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In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
v.
BOBBY CHIU,
Defendant and Appellant.

Case No. S202724

SUPREME COURT
FILED

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Appellate District, Case No. C063913
Sacramento County Superior Court, Case No.
The Honorable Lloyd G. Connelly, Judge

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ISSUE PRESENTED

In order for an aider and abettor to be convicted of first degree premeditated murder by application of the natural and probable consequences doctrine, must a premeditated murder have been a reasonably foreseeable consequence of the target offense, or is it sufficient that a murder would be reasonably foreseeable?

STATEMENT OF THE CASE

On September 29, 2003, Sarn Saeteurn argued with Mackinson Sihabouth over a girl, and Saeteurn challenged Sihabouth, both high school students, to an after-school fight for the following day. (1 RT 190, 204, 241-242, 249-250, 276, 278, 280, 285.) Sihabouth learned that Saeteurn planned to bring both back-ups and a gun to the fight, which caused Sihabouth to make his own additional arrangements. (1 RT 288.) Sihabouth knew appellant, Tony Hoong, and Simon Nim and called Nim for help. (10 CT 2750-2752, 2796; I RT 282-284, 290, 292; 3 RT 635-637.)

The next day, appellant promoted the fight. He asked American Legion high school student Toang Tran, "'Do you want to watch someone get shot?'" (9 CT 2661-2663; 2 RT 537-538, 551.) Appellant further explained that the fight would be worth watching and that his "friend" would shoot if he felt pressured. (9 CT 2661-2663; 2 RT 540-541, 551.) Sihabouth had also told a friend at school, Anthony Montes, that there would be a fight involving gunplay. (3 RT 854-855.)

A large crowd of spectators gathered at the fight location; however, Saeturn failed to show due to fear and Sihabouth left. (2 RT 254-260, 300-301, 305.) Members of the crowd, including appellant, Tony Hoong, and Rickie Che, remained at the scene. Also present was McClatchy High

School student Teresa Nguyen, who was waiting for her boyfriend, American Legion High School student Antonio Gonzales. (3 RT 631.)

When Nguyen finally found Gonzales, they greeted each other with a hug and a kiss. Appellant, sitting on the trunk of a car, said something to Nguyen, and she asked if he was mocking her. (3 RT 645, 648, 700-701; 5 RT 1250-1251.) Appellant laughed. That angered Nguyen, who told appellant to "shut up." (3 RT 649, 697; 5 RT 1252.) Nguyen then asked Gonzales to defend her. (3 RT 777.)

Gonzales and appellant walked towards each other. (10 CT 2753; 3 RT 653, 701.) Roberto Treadway, Gonzales's friend, ran next to Gonzales and said, "'Come on. I got your back.'" (3 RT 655, 694-695, 703-705.) Rickie Che and Tony Hoong also walked towards them. (3 RT 703-705, 744, 822.) There followed a fight between appellant, Che, and Hoong versus Gonzales, Treadway, and Joshua Bartholomew, Treadway's cousin. (3 RT 744-745.) Words were exchanged, including appellant calling Gonzales a "bitch." Rickie Che stared[1] at Treadway then punched him. (3 RT 701-702, 707, 739-743, 782-784, 858.) Appellant swung at Gonzales's face, causing Gonzales to fall to the ground. (10 CT 2753; 3 RT 709, 785.) Bartholomew then hit appellant hard on the back of the head. (3 RT 743, 746.)

At that point, Gonzales's cousin, Angel Hernandez, jumped into the fight and hit appellant on the head, causing him to fall on the ground. (2 RT 661-662, 787-788.) Gonzales then got up and continued his fight with appellant. (3 RT 789.) Hernandez stopped fighting, but Roberto Reyes, Gonzales' friend, stepped into the fight in her place. (3 RT 790.)

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[1] At trial, the act of staring at Treadway was described as "mean-mugged." (3 RT 739.) It gives "a bad vibe" and may be an invitation for a physical altercation. (3 RT 740.)

Appellant then said, "'[g]rab the gun.'" (3 RT 746.) Che got the gun from the car and placed it under his shirt. (10 CT 2719-2720, 2757-2758, 2787; 3 RT 826-828, 859-860.) Treadway and Bartholomew tried to run away but were stopped by Hoong, who brandished a knife and stabbed Treadway in the arm. (10 CT 2813-2814; 3 RT 749, 793-794.) Gonzales yelled "gun." Che pointed a black semi-automatic firearm at Gonzales's face and said, "'Run now, bitch, run.'" (3 RT 712-715, 749, 751-752, 797-798.) Gonzales complied with the order and ran from the fight. (3 RT 716-717.)

After Gonzales ran, Che pointed the gun at Treadway, but hesitated. (3 RT 861- 862.) Appellant and Hoong then chanted, "'Shoot him, shoot him, shoot him.'" (3 RT 799-800, 836, 861-863.) Che continued pointing the gun at Treadway, again hesitated, and shot him. (10 CT 2787-2788; 3 RT 753, 837, 861-863.) As Gonzales ran away, he heard the gunshot. (3 RT 716-717.) Gonzales turned around and saw Treadway on the ground with a gunshot wound to his head. Appellant, Hoong, and Che ran to the car and drove off. (10 CT 2732, 2734, 2760; 3 RT 716-717, 801, 862-863.) Treadway died from the gunshot wound to the head. (3 RT 614.)

