[NO MINUTES WERE GENERATED FOR THURSDAY, MARCH 24, 2016]

SUPREME COURT MINUTES
FRIDAY, MARCH 25, 2016
SAN FRANCISCO, CALIFORNIA

S231292 A139860 First Appellate District, Div. 2 **PEOPLE v. CRUZ-SANTOS (SIDONIO)**

The petitions for review are denied.
Kruger, J., was absent and did not participate.

CONCURRING STATEMENT
by Cantil-Sakauye, C. J.

In light of the dissenting statement, we note that reasonable minds may differ about the characterization of the record below. Furthermore, it is well established that this court's denial of a petition for review is not an expression of the court's opinion concerning the correctness of the underlying appellate decision, or its result, or of any law stated in that decision. (*People v. Davis* (1905) 147 Cal. 346, 349-350; see also, e.g., *People v. Triggs* (1973) 8 Cal.3d 884, 890-891; 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 502, p. 564 ["Practical evidence of [this proposition] is furnished by examples of disapproval of cases in which a hearing was denied only a few years before the disapproving Supreme Court decision"].)

Werdegar, J., Chin, J., & Corrigan, J., concur.

DISSENTING STATEMENT
by Liu, J.

The natural and probable consequences doctrine is a theory of accomplice liability. Under an aiding and abetting theory or a conspiracy theory, "[a] nontarget offense is a 'natural and probable consequence' of the target offense if, judged objectively, the additional offense was reasonably foreseeable." (*People v. Chiu* (2014) 59 Cal.4th 155, 161.) Neither the aider and abettor nor the coconspirator needs to actually foresee the nontarget offense. "Rather, liability ' "is measured by whether a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted." ' [Citation.] Reasonable foreseeability 'is a factual issue to be resolved by the jury.' [Citation.]" (*Id.* at p. 162.) As in this case, the natural and probable consequences doctrine often exposes a defendant to harsh punishment for "a crime of intent although his culpability regarding its commission may be no greater than that of negligence." (Dresser, Understanding Criminal Law (2d ed. 1995) § 30.05[B][5], p. 444.)

In *Chiu*, we imposed a restriction on the natural and probable consequences doctrine. We held that a defendant cannot be convicted as an aider and abettor of first degree murder as a natural and probable consequence of any target offense because "the connection between the defendant's culpability and the perpetrator's premeditative state is too attenuated." (*Chiu*, *supra*, 59 Cal.4th at p. 166.) Our holding recognized that, as a matter of law, there are limits to what can be considered a reasonably foreseeable outcome of an intentional act and, in turn, limits to an accomplice's culpability.

This case similarly tests the legal limits of foreseeability under the natural and probable consequences doctrine. The question here is whether defendants could be convicted of second degree murder, an inherently violent offense requiring an act of killing with malice aforethought (Pen. Code, § 187), on the theory that it was a reasonably foreseeable consequence of unlawful marijuana cultivation, an offense requiring no proof of violent conduct or intent (Health & Saf. Code, § 11358). The gap in culpability between these two offenses is reflected in the fact that second degree murder carries a minimum sentence of 15 years to life (Pen. Code, § 190, subd. (b)), whereas unlawful cultivation carries a maximum sentence of three years (*id.*, § 1170, subd. (h)). Although there may be cases where the concept of foreseeability can bridge this culpability gap, I doubt this is one. As explained below, the record appears devoid of evidence that links the murder in this case to the cultivation offense.

The narrow issue presented concerns the sufficiency of the evidence. But there is also an important legal principle to be elucidated here: Given the elasticity of the concept of foreseeability, trial courts have a key role to play in assessing whether, on the facts of a particular case, a natural and probable consequences theory of accomplice liability should go to the jury. This gatekeeping role is essential to ensuring that such liability is kept "consistent with reasonable concepts of culpability." (*Chiu*, *supra*, 59 Cal.4th at p. 165.) Because this case presents an opportunity to provide that guidance, and because defendants are serving life sentences on a theory of murder that appears unsupported by sufficient evidence, I would grant review.

