DISTRICT ATTORNEY'S REPORT

REPORT ON BART OFFICER ANTHONY PIRONE

INVOLVING THE DEATH OF OSCAR GRANT

NANCY E. O'MALLEY
District Attorney

DATE: January 7, 2021

Introduction

On January 1, 2009, BART Officer Johanes Mehserle ("Mehserle") shot and killed Oscar Grant on the passenger platform of the Fruitvale BART station. Mehserle was in the process of handcuffing Oscar Grant during a lawful arrest. Suddenly, Mehserle stood up, pulled out his gun and shot Oscar Grant in the back. The gunshot caused Oscar Grant's death.

Oscar Grant and his three companions had been removed from the BART car due to a fight onboard. They were sitting on the passenger platform when they were placed under arrest. One of the companions, next to Oscar Grant, was in the process of being handcuffed when the shooting occurred. Present at the scene were BART Officers Pirone and Guerra, both of whom were participating in handcuffing those being arrested.

Mehserle was charged with Murder, a violation of Penal Code Section 187. The defense successfully obtained a change of venue for the trial. The case was tried to a jury in Los Angeles Superior Court. The jury returned a verdict of Involuntary Manslaughter and found True the Allegation that Mehserle used a firearm.

Recently, the family of Oscar Grant requested that the District Attorney review whether the facts and the law could support criminal charges against former BART Officer Anthony Pirone.

I assembled a team of highly experienced attorneys and investigators to conduct an exhaustive review of the facts and evidence surrounding the events that led to and resulted in Oscar Grant's death. We analyzed the statutes governing the law of murder, manslaughter and any other crime(s) that could apply. We looked at applicable legal doctrine and caselaw as to how the laws could apply to the facts and the evidence.

While we took our time, we had many meetings reading transcripts, watching videos, reading accounts provided at or near the time of Oscar Grant's killilng. We delved deeply into the legal analysis before reaching a conclusion. On that note, the California Supreme Court unanimously rendered an important decision on December 17, 2020 which is incorporated into our review and decision.

The Questions to Be Answered

The questions to be answered are:

- Is evidence to prove beyond a reasonable doubt that Anthony Pirone killed Oscar Grant;
- Is there evidence to prove beyond a reasonable doubt that Anthony Pirone aided and abetted in the unlawful killing of Oscar Grant;
- Is there any non-lethal crime(s), committed in 2009, with which Anthony Pirone can be charged in 2021

Conclusion

The law makes clear that Anthony Pirone can be guilty of murder only if he personally killed Mr. Grant, or if he aided and abetted the actual killer. In fact, Pirone neither killed nor aided and abetted Mehserle, who actually killed Mr. Grant.

There is no evidence that Pirone personally caused Mr. Grant's death. The autopsy report states that the gunshot wound was the cause of death. The autopsy shows no injury to the neck or head or any other part of Mr. Grant's body that could have caused or contributed to his death. There were no internal injuries other than those caused by the gunshot wound. There was no evidence of brain damage or asphyxiation.

Mehserle, who shot Oscar Grant in the back, was conclusively determined to be the sole and actual killer.

To be guilty of murder as an aider and abettor, the evidence must prove that Pirone knew that Mehserle intended to kill Mr. Grant, and that Pirone intended to aid and abet that unlawful killing. According to witnesses and video evidence as discussed below, Mehserle and Pirone were in the process of arresting Mr. Grant before the shooting. Pirone was holding Mr. Grant down in the head, neck and shoulder area while Mehserle tried to handcuff Mr. Grant. While Pirone was holding Mr. Grant down, Mehserle drew his firearm, stepped back and fired a shot into Mr. Grant's back. Seconds before the shooting, one knee of Pirone was located on the mid-back, upper shoulder and neck area of Mr. Grant. While Pirone was in the process of standing up, Mehserle fired the fatal shot that was literally inches away from where Pirone had been positioned. Immediately following the shooting, Pirone called for medical assistance.