Appellant was charged with murder in violation of Penal Code section 187. At the trial, the prosecution proceeded with two theories of liability: (1) that appellant was guilty of murder because he directly aided and abetted Che in the shooting death of Treadway; and (2) that he was guilty of murder because he indirectly aided and abetted Che in the target offenses of assault and/or disturbing the peace. Accordingly, the jury was instructed with several standard CALCRIM instructions pertaining to indirect aiding and abetting and the natural and probable consequences doctrine.[2] The trial court first instructed the jury with CALCRIM No. 403,

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[2] The jury was also instructed with the standard CALCRIM instructions on direct aiding and abetting, which are not at issue here.

(continued...)

which provided that the jury had to first find that appellant intended to aid and abet the target offenses of either assault or disturbing the peace. It further provided that the jury had to then find that the commission of a murder was a natural and probable consequence of the commission of either an assault or disturbing the peace.[3] (10 CT 2864-2865.)

(...continued)

[3] CALCRIM No. 403 provided as follows:

> Before you may decide whether the defendant is guilty of murder, you must decide whether he is guilty of the crime of assault or disturbing the peace.
>
> To prove that the defendant is guilty of murder, the People must prove that:
>
> 1. The defendant is guilty of assault or disturbing the peace;
>
> 2. During the commission of assault or disturbing the peace; a coparticipant in that assault or disturbing the peace 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 the crime of murder was a natural and probable consequence of the commission of the assault or disturbing the peace.
>
> A coparticipant in a crime is the perpetrator or anyone who aided and abetted the perpetrator. It does not include a victim or innocent bystander.
>
> A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence. If the murder was committed for a reason independent of the common plan to commit the assault or disturbing the

(continued...)

The jury also received Special Instruction Nos. 2 and 3 as follows:

> [Special No. 2] In determining whether a homicide is the natural and probable consequence of assault and/or disturbing the peace you must consider all the surrounding circumstances. It is not a prerequisite that the defendant knew the perpetrator possessed a firearm prior to the homicide. However, you may consider knowledge of that fact or the absence of knowledge of that fact in determining the foreseeability of the homicide.
>
> [Special No. 3] Under natural and probable consequences the manner or precise form of the ensuing violence need not be foreseeable, the test is whether a reasonable person in the defendant's position would have or should have known that a murder or lesser crime was a reasonably foreseeable consequences of the act aided and abetted by the defendant.

(10 CT 2865-2866; see also 10 CT 2878-2879 [CALCRIM Nos. 915 (assault), 2688 (disturbing the peace)].)

The trial court then instructed the jury on murder with CALCRIM No. 520. The instruction provided that, in order for appellant to be found guilty of murder, the jury had to find that (1) Che committed an act that caused

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(...continued)

> peace, then the commission of murder was not a natural and probable consequence of murder.
>
> To decide whether the crime of assault or disturbing the peace was committed, please refer to the separate instructions that I will give you on those crimes.
>
> The People are alleging that the defendant originally intended to aid and abet either the crime of assault or the crime of disturbing the peace.
>
> The defendant is guilty of assault or disturbing the peace if you decide that the defendant aided and abetted one of these crimes and that murder was the natural and probable result of one of these crimes. However, you do not need to agree about which of these two crimes the defendant aided and abetted.
>
> (10 CT 2864-2865.)

Treadway's death; (2) Che's act was conducted with malice aforethought; and (3) Che killed without lawful justification.[4] (10 CT 2867-2868.)

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[4] CALCRIM No. 520 provides as follows:

> The defendant is charged in Count One with murder in violation of Penal Code section 187.
>
> To prove that the defendant is guilty of this crime, the People must prove that:
>
> 1. The perpetrator committed an act that caused the death of another person;
>
> 2. When the perpetrator acted, he had a state of mind called malice aforethought;
>
> AND
>
> 3. He killed without lawful justification.
>
> There are two kinds of malice aforethought, express malice and implied malice. Proof of either is sufficient to establish the state of mind required for murder.
>
> The perpetrator acted with *express malice* if he unlawfully intended to kill.
>
> The perpetrator acted with *implied malice* if:
>
> 1. He intentionally committed an act;
>
> 2. The natural and probable consequences of the act were dangerous to human life;
>
> 3. At the time he acted, he knew his act was dangerous to human life;
>
> AND

(continued...)

Finally, the trial court instructed the jury with CALCRIM No. 521 as follows:

> If you decide that the defendant is guilty of murder as an aider and abettor, you must decide whether it is murder of the first or second degree.
>
> The perpetrator is guilty of first degree murder if the People have proved that he acted willfully, deliberately, and with premeditation. The perpetrator acted *willfully* if he intended to kill. The perpetrator acted *deliberately* if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. The perpetrator acted with *premeditation* if he decided to kill before completing the act that caused death.
>
> The length of time the person spends considering whether to kill does not alone determine whether the killing is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances. A decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated. On the other hand, a cold, calculated decision to kill can be reached quickly. The test is the extent of the reflection, not the length of time.
>
> All other murders are of the second degree.
>
> The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People have not met this burden, you must find the

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(...continued)

> 4. He deliberately acted with conscious disregard for human life.
>
> Malice aforethought does not require hatred or ill will toward the victim. It is a mental state that must be formed before the act that causes death is committed. It does not require deliberation or the passage of any particular period of time.
>
> (10 CT 2867-2868.)

defendant not guilty of first degree murder.(10 CT 2868-2869, emphasis in original.)

