. 1975), also relied upon by the dissent, where the defendant and his confederate each carried a gun into a bank robbery and the confederate shot at somebody. In upholding the defendant's conviction for aiding and abetting assault with a deadly weapon, the court said, "Since he carried a gun, even if he did not use it, appellant is not in a strong position to raise the primary objection to the natural and probable consequences rule--that it imputes guilt for a crime for which the necessary mental state may be lacking."

As these cases demonstrate, in spite of the sometimes broad language of decisions citing the natural and probable consequences rule, the courts employing the rule require no less than we do--intentional assistance of another in the commission of an offense for which the accomplice has the requisite mental state. To construe the "natural and probable consequences" doctrine so broadly that accomplice liability could be imposed, not only for the offenses that a reasonable trier of fact could infer the defendant intended to aid and abet, but also for any other offense committed as a reasonably foreseeable consequence would destroy the concept of intent and replace it with a negligence standard. Negligence is not enough to convict the principal actor

and it should likewise not suffice to support accomplice liability. For this reason, the broad interpretation of the doctrine favored by the dissent has been roundly criticized:

> The "natural and probable consequence" rule of accomplice liability, if viewed as a broad generalization, is inconsistent with more fundamental principles of our system of criminal law. It would permit liability to be predicated upon negligence even when the crime involved requires a different state of mind.

LaFave & Scott § 6.8 at 590. Because of this, despite the broad language sometimes used, the rule has been applied by the courts in such a way that, for an offense to be the "natural and probable consequence" of another offense, it must be so likely to occur that there is sufficient evidence to support an inference that the accomplice intended that it occur. As such, the rule has limited ⊥43 value at best. [4] Any other application of the rule would render the legislative classification of offenses and punishment meaningless. [5] Although the government urges broad application of the rule because of a "strong deterrence" justification underpinning the rule, that argument is better made to the legislature.

Although the dissent takes the position that the natural and probable consequences rule it urges us to adopt is an "established rule", it has never been established in Palau. Moreover, it has been rejected by the majority of jurisdictions in the United States having statutes similar to Palau's, by the Model Penal Code (LaFave and Scott § 6.8 at 591, n. 35) and respected commentators ("Under the better view, one is not an accomplice to a crime merely because that crime was . . . a natural and probable consequence of another offense as to which he is an accomplice", id. at 587).[6] If the rule is to be established here, it should ⊥44 be by the legislature,

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[4] By rejecting the broad construction of the rule urged by the dissent, we do not mean to imply that the result in this case would be any different were we to embrace it; in other words, that where a fistfight erupts, it is "natural" and "probable" that a participant will leave the scene, obtain a deadly weapon from a building, return to the scene, and then maliciously use the weapon. Although the dissent takes the position that in a fistfight the use of "weapons at hand" is foreseeable, the milled lumber here was not a weapon at hand--it was necessary to leave the scene in order to obtain it.

[5] There is no reason why a broad based natural and probable consequences rule cannot be enacted legislatively. For example, in Kansas a person who aids and abets one crime "is also liable for any other crime committed in pursuance of the intended crime if reasonably foreseeable by him as a probable consequence of committing or attempting to commit the crime intended". Kan. Stat. Ann. § 21-3205(2). With the existence of such a statute, the courts do no violence to the legislative classification of offenses and punishment by applying the rule broadly, yet there is still some reluctance to a broad application. See *State v. Davis*, 604 P.2d 68 (Kan. 1979) (reversing a conviction of aiding and abetting an aggravated battery where defendant's confederate shot a security guard during a theft and there was no evidence that defendant knew his companion had a weapon).

[6] The hypothetical case presented by the dissent (at n. 4) demonstrates the reason why the natural and probable consequences rule is not preferred--the court in the hypothetical must convict even though it specifically finds the defendant did not have the intent required for aggravated assault. Of course, a court need not believe a defendant's testimony about his

not the judiciary. The judiciary cannot create crimes. It follows that we cannot enlarge the reach of enacted crimes by convicting a defendant where less than all the elements, including the mental element, of the charged offense are present.

III.

There is insufficient evidence from which a reasonable trier of fact could find beyond a reasonable doubt that appellants acted with malice aforethought and with the intent to assist the juvenile's attempted murder when appellants punched and pushed the victim. The trial court's decision finding appellants guilty of attempted murder in the second degree is REVERSED.