There was no evidence that Pirone knew in advance that Mehserle was going to shoot Mr. Grant. There was no evidence that Pirone intended to aid and abet Mehserle in the unlawful killing of Oscar Grant. While Pirone's overly aggressive conduct contributed to the chaotic nature of what transpired on the BART platform on January 1, 2009, he did not kill nor aid and abet in the killing of Oscar Grant.

Mehserle's defense at trial was that he thought he was pulling out his taser. The jury rejected the prosecution's charge of murder with the use of a gun and instead, found Mehserle guilty of involuntary manslaughter with the use of a gun. As discussed below, involuntary manslaughter is a crime committed *without intent*. It is the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.

Mehserle's defense at trial was that he thought he was pulling out his taser. The jury rejected the prosecution's charge of murder with the use of a gun and instead, found Mehserle guilty of involuntary manslaughter with the use of a gun. As discussed below, involuntary manslaughter is a crime committed *without the intent to kill*. It is the

commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.

Pirone did not kill Oscar Grant. He could not legally aid and abet in the crime of involuntary manslaughter of Oscar Grant. Even if the law recognized that theory, which it does not, Pirone could only be found guilty of involuntary manslaughter. The Statute of Limitations has long ago expired and charges could not now be filed.

What happened to Oscar Grant should never have happened. The evidence showed then as it shows now that the person who killed Oscar Grant was Johannes Mehserle and Mehserle alone.

For these reasons, the Alameda County District Attorney's Office charged Mehserle with murder and with the use of a gun. And in July of 2010, the jury found him guilty of Involuntary Manslaughter and found that he intentionally used a firearm. Mehserle was the only person criminally responsible for Oscar Grant's death.

Scope of Inquiry

In reviewing the events surrounding the homicide of Oscar Grant, the District Attorney's Office examined the following:

1. Trial Transcripts
2. Incident Videos
3. Statements from Witnesses
4. Autopsy Protocol
5. Appellate Opinions
6. Legal Research of Relevant issues, in particular the case of *People v. Gentile* (2020) __ Cal.5th___ (No. S256698) 2020 WL 7393491, at *1 which came out on Dec. 17, 2020.)

Facts

On January 1, 2009, Oscar Grant was suddenly shot and killed by BART Officer Johannes Mehserle ("Mehserle"). The killing occurred on the passenger platform of the Fruitvale BART Station. Mr. Grant and his companions were traveling on the BART train from San Francisco after celebrating New Year's Eve in San Francisco. At 2:01 a.m., the train operator reported to BART Central that a fight had broken out in the lead car of the BART train. She gave a description of those involved. At 2:04 a.m., BART Officer Anthony Pirone ("Pirone") responded. As Pirone arrived on the platform, Mr. Grant and his companions were leaving the train. Based on the descriptions given, Pirone suspected that Mr. Grant and his companions were possibly involved in the fight. Mr. Grant and one of his companions temporarily reboarded the train. Pirone ordered the others to remain on the platform, while he entered the BART car and aggressively removed Mr. Grant and the remaining person from the train. The detainees were directed to sit against the wall of the BART passenger platform. The BART train was still at the station with doors open.

Mehserle responded to the call with BART Officer Woffinden approximately four minutes after Pirone arrived. Mehserle was not Pirone's assigned partner. He arrived on the platform at 2:08. He was directed to watch Mr. Grant and his companions, who were still seated along the wall. Pirone went to speak to the train operator. Mehserle was standing in front of Mr. Grant. Pirone returned to the area where Mr. Grant and the others were seated, saying that Mr. Grant and others were "going to jail..."

Mr. Grant began to stand up. Pirone pushed Mr. Grant back to the ground and on to his knees. One of the young men who was seated to Mr. Grant's left, stood up but Mehserle pushed him back down. BART Officer Guerra ("Guerra") and Mehserle began to place handcuffs on the young man. The other young man who was at Mr. Grant's right stayed seated against the wall.

