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## Criminal Law - The Natural and Probable Consequences Doctrine Is Not a Natural Result for New Mexico - State v. Carrasco

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# CRIMINAL LAW—The Natural and Probable Consequences Doctrine Is Not a Natural Result for New Mexico—*State v. Carrasco*

## I. INTRODUCTION

In *State v. Carrasco*,<sup>1</sup> the New Mexico Supreme Court effectively rejected application of the natural and probable consequences doctrine in New Mexico. This test allows an accomplice to be convicted for those crimes that are the natural and probable consequences of his intentional acts. The *Carrasco* court held that sufficient evidence existed to find Robert Carrasco guilty of accessory to assault with intent to commit a violent felony (robbery), accessory to aggravated battery, accessory to attempted robbery, and accessory to false imprisonment.<sup>2</sup> However, the court remanded the case for re-trial on grounds of prosecutorial misconduct in commenting at trial as to the defendant's post-arrest silence.<sup>3</sup> Although the court agreed that the evidence supported a conviction, it opined that the court of appeals erred in applying the "natural and probable consequence test" to the law of accomplice liability in New Mexico.<sup>4</sup>

In barring application of the natural and probable consequences doctrine, the supreme court has curtailed the natural progression of the law of accomplice liability in New Mexico, creating increased burdens on the State to prove culpability for aiding and abetting where such specific intent is already difficult to prove. Additionally, the court's opinion may create added inconsistencies and confusion to an area of law already heavily laden with complexity in New Mexico, and will impede application of certain sentencing enhancements. This Note begins with a factual description of the case, then proceeds to discuss the historical background of accomplice liability law in New Mexico, concluding with an analysis of the court's rationale and its implications.

## II. STATEMENT OF THE CASE

### A. *Substantive Facts*

Robert Carrasco (defendant) and two other men, Stephen Padron and Mario Moncayo, drove to an Allsup's convenience store in Melrose, New Mexico on May 26, 1994.<sup>5</sup> Defendant stayed in the car while the other two men went into the store. Padron then struck the 62 year-old store clerk in the forehead with his fist, knocked her down, and kicked her, while Moncayo attempted unsuccessfully to open the cash register. The two men fled the store when a truck driver entered. They jumped into the waiting car in which defendant was sitting behind the wheel, and drove away. Padron and Moncayo were arrested a short time later and entered into plea agreements in which they both agreed to testify against the defendant. Defendant

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1. 124 N.M. 64, 946 P.2d 1075 (1997).

2. *See id.* at 68, 946 P.2d at 1079.

3. *See id.* at 67, 946 P.2d at 1078.

4. *See id.* at 68, 946 P.2d at 1079.

5. *See Carrasco*, 124 N.M. at 67, 946 P.2d at 1078. Unless otherwise noted, all factual references in this section refer to this citation.

claimed he was asleep in the car, or passed out from intoxication, when the other two men went into the store. He claimed to awaken finding himself alone in the car parked at Allsup's. He admitted driving the car away from the store, but claimed that he was unaware of the attempted robbery until the other two informed him of it as they drove away. At trial, defendant testified that he had started the car because he was cold and wanted to operate the heater.<sup>6</sup> He further admitted at trial that he had worked previously as a store clerk at the same Allsup's during the night shift for five to six months, and was familiar with the duties of the position.<sup>7</sup> It was also revealed at trial that although the defendant claimed to be intoxicated, there was no evidence of such intoxication either at the time of the assault, nor afterwards when the three men were arrested.<sup>8</sup>

### B. Procedural Facts

Defendant was charged and found guilty of conspiracy to commit robbery, accessory to assault with intent to commit a violent felony (robbery), accessory to aggravated battery, accessory to attempted robbery, and accessory to false imprisonment.<sup>9</sup> For sentencing purposes, the trial court merged the charges of accessory to assault with intent to commit a violent felony and accessory to aggravated battery, and enhanced the defendant's convictions (with the old-age sentencing enhancement<sup>10</sup>) because the victim was 62 years old at the time of the offenses.<sup>11</sup> The court of appeals reversed the convictions and remanded for a new trial because the prosecutor improperly cross-examined defendant on his post-arrest silence.<sup>12</sup> However, the appellate court utilized the natural and probable consequences doctrine to find that sufficient evidence existed to support defendant's convictions of accessory to assault with intent to commit a violent felony, aggravated battery and false imprisonment on retrial.<sup>13</sup>

The supreme court granted defendant's Petition for Writ of Certiorari.<sup>14</sup> The court then requested briefing as to whether the appellate court erred by applying the natural and probable consequences doctrine as supportive of the law of accomplice liability in New Mexico.<sup>15</sup> The court also requested briefing on two other issues regarding violation of the double jeopardy clause and the propriety of enhancing defendant's conspiracy sentence using New Mexico's "old-age enhancement" statute.<sup>16</sup>

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6. See *State v. Carrasco*, 122 N.M. 554, 556, 928 P.2d 939, 941 (Ct. App. 1996), *rev'd in part and aff'd in part*, 124 N.M. 64, 946 P.2d 1075 (1997).

