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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SANTA CRUZ

THE PEOPLE OF THE STATE OF
CALIFORNIA,

Plaintiff,

v.

BECKY ANN JOHNSON, et al.,

Defendants.

No. F22194
DEFENDANTS BRADLEY STUART
ALLEN'S AND ALEX DAROCY'S
NOTICE OF MOTION AND MOTION
TO DISMISS (PEN. CODE, § 995);
MEMORANDUM OF POINTS AND
AUTHORITIES

Hearing: May 8, 2012
Dept. 6
Time: 9:00 a.m.

TO: BOB LEE, DISTRICT ATTORNEY OF SANTA CRUZ COUNTY, STATE OF
CALIFORNIA and to his duly authorized deputies:

NOTICE IS HEREBY GIVEN that on MAY 8, 2012 in Department #6 of the above-
entitled court, defendants Bradley Stuart Allen and Alex Darocy will move this court for an order
dismissing the charges pending against them, pursuant to Penal Code section 995,¹ on the
grounds that the District Attorney did not present evidence at the preliminary hearing sufficient
to provide probable cause to believe Mr. Allen or Mr. Darocy committed those offenses.

¹ Unspecified section references are to the Penal Code.

This motion is based upon: this notice of motion and the points & authorities incorporated herewith; all other pleadings, records, and files herein; and such evidence and argument that may be presented at the hearing of this motion.

Dated: April __, 2012

Ben Rice
Attorney for Bradley Stuart Allen

Dated: April __, 2012

George J. Gigarjian
Attorney for Alex Darocy

STATEMENT OF THE CASE

On February 7, 2012, the District Attorney filed a complaint charging Mr. Allen, Mr. Darocy, and nine other codefendants with conspiracy to commit vandalism and/or trespass (count 1; § 182, subd. (a)(1)), felony vandalism (count 2; § 594, subd. (b)(1)), misdemeanor trespass by entering and occupying property (count 3; § 602, subd. (m)), and misdemeanor trespass by refusing to leave private property (count 4; § 602, subd. (o)). The cases of Mr. Allen and Mr. Darocy were bifurcated from the other codefendants' cases, as their cases shared common factual and legal issues.

A preliminary hearing for Mr. Allen and Mr. Darocy was held over three days, on March 13, 14, and 15, 2012. All parties filed multiple briefs concerning the legal issues, and Mr. Allen and Mr. Darocy presented affirmative evidence on their behalf. After the preliminary hearing, Mr. Allen and Mr. Darocy were held to answer on counts 1, 3, and 4 (conspiracy and the two misdemeanor trespass counts), but were not held to answer on count 2 (felony vandalism). (3RT 68.) The trial court denied a defense motion to reduce count 1 to a misdemeanor, without prejudice. (See § 17, subd. (b).) (3RT 71-72.)

On March 12, 2012, the District Attorney filed an information that included all four of the original charges.

STATEMENT OF FACTS

A large number of people entered a vacant building at 75 River Street on November 30, 2011. The incident occurred during the time of the “Occupy” movement across the country, and at least some of the participants considered themselves part of that movement. An unknown number of people remained in the building for four nights, ultimately causing property damage estimated at over \$400.00.

Mr. Allen and Mr. Darocy were established photojournalists who regularly posted their work on an internet-based media outlet called Indybay. They were seen entering and exiting the vacant building only during the first day of the “occupation”. Each man was always observed carrying their cameras or taking pictures. They subsequently posted photographs of the incident to the Indybay website as well as to their own independent websites. There was no evidence that they were involved in planning the incident, that they encouraged the occupiers, that they encouraged people outside the building to join or support the occupiers, that they committed any vandalism, or that they remained in or around the building beyond the first few hours of its occupation.

The cases of Mr. Allen and Mr. Darocy have been bifurcated from the cases of the other codefendants because of their unique factual circumstances: both men were photographing the incident and subsequently posted photographs to an online media outlet. The People agreed that the case should be bifurcated due to Mr. Allen and Mr. Darocy’s particular circumstances. Mr. Allen and Mr. Darocy both contend that they had no intent to participate in the incident themselves.

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A. Background

Neither Mr. Allen and Mr. Darocy have criminal records.

Both Mr. Allen and Mr. Darocy have education related to photojournalism. Mr. Allen has a master’s degree in Social Documentation from the University of California, Santa Cruz. (2RT

42.) Mr. Darocy has a bachelor's degree in History of Art and Visual Culture, also from the University of California, Santa Cruz, and he wrote his thesis on social documentary photography. (2RT 56-57.)