HOFFMAN, Justice, dissenting:

I. Malice Aforethought

The majority reverses the appellants' convictions for aiding and abetting attempted murder in the second degree because they conclude that the "record is barren of evidence supporting an inference of malice on the part of the appellants." I respectfully disagree.[7]

⊥45 This court held in *ROP v. Ngiraboi* , 2 ROP Intrm. 257 (1991) that a showing of malice aforethought will suffice for a conviction of attempted murder in the second degree:

> The phrase "malice aforethought" is a term of art denoting various mental states, such as intent to kill, intent to cause great bodily harm, intent to do an act imminently dangerous to others and evincing a depraved and malignant heart regardless of human life, and intent to commit a felony. Id. at 261.

The trial judge in this case specifically found that the appellants had malice aforethought and had participated in the beating with a gross, wanton and willful disregard for whether their actions would end in the death of the victim. "It is not the role of an appellate court to re-weigh the evidence, test the credibility of witnesses, or draw inferences from the evidence. The trial

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discussions with his confederate, nor look solely to that testimony to determine his intent. Viewing the dissent's hypothetical more realistically, our decision today would clearly permit a conviction for aggravated assault where a defendant and his confederate agree to bring guns along to carry out an armed robbery of a bank, but the testimony at trial is that defendant told his confederate not to fire his gun. In that case, the trier of fact could infer from the fact that both participants agreed to bring guns to carry out the robbery that defendant intended that the guns be used and therefore convict defendant of aiding and abetting the aggravated assault. The judge would not have to accept the testimony that indicated otherwise--he could infer the intent of the defendant from what the defendant knew and did rather than from what he said.

[7] I would agree that the appellants are not guilty of acting as principals to commit the crime of attempted murder in the second degree, 17 PNC §§ 104 & 1702, because their acts alone, if carried through to completion, without the acts of the juvenile, would not have resulted in the death of the victim.

judge is the fact-finder for all purposes, and his analysis will not be disturbed on appeal unless clearly erroneous." *ROP v. Ngiraboi*, supra, at 259.

The majority, in support of its contention that there is no evidence showing malice aforethought, points to the appellants' use of only their fists, the average size and muscular build of the victim, the ability of the victim to get to his feet after having been knocked down the first time, and to the fact that the victim was able to attempt to flee. These facts, the majority concludes, do not permit an inference of malice aforethought.

The majority's reading of the record ignores other damning evidence showing the requisite mental state. For example, the record also shows, viewed most favorably to the prosecution, that the beating lasted as long as 30 minutes; that the victim was trying to escape, but was prevented from doing so while the defendants continued to beat him; that the fight pitted four young men against one lone victim; that all of the defendants were "pulling [the victim] to come and punch him;" that the victim had been knocked to the ground and, when he regained his feet, the beating continued; that the victim was not fighting back; that the defendants were swearing as they beat the victim; that the defendants' pummeling of the victim with their fists could have caused the victim's perforated ear drum and bleeding from his right ear; that the appellants did not physically attempt to stop the victim from being kicked and repeatedly punched after he had been knocked to the ground unconscious; and that the fight was apparently unprovoked in any way.

⊥46 The majority's analysis also ignores the ability of the trial court to observe the victim and the defendants. For instance, the majority points to the "average size" of the victim as demonstrating a lack of malice aforethought. However the transcript is silent on the height, weight and build of the appellants although the trial court surely had an opportunity to observe these. Describing the victim as being of average size is meaningless without the ability to compare the victim to the appellants, something the trial court was able to do and this court is not. In short, there was sufficient evidence for a trial court with an opportunity to observe and to listen to the witnesses to conclude that this was a vicious, unprovoked attack on a lone, defenseless victim by four young men, committed with such savagery and brutality that the attackers were possessed of malice aforethought.