7. See *id.* at 557, 928 P.2d at 942.

8. See *id.*

9. See *id.* at 554, 928 P.2d at 939.

10. N.M. STAT. ANN. § 31-18-16.1 (Repl. Pamp. 1994) (allowing enhancement of a sentence when a separate finding of fact reveals that a person sixty years of age or older, or handicapped, is intentionally injured in the commission of a noncapital felony).

11. See *State v. Carrasco*, 124 N.M. 64, 75, 946 P.2d at 1075, 1086 (1997).

12. See *id.* at 67, 946 P.2d at 1078.

13. See *State v. Carrasco*, 122 N.M. 554, 558-59, 928 P.2d 939, 943-44 (Ct. App. 1996), *rev'd in part and aff'd in part*, 124 N.M. 64, 946 P.2d 1075 (1997).

14. See *State v. Carrasco*, 122 N.M. 416, 925 P.2d 882 (1996).

15. See *Carrasco*, 124 N.M. at 67, 946 P.2d at 1078 (1997).

16. See *id.*

The supreme court held that New Mexico does not apply the natural and probable consequences test to determine accessory liability, although it found that there was sufficient evidence under traditional accessory liability law in New Mexico to sustain the convictions.<sup>17</sup> However, the court also held that the old-age enhancement statute did not apply to defendant's conspiracy conviction because the 62-year old victim was not injured during commission of the conspiracy.<sup>18</sup> Justice Baca dissented from part of the opinion, stating that although he agreed that there was sufficient evidence to convict the defendant, he believed the natural and probable consequences doctrine was appropriate in New Mexico, and would have enabled the court to properly enhance the defendant's conviction with the old-age enhancement statute.<sup>19</sup>

### III. BACKGROUND

Accessory liability law in New Mexico can be described as somewhat enigmatic and ambiguous.<sup>20</sup> Historically, courts have maintained that one who aids and abets in the commission of a crime must share the criminal intent of the principal.<sup>21</sup> However, even those earlier cases have failed to elucidate a definitive rule interpreting the intent required to hold an accomplice liable for the principal's criminal acts.<sup>22</sup> The court in *State v. Ochoa*<sup>23</sup> set the interpretive standard in New Mexico, which generally follows the Model Penal Code,<sup>24</sup> holding that an accomplice must have the required level of intent for the crime committed by the principal.<sup>25</sup> However, the same court essentially abolished the distinction between the principal's and the accessory's acts,<sup>26</sup> stating that "every person concerned in the commission [of a felony], whether he directly commits the offense or procures, counsels, aids, or abets in its commission, must be prosecuted, tried, and punished as a principal."<sup>27</sup> The *Ochoa* court further added that:

The evidence of aiding and abetting may be as broad and varied as are the means of communicating thought from one individual to another; by acts, conduct, words, signs, or by any means sufficient to incite, encourage or instigate commission of the offense or calculated to make known that

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17. See *id.* at 68, 946 P.2d at 1079.

18. See *id.* at 74-75, 946 P.2d at 1085-86. Although the court noted that conspiracy to commit robbery is not a capital felony, it used the language contained in the New Mexico Statutes to support its finding that the sentence here could not be enhanced by two years: "[w]hen a separate finding of fact by the court or jury shows that in the commission of a noncapital felony a person sixty years of age or older or who is handicapped was intentionally injured." See *id.* at 74, 946 P.2d at 1085 (quoting N.M. STAT. ANN. § 31-18-16.1 (Repl. Pamph. 1994)).

19. See *id.* at 75, 946 P.2d at 1086 (Baca, J., dissenting).

20. See generally Mark B. Thompson, III & Norman L. Gagne, *The Confusing Law of Criminal Intent in New Mexico*, 5 N.M. L. REV. 63 (1974).