Appellant was found guilty as charged. (9 CT 2906-2907, 2916.)

On appeal, appellant argued that the standard instructions on the natural and probable consequences doctrine and degrees of murder (CALCRIM Nos. 403 and 521) together failed to instruct the jury that it had to find that first degree murder was a natural and probable consequence of either assault or disturbing the peace. Rather, the instructions allowed the jury to convict appellant of first degree murder based solely on Che's mens rea. The California Court of Appeal agreed. Citing *People v. Woods* (1992) 8 Cal.App.4th 1570, 1586-1587, and *People v. Hart* (2009) 176 Cal.App.4th 662, 673, the court reasoned that the aider and abettor is liable vicariously only for those crimes committed by the perpetrator that the jury found to have been reasonably foreseeable under the circumstances. In the appellate court's view, the trial court should have instructed the jury sua sponte that it needed to decide whether first degree murder, rather than simply murder, was a natural and probable consequence of the target offense. Because the trial court failed to do so, the Court of Appeal concluded that the jury could have convicted appellant of first degree murder simply because that was the degree of murder the jury found the perpetrator had committed and without determining whether a premeditated murder was foreseeable. Consequently, the appellate court reduced appellant's first degree murder conviction to one of second degree murder.

SUMMARY OF ARGUMENT

Under the natural and probable consequences doctrine, an aider and abettor is guilty not only of the target offenses he or she actually intends, but also "for any other offense that was a 'natural and probable consequence' of the crime aided and abetted." (*People v. Prettyman* (1996) 14 Cal.4th 248, 260.) "Liability under the natural and probable consequences doctrine '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.'" (*People v. Medina* (2009) 46 Cal.4th 913, 920.) Thus, an aider "shares the guilt of the actual perpetrator." (*Prettyman*, at p. 259.)

The policy underlying the doctrine is that a person should be liable for the ultimate result of engaging in conduct dangerous to society, even if that result is "worse than the bad result he intended." (LaFave & Scott, Criminal Law (1972) Crimes Against the Person, p. 560; Kadish, Complicity, Cause and Blame: A Study in the Interpretation of Doctrine, 73 Cal.L.Rev. (1985) pp. 352-353.)

> The law's policy is simply to extend criminal liability to one who knowingly and intentionally encourages, assists, or influences a criminal act of another, if the latter's crime is naturally and probably caused by (i.e., is the natural and probable consequence of) the criminal act so encouraged, assisted, or influenced.

(*People v. Brigham* (1989) 216 Cal.App.3d 1039, 1052–1053.)

Accordingly, this Court has characterized the aider and abettor's exposure under the doctrine as being "everything done by his confederates, which follows incidentally in the execution of the common design as one of its probable and natural consequences." (*People v. Kauffman* (1907) 152 Cal. 331, 334.) In other words, ". . . the act of one is the act of all." (*Ibid.*)

Because the natural and probable consequences doctrine is one of equity, its application should turn on the factual question of the foreseeablity of the actual harm that results rather than on the foreseeability of a specific crime (and its elements). Thus, in the case of a murder, the key question should be whether an unlawful homicide was a reasonably foreseeable consequence of the target crime. In other words, the jury should only determine if a natural and probable consequence of the target crime was that a death would result. "If so, then an aider and abetter of the target crime would be held criminally liable for the death and share[] the guilt of the actual perpetrator." (*People v. Prettyman*, *supra*, 14 Cal.4th at p. 259, internal quotations omitted.)

The aider is criminally liable for an unintended criminal act that "grows out of and is the proximate consequences of one that has been authorized or procured." (*People v. Prettyman*, *supra*, 14 Cal.4th at p. 289 (conc. opn. of Brown, J.).) It follows that determining whether a nontarget offense is a natural and reasonable consequence of a target crime does not turn on a question-of-law "comparison of the offenses and their individual requirements in the abstract. It is rather the resolution of a pure question of fact that turns on an assessment of the circumstances surrounding the commission of the crimes in the concrete." (*People v. Prettyman*, *supra*, 14 Cal.4th at p. 279 (conc. opn. of Mosk, J.).) Thus,

> [w]hat is crucial is that the aider and abettor either knew or should have known that a *killing* was a likely result of this abetted criminal rampage, not whether this foreseeable killing might constitute first degree murder as opposed to second degree murder or some variety of manslaughter. Aiders and abettors are not lawyers and their liability should not turn on the abstruse distinctions between the various types of criminal homicide. "A primary rationale for punishing aiders and abettors as principals-to deter them from aiding or encouraging the commission of offenses" (*People v. Cooper* [1991] 53 Cal.3d [1158,] 1168),

> would not be advanced by engrafting such rarefied distinctions on the derivative liability of accomplices.

(*People v. Woods, supra,* 8 Cal.App.4th 1570, 1603 (dis. opn. of Sparks, J.) (emphasis added).)

In any event, even if the trial court erred in failing to instruct the jury that it had to find that a premeditated murder was reasonably foreseeable, any error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; see, e.g,. *People v. Canizalez* (2011) 197 Cal.App.4th 832, 853 [CALCRIM Nos. 400, 403].) It is not reasonably possible that the jury, on the facts in this case, would have concluded that a murder was foreseeable but that a premeditated murder was not.