Both Mr. Allen and Mr. Darocy publish photographs to an online media outlet called Indybay. Indybay is the local branch of Indymedia, which was founded in 1999. (2RT 42.) Indymedia was intended to serve as an alternative to the mainstream press and began by covering the World Trade Organization protests in Seattle. (2RT 42.) Indymedia has an editorial policy that encourages truth-telling through open publishing. (2RT 43.) The website is edited, however, to control its content – for instance, personal attacks and pornographic material are always removed. (2RT 81-82.)

Mr. Allen is a senior member of Indymedia. (2RT 103.) Both Mr. Allen and Mr. Darocy are members of the editorial board of Indybay. (2RT 44, 81.) This means they are permitted to write feature articles as well as review and edit the postings of other members. (2RT 81, 101-103.) A person is not accepted to the editorial board unless they have been nominated by someone already on the board. (2RT 101.) The person's prior contributions, education, and experience are all reviewed during the process. (2RT 101.)

Both Mr. Allen and Mr. Darocy have press cards for Indybay. (2RT 44, 100.) A person is issued an Indybay press card only after he or she works regularly with the organization and goes through an orientation process. (2RT 75, 82-83.)

Mr. Allen's photographs have also been published by more mainstream news publications, including the Santa Cruz Sentinel and the San Jose Mercury News. (2RT 47.)

Mr. Darocy has covered many current events and posted the photographs to Indybay, including Occupy Santa Cruz, Occupy Monterey, protests at UC Santa Cruz, a protest at an Ohlone burial ground, and demonstrations following the death of Oscar Grant in Oakland. (2RT 106.) He tends to cover "hot social issues" in Santa Cruz. (2RT 110-111.) He often includes coverage of the police response to such events, and interviews officers to get their side of the

story. (2RT 111; see also 1RT 33.) A sampling of Mr. Darocy's articles and photographs were admitted into evidence. Please see Preliminary Hearing Defense Exhibits A14 through A27.

Mr. Allen is a member of the National Press Photographer's Association a non-profit dedicated to the advancement of visual journalism. A letter co-authored by that group with the Reporter's Committee for Freedom of the Press was written to the court on Mr. Bradley's behalf and admitted into evidence by stipulation.² (2RT 71.)

B. Incident

On November 30, 2011, City of Santa Cruz Police Officer William Winston and his partner responded to the county courthouse at about 2:00 p.m. (1RT 12), because of an expected march "to a foreclosed property." (1RT 12, 31.) A flyer said that the march was being conducted "in solidarity with" Occupy Santa Cruz. (1RT 32.) There were about 75 people gathered on the Water Street side of the courthouse. (1RT 14.) Some of the people were holding banners, most of which related to mortgages. The officers could not hear what any of the people were saying. (1RT 15.)

The officers observed the group travel west on Water Street toward Ocean and River Streets. (1RT 15-16.) During the march, Mr. Darocy was taking photographs of people participating in the march. (1RT 35.) Mr. Allen was not observed during the march. (1RT 35.) The marchers first went to the Chase Bank on River Street. (1RT 35-36.) They remained there for about 20 minutes, with people making announcements that the officers could not hear. (1RT 36.) The group then proceeded East on Water Street to 75 River Street, to a building that had

² The authors introduced the organization as follows: "The Reporters Committee is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970. NPPA is a nonprofit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. Since 1946, NPPA has vigorously promoted freedom of the press in all its forms, especially as that freedom relates to visual journalism." The Reporters committee Steering Committee includes Judy Woodruff of PBS/ The Newshour; Dan Rather of HD Net; Bob Schieffer of CBS News; Andrea Mitchell of NBC news; Michael Duffy of Time; Jess Bravin of the Wall Street Journal; Tony Mauro of the National Law Journal; Scott Applewhite of the Associated Press; and, Wolf Blitzer of CNN.

been vacant for three years but was not a foreclosed property. (1RT 17, 35-36, 73; 2RT 21.) At that point, there were about 100 people in the group. (1RT 18.) A large portion of the group entered the building at 75 River Street through an unlocked door; others remained outside. (1RT 18.) Some of the people were observed on the roof. (1RT 20-21.)