21. See, e.g., *State v. Salazar*, 78 N.M. 329, 331, 431 P.2d 62, 64 (1967).

22. See Thompson & Gagne, *supra* note 20, at 86.

23. 41 N.M. 589, 72 P.2d 609 (1937).

24. See MODEL PENAL CODE § 2.06(3) (Official Draft 1962).

25. See *Ochoa*, 41 N.M. at 599-600, 72 P.2d at 615-16.

26. See *id.* at 599, 72 P.2d at 615.

27. *Id.*

commission of an offense already undertaken has the aider's support or approval.<sup>28</sup>

Therefore, interpreting the actions that permit a finding that the accomplice did indeed aid and abet must be analyzed on a case-by-case basis. The ultimate determination as to culpability of the accessory is for the trier of fact.

The court in *State v. Nance*<sup>29</sup> expanded the *Ochoa* rule, holding that a defendant convicted of armed robbery may be charged as a principal even though no proof existed that he was armed with a gun or knife at the time the offense was committed.<sup>30</sup> Thus, *Nance* effectively planted the seeds for a more expansive approach to accessory liability in New Mexico, stating that "[w]e find nothing in the statute indicating an intent to make one who aids and abets in the commission of a crime a separate offense distinct and different from the crime committed by the one actually perpetrating it."<sup>31</sup> After *Nance*, persons guilty of aiding and abetting were effectively put on notice that they may be charged as a principal and convicted as an accessory or vice versa.<sup>32</sup>

Later courts utilized the expansive approach adopted in *Nance* to enable triers of fact to infer the accomplice's level of culpability required to constitute the principal crime based upon circumstantial evidence. For instance, the court in *State v. O'Dell*<sup>33</sup> held that although the defendant claimed he lacked knowledge of the robbery until after it was completed, sufficient evidence existed to infer the requisite level of culpability when he shot at the pursuing police car following the robbery.<sup>34</sup>

The evolution of New Mexico accessory liability has become aligned with the principles underlying the natural and probable consequences doctrine. This doctrine maintains that an accomplice may be held criminally liable for not only those crimes that he intended to facilitate, but also all crimes that are the natural and probable consequences of the principal's offense.<sup>35</sup> The accomplice's intent to cause the additional resulting harm is irrelevant as long as the result was foreseeable from the participation in the principal crime.<sup>36</sup> Many other jurisdictions have adopted and now utilize the doctrine on a regular basis.<sup>37</sup> Indeed, the New Mexico Court of Appeals has utilized the rationale behind the doctrine to find a defendant guilty of the principal's acts.<sup>38</sup> The doctrine's use is a logical progression of the law of

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28. *Id.* (citing *State v. Wilson*, 39 N.M. 284, 46 P.2d 57 (1935)).

29. 77 N.M. 39, 419 P.2d 242 (1966), *cert. denied*, 386 U.S. 1039 (1967).

30. *See id.* at 45, 419 P.2d at 246.

31. *Id.* at 46-47, 419 P.2d at 247.

32. *See State v. Wall*, 94 N.M. 169, 172, 608 P.2d 145, 147 (1980).

33. 85 N.M. 536, 514 P.2d 55 (Ct. App. 1973).

34. *See id.* at 537.

35. *See State v. Carrasco*, 124 N.M. 64, 68, 946 P.2d 1075, 1079 (1997). *See also People v. Croy*, 710 P.2d 392, 398 n.5 (Cal. 1985).

36. *See Croy*, 710 P.2d at 398 n.5.

37. *See, e.g., People v. Beeman*, 674 P.2d 1318, 1324 (Cal. 1984); *Harris v. State*, 425 N.E.2d 154, 156 (Ind. 1981).

38. *See State v. Dominguez*, 115 N.M. 445, 455, 853 P.2d 147, 157 (Ct. App. 1993) (holding that substantial evidence existed to show accomplice shared principal's intent to commit an aggravated battery, regardless of fact that defendant did not intend the stabbing and was not present when the stabbing occurred); *State v. O'Dell*, 85 N.M. 536, 537, 514 P.2d 55, 56 (Ct. App. 1973) (holding that defendant was still convictable as an

accomplice liability in New Mexico, as many courts have interpreted Section 30-1-13 of the New Mexico Statutes to mean that a person who aids or abets in the commission of a crime is equally as culpable as the principal.<sup>39</sup>

The court's holding in *State v. Dominguez*<sup>40</sup> illustrates the close nexus between New Mexico law and the natural and probable consequences doctrine. In *Dominguez*, the court held that whether or not defendant was present and actually intended that the principal stab the victim was irrelevant for purposes of conviction, provided there was some evidence that defendant intended to somehow injure the victim.<sup>41</sup> Similarly, under the natural and probable consequences doctrine, the defendant's intent to injure the victim would also be sufficient to find substantial evidence supported a conviction for the natural consequences of his actions—the victim's death. Thus, the analysis invoked by the natural and probable consequences doctrine serves to complement and simplify that underlying New Mexico law on aiding and abetting.