ARGUMENT

I. WHERE MURDER IS A FORESEEABLE CONSEQUENCE OF A TARGET CRIME, THEN LIABILITY FOR FIRST DEGREE MURDER BASED ON PREMEDITATION MAY BE PROPERLY IMPOSED ON ONE WHO AIDS AND ABETS THE TARGET CRIME

In murder cases where the aider's liability is based on the natural and probable consequences doctrine, a conviction for first degree murder is appropriate where the aider could reasonably foresee the victim's death and the perpetrator acted with premeditation and deliberation. The purpose of the doctrine is to punish aiders for the foreseeable harms that directly result from their actions. To assign liability strictly based on the foreseeability of a specific unintended crime goes against this purpose and defeats the vicarious nature of the doctrine. Indeed, as set forth in more detail below, liability under the doctrine requires a careful factual analysis focusing on the foreseeability of the harm, e.g., a shooting death, rather than a legal analysis of whether a first degree murder, as opposed to simple murder, was foreseeable. If a jury finds that the resulting death was a natural and probable consequence of the intended offense, then the aider's liability

under the doctrine is strictly vicarious and is therefore guilty of the same degree of murder as the perpetrator.

A. Overview of the Natural and Probable Consequences Doctrine

Generally, "[a]ll persons concerned in the commission of a crime, ... whether they directly commit the act constituting the offense, or aid and abet in its commission, ... are principals in any crime so committed." (§ 31.) Accordingly, an aider and abettor "shares the guilt of the actual perpetrator." (*People v. Prettyman*, *supra*, 14 Cal.4th at p. 259; see also *People v. Mendoza* (1998) 18 Cal.4th 1114, 1122.)

> A person aids and abets the commission of a crime when he or she, (i) with knowledge of the unlawful purpose of the perpetrator, (ii) and with the intent or purpose of committing, facilitating, or encouraging commission of the crime, (iii) by act or advice, aids, promotes, encourages or instigates the commission of the crime.

(*People v. Cooper* (1991) 53 Cal.3d 1158, 1164.) The mental state necessary for conviction as an aider and abettor is "knowledge of the perpetrator's criminal purpose and the intent or purpose of committing, encouraging, or facilitating the commission of the target offense." (*Mendoza*, at p. 1118.)

Under the natural and probable consequences doctrine, an aider and abettor maybe held liable for crimes beyond those "target crimes" specifically aided. Such libility "is based on the recognition that 'aiders and abettors should be responsible for the criminal harms they have naturally, probably and foreseeably put in motion.' [Citation.]" (*People v. Prettyman, supra,* 14 Cal.4th 248, 260.) Accordingly,

> "Under California law, a person who aids and abets a confederate in the commission of a criminal act is liable not only for that crime (the target crime), but also for any other offense (nontarget crime) committed by the confederate as a 'natural and

> probable consequence' of the crime originally aided and abetted. To convict a defendant of a nontarget crime as an accomplice under the 'natural and probable consequences' doctrine, the jury must find that, with knowledge of the perpetrator's unlawful purpose, and with the intent of committing, encouraging, or facilitating the commission of the target crime, the defendant aided, promoted, encouraged, or instigated the commission of the target crime. The jury must also find that the defendant's confederate committed an offense other than the target crime, and that the nontarget offense perpetrated by the confederate was a 'natural and probable consequence' of the target crime that the defendant assisted or encouraged."

(*People v. Gonzales* (2011) 52 Cal.4th 254, 298-299, quoting *People v. Prettyman*, *supra*, 14 Cal.4th at p. 254; see also *People v. Croy* (1985) 41 Cal.3d 1, 12, fn. 5.)

Thus, "[t]he [] question is not whether the aider and abettor actually foresaw the additional crime, but whether, judged objectively, it was reasonably foreseeable." (*People v. Medina* (2009) 46 Cal.4th 913, 920, citing *People v. Prettyman*, *supra*, 14 Cal.4th at pp. 260–262.) "Liability under the natural and probable consequences doctrine '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.'" (*Medina*, at p. 920, citing *People v. Nguyen* (1993) 21 Cal.App.4th 518, 535; *People v. Luparello* (1986) 187 Cal.App.3d 410, 439 ["aiders and abettors should be responsible for the criminal harms they have naturally, probably and foreseeably put in motion"].) The "inquiry is strictly objective, and does not depend on the defendant's state of mind as to the confederate's crime." (*People v. Caesar* (2008) 167 Cal.App.4th 1050, 1058, overruled on another point in *People v. Superior Court (Sparks)* (2010) 48 Cal.4th 1, 18.)

B. The Underlying Policy of the Doctrine Requires that Liability Be Based on the Foreseeability of the Resulting Harm Rather than the Specific Crime; Therefore, an Aider Can Be Guilty of First Degree Murder Under the Doctrine Where a Death Was a Foreseeable Harm Flowing From the Intended Crime

The underlying policy of the doctrine is that a person should be liable for the result of engaging in conduct dangerous to society, even if the result is "worse than the bad result he intended." (LaFave & Scott, Criminal Law (1972) Crimes Against the Person, p. 560; Kadish, Complicity, Cause and Blame: A Study in the Interpretation of Doctrine, 73 Cal.L.Rev. (1985) pp. 352-353.) This Court has characterized the aider and abettor's exposure under the doctrine as being "everything done by his confederates, which follows incidentally in the execution of the common design as one of its probable and natural consequences." (*People v. Kauffman*, *supra*, 152 Cal. at p. 334; see also *People v. Croy*, *supra*, 41 Cal.3d at p. 12, fn. 5 ["any reasonably foreseeable offense committed by the person he aids and abets."].) In other words, "... the act of one is the act of all." (*Kauffman*, at p. 334.) Indeed,

> [t]his derivative criminal liability of an aider and abettor centers on causation. The law's policy is simply to extend criminal liability to one who knowingly and intentionally encourages, assists, or influences a criminal act of another, if the latter's crime is naturally and probably caused by (i.e., is the natural and probable consequence of) the criminal act so encouraged, assisted, or influenced.