Mehserle then went behind Mr. Grant who was on his knees and tried to put handcuffs on Mr. Grant. Pirone stood directly in front of Mr. Grant saying "bitch-ass nigger, right?" Mehserle pushed Mr. Grant forward. He rolled onto his back/side and then onto his stomach as Mehserle struggled to put handcuffs on him. Mr. Grant fell on the leg of the young man to his right. When Mr. Grant went down on his stomach, Pirone put his knee on Mr. Grant's upper shoulder - neck area. At this time, Pirone was looking at and speaking to another person being detained. He used his knee to control Mr. Grant while placing his hand to restrain this second person. While Pirone was holding Mr. Grant down, Mehserle drew his firearm, stepped back and fired a shot into Mr. Grant's back. According to the evidence, Mehserle spontaneously said "Oh my God, I shot him."

Seconds before the shooting, Pirone's knee was on the mid-back, upper shoulder and neck area of Mr. Grant. Pirone was in the process of standing up, but was still leaning over Mr. Grant when Mehserle fired the fatal shot, inches away from where Pirone had been positioned.

Once Mehserle fired the gun, Pirone immediately jumped up and backed away from Mehserle, Mr. Grant and the other young men. Pirone then turned Mr. Grant over and directed Mehserle to place handcuffs on Mr. Grant. Pirone then called for medical assistance.

Mr. Grant was taken by ambulance to the hospital. Medical professionals provided Mr. Grant with extensive medical therapy, including intravenous fluids. Mr. Grant was taken into surgery, but ultimately passed away. At the time of his death, several medical devices were still attached to Mr. Grant's body where they remained until the autopsy. Mr. Grant died as a result of being shot by Officer Mehserle.

Since one of the key questions in this inquiry is whether Pirone could have been a cause of Mr. Grant's death, it is important to take a detailed look at the autopsy results.

Dr. Thomas Rogers, M.D. performed the autopsy on January 2, 2009. Dr. Rogers found that the cause of Mr. Grant's death was a gunshot wound to the torso. The autopsy included a thorough interior and exterior examination of Mr. Grant. The external autopsy revealed no blunt trauma to the head and neck, the left arm, the right and left legs, or the torso. The autopsy showed a 4-inch contusion on the anterior proximal upper arm, possibly related to a thoracotomy incision. The autopsy revealed a 7/8 x 1/8- inch abrasion on the anterior distal upper arm, initially covered by the blood pressure cuff. There was an extensive description of the gunshot wound and surrounding areas. The external examination revealed prominent periorbital edema. Dr. Rogers' autopsy protocol stated that "[t]his does not represent a blunt injury." The periorbital tissues are most noticeably swollen following the gravitational redistribution of fluid in the horizontal position. The autopsy revealed several areas of edema, mostly likely caused by the introduction of fluids and the body during medical treatment.

The internal examination of Mr. Grant's body revealed that his heart, his vessels (right pulmonary artery and pulmonary veins, his aorta and tributaries were unremarkable. His pulmonary trunk was normal. His trachea and bronchi were non-remarkable. No other abnormalities were noted. A layer-by-layer dissection was done of the strap muscles of the neck. No areas of hemorrhage were identified. The laryngeal structures were intact and without abnormalities. The cervical vertebral column and thyroid gland were nonremarkable. There was prominent soft tissue edema about the cranial vault (sometimes referred to as the skull vault). However, sectioning of the brain and stripping the dura (membrane that surrounds the brain) from the inner table of the skull revealed no abnormalities.

Based on these medical findings, the sole cause of death of Mr. Grant was the single gunshot into his back. There was no sign of brain injury or asphyxiation or any other cause that contributed to Mr. Grant's death.