To illustrate, New Mexico law requires that the aider share the principal's intent to commit the crime,<sup>42</sup> but he is not required to intend or foresee the end result,<sup>43</sup> and is held equally as culpable as the principal.<sup>44</sup> Under the natural and probable consequences doctrine, the aider or abettor is criminally responsible for those acts which are the natural and probable consequences of his conduct. Therefore, it simplifies the inquiry to state that since an accomplice may be convicted for his intentional participation in a crime, regardless of whether he intended the end result, he should be held accountable for the natural and probable results of his intentional criminal acts.

#### IV. RATIONALE

In *Carrasco*, the New Mexico Supreme Court explicitly rejected the natural and probable consequences test of accessory liability employed by the court of appeals.<sup>45</sup> This section will discuss the two primary reasons for the court's rejection of the doctrine. First, the natural and probable consequences doctrine has been criticized for being inconsistent with the culpability level for accomplice liability established by the Model Penal Code;<sup>46</sup> and second, the majority in *Carrasco*

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accessory where evidence showed he approved of principal's actions and intent, regardless of fact that he did not know of robbery until after it occurred).

39. See, e.g., *State v. Nance*, 77 N.M. 39, 45, 419 P.2d 242, 246 (1966); *State v. Ochoa*, 41 N.M. 589, 599, 72 P.2d 609, 615 (1937).

40. 115 N.M. 445, 853 P.2d 147 (Ct. App. 1993).

41. See *id.* at 454, 853 P.2d at 156. See also *State v. Padilla*, 118 N.M. 189, 200, 879 P.2d 1208, 1219 (Ct. App.), *cert. denied*, 117 N.M. 802, 877 P.2d 1105 (1994) (holding that sufficient post-crime evidence existed that linked defendant with aiding and abetting the principal in robbing a gas station when she operated "getaway" car and failed to stop in police pursuit).

42. See *State v. Luna*, 92 N.M. 680, 683, 594 P.2d 340, 343 (Ct. App. 1979).

43. See *State v. Holden*, 85 N.M. 397, 400, 512 P.2d 970, 973 (Ct. App.), *cert. denied*, 85 N.M. 380, 512 P.2d 953 (1973).

44. See *Nance*, 77 N.M. at 46, 419 P.2d 247.

45. See *State v. Carrasco*, 124 N.M. 64, 68-69, 946 P.2d 1075, 1079-80 (1997).

46. See *id.* (citing 2 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* § 6.8(b) (1986)).

believes the doctrine is inconsistent with the approach that New Mexico applies in accessory liability cases.<sup>47</sup>

#### A. *Inconsistency with the Model Penal Code*

Scholars have criticized the natural and probable consequences test of accomplice liability because it contradicts fundamental concepts of culpability embedded in our criminal law system.<sup>48</sup> Specifically, the Model Penal Code's guidelines bar the application of the principal's state of mind to the accomplice, because the two crimes are separate and require different degrees of culpability.<sup>49</sup>

There may, however, be two instances in which the doctrine is acceptable: 1) Felony-Murder; and 2) Misdemeanor-Manslaughter, "for they do permit conviction for a homicide occurring in the execution of a felony or dangerous misdemeanor without any showing that the defendant intentionally, knowingly, recklessly, or even negligently caused the death."<sup>50</sup> Although the Model Penal Code does not contain felony-murder or misdemeanor-manslaughter provisions, New Mexico law does contain such provisions and the courts utilize them on a regular basis.<sup>51</sup>

The *Carrasco* court referred to the commentary following section 2.06 of the Model Penal Code regarding the scope of liability to support its position on the incompatibility of New Mexico law and the Model Penal Code.<sup>52</sup> The commentary does indicate a recommendation to avoid extending accomplice liability beyond that for which a purpose was present. However, drafters of the Code acknowledged that there are "special situations" which may warrant a consequences analysis, and that some states have adopted modified versions of the Model Penal Code that extend liability to reasonably foreseeable crimes when intentionally facilitated.<sup>53</sup>

Moreover, the *Carrasco* court did not attempt to claim that the natural and probable consequences test would enable a trier of fact to convict a defendant as an accessory if his conduct was merely incidental to the principal crime. To the contrary, the doctrine implies that an accomplice could only be convicted for crimes that were foreseeable from his intentional criminal conduct. Thus, the language contained within the doctrine appears to serve as a built-in mechanism to ensure an initial level of culpability required to convict, which does not directly contradict the portion of the Model Penal Code referred to by the majority in *Carrasco*. Therefore, the *Carrasco* court's reliance on the test's inconsistency with the Model Penal Code seems misplaced, especially when New Mexico is not a state that closely follows the Model Penal Code guidelines for accessorial liability.