The officers positioned themselves in the back parking lot to “keep[] an eye” on things around 3:00 p.m.. (1RT 19,42.) They observed Mr. Allen and Mr. Darocy enter the building at different points in the afternoon of November 30, 2011. (1RT 22, 25.) Mr. Allen was observed entering the building at some point after the initial entry by the group, (1RT 42, 53), but left the building at some point while it was still light out. (1RT 57.) Mr. Darocy was seen entering and exiting the building three or four times, actively taking photographs the entire time. (1RT 41.) Mr. Darocy and Mr. Allen took some photographs of the officers. (1RT 40-41, 57-58.)

No further evidence demonstrated that either Mr. Allen or Mr. Darocy were in or around the building during the subsequent four days of occupation.

The officers did not know, initially, whether any of the people who had entered the building had consent from the owner of the building. (1RT 26.) Later, the officers determined that Wells Fargo was the leaseholder of the building, and that no one had permission to enter. (1RT 73.) After receiving authority from Wells Fargo, some of the officers then gave verbal warnings that the people inside the building were not allowed to be there. (1RT 27-28, 45-46, 73.) The initial announcements were made at about 7:00 p.m. (1RT 58.) They were not amplified, and there was a lot of other noise outside the building. (1RT 47-48, 65.) There was no evidence indicating that either Mr. Allen or Mr. Darocy heard the announcement or were even still in the building when such announcements were made.

People were inside the building over the next four days, dwindling in numbers. (1RT 69, 12.) Everyone had cleared out by the morning of December 4th. (1RT 104.) On the second or third day, officers posted notices around the building warning of trespassing prosecution. (1RT 28.) During the four days, at least one member of the Santa Cruz City Council entered the building, but she was not among those charged with any crimes. (1RT 60, 106.) At some point a

photographer from the Santa Cruz Sentinel (the County's principal newspaper) was allowed to enter, spent an unknown amount of time inside, and published a photograph taken from inside the building. (1RT 108-109.)

After everyone cleared out of the building on December 4th, officers entered to collect evidence and assess damage. (1RT 69.) The damage included graffiti, most of which contained the word "occupy," mainly in the elevator and on the roof. (1RT 85-86, 111.) The building's internal security cameras, which were not working at the time of the protestors' entry, had been covered with tape and had their wires pulled out. (1RT 86, 89-90.) There was damage to some of the furniture. (1RT 90.) The repairs and cleanup were estimated to cost over \$400. (1RT 90.)

Officers also found posted inside the building a sign entitled, "Guidelines/ Groundrules." (PX Defense Exhibit A-4.) Such sign, among other things, stated "Absolutely no vandalism, Promote a non-violent atmosphere, and Pick up after yourself and others."

Following the incident, a group called Autonomous Anonymous tried to take credit for the entry into the building, calling itself "a splinter group of Occupy Santa Cruz." (2RT 15.) Later information indicated that people associated with the Occupy Santa Cruz group were not part of the initial entry, but did join in the later occupation of the building. (2RT 18.) The police did not consider the term "occupy" as associated with one particular group, as it has become a common expression. (2RT 21.)

C. Photographs

One police photograph showed Mr. Allen in the doorway of the building and another on the roof of the building. Both photographs showed him holding a camera.

Subsequent to the incident, Mr. Allen posted photographs of the incident to the Indybay website. (1RT 22.) Two of the photographs were taken from the roof. (1RT 24-25; 2RT 8-10.) (2RT 8-9, 24-25.) Six of the photographs posted were taken from inside the bank. (1RT 76-77.) One of Mr. Allen's photographs, showing a group gathered in a circle inside the building, was posted with the title, "Shareholder's meeting." (1RT 77, 98.) The photograph shows Mr. Darocy

holding a camera, outside of the circled group, with his line of sight focused away from the group. (1RT 98.)

D. Defense Witnesses

Professor Warren Sack, PhD., is the Chair of Digital Arts and New Media Department at the University of California, Santa Cruz (2RT 39-40.) Dr. Sack was accepted as an expert witness. (2RT 42.) He has been engaged in the research of “new technologies and news” for twenty years, first studying at Yale, and then the MIT Media Laboratory. (2RT 41.) He has published and taught on issues concerning new technologies and the news. (2RT 41.) He was one of Mr. Allen’s professors when Mr. Allen was obtaining his master’s degree in social documentation. According to Dr. Sack, Indymedia is a news source (2RT 42), and Mr. Allen is a photojournalist. (2RT 49.) He also indicated that someone with Mr. Darocy’s education and experience would likely be a journalist. (2RT 57-58.)