There was no evidence showing that Pirone knew that Mehserle was planning to shoot Mr. Grant. On the contrary, there was evidence that the shooting took Pirone entirely by surprise. There was no evidence that Mehserle ever told Pirone that he planned to shoot before firing his weapon. Pirone was actually looking in the direction of another detainee when Mehserle drew his gun. Mehserle fired just seconds after pulling his gun from its holster. Pirone was leaning over Mr. Grant as he and Mehserle when Mehserle stepped back, and Pirone was just starting to straighten up when Mehserle fired. At the time Mehserle shot, Pirone was perilously close to the line of fire. Pirone's immediate reaction to the shooting shows surprise. Like Guerra, and everyone else on the platform, Pirone reacted with shock and surprise: he jumped up, and stepped away. He promptly called for medical assistance. Pirone's actions show that he knew nothing of Mehserle's intent to shoot Mr. Grant until he heard the gunshot. Since Pirone did not know of Mehserle's intent to shoot, he could not share that intent. He could not have intended to encourage the shooting.

Here, the People are statutorily barred from charging Pirone for anything but murder. The offense date is 01/01/2009. Nearly twelve years have elapsed since Mr. Grant's homicide. Thus, the statute of limitations has run on every crime but murder. This is true even with tolling.

Homicide: Traditional Theories of Criminal Liability

Murder

Homicide is the unlawful killing of another. There are two types of homicide: murder and manslaughter. What differentiates murder from manslaughter is that murder requires the killing to be committed with a specific mental state: malice aforethought. Penal Code section 187.

Malice may be express or implied. Penal Code section 188(a). Express malice is an unlawful intent to kill. Penal Code section 188(a)(1). Implied malice may be shown "when a person does an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life." *People v. Dellinger* (1989) 49 Cal.3d 1212, 1218–1219, *citing People v. Watson* (1981) 30 Cal.3d 290; Penal Code section 188(a)(2).

In California, murder may take two degrees: first- or second-degree murder. First-degree murder is murder done with premeditation and deliberation, or in the commission of an enumerated felony (felony-murder rule). Penal Code section 189(a). Second-degree murder is defined as all other murder. Penal Code section 189(b). Regardless of the degree, to be guilty of murder a criminal defendant must have committed an act with malice aforethought, and this act must cause the death of another. *People v. Roberts* (1992) 2 Cal.4th 271, 315-321.

Here, Pirone cannot ethically be charged with murder under a traditional theory of criminal liability because both prongs of murder are not met.

Pirone did not commit an act that caused the death of Mr. Grant; rather, Mehserle pulled the trigger, which directly caused Mr. Grant's death. There is no evidence that Pirone possessed malice aforethought. Pirone cannot be charged with murder on an express malice theory because there is no evidence to suggest that he possessed an express intent to kill Mr. Grant.[1] Similarly, Pirone cannot be charged with murder on an implied malice theory because there is no evidence, beyond a reasonable doubt, suggesting that Pirone knowingly committed an act that would lead to the natural and probable consequence of causing another person's death.[2] Although Pirone's

[1] Therefore, no colorable argument can be made with respect to first-degree murder because there is no evidence that Pirone possessed any level of premeditation or deliberation.

[2] This will be visited further in the next section.

conduct was certainly aggressive and unprofessional, this conduct does not rise to the mental state required for murder.

From a more practical perspective, Mehserle was charged with murder in 2009, but the jury returned only a verdict of involuntary manslaughter. This means the jury did not find that Mehserle possessed the mens rea necessary for murder. It is likely that a jury today—even in the current climate in which we live, which is far more scrutinizing of law enforcement—would not conclude that a non-shooter possessed malice aforethought.

Homicide: Alternative Theories of Criminal Liability

The natural and probable consequences doctrine.

The recent passage of SB 1437 and the changes made to sections 188 and 189 have precluded the use of the natural and probable consequences doctrine in murder.