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47. See *id.* (citing N.M. U.J.I. CRIM. 14-2822).

48. See LAFAVE & SCOTT, *supra* note 46, § 6.8(b), at 158.

49. See *id.* (citing MODEL PENAL CODE § 2.06, commentary at 312 (1985)).

50. *Id.* at 159.

51. See N.M. STAT. ANN. §§ 30A-2-1(A)(2), -3(b) (Repl. Pamp. 1994).

52. See *State v. Carrasco*, 124 N.M. 64, 67, 946 P.2d 1075, 1079 (1997) (citing MODEL PENAL CODE § 2.06(3), cmt. 6(b) (1985)).

53. See MODEL PENAL CODE § 2.06(3), cmt. 6(b) (1985) (discussing scope of liability).

### B. Inconsistency with New Mexico UJI 14-2822

The most detailed basis for the *Carrasco* court's rejection of the doctrine is that it is inconsistent with New Mexico's approach to accessory liability as stated in New Mexico Uniform Jury Instructions Criminal 14-2822.<sup>54</sup> The court stated that a jury in New Mexico "must find a community of purpose for *each* crime of the principal."<sup>55</sup> This standard requires the jury to determine the level of culpability for each crime, and the jury cannot convict a defendant based upon his principal's intentions. Curiously, the court based this finding on New Mexico's Uniform Jury Instructions on accomplices.<sup>56</sup>

The *Carrasco* court then proceeded to apply New Mexico law on accomplice liability and found sufficient evidence to support the convictions under New Mexico Uniform Jury Instruction Criminal 14-2822, New Mexico case law, and Section 30-1-13 of the New Mexico Statutes.<sup>57</sup> In doing so, the court agreed that an accessory must share the criminal intent of the principal under *Ochoa*, and that one who aids or abets in the commission of a crime is equally culpable as the principal under *Nance*.<sup>58</sup> Thus, the *Carrasco* court found substantial evidence that "a rational jury reasonably could have inferred" that the defendant intended the criminal acts, due in part to his role in the crime by keeping the car engine running outside the store in order to facilitate a fast getaway.<sup>59</sup>

The *Carrasco* court would have reached the same result of affirming the convictions had it applied the natural and probable consequences doctrine. The only difference would be that the old-age sentencing enhancement would apply to defendant's conspiracy conviction because the victim was sixty-two years of age at the time of the offenses.<sup>60</sup> The court reasoned that since the victim was not injured in the commission of the conspiracy, but only as a result of the conspiracy, the sentencing enhancement could not be added.<sup>61</sup> However, dissenting Justice Baca, who felt the court should have applied the natural and probable consequences test, pointed out that if the court had done so, the defendant's sentence could have been enhanced.<sup>62</sup> This is because if the defendant is found guilty of robbing the store, he is also responsible for those acts which are the natural and probable consequences of his conspiracy—the injury to a sixty-two year old woman. Justice Baca found support from the case of *State v. Compton*<sup>63</sup> for the proposition that "a criminal actor takes his victim as is."<sup>64</sup>

In sum, the *Carrasco* court's rejection of the natural and probable consequences doctrine seems unnecessary, as the convictions were ultimately affirmed. Granted, the court has a valid argument that the doctrine may be inconsistent with some

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54. See *Carrasco*, 124 N.M. at 68, 946 P.2d at 1079 (citing N.M. U.J.I. CRM. 14-2822).

55. *Id.*

56. See *id.*

57. See *id.* at 69-70, 946 P.2d at 1080-81.

58. See *id.* at 70, 946 P.2d at 1081.

59. See *id.*

60. See *id.* at 74, 946 P.2d at 1085.

61. See *id.*

62. See *id.* at 75, 946 P.2d at 1086 (Baca, J., dissenting).

63. 104 N.M. 683, 692, 726 P.2d 837, 846 (1986).