I.

Defendants Sidonio Cruz-Santos and Augustin Zepeda-Onofre worked an illegal marijuana growing operation ("the garden"). On the night in question, they hosted an employee (Ramon) and three other men (Conrado, Gabino, and Angel) at the garden. Defendants first met Ramon three days earlier through Conrado and hired Ramon to work at the garden. Gabino, whom defendants had not met before, was Conrado's roommate and Ramon's brother-in-law. The evening began with drinks and food, and eventually some of the men used cocaine. At some point, Cruz-Santos became irritated when he heard the sound of all-terrain vehicles (ATVs) nearby. He instructed Zepeda-Onofre to shoot a gun into the air to "frighten those assholes," and Zepeda-Onofre complied.

Later that evening, Conrado and Gabino began arguing about whether Gabino told Conrado's wife that Conrado used cocaine. Cruz-Santos became annoyed at their bickering, so he drew his gun and told the two men: "If you have problems in your house then go fix them in your house. But don't come here and give me problems. Because the devil is touching me and I can be capable of anything." Ramon urged the two men to leave, and Conrado, Gabino, and Ramon left the garden and walked toward the driveway that led off the property. Conrado said he was too drunk to drive and asked Ramon to get his truck.

As Ramon walked to the truck, he noticed that Cruz-Santos and Zepeda-Onofre were walking toward the end of the driveway where Conrado and Gabino were waiting. He then heard several gunshots. He continued walking, got into the truck, and drove back to the driveway. When he returned, he saw Conrado on the ground with Cruz-Santos pointing his gun toward Conrado's head. Ramon heard Cruz-Santos say that Conrado shouldn't say anything about what he saw or else he would find and kill his family. Ramon asked about Gabino, and Cruz-Santos told him that Gabino "had gone to hell." Ramon asked Cruz-Santos why, and Cruz-Santos said, "because I want[ed] to." Ramon asked again about Gabino, and Cruz-Santos told Zepeda-Onofre to show Gabino's body to Ramon. Cruz-Santos demanded that Ramon and Conrado take Gabino's body and dispose of it. After getting the body into the truck, Conrado refused to get in. Ramon got in, drove the truck, dumped the body, and then notified the police.

Ramon was initially charged and held for the murder, but those charges were dropped when he agreed to cooperate. Both defendants were arrested and charged with second degree murder, unlawful cultivation of marijuana, three counts of assault with a firearm, and firearm-related enhancements. Ramon testified against defendants.

At the end of trial, the court heard counsel's arguments on the proposed jury instructions. The parties disagreed with respect to CALCRIM No. 402, titled Natural and Probable Consequences Doctrine (Target and Non-Target Offenses Charged). Objecting to the instruction, defense counsel said: "[T]he bottom line [of] the theory is that if you cultivate marijuana and that you are armed, that natural and probable consequences is that you are guilty of murder. What evidence did we hear that that's the case? . . . [T]heir witness said they were having a party at the marijuana grow and they went down there and there was a dispute between Conrado and Gabino, and then where Ramon came there and Gabino was shot. And somehow [Cruz-Santos] and [Zepeda-Onofre] made admissions that they were involved. There is no evidence that this relates — that the homicide related to the cultivation of marijuana. [¶] . . . [¶] Here we are just saying well, jury, you don't have any evidence, but you decide whether it is reasonably foreseeable without any evidence and use your own opinions whether it is foreseeable that murder would result from the cultivation of marijuana. That is fundamentally wrong."

The trial court initially expressed doubts about instructing the jury on this theory: "Is there any case? Because we do have published cases on natural and probable consequences for certain acts. Do we have any published cases on armed marijuana camps? Do we have any at all in the state?