"When an accomplice aids and abets a crime, the accomplice is culpable for both that crime and any other offense committed that is the natural and probable consequence of the aided and abetted crime. ... In 2018, the Legislature enacted Senate Bill No. 1437 (2017–2018 Reg. Sess.) (Senate Bill 1437). ... Among other things, Senate Bill 1437 amended Penal Code section 188 to provide that "[e]xcept as stated in subdivision (e) of Section 189 [governing felony murder], in order to be convicted of murder, a principal in a crime shall act with malice aforethought. **Malice** shall not be imputed to a person based solely on his or her participation in a crime." (Pen. Code, § 188, subd. (a)(3); all undesignated statutory references are to the Penal Code.) Recently, the California Supreme Court held "...We hold that Senate Bill 1437 bars a conviction for second degree murder under the natural and probable consequences theory." (*People v. Gentile* (Cal., Dec. 17, 2020, No. S256698) 2020 WL 7393491, at *1.)

The *Gentile* case holds, in essence, that a non-killer participant in a crime cannot be held vicariously liable for any death that results from that crime unless that non-killer acted with implied malice, that is with knowledge that death would likely result, and with a knowing and wilful disregard of the likelihood that death would occur.

The natural and probable consequences theory of liability does not apply in the instant case as a matter of law. Furthermore, there is no showing in the instant case that Pirone knew that Mehserle was likely to shoot and kill Mr. Grant, and therefore no theory of second degree murder available.

Aider and Abettor Criminal Liability

General Principles

"A principal in the commission of a crime is one who directly commits the crime or who aids and abets the perpetrator." *In re Michael T.* (1978) 84 Cal.App.3d 907, 910;

Penal Code section 31. If a principal aids or abets the perpetrator, the People must prove that the principal "counseled, encouraged or assisted in the commission of a crime with knowledge that a crime was being committed." *In re Michael T.*, *supra*, at 910. Aiding and abetting requires the People to prove that "an aider and abettor rendered aid with an intent or purpose of either committing, or of encouraging or facilitating commission of, the target offense." *People v. Beeman* (1984) 35 Cal.3d 547, 551.

In *Beeman*, the appellant was convicted of several crimes relating to a home burglary and robbery of appellant's family member. The appellant was not present during the actual commission of the crime, but had conspired with two co-defendants in the planning of the burglary by, notably, giving the men tips on jewelry the victim possessed and by drawing blueprints of the victim's home. However, shortly before the crime was committed, the appellant alleges that he called the men and stated he did not want to follow through with the crime. The trial court severed the defendants, the appellant's co-defendants pled guilty to robbery, and both defendants testified against the appellant at appellant's trial. The appellant was convicted of several crimes, including burglary and robbery. The appellant challenged a jury instruction which required an aider and abettor to have knowledge of a crime to be found guilty, but not the intent to commit the crime. The court agreed that this jury instruction was erroneous and reversed the appellant's conviction, holding that an "aider and abettor [must] act with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense." *Id.* at 560; emphasis in original.

Aiding and abetting is a form of vicarious liability. *People v. Torres* (1990) 224 Cal.App.3d 763, 770. "It is the aiding and abetting of a committed offense or the attempted commission of an offense which constitutes a crime." *Id.* at 770, *citing People v. Hood* (1969) 1 Cal.3d 444, 456–457.

> The critical element which must be found to establish vicarious liability for the targeted offense is the aider and abettor's intent to facilitate and encourage that offense. (Citation) A finding of intent is not necessary to establish liability for "the particular offense ultimately committed by the perpetrator." (Citation) "The critical element which must be found to establish vicarious liability for an unplanned offense is that the offense was in fact a natural and probable consequence of the targeted offense. (Citations) . . . [A]s an aider and abettor . . . his knowledge that an act which is criminal was intended, and his action taken with the intent that the act be encouraged or facilitated, are sufficient to impose liability on him for any reasonable foreseeable offense committed as a consequence by the perpetrator. Therefore, " '[i]t is the intent to encourage and bring about conduct that is criminal, not the specific intent that is an element of the target offense, which Beeman holds must be found by the jury. [Citation.]' Nevertheless, the perpetrator must have the requisite specific intent of the target offense and the jury must be so instructed.