64. See *Carrasco*, 124 N.M. at 75, 946 P.2d at 1086 (Baca, J., dissenting).



aspects of New Mexico law on accomplice liability. However, the negative implications associated with rejection of the doctrine entirely outweigh the burdens created by these inconsistencies, particularly in light of the reliance on the reasoning behind the doctrine to convict accessories in the past.<sup>65</sup>

## V. ANALYSIS

Comparative doctrine analysis of the principles underlying the natural and probable consequences and those which govern New Mexico accomplice liability reveal that the doctrine fosters the natural growth of the law in New Mexico. This section embarks on this analysis by first explaining the rationale behind the doctrine, and then utilizes other courts' interpretation of the doctrine to illustrate the logical link it bears with current New Mexico accomplice liability.

Application of the natural and probable consequences doctrine requires affirmative answers to the following four questions:

"(1) Did *P* commit crime A?; (2) If yes, did *S* intentionally assist in the commission of Crime A, i.e., was *S* an accomplice in the commission of that offense?; (3) If yes, did *P* commit any other crimes?; and (4) If yes, were these crimes, although not contemplated or desired by *S*, reasonably foreseeable consequences of Crime A?"<sup>66</sup>

This relatively simple formula provides the trier of fact with hard and fast parameters with which to analyze difficult *mens rea* issues involving accomplices.

While it is true that some courts have described the natural and probable consequences doctrine as "obnoxious . . . to the basic precepts and purposes of our criminal law,"<sup>67</sup> many jurisdictions have adopted the doctrine as a workable test to determine the level of culpability required to convict a defendant of aiding and abetting.<sup>68</sup> A review of California law on accomplice liability illustrates why the natural and probable consequences doctrine is a natural progression of accomplice liability law.

In *People v. Nguyen*,<sup>69</sup> the court explained that since California's Penal Code expresses the sentiments that if one is "concerned in the commission of a crime," they are to be punished as a principal.<sup>70</sup> This in effect creates a "bright line" rule for accomplice liability.<sup>71</sup> The *Nguyen* court likened the accomplice's guilt to that of the conspirator, vicarious in nature, and thus subject to liability for those offenses that were "reasonably foreseeable" as a result of the principal's actions.<sup>72</sup> Thus, the *Nguyen* court aptly held that the analysis should not focus on the specific intent required to establish the target offense, but rather on the "intent to encourage and

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65. See discussion *infra* Part V.

66. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 30.05[B] (2d. ed. 1995) (citing *People v. Woods*, 11 Cal. Rptr. 2d 231, 239 (Ct. App. 1992)).

67. *People v. Langston*, 273 N.W.2d 99, 100 (Mich. Ct. App. 1978), *rev'd*, 320 N.W.2d 53 (1982). See also DRESSLER, *supra* note 66, § 30.05[B].

68. See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 65, 515 (Hornbook Series 1972).

69. 26 Cal. Rptr. 2d 323 (Ct. App. 1993).

70. See *Nguyen*, 26 Cal. Rptr. 2d at 329 (quoting CAL. PENAL CODE § 31 and citing § 971 (West 1988)).

71. See *id.* at 330.

72. See *id.*

bring about conduct that is criminal."<sup>73</sup> Further, the court opined that this analysis is a factual analysis, strictly reserved for the trier of fact:

Consequently, the issue does not turn on the defendant's subjective state of mind, but depends upon whether, under all of the circumstances presented, 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 by the defendant.<sup>74</sup>

Similarly, since one who is involved in the commission of a crime should also be prosecuted as a principal in New Mexico,<sup>75</sup> it logically follows that he should be held responsible for the natural and probable consequences of his participatory acts in the commission of a crime.

It has been argued that because accomplice liability depends primarily upon the *mens rea* element, the trier should determine the accomplice's specific intent to commit the principal's crime.<sup>76</sup> This is arguably to ensure that those who have neither mentally nor physically committed to the perpetration of a crime are not convicted to the same extent as the principal.<sup>77</sup> However, this analysis is based upon the assumption that the natural and probable consequences doctrine requires that the accomplice be held liable entirely without fault or some degree of culpability for the crime. This assumption is not warranted because it is generally recognized that without the requisite *mens rea*, one is precluded from being an accomplice.<sup>78</sup> For example, a law enforcement officer who feigns complicity in an undercover operation in order to reveal incriminating evidence is not an accomplice by definition.<sup>79</sup> This presumes that the accomplice defendant must have an initial threshold level of culpability under the natural and probable consequences doctrine, meaning that he must have intentionally encouraged or aided in the principal's criminal acts. Furthermore, because the intent referred to in New Mexico's Uniform Jury Instruction Criminal 14-2822 does not describe the specific *mens rea* element to apply to the offense, a reckless mental state could be presumed to apply to the accomplice's acts under the Model Penal Code.<sup>80</sup> Indeed, one viewpoint is that intent corresponds to the *mens rea* of "purpose" in the Model Penal Code.<sup>81</sup> However, this is not the universal interpretation.