(*People v. Brigham*, *supra*, 216 Cal.App.3d at pp. 1052–1053.)

As Justice Brown indicated in her concurrence in *Prettyman*, the justification for the natural and probable consequence theory of liability is causation. (*People v. Prettyman*, *supra*, 14 Cal.4th at p. 289 ["'[E]ven if the particular criminal act has not been authorized or consented to, if it grows out of and is the proximate consequence of one that has been

authorized or procured, the defendant is criminally liable ... .' In this manner, the law has maintained criminal responsibility commensurate with culpability."], (conc. opn. of Brown, J.); see also *People v. Cooper*, *supra*, 53 Cal.3d at p. 1168 ["A primary rational for punishing aiders and abettors as principals [is] to deter them from aiding or encouraging the commission of offenses."].) In *Prettyman*, this Court opined:

> Rarely, if ever is [it] true [that an aider and abettor can become liable for the commission of a very serious crime commited by the aider and abettor's confederate even though the target offense contemplated by his aiding and abetting may have been trivial]. Murder, for instance, is not the "natural and probable consequence" of "trivial" activities. To 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.

(*People v. Prettyman*, *supra*, 14 Cal.4th at p. 269.) Accordingly, derivative liability under the doctrine is not unfair or inconsistent with notions of criminal responsibility.

In cases where the unintended offense involves a homicide, the policy considerations underlying the doctrine strongly support the position that, for an aider to be liable for first degree murder, all that is required is that a death had to be foreseeable. The doctrine is one of equity: the aider is criminally liable if the unintended criminal act "grows out of and is the proximate consequences of one that has been authorized or procured." (*People v. Prettyman*, *supra*, 14 Cal.4th at p. 289 (conc. opn. of Brown, J.).) "In this manner, the law has maintained criminal responsibility commensurate with culpability." (*Ibid.*) Accordingly,

> [w]hat is crucial is that the aider and abettor either knew or should have known that a killing was a likely result of this abetted criminal rampage, not whether this foreseeable killing might constitute first degree murder as opposed to second degree murder or some variety of manslaughter. Aiders and abettors are not lawyers and their liability should not turn on the abstruse

> distinctions between the various types of criminal homicide. "A primary rationale for punishing aiders and abettors as principals-to deter them from aiding or encouraging the commission of offenses" (*People v. Cooper*, *supra*, 53 Cal.3d at p. 1168), would not be advanced by engrafting such rarefied distinctions on the derivative liability of accomplices.

(*People v. Woods*, *supra*, 8 Cal.App.4th at p. 1603 (dis. opn. of Sparks, J.).) It follows that determining whether a nontarget offense is a natural and reasonable consequence of a target crime does not turn on a purely legal "comparison of the offenses and their individual requirements in the abstract. It is rather the resolution of a pure question of fact that turns on an assessment of the circumstances surrounding the commission of the crimes in the concrete." (*People v. Prettyman*, *supra*, 14 Cal.4th at p. 279 (conc. opn. of Mosk, J.).)

This Court's opinion in *People v. Medina* is illustrative. *Medina* involved a gang-related verbal altercation that had escalated to a physical fight and ended in the defendant shooting to death a member of the opposite gang. While celebrating at a New Year's Eve party, the defendant and his fellow gang members approached an individual and asked him, "Where are you from?" The intent was to inquire about gang membership, and the question was commonly known as an "aggressive step." (*People v. Medina*, *supra*, 46 Cal.4th at p. 917.) Predictably, the conduct resulted in a physical altercation, with someone yelling out "get the heat." The victim eventually returned to his car but, as he drove away, the defendant fired shots at the car and killed the victim. (*Ibid.*) The defendant was charged with first-degree murder and was alleged to be the actual perpetrator, while the co-defendants were charged as aiders and abettors. (*Ibid.*) With the exception of one co-defendant, the remaining were found guilty as charged as aiders and abettors. (*Id.* at p. 919.) On appeal, the Court of Appeal reversed the aiders' convictions on the ground that there was insufficient

evidence that *murder* and attempted murder were reasonably foreseeable consequences of simple assault. (*Ibid.*)

In reversing the Court of Appeal and finding sufficient evidence that murder and attempted murder were reasonably foreseeable consequences of simple assault, this Court reasoned as follows:

> "[A]lthough variations in phrasing are found in decisions addressing the doctrine—'probable and natural,' 'natural and reasonable,' and 'reasonably foreseeable'—the ultimate factual question is one of foreseeability." (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 107, 17 Cal.Rptr.3d 710, 96 P.3d 30.) Thus, "'[a] natural and probable consequence is a foreseeable consequence'...." (*Ibid.*) But "to be reasonably foreseeable '[t]he consequence need not have been a strong probability; a possible consequence which might reasonably have been contemplated is enough....' (1 Witkin & Epstein, Cal.Criminal Law (2d ed.1988) § 132, p. 150.)" (*People v. Nguyen, supra*, 21 Cal.App.4th at p. 535, 26 Cal.Rptr.2d 323.) A reasonably foreseeable consequence is to be evaluated under all the factual circumstances of the individual case (*ibid.*) and is a factual issue to be resolved by the jury. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1376, 37 Cal.Rptr.2d 596; *People v. Godinez* (1992) 2 Cal.App.4th 492, 499, 3 Cal.Rptr.2d 325.)