Id. at 769–770. In other words, an aider and abettor must have the intent to encourage or facilitate the commission of the perpetrator's intended crime. *Id.* at 771.

"Factors relevant to a determination of whether defendant was guilty of aiding and abetting include: presence at the scene of the crime, companionship, and conduct before and after the offense." *People v. Singleton* (1987) 196 Cal.App.3d 488, 492. Although mere presence at the scene of a crime or knowledge of a crime alone are insufficient to impose criminal liability, these are nonetheless factors for the jury to consider. *People v. Nguyen* (1993) 21 Cal.App.4th 518, *citing People v. Durham* (1969) 70 Cal.2d 171, 184-85, fn. 11. In *In re Michael T.* (1978) 84 Cal.App.3d 907, a liquor store clerk shot and killed a boy. In retaliation, a boy named Kenneth Washington shot and killed one of the store clerks. The only evidence tying the juvenile, Michael, to the crime were statements attributed to him and his mere presence near the scene of the crime.[3] The court found the evidence linking Michael to the crime insufficient to support a murder conviction under an aider and abettor theory of liability. The court noted that the evidence was uncontroverted that Washington committed the murder but that there was no evidence that Michael participated in the crime by rendering aid or by acting as a co-conspirator. The court held that "[m]ere presence at the scene of a crime which does not itself assist its commission or mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting." *Id.* at 911.

In *People v. Boyd* (1990) 222 Cal.App.3d 541, the defendants robbed and murdered the victim, a pizza delivery driver. At trial, both were found guilty of first-degree murder and second-degree robbery. Both defendants appealed, arguing that the trial court erred because it did not instruct the jury that the mere presence at the scene of a crime or the mere knowledge of the crime does not constitute aiding and abetting. The appellate court agreed, stating,

> To be liable for a crime as an abettor, the accused must have instigated or advised the commission of the crime or have been present for the purpose of assisting the crime. He must share the criminal intent with which the crime was committed. Neither his mere presence at the scene of the crime nor his failure, through fear, to prevent a crime establishes, without more, that an accused was an abettor.

Id. at 556–557, *citing People v. Durham* (1969) 70 Cal.2d 171, 181.

---

[3] Two witnesses standing near the liquor store stated that before the shooting, Michael had warned them to get out of the way because there was going to be a shooting at the store. Later that same evening, another man, Anthony Hemphill, was at a dice game near the liquor store when he alleged that Michael walked in and bragged, "We got the guy." Also later that evening, Michael went to the home of a woman named Margaret Jones, asking if he could leave a gun at her house. About thirty minutes later, Washington arrived with a gun. Jones testified that she heard both Michael and Washington discuss the crime, and Michael stated, "Man, we shot the wrong blood" and then handed Jones bullets. Jones told police that she heard both boys say that they had shot the clerk in retaliation for the boy who was shot.

Natural and Probable Consequences Doctrine

It is clear that the legal Doctrine of "Natural and Probable Consequences" no longer applicable in murder cases.

Manslaughter

Manslaughter is the killing of another with no malice aforethought. Penal Code section 192. Manslaughter is also a lesser included offense to murder. *People v. Barton* (1995) 12 Cal.4th 186, 201. There are two types of manslaughter relevant to our discussion here: voluntary and involuntary manslaughter.[4]

Voluntary manslaughter is a killing committed "upon sudden quarrel or heat of passion." Penal Code section 192(a). Case law further defines voluntary manslaughter as not only a killing committed after provocation, but also as a killing committed in imperfect self-defense or imperfect defense of others. *People v. Beltran* (2013) 56 Cal.4th 935; *In re Christian S.* (1994) 7 Cal.4th 768; Penal Code section 192(a). These circumstances negate the mens rea of malice aforethought.