Although the *Carrasco* majority utilized the Model Penal Code as a basis for rejecting the natural and probable consequences doctrine, New Mexico is generally

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73. *See id.*

74. *Id.* at 331.

75. *See State v. Ochoa*, 41 N.M. 589, 600, 72 P.2d 619, 620 (1937).

76. *See, e.g., Grace E. Mueller, The Mens Rea of Accomplice Liability*, 61 S. CAL. L. REV. 2169, 2172-73 (1988).

77. *See id.*

78. *See* 1 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 38 (15th ed. 1993). *See generally* *United States v. Becker*, 62 F.2d 1007 (2nd Cir. 1933); *United States v. Hughey*, 116 F.Supp. 649 (W.D. Ark. 1953).

79. *See Lett v. United States*, 15 F.2d 690, 691 (8th Cir. 1926).

80. *See* MODEL PENAL CODE § 2.02(3) (1985).

81. *See Mueller, supra* note 76, at 2175.

not considered to be a Model Penal Code state.<sup>82</sup> In fact, fundamental differences between New Mexico's statute on accessory liability and the Model Penal Code exist. Those differences indicate that the legislature left courts free to interpret the level of culpability for an accessory on a case-by-case basis. Specifically, the Model Penal Code defines an accomplice as one who "(a) with the *purpose* of promoting or facilitating the commission of the offense . . . (i) solicits such other person to commit it; or (ii) aids or agrees to aid such other person in planning or committing it . . . ."<sup>83</sup> However, New Mexico's statute defines an accessory as one who "procures, counsels, aids or abets in its commission and although he did not directly commit the crime and although the principal who directly committed such crime has not been prosecuted or convicted."<sup>84</sup> Thus, it can be inferred that since no *mens rea* element is mentioned in the statutory language, general criminal intent is the appropriate standard.<sup>85</sup> This means that an accomplice may be held liable for disregarding a substantial and unjustifiable risk that a certain result could occur.<sup>86</sup> And, since criminal negligence is the minimum level of culpability required for non-strict liability crimes in New Mexico,<sup>87</sup> the argument that the natural and probable consequences doctrine abolishes the *mens rea* element is without merit. It may be surmised that this omission is merely an oversight in drafting the New Mexico statute. However, established rules governing statutory interpretation dictate that the omission may be an indication that the drafters either could not agree to the correct interpretation, or they intended to leave the interpretive decisions to the courts on a case-by-case basis.<sup>88</sup>

Furthermore, the supreme court's analysis in *Carrasco* would insist that the specific intent element referred to in New Mexico Uniform Jury Instruction Criminal 14-2822 be defined to mean "purpose" and not mere "recklessness."<sup>89</sup> Yet, the court ultimately affirmed the convictions under this higher culpability standard, by concluding that a rational jury could have inferred that defendant intended to aid the principals.<sup>90</sup> This suggests that the court may not have been justified in criticizing the lower court's application of the natural and probable consequences doctrine. Specifically, if the jury is entitled to *infer* that a defendant acted *purposefully*, they should also be entitled to infer that he acted with reckless disregard of the foreseeable and harmful consequences of his acts.

The question of whether one is indeed an accomplice depends upon the nature of the evidence. For example, if no conflict exists that a defendant participated in

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82. See generally Stephanie M. Griffin, *Whether the Elements of Deliberation and Premeditation Adequately Distinguishes First Degree Murder from Second Degree Murder*: State v. Garcia, 24 N.M. L. REV. 437 (1994); Jonathan J. Lord & Scott E. Turner, *Criminal Law*, 21 N.M. L. REV. 605, 612 (1991).