Peter Maiden was the Indymedia photograph coordinator from 2000 to 2008. (2RT 75.) He opined that Mr. Allen and Mr. Darocy were not merely “citizen journalists,” but rather are professional photo journalists. (2RT 77-78.) He cited their training as well as the professional quality of their photographs in support of this opinion. (2RT 77-78.)

Michael Rotkin, a former UCSC Professor who had served six terms on the Santa Cruz City Council (including five terms as mayor) testified for Mr. Allen. (2RT 84-85.) He knew Mr. Allen as an undergraduate and graduate student. (2RT 86-87.) Professor Rotkin had participated in a number of previous demonstrations, at which Mr. Allen had taken photographs. (2RT 87-89.) During the six or more prior demonstrations, Mr. Allen was always “covering” the events by taking photographs– and had never been a part of the actual demonstrations. (2RT 89-90.)

The parties stipulated to the proffered testimony of two additional defense witnesses who would have testified that they each had seen Mr. Allen at three different demonstrations and would have identified the six photographs entered into evidence as coming from those six

demonstrations. On each of those occasions the witnesses would have described Mr. Allen as acting only as a photojournalist. (2RT 73.)

POINTS AND AUTHORITIES

The pending charges of conspiracy, trespass, and vandalism are not supported by the evidence introduced at the preliminary hearing. There is no probable cause to believe that Mr. Allen and Mr. Darocy intended to participate in the trespass or vandalism, that they made any agreement to commit a trespass or vandalism, or that they or aided and abetted the trespass or vandalism. The evidence established that their intent and actions consisted of providing media coverage of the incident for publication.

I. STANDARD OF REVIEW

An information (or individual counts therein) must be set aside if the defendant has been “committed without reasonable or probable cause.” (§ 995, subd. (a)(2)(B).) In order for a defendant to be put on trial for a particular offense, the preliminary hearing must present “such a state of facts as would lead a man of ordinary caution or prudence to believe and conscientiously entertain a strong suspicion” that he committed that crime. (*People v. San Nicolas* (2004) 34 Cal. 4th 614, 654, internal citation and quotation marks omitted.) The court should set aside an information if there is no “rational ground for assuming the possibility that an offense has been committed and the accused is guilty of it.” (*Ibid.*)

II. THERE WAS NO PROBABLE CAUSE TO BELIEVE MR. ALLEN OR MR. DAROCY COMMITTED CONSPIRACY BECAUSE THEY LACKED THE SPECIFIC INTENT TO DO SO

The evidence at the preliminary hearing provided no probable cause to believe that Mr. Allen or Mr. Darocy committed conspiracy to commit trespass or vandalism.³ (§ 182, subd. (a).) There was no evidence that either defendant entered into an agreement with anyone else to

³ The District Attorney has charged this offense in the alternative, with the target offenses of either trespassing “in violation of Section 602(m) and Section 602(o)” or vandalism “in violation of Penal Code section 594(b)(1) ... and 594(b)(2).”

commit trespass or vandalism, and there was no evidence that either defendant had the specific intent to commit trespass or vandalism.

In order to be charged with conspiracy, the evidence must establish probable cause to believe that the defendants (1) entered into an agreement with others to trespass or commit vandalism and (2) specifically intended to trespass or commit vandalism. “To support charges of conspiracy, a specific intent crime, there must be proof of an agreement to commit unlawful acts or lawful acts by unlawful means, accompanied by an overt act to affect the object of the agreement. [Citations.]” (*Parnell v. Superior Court of Alameda County* (1981) 119 Cal.App.3d 392, 403.)

A. There Was No Evidence Either Defendant Entered into an Agreement to Commit Trespass or Vandalism

At the preliminary hearing, the prosecutor argued that the agreement was shown by the defendants’ presence during the incident. (3RT 22-23.) However, it is well-settled that “mere association or mere presence cannot alone furnish the basis for a charge of coconspiracy.” (*Simmonds v. Superior Court of San Francisco* (1966) 245 Cal.App.2d 704, 708.) The prosecutor’s theory thus fails to support the magistrate’s finding.