(*People v. Medina, supra*, 46 Cal.4th at pp. 919-920.) This Court then concluded that, after examining the record in its entirety and in the light most favorable to the prosecution, "a rational trier of fact could have found that the shooting of the victim was a reasonably foreseeable consequence of the gang assault." (*Id.* at p. 922.) This Court explained that "the jury could reasonably have found that a person in defendants' position (i.e., a gang member) would have or should have known that retaliation was likely to occur and that escalation of the confrontation to a deadly level was reasonably foreseeable." (*Id.* at pp. 922-923.)

Though the issue before this Court in *Medina* involved sufficiency of the evidence, this Court's rationale is instructive on the issue here. Specifically, when analyzing the sufficiency of the evidence, this Court did

not evaluate whether the evidence was sufficient to support a finding that a *first-degree* murder was foreseeable. Rather, this Court focused on the extent that a "shooting of the victim" was foreseeable. This Court therefore demonstrated that, at least in the context of an assult that leads to a first-degree murder, the appropriate inquiry is whether a "shooting" or "escalation of the confrontation to a deadly level" was foreseeable. (*People v. Medina*, *supra*, 46 Cal.4th at p. 927.) That this Court did not address whether it was foreseeable that Medina committed a first-degree premeditated murder further demonstrates that the foreseeablity analysis should focus on the likely results or harm and not on a specific crime.

A similar approach was followed by the court in *People v. Gonzales* (2001) 87 Cal.App.4th 1, 10. There, the court determined that a "fatal shooting" was the natural and probable consequences of a gang fight that supported the first-degree murder conviction of the aiders and abetters of the fight. Like *Medina*, the *Gonzales* court did not consider whether a premeditated murder was a foreseeable consequence, even though that was the crime that the perpetrator actually committed. (*Ibid.*)

In this case, like the circumstances in *Medina* and *Gonzales*, the shooting death of Treadway was a reasonable result to be expected from the target crime[s] of assault and/or disturbing the peace. Like the aiders in *Medina*, appellant was aware that Che was armed, would use the gun if provoked, and instigated a fight with Gonzales knowing that it would likely result in gunplay. In light of the doctrine's policy considerations, the trial court correctly instructed the jury on indirect aider and abettor liability. The doctrine's purpose is to "deter aiders from engaging in criminal activity that could lead to results far worse than the intended target crime." (*People v. Cooper*, *supra*, 53 Cal.3d at p. 1168.) The aider's liability is vicarious and he/she could be liable for first-degree murder as long as a death was reasonably foreseeable. (*People v. Woods*, *supra*, 8 Cal.App.4th

at pp. 1602-1603 (dis. opn. of Sparks, J.) ["All that is required is that defendant knew or should have known that the charged crime was likely to happen in some manner as a result of the commission of the targeted crime. 'If the principal's criminal act charged to the aider and abettor is a reasonably foreseeable consequence of *any* criminal act of that principal, knowingly aided and abetted, the aider and abettor of such criminal act is derivatively liable for the act charged.' (*People v. Brigham*, *supra*, 216 Cal.App.3d at p. 1054, 265 Cal.Rptr. 486, emphasis in original.) As applied to homicide, it is enough that an unlawful killing was a likely consequence of the target crime."].)

The Court of Appeals' approach in the instant case undermined the "derivative" liability intended by the natural and probable consequences doctrine by allowing the aider and abettor's liability to be reduced if he could foresee the perpetrator's actus reas, but not the specific mens rea involved. (See *People v. Garrison* (1989) 47 Cal.3d 746, 778 [accomplice liability is vicarious].) An aider's culpability in a homicide that was reasonably foreseeable should not be reduced simply because the aider could not also predict with precision the manner within which the perpetrator would commit the murder. Rather, the aider's fate is "inexorably tied to the perpetrator." (*People v. Woods*, *supra*, 8 Cal.App.4th at p. 1604 (dis. opn. of Sparks, J.).) Indeed, in *Medina*, this Court focused on the forseeability of the actus reas of the perpetrator, in that case a shooting, when applying the natural and probable consequences doctrine.