Do you have any to proffer to the Court? It is certainly inviting, especially when we first began to litigate these motions and we were picking a jury when the newspaper article came out and said, hey, there is 20 plus unsolved crimes, we don't even know who some of the victims are in marijuana grows in the North Bay, so it is in the context of the Press Democrat and the news article, you think oh boy, this is pretty dangerous. [¶] On the other hand, we probably have 100 marijuana grows in Santa Rosa that haven't resulted in any harm whatsoever, just pulling numbers out of the hat, but between Sonoma, Napa, Mendocino, Lake County, probably thousands of marijuana grows that are armed that hasn't resulted in any accidental discharge or death or the killing of intruders. I think this would be a lot more viable if, in fact, this was an intruder. . . . We actually had something kind of consistent with why you would think they may be armed, that someone comes to steal it and they kill them or someone on an ATV wanders in having recreational purposes, and gets killed. I think it would be more logically consistent to argue for this. [¶] . . . I'm leaning strongly on pulling the plug on this, because I don't see how it is necessary to the People based on the evidence in this case. And I really do think we are kind of filling some gaps by an instruction where we didn't have actual evidence. . . . I remember poignantly one expert saying yeah, it is common to have guns in marijuana camps, but that's a far different cry from it then becomes natural and probable that someone will get murdered as a result of that combination."

The district attorney responded by arguing that the issue was a factual question for the jury to decide: "I don't know that there is a case specifically about [Health and Safety Code section] 11358 with or without an arming enhancement, but what I do know is that . . . the basic law is that what constitutes a probable and natural consequence is a question for the trier of fact . . . . [¶] . . . [¶] . . . [W]hen you put guns, multiple guns in the hands of people while they are cultivating marijuana for the purpose of protecting it, it is not only foreseeable but planned that you are going to use those firearms. . . . [I]f there is some evidence in the record to support a theory of liability, the Court must instruct on it. They arm themselves and others, meaning [Cruz-Santos] had Ramon armed in a marijuana grow with instructions that this is for either an emergency or to defend yourself, there is the perceived threat to the garden, the garden itself is very covertly placed, strategically placed. This ATV keeps coming by, which is a perceived threat, and the response is somebody is going to shoot a warning shot in the air . . . . [¶] . . . Yes, the argument was about cocaine use between Gabino and Conrado. But the fact of the matter is they were drawing unwanted attention to the scene. . . . [T]he evidence supports that theory, whether the Court thinks it is a good theory or not, whether the defense thinks it is a good theory or not."

Defense counsel responded by saying "there is no case law supporting" the instruction and contrasted it with gang cases: "The reason why disturbing the peace, a [Penal Code section] 415 allowed in gang cases, [is] because there has to be some predicate evidence to show that a person engaged in a fight because of the culture of a gang, natural and probable consequences would be a more violent act, an assault or a murder. . . . In this case there is no basis for it. It is just that they want a jury to be able to say what they think is foreseeable, and we don't just let juries make their own decisions without evidence."

Despite its misgivings, the trial court concluded: "I'm going to add [CALCRIM No. 401, Aiding and Abetting: Intended Crimes] and I'll give [CALCRIM No.] 402, and based on the evidence that was presented to the jury in the manner and number of firearms and the way it was used, not only in threatening those that work there but also an ATV that came across the scene, I think it is fair to the jury to make the decision. The instruction summarizes the law that they could apply to the facts as they find them."

Accordingly, the trial court instructed the jury with CALCRIM No. 402 as follows: "You must first decide whether the defendant is guilty of Illegal Cultivation of Marijuana, Assault with a Firearm, or Brandishing a Firearm. These will be called the 'target offenses.' If you find the defendant is guilty of any of these crimes, you must then decide whether that defendant is guilty of Murder. [¶] Under certain circumstances, a person who is guilty of one crime may also be guilty of other crimes that were committed at the same time. [¶] To prove that the defendant is guilty of Murder under this theory, the People must prove that: [¶] 1. The defendant is guilty of one of the target offenses; [¶] 2. During the commission of the target offense or offenses, a coparticipant in that crime committed the crime of Murder; [¶] and [¶] 3. Under all of the circumstances, a reasonable person in the defendant's position would have known that the commission of Murder was a natural and probable consequence of the commission of the target offense or offenses he committed."