Involuntary manslaughter is a killing "in the commission of an unlawful act, not amounting a felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." Penal Code section 192(b). The mens rea required to support an involuntary manslaughter conviction is criminal negligence, which is a higher degree than civil negligence. It is negligence that is aggravated, gross, or reckless, and a departure from the conduct of an ordinarily reasonable person under the same or similar circumstances. *People v. Mehserle*, *supra*, at 1140, *citing People. v. Penny* (1955) 44 Cal.2d 861, 879 and *People v. Oliver* (1989) 210 Cal.App.3d 138, 146-47. It has also been defined as conduct which carries a high degree of risk of death or great bodily harm. *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440.

Here, Pirone cannot be charged with manslaughter because there are no facts to suggest that Pirone acted because of provocation, imperfect self-defense or defense of others, or with criminal negligence. Additionally, the Statute of Limitations has long run on the crime of Manslaughter.

Statutory Limitations

Penal Code section 188(a)(3) states that a principal to murder must possess malice aforethought and that "malice shall not be imputed to a person based solely on his or her participation in a crime." This is codified in case law, which holds that if a specific intent crime is at issue, the aider and abettor "must share the specific intent of the perpetrator." *People v. Beeman* (1984) 35 Cal.3d 547, 560. As stated by the *Beeman* court,

---

[4] Vehicular manslaughter is a third subset of manslaughter, but is irrelevant to this discussion.

> [A]n aider and abettor will "share" the perpetrator's specific intent when he or she knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime. (Citations) The liability of an aider and abettor extends also to the natural and reasonable consequences of the acts he knowingly and intentionally aids and encourages. *Ibid.*

Here, the People cannot proceed on an aider and abettor theory of liability to support a murder charge because neither prong is met: there is no target crime, and even if there was, murder is not a natural and probable consequence of the crime of a misdemeanor assault under color of authority.

The People cannot prove beyond a reasonable doubt that Pirone independently possessed malice aforethought as required by Penal Code section 188(a)(3). Even if Mehserle's act was supported by express or implied malice, there is no evidence to suggest that Pirone shared this intent with Mehserle. Indeed, a jury already determined that even the actual shooter did not possess the intent to kill necessary to support a murder conviction.

Furthermore, there is no evidence that, as the *Beeman* court noted, Pirone knew "the full extent of the perpetrator's criminal purpose" or that he gave "aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime." Witness accounts describe even Mehserle as dumbfounded by his own actions. Mehserle told Pirone immediately before the shooting to stand back because he was going to tase Mr. Grant. There were neither words nor any indication that Mehserle planned to shoot Mr. Grant. In fact, Mehserle testified that he was unaware he had reached for his firearm and shot Mr. Grant until he heard the shot.

Furthermore, Mehserle's shooting was entirely unforeseeable. The People must prove that a reasonable person would foresee that killing Mr. Grant was a natural and probable consequence of the target offense of misdemeanor assault by a police officer. Although the standard is an objective one, the facts from the case nonetheless demonstrate that the shooting was unexpected, even for Mehserle. Mehserle's immediate reaction was, "Oh my God, I shot him." Although Pirone behaved aggressively and placed his knee on Mr. Grant's back-neck area, this does not satisfy the legal requirements necessary to prove liability on an aider and abettor theory. Pirone's knee on Mr. Grant's back-neck area did not cause Mr. Grant's death. The findings of the autopsy establish that fact beyond any doubr.

Furthermore, there is no evidence to suggest that Pirone's actions led to Mehserle shooting Mr. Grant. Mehserle testified that he planned to tase Mr. Grant because he was unable to handcuff Mr. Grant. Mehserle's defense—whether on scene or at trial—was never that he acted at the direction of, or in conjunction with, Pirone. On scene, Mehserle's explanation was that Mr. Grant refused to bring his hands behind his

back. He testified that he saw Mr. Grant's right hand go into his pocket. Believing Mr. Grant was reaching for a weapon, Mehersle decided to tase Grant. He said, "Fuck this, I'm going to tase him." Mehserle tugged on his handgun three times before he pulled the gun out of its holster and shot Mr. Grant one time in the back. Mehserle testified that he did not realize he had mistaken his taser for his firearm until he heard the shot. At trial, although Mehserle conceded that Pirone was behaving aggressively, his entire defense rested on firearm-taser confusion. He also testified that he did not notice Pirone had placed knee on Grant's neck. Thus, the nexus between Mehserle's act of shooting Mr. Grant and Pirone's aggressive behavior cannot be established beyond a reasonable doubt.