It is not our province as an appellate court lightly to set aside the trial court's findings of fact and to substitute our own judgment based on a cold record. Malice aforethought is a factual issue, *ROP v. Ngiraboi*, supra; whether particular facts demonstrate malice aforethought depends on the circumstances of the case. *Pine v. People*, 455 P.2d 868, 869 (Colo. 1969). The trial court was in a superior position to evaluate those circumstances; this court is not. "We view challenges to the sufficiency of evidence by considering whether, when viewing the evidence in the light most favorable to the prosecution and giving due deference to the trial judge's opportunity to hear the witnesses and observe their demeanor, any reasonable trier of fact could have found that the essential elements of the crime were established beyond a reasonable doubt. If this standard is met, the conviction must be upheld." *Liep v. ROP*, 5 ROP Intrm. 4, 9 (1994). I would hold that the record is sufficient to support the trial court's findings of fact.

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II. Natural and Probable Consequences

I further disagree with the majority's rejection of the application of the "natural and probable consequences" rule to the actions of the appellants. "The established rule, as it is usually stated by courts and commentators, is that accomplice liability extends to acts of the principal. . .which were a 'natural and probable consequence' of the criminal scheme the accomplice encouraged or aided." W. LaFave & A. Scott, Criminal Law § 6.8(b) at 590 (2d ed. 1986)(hereinafter "LaFave & Scott). [8] Therefore, the ⊥47 question is whether the juvenile's actions in striking the victim on the back of the head with a stick were a natural and probable consequence of the criminal scheme to attack and beat the victim. The answer depends on what is meant by the phrase "natural and probable consequences."

The majority states that "the rule has been applied by the courts in such a way that, for an offense to be the 'natural and probable consequence' of another offense, it must be so likely to occur that there is sufficient evidence to support an inference that the accomplice intended that it occur." I read the case law differently. The courts, in their interpretation of the phrase have ranged from an express or implied total rejection of the concept, see *United States v. Hamlin*, 911 F.2d 551 (11th Cir. 1990); *United States v. Batt* , 811 F. Supp. 625 (D. Kan. 1993), to almost a strict liability standard, see *State v. Davis* , 682 P.2d 883, 886 (Wash. 1984)("[A]n accomplice, having agreed to participate in a criminal act, runs the risk of having the primary actor exceed the scope of the preplanned illegality."); *State v. Marchesano* , 783 P.2d 247, 253 (Ariz. App. 1989) ("Arizona courts have long acknowledged that joint participation in a general felonious plan is enough to hold an accomplice liable as principal for any crime committed in execution of the plan."); *State v. Shon* , 385 P.2d 830, 838-39 (Haw. 1963)("The aider and abettor is fully responsible for the acts of the actual perpetrator of the offense."). But the majority of courts apply the test without qualification. See e.g. , *People v. Bearslee* , 806 P.2d 1311, 1321 (Cal. 1991); *United States v. Jones* , 517 F.2d 176, 181 (D.C. Cir. 1975). Whether the acts of the principal are the natural and probable consequence of the scheme aided and abetted is a factual question to be decided by the finder of fact. See *United States v. Clayborne* , 509 F.2d 473, 475-76 (D.C. Cir. 1974); *People v. Durham* , 449 P.2d 198, 204 (Cal. 1969); *State v. Davis* , 604 P.2d 68, 71 (Kan. App. 1979).

It is not necessary for this court to adopt a negligence standard or to view the phrase natural and probable consequences as a "broad generalization" [9] for us to find that in this case

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[8] While this rule has been subject to criticism on the grounds that it "asks, in effect, whether an intent with respect to one offense should suffice as to another offense which was the consequence of the one intended," LaFave & Scott, supra, § 6.8(b) at 590, this critique of the rule has far less force when, as here, the trial court has independently found the existence of the requisite intent for the commission of the crime aided and abetted.

[9] "The 'natural and probable consequence' rule of accomplice liability, if viewed as a broad generalization, is inconsistent with more fundamental principles of our system of criminal law." LaFave & Scott, supra, § 6.8(b) at 590 (emphasis added). The natural and probable consequences test as well as the reasonably foreseeable test are well established in the criminal law outside of the aider and abettor context. See *Pinkerton v. United States*, 66 S.Ct. 1180 (1946); *United States v. Talbot*, 590 F.2d 192, 195 (6th Cir. 1978).