The trial court also instructed the jury with CALCRIM No. 417, titled Liability for Coconspirators' Acts, as follows: "A member of a conspiracy is not criminally responsible for the act of another member if that act does not further the common plan or is not a natural and probable consequence of the common plan. [¶] To prove that a defendant is guilty of the crime of Murder, charged in Count I, under a conspiracy theory, the People must prove that: [¶] 1. The defendant conspired to commit Illegal Cultivation of Marijuana; [¶] 2. A member of the conspiracy committed the Murder to further the conspiracy; [¶] and [¶] 3. Murder was a natural and probable consequence of the common plan or design of the crime that the defendant conspired to commit." The jury was also instructed that it needed to evaluate the conspiracy and aiding and abetting theories separately.

After deliberating for one day, the jury submitted a question to the court: "If we decide there <u>was</u> a conspiracy to unlawfully cultivate, does the liability of coconspirators apply to the murder charge only? Or, does it apply to <u>all</u> charges that we determine are the natural and probable consequences of the conspiracy?" The trial court responded by instructing the jury with a modified version of CALCRIM No. 417, which included assault with a deadly weapon as a nontarget offense. The CALCRIM No. 402 instruction was not changed.

The jury convicted both defendants of second degree murder. Although the jury found that both defendants "used" a firearm during the commission of the murder and that a principal in the murder was armed, the jury found "not true" that either defendant "personally and intentionally discharged a firearm" that killed Gabino.

II.

In the Court of Appeal, defendants argued that the trial court erred when it instructed the jury on murder as a natural and probable consequence of unlawful cultivation of marijuana or conspiracy to illegally cultivate marijuana. The Court of Appeal affirmed, holding that "[t]he jury could conclude from the prosecution's evidence that there was the possibility of gun violence inhere[nt] in the marijuana operation." But the reasoning in support of this conclusion appears unconvincing.

In *People v. Prettyman* (1996) 14 Cal.4th 248 (*Prettyman*), we said that "[t]o trigger application of the 'natural and probable consequences' doctrine, there must be a *close connection* between the target crime aided and abetted and the offense actually committed." (*Id.* at p. 269, italics added.) Where the target offense involves intentional violence against others, the law holds the defendant accountable for harms, including death, that foreseeably result from the violence he intentionally set in motion, whether or not he intended those resulting harms. *Chiu*, for example, involved a gang fight that escalated into a fatal shooting. (*Chiu*, *supra*, 59 Cal.4th at pp. 159–160.) The defendant actively participated in the fight and was charged with murder on a natural and probable consequences theory that posited assault (Pen. Code, § 240) or disturbing the peace by unlawfully fighting in a public place (*id.*, § 415, subd. (1)) as the target offense. In that context, where the target offense involved nonlethal yet intentional violence, we said "punishment for second degree murder is commensurate with a defendant's culpability for aiding and abetting a target crime that would naturally, probably, and foreseeably result in a murder under the natural and probable consequences doctrine." (*Chiu*, at p. 166.) The risk of violence and danger inherent in the target offense forms the predicate for imposing liability for murder based on foreseeability and makes punishment for murder "commensurate" with the defendant's culpability. (*Ibid.*) Gang fights that escalate into severe bodily harm or death are paradigmatic circumstances in which we have upheld natural and probable consequences liability. (See *People v. Smith* (2014) 60 Cal.4th 603; *People v. Favor* (2012) 54 Cal.4th 868 (*Favor*); *People v. Medina* (2009) 46 Cal.4th 913 (*Medina*); see also *Prettyman*, at pp. 262–263 [collecting cases].)