Prosecutor's Legal and Ethical Responsibility

The minimum requirement for filing and maintaining criminal charges. A prosecutor shall seek or file criminal charges only if the prosecutor reasonably believes that the charges are supported by probable cause, that admissible will be sufficient to support conviction beyond a reasonable doubt and that the decision is in the interest of justice. ABA Standard 3-4.3(a). The United States Supreme Court declared in a seminal case "]w]hile a prosecutor may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce wrongful convictions as it is to use every legitimate means to bring about a just one." Berger v. U.S. (1935) 295 U.S. 78, 88.

The Alameda County District Attorney's Office adheres to the strongest ethical standards in the review and prosecution of criminal cases. Cases must be decided on facts and the law. Undue influence, favoritism, prejudice, pressure or bias can never be part of the decision making process.

Conclusion

Pirone's conduct on the night in question was offensive and unacceptable. He may very well have violated BART Police Policy. During the initial investigation and now upon reinvestigation, the Office deplores his behavior in the strongest possible terms. Administrative, disciplinary and civil sanctions imposed against him were entirely justified. The question presented here, however, is whether there was sufficient evidence to convict Pirone of murder beyond a reasonable doubt.

In evaluating this evidence, we are bound by the high legal standards required in the charging of any criminal case, regardless of our feelings about Pirone and his behavior. To justify the bringing of criminal charges and after consideration of applicable lawful defenses, there must be enough legally admissible evidence to convince 12 reasonable persons in this community to believe unanimously and beyond a reasonable doubt that a crime has been committed and that the defendant is guilty of committing it. This is the highest standard of proof known in the entire field of law.

Mindful of this high burden, and in view of everything we have considered and reconsidered, we conclude that we cannot prove Pirone guilty beyond a reasonable doubt. There was not enough evidence to charge him with murder in 2009 and there is not enough evidence now. We condemn Pirone's conduct, but we cannot charge him with murder.

APPENDIX

Statute of limitations

In addition to evidentiary rules which limit what charges the People can bring against an individual, there are statutory limitations which further constrain the People's charging decisions. The statute of limitations ensures timely prosecution of crimes before loss of evidence, witnesses, or fading memories. The statute of limitations varies greatly depending on the type and severity of the crime, as demonstrated in the following table:

Crime	Statute of Limitations
Penal Code section 799(a): Offenses punishable by: - Death - Imprisonment in state prison for life without possibility of parole - Embezzlement of public money	None
Penal Code section 800: Offenses punishable by: - Imprisonment in state prison for 8 or more years	6 years
Penal Code section 801.6: - Crimes against elders and dependent adults - 273.5 (Penal Code section 803.7(a))	5 years
Penal Code section 801.5 & 803(c): - Fraud, breach of fiduciary obligation, theft, embezzlement on an elder or dependent adult, misconduct in office	4 years
Penal Code section 801: - Offenses punishable in state prison (felonies) - Offenses against a minor under 14 years old	3 years
Penal Code section 802(c) - Misdemeanors under Business and Professions Code section 729	2 years
Penal Code section 802(a): - Any crimes not punishable by death or state prison (misdemeanors)	1 year

In rare circumstances, the statute of limitations for bringing a cause of action may temporarily stop running. This is known as tolling. Penal Code section 803(a) provides that the statute of limitations may be tolled for a maximum of three years if a criminal defendant is not within the state.