⊥48 there was sufficient evidence for the trial court to conclude that the use of a stick to strike the victim was a natural and foreseeable consequence of the defendants' decision to attack and beat him. I would hold that sticks, stones and other weapons at hand are used so frequently in fights that the question of whether their use in a particular fight is a natural and probable consequence is an issue for the trial judge to decide. Attacks, particularly of the brutal type involved in this case, are not fought by the Marquis of Queensberry Rules. It hardly provokes surprise or comment when a participant in a brawl seizes a stick or rock and proceeds to hit one of the other participants; that is the nature of fights. The only thing surprising about the use of a stick in this fight is that the juvenile apparently had to go to some effort to obtain one; but that, of course, is of only slight relevance to the issue of whether the use of a stick was a natural and probable consequence.

The majority supports its position by distinguishing the facts of three cases cited by the Republic of Palau in its brief, but its efforts ignore the many cases where the acts of the principal are even more attenuated from the original plan undertaken by the aider and abettor than in the facts of this case. For example, in *United States v. Austin* , 585 F.2d 1271 (5th Cir. 1978), the defendant was convicted of aiding and abetting the making of false entries in bank books and reports and in concealing material facts about the bank's condition from the FDIC. In responding to the argument that there was insufficient evidence of his intent to commit these crimes to sustain the convictions, the court agreed:

> [T]here is nothing in the record to establish that Austin personally participated in effecting the false entries in the Bank's books or in the FDIC report, that he even knew that his two $200,000 checks were used or for what purpose they were used. It is not necessary, however, that one charged as an aider or abettor commit the overt acts that serve to accomplish the offense or that he have knowledge of the particular means his principals (in this case the three Bank officers) employ to carry out this criminal ⊥49 activity. Criminal liability under the aider or abettor statute results from the existence of "a community of unlawful intent between the [aider or abettor] and the [principal],"; an aider and abettor is "liable for any criminal act which in the ordinary course of things was the natural or probable consequence of the crime that he advised or commanded, although such consequence may not have been intended by him." Id. at 1277 (citations and footnotes omitted).

See also *ROP v. Sakuma*, 2 ROP Intrm. 23, 32 (1990)(defendant aided and abetted use of firearm when only evidence was his presence in car during drive-by shooting); *United States v. DeLamotte*, 434 F.2d 289 (2nd Cir. 1970), cert. denied , 91 S.Ct. 910 (1971) (reasonably foreseeable that principals would cross state line in kidnaping although no evidence defendant knew this); *United States v. Christian* , 942 F.2d 363, 368 (6th Cir. 1991)(defendant convicted of aiding and abetting use of firearm in relation to a drug offense; no showing that defendant had knowledge of firearm. "The 'well recognized nexus between drugs and firearms,' is acknowledged in this instance where parties who had never dealt with each other before, agreed to exchange [drugs]."); *United States v. Tijerina* , 407 F.2d 349 (l0th Cir. 1969), cert. denied, 90 S.Ct. 76 (1969) (defendants were convicted of aiding and abetting a mob assault on two forest rangers even though there was no evidence cited that this was the agreed upon or expected

outcome of the mob activity); LaFave & Scott, supra, § 6.7(c) at 580 n 53.

The majority has chosen, for reasons unpersuasive to me, to reject the "established rule," LaFave & Scott, supra, § 6.8(b) at 590, that aiders and abettors are liable for the natural and probable consequences of the criminal scheme to which they have lent their support. In its stead, the majority has adopted a rule, followed by only a very few courts, that an aider and abettor's criminal liability is limited solely to those crimes which he ⊥50 specifically intended to assist. [10] I would reject such
a rule and vote to affirm the appellants' convictions.

[10] Consider the following hypothetical: Two bank robbers, A and B, decide to rob a bank. In planning the robbery, A says to B, "Let's bring our guns along and use them to carry out the robbery, but be sure not to fire your gun. I don't want to be convicted of murder or aggravated assault." The robbery proceeds as planned, guns are pointed at the bank tellers and they are told to turn over their money. B, however, forgets A's instructions and shoots and injures one of the tellers. Under the rule announced by the majority, assuming the court believes A did not intend the teller to be shot, A is innocent of aiding and abetting B in the crimes of aggravated assault, 17 PNC § 502, assault and battery with a dangerous weapon, 17 PNC § 504, or even simple assault and battery, 17 PNC § 503. This is so even though the victim would not have been shot but for the actions of A in aiding and abetting B. Such an outcome is contrary to the overwhelming weight of the case law. See e.g., *People v. Durham*, supra, at 207.