In its opinion, the Court of Appeal relied on *People v. Hart*, *supra*, 176 Cal.App.4th at p. 668, which was recently disapproved by this Court in *People v. Favor* (2012) 54 Cal.4th 868, 879, fn. 3. In *Hart*, the trial court instructed the jury concerning aiding and abetting liability for the nontarget offense of attempted murder under the "reasonable and probable

consequences" doctrine using CALCRIM No. 402. (*Hart*, at p. 669.) The *Hart* jury was advised to refer to separate instructions to decide whether the crimes of attempted murder and assault with a firearm were committed. (*Ibid.*) The Court of Appeal reversed. It concluded that the instructions did not fully inform the jury that, in order to find a defendant guilty of attempted premeditated murder as a natural and probable consequence of attempted robbery, it was necessary to find that attempted premeditated murder, not just attempted murder, was a natural and probable consequence of the attempted robbery. The general instructions concerning the premeditation and deliberation elements of attempted premeditated murder, in the court's view, did not suffice. (*Id.*, at p. 673.) In other words, the *Hart* court, reasoned that an aider and abettor could be guilty of a crime less than that committed by the perpetrator, and, thus, that the trial court should instruct the jury to determine whether premeditated attempted murder, as opposed to merely attempted murder, was reasonably foreseeable under the natural and probable consequences theory of liability. (*Ibid.*)

In *Favor*, however, this Court held otherwise. This Court held that "the jury need not be instructed that a premeditated attempt to murder must have been a natural and probable consequence of the target offense." (*Id.* at p. 872.) Rather, the trial court needs only to instruct that "attempted murder ... qualifies as the nontarget offense to which the jury must find foreseeability." (*Id.* at p. 879.) "[O]nce the jury finds that an aider and abettor, in general or under the natural and probable consequences doctrine, has committed an attempted murder, it separately determines whether the attempted murder was willful, deliberate, and premeditated." (*Id.* at pp. 879–880.) The majority reasoned that section 664, subdivision (a) "'requires only that the attempted murder itself was willful, deliberate, and premeditated'" and that "it is only necessary that the attempted murder 'be

committed by one of the perpetrators with the requisite state of mind.'" (*Id.* at p. 879; see also *People v. Lee* (2003) 31 Cal.4th 613, 626.) Consequently, this Court disapproved *Hart.* (*Id.* at p. 879, fn. 3.)

This Court explained that the *Hart* analysis failed for two reasons. First, *Hart*'s reliance on *Woods* was misplaced because *Woods* did not involve attempted murder but rather murder, a crime that can be divided into degrees. Attempted premeditated murder, as this Court found, is a penalty provision pursuant to section 664, subdivision (a), and not a greater degree of attempted murder. (*People v. Favor, supra*, 54 Cal.4th at pp. 876-877.)

Second, this Court found that *Hart* failed to consider this Court's holding in *Lee*. In *Lee*, this Court held that the plain language of the section 664, subdivision (a), penalty provision did not require personal willfulness as an aider and abettor, but only that the attempted murder was willful. (*People v. Favor, supra*, 54 Cal.4th at p. 877.) Because there is no distinction between the direct perpetrator and the aider and abettor, this Court found that premeditation was not a required component of an aider and abettor's mental state. (*Ibid.*)

It further noted that the legislature could have limited section 664's application to attempted murderers who personally acted with premeditation, but declined to do so. Indeed, in dictum, this Court in *Lee* noted that an aider and abettor liable for attempted murder under a natural and probable consequences theory "may" be less blameworthy; therefore, it would be rational for the legislature to limit section 664's application to those who personally acted with deliberation. (*People v. Favor, supra*, 54 Cal.4th at pp. 877-878.)

In any event, although *Lee* did not involve the natural and probable consequences doctrine, this Court nevertheless stated that, even under that doctrine, an aider and abettor's

> punishment need not be finely calibrated to the criminal's mens rea. It takes account of other valid penalogical considerations, such as the defendant's conduct, the consequences of such conduct, and the surrounding circumstances, including the fact that the murder attempted was willful, deliberate, and premeditated.

(*People v. Favor*, *supra*, 54 Cal.4th at p. 878, quoting *People v. Lee*, *supra*, 31 Cal.4th at p. 627.) This language further demonstrates that the doctrine is more concerned with assigning criminal liabilty based on the foreseeability of the actual harm caused rather than pinpointing criminal liablility based on the foreseeability of the specific charged crime. (See, e.g., *People v. Ayala* (2010) 181 Cal.App.4th 1440, 1450 [shooting death of Rodriguez was a reasonably foreseeable consequence of the assault defendant aided and abetted]; *People v. Gonzales*, *supra*, 87 Cal.App.4th at p. 10; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1378 [Mora was criminally responsible for the shooting of Ramirez as an aider and abettor]; *People v. King* (1938) 30 Cal.App.2d 185, 201 [natural and probable consequence was homicide]; *People v. Wheaton* (1923) 64 Cal.App. 58, 68 [murder reasonably foreseeable consequence of either robbery or burglary].) This language is consistent with the derivative nature of the aider's liability under the doctrine.

Accordingly, the trial court below was not required to instruct the jury that it had to determine whether appellant should have foreseen a premeditated murder. Rather, a review of the instructions as a whole demonstrates that the trial court correctly instructed the jury on aider and abettor liability based on the natural and probable consequences doctrine. The jurors were first instructed that, in order to find appellant guilty of murder, they had to determine whether he was guilty of the target offense (either assault or disturbing the peace), whether a coparticipant committed a murder during the commission of the target offense, and whether a

reasonable person in appellant's position would have known that the commission of the crime of murder was a natural and probable consequence of the commission of the target offense. (10 CT 2864-2865 [CALCRIM No. 403].) The trial court then instructed that, to find appellant guilty of murder, the People had to prove that the perpetrator committed an act that caused the death of another person, that the perpetrator acted with malice aforethought, and that he killed without lawful justification. (10 CT 2867-2868 [CALCRIM No. 520].) Finally, the trial court instructed that, if the jury found appellant guilty of murder as an aider and abettor, it had to determine whether the murder was in the first or second degree. The trial court further instructed that, to find appellant guilty of first degree murder, the People had to prove that the perpetrator acted willfully, deliberately, and with premeditation, and that all other murders were of the second degree. (10 CT 2868-2869 [CALCRIM No. 521].)