Ordinarily, “a conspiracy may be proved by circumstantial evidence.” (*People v. Donahue* (1975) 46 Cal.App.3d 832, 840 [affirming dismissal of conspiracy charge pursuant to defendant’s section 995 motion].) However, when the asserted object of the conspiracy involves “the exercise of fundamental First Amendment rights,” such as a political demonstration, there is a higher standard of proof. (*Castro v. Superior Court* (1970) 9 Cal.App.3d 675, 682; see *Long v. Valentino* (1989) 216 Cal.App.3d 1287, 1294, fn. 4.) In such cases, the prosecution may not rest its case on circumstantial evidence. (*Castro v. Superior Court, supra*, 9 Cal.App.3d at p. 682; *Long v. Valentino, supra*, 216 Cal.App.3d at p. 1294, fn. 4.) Instead, the prosecution must prove, by direct evidence, that the agreed-upon object of the conspiracy was a crime. (*Castro v. Superior Court, supra*, 9 Cal.App.3d at p. 682; *Long v. Valentino, supra*, 216 Cal.App.3d at p. 1294, fn. 4.)

Even when proceeding on circumstantial evidence, “there must be some evidence from which the unlawful agreement can be inferred before criminal liability may be imposed on the basis of conspiracy.” (*People v. Donahue, supra*, 46 Cal.App.3d at p. 840.) Evidence from which an agreement may be inferred includes “the entire conduct of the parties, their relationship, acts, and conduct, during and after the crime.” (*People v. Lewis* (1963) 222 Cal.App.2d 136, 144.)

Here, there is no direct evidence at all that the defendants entered into an agreement to commit a crime. Moreover, no agreement to commit a crime may be inferred based on the circumstantial evidence here. There was no evidence that the defendants had a relationship with any of the other trespassers prior to the incident, and the evidence established that the only relationship between the defendants themselves was in their capacity as professional photojournalists. The conduct of the defendants during the incident consisted of photographing the incident for a short period of time. There was no evidence that either of the defendants participated in the event in any other way: neither defendant shouted slogans or held signs, neither defendant stayed in the building a substantial period of time, and neither defendant committed any vandalism. Following the incident, the defendants posted photographs on their websites and on Indymedia, just as they had for numerous other social/political events that they had documented.⁴

In sum, the evidence at the preliminary hearing established that the defendants were present during the beginning of the incident because they intended to provide media coverage of the newsworthy event. The prosecution failed to provide any direct or circumstantial evidence that either defendant entered into an agreement to commit a crime.

B. There Was No Evidence Either Defendant Had the Specific Intent to Commit Trespass or Vandalism

⁴ As counsel for Mr. Darocy noted during the preliminary hearing, under the prosecution’s theory, the defendants would be guilty of conspiring with every single group that they documented. (3RT 31.)

The prosecution also failed to present any evidence that either defendant had the specific intent to commit a trespass or vandalism. As the defense argued at the preliminary hearing, the evidence established that the defendants' only intent was to document the event for publication.

“Specific intent in a charge of conspiracy means that the conspirators must have the intent through concert of action to do an unlawful act, or to do a lawful act by unlawful means. The essence of the offense lies in the intent; an intent to commit a specific unlawful act or to commit a specific lawful act by unlawful means.” (*People v. Bowman* (1958) 156 Cal.App.2d 784, 797.) “All the circumstances surrounding the act furnish the evidence from which the presence or absence of the specific intent may be inferred by the jury.” (*Id.* at p. 798.)

When the evidence shows that the defendant lacks the specific intent to commit the target offense, he may not be charged with conspiracy. Thus, in *People v. Urziceanu* (2005) 132 Cal.App.4th 747, the defendant's conspiracy conviction was reversed because the jury was not allowed to consider the fact that he believed, in good faith, that he had created a legal medical marijuana cooperative. The court explained that even if the defendant had violated the law, his lack of intent to do so was relevant to the conspiracy charge. (*Id.* at p. 797.)

Here, the circumstantial evidence failed to provide any basis for inferring that either defendant specifically intended to commit a trespass or vandalism. There was no evidence that the defendants had previously participated in any prior Occupy events. The evidence established that the only connection between the defendants and any prior Occupy events was in the defendants' capacity as professional photojournalists. There was no evidence that the defendants did anything during the incident other than take photographs. The defendants' lack of intent to commit the underlying offenses negates the required specific intent required for the conspiracy charge.

In short, there was no probable cause to believe that Mr. Allen or Mr. Darocy had the required specific intent to commit trespass or vandalism, or that they entered into an agreement to commit either of those crimes. The conspiracy charge (count 1) should be dismissed.