The trial court in this case authorized the jury to convict defendants of murder with malice aforethought as a natural and probable consequence of unlawful marijuana cultivation. The offense of unlawful cultivation requires proof that the defendant planted, cultivated, harvested, dried, or processed one or more marijuana plants, knowing that the substance was marijuana. (Health & Saf. Code, § 11358; CALCRIM No. 2370.) It does not require any proof of actual or intended violence. To be sure, one can imagine scenarios in which participants in a marijuana grow operation use guns for the purpose of protecting the operation from thieves, intruders, or law enforcement. In such scenarios, violence against intruders, including murder, may be a foreseeable consequence of the offense of unlawful cultivation. But that is not the scenario we have here.

Ramon, Conrado, and Gabino were not intruders on the grow operation; they were defendants' guests. The evening consisted of eating, drinking, and using cocaine, not planting, harvesting, drying, or processing marijuana. Gabino and Conrado got into an argument about whether Gabino had told Conrado's wife that Conrado used cocaine, a subject having nothing to do with marijuana cultivation or defendants' grow operation. Further, Ramon testified that Cruz-Santos gave him a gun to protect the harvest against wild animals and thieves, not against irritating guests. Cruz-Santos's irritation at the argument between Gabino and Conrado caused him to draw his gun and tell the two men, "If you have problems in your house then go fix them in your house. But don't come here and give me problems. Because the devil is touching me and I can be capable of anything." At no point did Cruz-Santos suggest that his irritation had anything to do with the grow operation. Moreover, as the Court of Appeal observed, Gabino and Conrado walked "out of . . . 'the garden' and towards the driveway off the property." There is no evidence that Gabino or Conrado posed a threat to the grow operation or its secrecy, or that Gabino was killed for any reason related to the grow operation. Indeed, when Ramon asked Cruz-Santos why Gabino had been killed, Cruz-Santos said, "because I want[ed] to." On this record, the evidence appears insufficient to conclude that the murder of Gabino was a reasonably foreseeable consequence of defendants' commission of unlawful marijuana cultivation.

While acknowledging that this court "has repeatedly refused to accept that running a large-scale drug operation necessarily entails murder," the Court of Appeal opined that "[a] tie between gunshot death and the clandestine commercial cultivation of marijuana may not be inevitable, but the possibility of a connection has been around at least since *People v. Dillon* (1983) 34 Cal.3d 441 . . . ." But *Dillon* involved a defendant who attempted to rob a marijuana farm and, in the process, killed the guard protecting it. (*Id.* at pp. 451–452.) The defendant could not have been convicted of murder as a natural and probable consequence of illegal cultivation because he did not cultivate marijuana or aid and abet cultivation. Instead, he was convicted of murder on a felony-murder theory rooted in his commission of attempted robbery. (*Id.* at p. 450.)

The heart of the Court of Appeal's reasoning is as follows: "[T]he jury could conclude that workers commonly carried loaded firearms with the expectation that they might be needed and were expected to be used. From the incident when Zepeda-Onofre obeyed the command of Cruz-Santos to 'frighten those assholes' making too much noise, the jury could further conclude that neither defendant was averse to having a gun fired at persons who caused irritation. From the incident when the drunken Cruz-Santos brandished his firearm to halt the dispute between [Conrado] and [Gabino], the jury could conclude that Cruz-Santos had no inhibition about threatening to use his gun to halt irritation coming from an even closer source, that is, one not coming from an intruder or thief, but emanating from within the garden itself. And from defendants' use of their guns to kill Gabino and then to coerce [Ramon] and Conrado into disposing of the bodies [*sic*], the jury could conclude that defendants had no compunctions about using deadly force in order to compel compliance from employees at the very place they were cultivating marijuana."