The instructions correctly instructed the jury that, in order for appellant to be liable as an aider and abettor under the natural and probable consequences doctrine, it had to find that he intended to aid and abet the commission of the target offense and that the murder was a natural and probable consequence of the target offense. If the jury found that the murder was a natural and probable consequence of the target offense, it then understood that it had to determine whether appellant was guilty of first or second degree murder, and that it needed to make the determination based on the perpetrator's mental state. This is the crux of liability based on the doctrine. (See, e.g., *People v. Favor*, *supra*, 54 Cal.4th at pp. 874-875 [jury similarly and properly instructed with standard instructions for attempted murder].)

Here, it was clear that appellant knew or should have known that a killing was likely during the "criminal rampage." Appellant came prepared to participate in a fight against Sihabouth, was aware that Che was armed

and would use the firearm if necessary, intentionally provoked a fight with Gonzales, and ordered Che to retrieve and use the firearm. As instructed by the trial court, the jury first had to find that murder, in other words a death, was the natural and probable consequence of the target offenses of either assault or disturbing the peace. If the jury found that a murder was a foreseeable consequence to the target offense, it then had to fix the degree by determining whether Che had acted with premeditation and deliberation.

This was correct because liability for first-degree murder by application of the doctrine does not require a determination of whether a *premeditated* murder was a probable consequence of the target offense. Again, in cases involving homicide, it is sufficient if the aider could have foreseen a murder or unlawful homicide with the specific degree of murder determined by the jury depending upon the perpetrator's mens rea. This is so because the aider's "fate [] is inexorably tied to the perpetrator." (*People v. Woods*, *supra*, 8 Cal.App.4th at p. 1604 (dis. opn. of Sparks, J.); see e.g., *People v. Gonzales, supra,* 87 Cal.App.4th at p. 10 [following the giving of the pattern instruction on liability of an aider and abettor for the natural and probable consequences of the target offense, verdicts for first-degree murder upheld because sufficient evidence for jury to conclude a fatal shooting would be the natural and probable consequence of the fight between the groups of young men].)

II. ERROR, IF ANY, WAS HARMLESS BEYOND A REASONABLE DOUBT

Even if the trial court erred in failing to instruct the jury that it had to find that a premeditated murder was reasonably foreseeable, any error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; see, e.g,. *People v. Canizalez* (2011) 197 Cal.App.4th 832, 853 [CALCRIM Nos. 400, 403].) It is not reasonably possible that the jury, on the facts in this case, would have concluded that a murder was foreseeable

but that a premeditated murder was not. Given that the jury concluded that a murder (with express or implied malice) was a reasonably foreseeable result, it would defy logic to conclude that the jury would not have also determined that a premeditated murder was equally foreseeable. In other words, had the jury been instructed to find that a premeditated murder was foreseeable, it may be said beyond reasonable doubt that the jury would have so found. Indeed, the jury was instructed on premeditation and told that "a cold, calculated decision to kill can be reached quickly." (10 CT 2868-2869.)

As the court below held, the evidence here was sufficient to support a finding that a murder was a foreseeable consequence of the target offense[s]. (Opinion, at pp. 15-17.) As discussed above, appellant was aware that Che was armed and would use the firearm if provoked. (9 CT 2661-2663; 2 RT 540-541.) It is undisputed that appellant personally instigated the altercation with Gonzales and Treadway by mocking Nguyen and ordered Che to get the gun. (3 RT 645, 648-649, 697, 700-701; 5 RT 1250-1252.) Appellant then ordered Che to shoot, which he did. (10 CT 2787-2788; 3 RT 753, 799-800, 836-837, 861-863.) Appellant personally put the shooting death of Treadway in motion, and the facts of this case do not prove otherwise. On the facts here, if a shooting murder was reasonably foreseeable then it was equally as foreseeable that the shooting could be premeditated. Accordingly, any instructional error here was harmless beyond a reasonable doubt. (See, e.g., *People v. Farley* (2009) 46 Cal.4th 1053, 1059, 1113-1116 ["even if the jury had been improperly instructed regarding felony murder, 'other aspects of the verdict or the evidence leave no reasonable doubt that the jury made the findings necessary for' premeditated murder, and hence any error was harmless beyond a reasonable doubt."]; *People v. Chun* (2009) 45 Cal.4th 1172, 1205; *Hedgpeth v. Pulido* (2008) 555 U.S. 57, 61 (per curiam) [when the jury was

instructed on both a valid and an invalid theory of guilt, the conviction will not be set aside if the invalid instruction was harmless].)

CONCLUSION

For the foregoing reasons, respondent respectfully asks this Court to reverse the judgment of the Court of Appeal and reinstate the judgment of conviction for first-degree murder against appellant.

Dated: December 12, 2012

Respectfully submitted,

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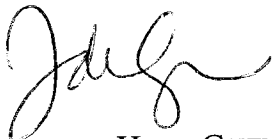

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CERTIFICATE OF COMPLIANCE

I certify that the attached **BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 7,170 words.

Dated: December 12, 2012

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Chiu*** No.: **S202724**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On December 13, 2012, I served the attached **BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on December 13, 2012, at Sacramento, California.

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