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III. THERE WAS NO PROBABLE CAUSE TO BELIEVE MR. ALLEN OR MR. DAROCY COMMITTED A TRESPAS

The evidence at the preliminary hearing provided no “rational ground” for believing that Mr. Allen or Mr. Darocy committed either of the charged forms of trespass: occupying the building (count 3) or refusing to leave the building (count 4).⁵

The magistrate found no probable cause to believe that the defendants themselves committed a trespass, but found that the trespass counts were viable on an aiding and abetting theory. (3RT 69-70.) The magistrate indicated that the defendants promoted the trespass by publicizing the message of the trespassers through their photojournalism. (See 3RT 42-43.)

A. There Was No Evidence the Defendants Aided and Abetted a Trespass

“An aider and abettor is a person who, ‘acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime.’ [Citation.]” (*People v. Prettyman* (1996) 14 Cal.4th 248, 259.) Here, the second and third requirements are missing. There is no evidence that the

⁵ In count 3, the defendants are charged with violating section 602, subdivision (m), which prohibits “[e]ntering and occupying real property or structures of any kind without the consent of the owner, the owner’s agent, or the person in lawful possession.”

In count 4, the defendants are charged with violating section 602, subdivision (o), which states that a trespass is committed when someone “[r]efus[es] or fail[s] to leave land, real property, or structures belonging to or lawfully occupied by another and not open to the general public, upon being requested to leave by (1) a peace officer at the request of the owner, the owner’s agent, or the person in lawful possession, and upon being informed by the peace officer that he or she is acting at the request of the owner, the owner’s agent, or the person in lawful possession, or (2) the owner, the owner’s agent, or the person in lawful possession....”

defendants had “the intent or purpose of committing, encouraging, or facilitating the commission of” the trespass, and no evidence that either defendant performed any act or gave any advice that aided, promoted, encouraged, or instigated the commission of the crime.’ ” (*People v. Prettyman, supra*, 14 Cal.4th at p. 259.)

No California case has held that taking photographs of people engaging in a crime or a demonstration (or posting such photographs following the crime) equates to an “act or advice” that “aids, promotes, encourages or instigates, the commission of the crime.’ ” (*People v. Prettyman, supra*, 14 Cal.4th at p. 259.) Taking photographs is akin to “mere presence” at the scene of a crime, which is insufficient, by itself, to establish liability as an aider and abettor. (*People v. Richardson* (2008) 43 Cal.4th 959, 1024.)

Companionship and conduct before and after the crime are relevant to the determination of whether a defendant has performed any act or gave any advice that “aided, promoted, encouraged, or instigated the commission of the crime’ ” (*People v. Prettyman, supra*, 14 Cal.4th at p. 259; see *People v. Haynes* (1998) 61 Cal.App.4th 1282, 1294.) Here, there is no evidence that either Mr. Allen or Mr. Darocy was a member of Occupy Santa Cruz or any other group that claimed responsibility for the trespass. There is no evidence that either Mr. Allen or Mr. Darocy had previously participated in any actions by such groups. There is no evidence that either defendant advocated for such groups in prior internet postings. (See 3RT 61-62.) And, there is no evidence that Mr. Allen or Mr. Darocy engaged in any conduct before or after the crime other than taking photographs and posting them on Indybay and their own websites.

In order to be prosecuted as an aider and abettor, there must be evidence indicating the defendant played an “affirmative supportive role” in the charged offense. (*People v. Campbell* (1994) 25 Cal.App.4th 402, 410.) Thus, the charges in this case may stand only if taking photographs of trespassers with the intent to post them on the internet can be said to play an “affirmative supportive role” in the trespass. This court should reject that notion, as it would create dangerous precedent that would have a chilling effect on the exercise of First Amendment rights. Although there is no First Amendment right to trespass (*Tobe v. City of Santa Ana* (1995)

9 Cal.4th 1069, 1103), the federal constitution does protect a journalist's the right to publish lawfully obtained material. (*Smith v. Daily Mail Pub. Co.* (1979) 443 U.S. 97, 104.) The constitutional protections for free speech and freedom of the press would be significantly impacted if a person could be prosecuted for photographing and publishing a criminal act on the basis that those acts somehow promoted the crime itself.

This was a newsworthy event, such that journalistic coverage was appropriate. The Occupy protests were going on all over the country at the time and were featured prominently in both mainstream and alternative media. In fact, Mr. Allen and Mr. Darocy were not the only journalists on the scene: The Santa Cruz Sentinel newspaper and a local television news station both sent reporters and photographers to cover the event. The defendants here presented overwhelming evidence to show that they were legitimate journalists with no particular connection to the group or its message. Under the circumstances, their actions in photographing the event and, later, posting photographs on the internet, could not possibly have "aided, promoted, encouraged, or instigated the commission of the crime'" (*People v. Prettyman, supra*, 14 Cal.4th at p. 259.)