This reasoning is unpersuasive. First, although it may be reasonably foreseeable that a grow operation worker who carries a gun will use it to protect the operation, it is not reasonably foreseeable that the worker will use the gun against a person who simply irritates the worker but poses no apparent threat to the operation. Second, as to the ATV incident in which Cruz-Santos ordered Zepeda-Onofre to "frighten those assholes," the evidence shows that Cruz-Santos ordered Zepeda-Onofre to shoot into the air. This does not support the inference that "neither defendant was averse to having a gun fired *at* persons who caused irritation," as the Court of Appeal believed. (Italics added.) Third, the last sentence of the Court of Appeal's reasoning above simply begs the question: The fact that Gabino was killed cannot itself serve as a basis for the jury to infer that Gabino's murder was a natural and probable consequence of defendants' unlawful marijuana cultivation. (See *Sakiyama v. AMF Bowling Centers, Inc.* (2003) 110 Cal.App.4th 398, 407 [" 'almost any result [is] foreseeable with the benefit of hindsight' "].) Altogether, the Court of Appeal's observations establish only that Gabino's murder occurred at or near the garden. They do not establish that Gabino's murder had anything to do with the grow operation, much less that it was a reasonably foreseeable consequence of defendants' unlawful cultivation of marijuana. There does not appear to be evidence of a "close connection" (*Prettyman, supra,* 14 Cal.4th at p. 269) between the cultivation offense and Gabino's murder.

The district attorney argued in the trial court that the jury could conclude that Gabino and Conrado "were drawing unwanted attention to the scene" and thus Gabino's murder was reasonably foreseeable. But there is no evidence that either defendant was concerned that the argument between Gabino and Conrado was drawing unwanted attention to the grow operation. And even if they had been drawing unwanted attention, Gabino's murder could not have been reasonably foreseeable in light of the fact that he was killed *after* he and Conrado had walked out of the garden and down the driveway to leave the property.

In her closing argument, the district attorney suggested that defendants, who had not met Gabino before, determined that Gabino was a "snitch" on the basis of Conrado's accusation (which Gabino denied) that Gabino had told Conrado's wife that Conrado used cocaine. But again, the evidence shows that Cruz-Santos expressed irritation at Conrado and Gabino's bickering, not concern about Gabino's trustworthiness. And when Ramon asked Cruz-Santos why Gabino had been killed, Cruz-Santos simply said, "because I want[ed] to." There is no evidence that either defendant thought Gabino was a snitch. Of course, we cannot entirely rule out this possibility, but a speculative *possibility* is not a legally sufficient basis to infer that Gabino's murder was a *natural and probable* consequence of defendants' participation in working and protecting the garden. Foreseeability must be predicated on more than a theory that rationalizes behavior in hindsight; it must be judged objectively from the standpoint of " ' "a reasonable person in the defendant's position." ' " (*Chiu, supra,* 59 Cal.4th at p. 162.)

In sum, defendants make a strong case that the trial court erred in instructing the jury on second degree murder as a natural and probable consequence of unlawful cultivation or conspiracy to commit unlawful cultivation. The evidence does not appear sufficient to support this theory of malice murder. Further, the instruction on natural and probable consequences appears prejudicial in light of the question submitted by the jury to the court during its deliberations: "If we decide there was a conspiracy to unlawfully cultivate, does the liability of coconspirators apply to the murder charge only? Or, does it apply to all charges that we determine are the natural and probable consequences of the conspiracy?" This question, together with the jury's "not true" finding on whether either defendant personally shot Gabino, suggests "a reasonable probability that the jury in fact found the defendant[s] guilty solely on the unsupported theory." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1130; see *College Hosp. Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715 [the term "reasonable probability" under *People v. Watson* (1956) 46 Cal.2d 818 "does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*"].)

III.

The district attorney persuaded the trial court that foreseeability is a question for the jury, and our cases have said this as well. (See *Chiu*, *supra*, 59 Cal.4th at pp. 161–162; *Medina*, *supra*, 46 Cal.4th at p. 920.) As *Chiu* made clear, however, the issue of foreseeability in this context does not invariably go to the jury. Given the rationale for the natural and probable consequences doctrine, the concept of foreseeability is subject to limitation as a matter of law. *Chiu* explained that punishment for first degree premeditated murder would not be "commensurate with a defendant's culpability for aiding and abetting" any target offense, even an intentionally violent offense, no matter how foreseeable the resulting murder. (*Chiu*, at p. 166.) "Although we have stated that an aider and abettor's 'punishment need not be finely calibrated to the criminal's mens rea' (*Favor, supra*, 54 Cal.4th at p. 878), the connection between the defendant's culpability and the perpetrator's premeditative state is too attenuated to impose aider and abettor liability for first degree murder under the natural and probable consequences doctrine, especially in light of the severe penalty involved and the . . . public policy concern of deterrence." (*Ibid.*)