Similarly, there is no evidence or legal basis providing probable cause to believe that either Mr. Allen or Mr. Darocy had the intent required for prosecution as an aider and abettor: "the intent or purpose of committing, encouraging, or facilitating the commission of" the trespass." (*People v. Prettyman, supra*, 14 Cal.4th at p. 259.) The evidence showed that both defendants intended to photograph the event and to post the photographs on Indybay as well as their own websites. There is no evidence the defendants intended to help anyone commit the trespasses. The lack of probable cause to believe that the defendants intended to aid and abet the trespass is shown by the defendants' prior activity as journalists, the newsworthy nature of the event, and the lack of any significant connection between the defendants and the trespassers.

B. There Was No Evidence the Defendants Directly Committed a Trespass

As the magistrate found, the trespass charges cannot stand under the theory that the defendants directly committed the offenses.

The trespass charged in count 3, a violation of section 602, subdivision (m), requires not only an entry without consent, but also the act of “occupying” the structure. (*Ibid.*) Importantly, one cannot “occupy” a structure within the meaning of this subdivision unless there has been “a non-transient, continuous type of possession.” (*People v. Wilkinson* (1967) 248 Cal.App.2d Supp. 906, 910; see also *In re Catalano* (1981) 29 Cal.3d 1, 10, fn. 8; CALCRIM 2931 [statute requires that defendant “occupied some part of the (land/ [or] building) continuously until removed”].) The statute requires “some degree of dispossession and permanency” before it is violated. (*People v. Wilkinson, supra*, 248 Cal.App.2d Supp. at p. 911 [the “transient overnight use” of part of a ranch for sleeping “was not the type of conduct which the Legislature intended to prevent when it used the word ‘occupy’ ”].)

Prior to the preliminary hearing, the District Attorney acknowledged there was no evidence to suggest that either Mr. Allen or Mr. Darocy could be found liable as a direct perpetrator under section 602, subdivision (m). (See People’s Preliminary Hearing Points and Authorities, p. 15.) Indeed, the evidence shows that neither Mr. Allen nor Mr. Darocy ever “occup[ied]” the River Street building within the meaning of section 602, subdivision (m). Both men entered the building, but each one’s stay inside was merely transient. Mr. Darocy was seen entering and exiting several times during the afternoon of November 30. (1RT 41.) Mr. Allen was observed entering the building at some point after the initial entry by the group, and he left the building at some point while it was still light out. (1RT 53, 57.) There was no evidence either one remained in the building for any significant period of time or at any time after the first afternoon/ early evening. Thus, they cannot be held liable for the occupation of the building on a direct perpetrator theory.

In count 4, the defendants are charged with trespass under section 602, subdivision (o), which states that a trespass is committed when someone “[r]efus[es] or fail[s] to leave land, real property, or structures belonging to or lawfully occupied by another and not open to the general

public, upon being requested to leave by (1) a peace officer at the request of the owner, the owner's agent, or the person in lawful possession, and upon being informed by the peace officer that he or she is acting at the request of the owner, the owner's agent, or the person in lawful possession, or (2) the owner, the owner's agent, or the person in lawful possession....”

In order to charge someone with a trespass under section 602, subdivision (o), there must be evidence that the request to leave was communicated to and received by the purported trespasser. (*People v. Medrano* (1978) 78 Cal.App.3d 198, 215.) In *Medrano*, the defendant was one of several union organizers who entered a farm labor camp. Ultimately, sheriff's deputies asked the union organizers to leave the premises. Upon receiving this request, most of the union organizers left. However, Medrano was standing “some distance away” when the request was made, and he did not leave. (*Id.* at p. 204.) The court agreed that the lack of evidence that any of the peace officers requested him to leave provided grounds for reversal of Medrano's conviction. (*Id.* at p. 215.)

In this case, there is no evidence that either of the two defendants was even present on the property when the requests to leave were made. Indeed, prior to the preliminary hearing, the District Attorney acknowledged it had no evidence that either Mr. Allen or Mr. Darocy was inside the building when the police commanded those inside to leave. (See *People's Preliminary Hearing Points and Authorities*, p. 15.) The evidence presented at the preliminary hearing confirmed that this was an appropriate concession. The verbal warnings were not issued until about 7:00 p.m., and there was no evidence either defendant remained inside the building at that point.

Even if there was evidence to support a finding that either of the two defendants was inside the building at the time that police officers made general verbal announcements, posted signs, and spoke with one of the persons in the subject building, there is no evidence that Mr. Allen or Mr. Darocy directly heard or was told of the officers' request to leave. As in *Medrano*, this lack of evidence is fatal to a holding order under section 602, subdivision (o). In sum, the defendants may not be held liable as direct perpetrators of the trespass charged in count 4.

IV. THERE WAS NO PROBABLE CAUSE TO BELIEVE MR. ALLEN OR MR. DAROCY COMMITTED FELONY VANDALISM

In count 2, the defendants are charged with felony vandalism – i.e., causing property damage of over \$400. (§ 594, subd. (b).) As the magistrate found, the evidence at the preliminary hearing provided no “rational ground” for believing that Mr. Allen or Mr. Darocy committed felony vandalism.

Both before and during the preliminary hearing, the prosecutor essentially conceded that there was no evidence that either Mr. Mr. Allen or Mr. Darocy were direct perpetrators of any vandalism. (See *In re Leanna W.* (2004) 120 Cal.App.4th 735, 744 [minor could not be held liable for vandalism on an aiding and abetting theory where she was in her grandmother’s house, without permission, along with 30 to 40 people, any one of whom could have committed the vandalism].) The prosecutor instead argued that both defendants were liable for the vandalism because vandalism was a natural and probable consequence of the trespasses that the defendants allegedly aided and abetted or conspired to commit. (See People’s Preliminary Hearing Points and Authorities, pp. 9-13.)

As explained in the previous sections, there was no evidence providing probable cause to believe that either Mr. Allen or Mr. Darocy conspired to commit a trespass or that they aided and abetted a trespass. Moreover, under the circumstances, felony vandalism was not a natural and probable consequence of any trespass.

An aider and abettor may be held responsible for the target offense as well as a non-target offense committed by a confederate, if the non-target offense “was a natural and probable consequence of the target crime(s) that the defendant encouraged or facilitated.” (*People v. Prettyman, supra*, 14 Cal.4th at p. 267.)

At least one published case has rejected the argument that vandalism is a natural and probable consequence of trespass. While *Wawanesa Mutual Ins. Co. v. Matlock* (1997) 60 Cal.App.4th 583 involved civil liability, its facts and legal analysis are applicable here. In *Wawanesa*, two teenagers bought cigarettes and then trespassed onto a private storage facility.

One of the two trespassers tossed a cigarette, causing a fire and significant property damages. (*Id.* at pp. 585-586.) The teenager who had tossed the cigarette was insured; the insurance company sought contribution from the co-trespasser on a conspiracy theory. (*Id.* at p. 586.) On appeal, the court held it was improper to hold the co-trespasser liable because the fire was not a natural and probable consequence of the trespass, even though the co-trespasser knew his companion was going to smoke cigarettes on the property. The court explained that it was “unaware of any legal authority which does, that by merely trespassing on property one necessarily becomes liable for all damage that can be linked to a fellow trespasser.” (*Id.* at p. 590.)

As pointed out during the preliminary hearing, the “Occupy Santa Cruz” movement previously issued a “Statement of Nonviolence” declaring that it is “philosophically opposed to physical violence and/or harm against people and is strategically opposed to the destruction and/or defacement of property.” (See PX Defense Exhibit A-13 and Defendant Darocy’s Preliminary Hearing Points and Authorities, p. 5.) There was also no evidence that the Occupy Santa Cruz group had previously committed any vandalism. (See 3RT 37.) Further, the “Guidelines/ Groundrules” sign posted inside the building (Defense Exhibit A-4), expressly stated “Absolutely no vandalism.” In light of this evidence (or lack thereof), a participant in the “Occupy Santa Cruz” trespass into the building could not have anticipated that some of the trespassers would cause property damage in direct violation of the movement’s philosophy.

CONCLUSION

For the reasons stated herein, Mr. Allen or Mr. Darocy respectfully request that this Court decline to hold them to answer on any of the charged offenses.

Dated: April ____, 2012

Ben Rice
Attorney for Bradley Stuart Allen

Dated: April __, 2012

George J. Gigarjian
Attorney for Alex Darocy