Just as *Chiu* applied "reasonable concepts of culpability" to set a categorical limit on natural and probable consequences liability (*Chiu*, *supra*, 59 Cal.4th at p. 165), trial courts should apply reasonable concepts of culpability to determine whether, on the facts of a particular case, criminal liability on a natural and probable consequences theory should go to the jury. This judicial gatekeeping role is especially appropriate because the natural and probable consequences doctrine has its origins in the common law. (See *Prettyman*, *supra*, 14 Cal.4th at p. 260; *id.* at pp. 287–289 (conc. opn. of Brown, J.).) In this case, the trial court had the right instinct when it initially questioned whether the connection between defendants' cultivation offense and the killing of Gabino was too attenuated to support a natural and probable consequences theory of murder. As

the trial court said, "I really do think we are kind of filling some gaps by an instruction where we didn't have actual evidence." It is true, as the district attorney argued, that foreseeability is a question for the jury. But because the concept of foreseeability is so elastic, it is incumbent upon trial courts to determine in a given case whether exposure to natural and probable consequences liability would be "commensurate" with the defendant's culpability. (*Chiu*, at p. 166.)

At its essence, the natural and probable consequences doctrine imposes liability on the basis of *negligence* layered on top of a defendant's culpability for aiding and abetting a target offense. (See *Chiu, supra*, 59 Cal.4th at p. 164 [" 'Because the nontarget offense is unintended, the mens rea of the aider and abettor with respect to that offense is irrelevant and culpability is imposed simply because a reasonable person could have foreseen the commission of the nontarget crime.' "].) Although reasonable foreseeability can be a legitimate basis for assigning culpability, courts and commentators have long observed that the concept is susceptible to overbroad application. (See *Thing v. La Chusa* (1989) 48 Cal.3d 644, 668 ["there are clear judicial days on which a court can foresee forever"]; *Goldberg v. Housing Authority of City of Newark* (N.J. 1962) 186 A.2d 291, 293 ["Everyone can foresee the commission of crime virtually anywhere and at any time."]; Guthrie et al. (2001) *Inside the Judicial Mind*, 86 Cornell L.Rev. 777, 799 ["Hindsight vision is 20/20. People overstate their own ability to have predicted the past and believe that others should have been able to predict events better than was possible. Psychologists call this tendency for people to overestimate the predictability of past events the 'hindsight bias.' " (fns. omitted)]; Rachlinski (1998) *A Positive Psychological Theory of Judging in Hindsight*, 65 U. Chi. L.Rev. 571, 571 [" 'Nothing is so easy as to be wise after the event.' " (fn. omitted, quoting *Cornman v. The Eastern Counties Railway Co.* (Exch. 1859) 157 Eng. Rep. 1050, 1052)].)

In light of these concerns, it is the proper role of trial courts to screen out cases in which the concept of foreseeability cannot bridge the gap between a defendant's culpability in aiding and abetting the target offense and the culpability ordinarily required to convict on the nontarget offense. This judicial check serves to ensure that natural and probable consequences liability — a judge-made doctrine in tension with the usual mens rea requirement of the criminal law — is kept "consistent with reasonable concepts of culpability." (*Chiu*, *supra*, 59 Cal.4th at p. 165; cf. 2 LaFave, Substantive Criminal Law (2003) § 13.3(b), p. 362; Model Pen. Code & Commentaries, com. 6(b) to § 2.06, p. 312, fn. 42.)

Because this case would enable us to provide useful guidance to the trial courts, and because defendants present a strong argument that they were convicted of second degree murder on a theory unsupported by sufficient evidence, I would grant review.