83. MODEL PENAL CODE § 2.06(3) (1985) (emphasis added).

84. N.M. STAT. ANN. § 30-1-13 (Repl. Pamp. 1994).

85. See Santillanes v. State, 115 N.M. 215, 218, 849 P.2d 358, 361 (1993).

86. See MODEL PENAL CODE § 2.02, commentary at 240 (1985).

87. See Reese v. State, 106 N.M. 498, 501, 745 P.2d 1146, 1149 (1987).

88. See generally TVA v. Hill, 437 U.S. 153 (1978).

89. See State v. Carrasco, 124 N.M. 64, 70, 946 P.2d 1075, 1081 (1997). The majority equates New Mexico Statutes Annotated § 30-1-13 with the Model Penal Code § 2.06(3), which explicitly states that one is an accomplice if he aids in commission of a crime "with the *purpose* of promoting or facilitating." See *id.* (quoting the MODEL PENAL CODE § 2.06(3) (Official Draft 1962)).

90. See *id.*

a crime (i.e. if such active participation is conceded), the determination as to whether he was an accomplice is a question of law for the trial judge.<sup>91</sup> However, where a conflict does exist as to whether there was participation in the crime by the defendant, the question is one of fact to be resolved by a jury.<sup>92</sup> Likewise, “[i]t is a question of fact, as to whether there is a conspiracy, . . . and whether the act charged is a natural and probable consequence of that conspiracy.”<sup>93</sup>

In *Carrasco*, the appellate court aptly left to the jury the determination as to whether the defendant did indeed act as an accomplice, as there were factual issues regarding whether the defendant aided and abetted in commission of the crimes.<sup>94</sup> However, the majority opinion of the supreme court went too far in discarding the natural and probable consequences theory of accomplice liability, as the theory already compliments New Mexico law. The lower court found that defendant acted as a co-conspirator and accomplice.<sup>95</sup> As such, the court found that he was equally responsible for all natural, probable and reasonable consequences arising from the attempted robbery of the Allsup's, including the physical harm to, and false imprisonment of, the elderly store clerk.<sup>96</sup> Thus, the court seemed to incorporate theories of conspirator liability with complicity to reach its determination, which was not overturned by the supreme court.

Associating accomplice liability with conspiracy liability is a practice derived from *Pinkerton v. United States*.<sup>97</sup> In *Pinkerton*, the defendant was indicted for substantive tax evasions that were committed by his brother while the defendant was in jail, and for conspiring with his brother to evade taxes.<sup>98</sup> Under the “Pinkerton Rule,” one may be held responsible for the substantive crimes of a co-conspirator committed to further the plan unless he overtly acts to disavow or defeat the conspiracy.<sup>99</sup> Later courts have utilized the Pinkerton Rule to establish a basis for holding a defendant accountable for crimes committed by a principal, even outside the conspiracy context.<sup>100</sup> The Pinkerton Rule governing conspiratorial liability and the underlying theory of accomplice liability produce similar results, and are each questions of fact for jury determination. Therefore, it logically follows that holding an accomplice vicariously liable for those acts which are the natural and probable consequences of the intended crime should be permissible.

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91. See TORCIA, *supra* note 78, § 38. See also *Harris v. State*, 420 So.2d 812 (Ala. Crim. App. 1982) (holding that a witness who had been indicted as a codefendant and who pleaded guilty and voluntarily testified to his participation in robbery, was accomplice to robbery as a matter of law).

92. See TORCIA, *supra* note 78, § 38. See also *State v. Redding*, 422 N.W.2d 260, 262 (Minn. 1988) (holding that trial judge in murder trial properly instructed jury that it must decide whether woman who “cased” store before robbery took place, which resulted in murder, could be considered an accomplice).

93. *Martinez v. State*, 413 So.2d 429, 430 (Fla. Dist. Ct. App. 1982) (citations omitted).

94. See *State v. Carrasco*, 122 N.M. 554, 556, 928 P.2d 939, 941 (Ct. App. 1996), *rev'd in part and aff'd in part*, 124 N.M. 64, 946 P.2d 1075 (1997).

95. See *id.*

96. See *id.* at 559, 928 P.2d at 944.

97. 328 U.S. 640 (1946).

98. See *id.* at 641.

99. See *id.* at 647.

100. See, e.g., *People v. Padilla*, 906 P.2d 388, 404 (Cal. 1996) (holding that a defendant's guilt in aiding and abetting another in a murder is derivative, predicated on the acts and guilt of the principal, and thus like the conspirator's liability).

In sum, the *Carrasco* court's opinion which discredits, and effectively discards, the natural and probable consequences doctrine was unwarranted and unnecessary in light of the evolution of accomplice liability in New Mexico.

## VI. IMPLICATIONS

Assessing the consequences of barring the use of the doctrine in the future reveals the difficulties which subsequent courts will experience in convicting defendants of aiding and abetting. The court's opinion halts the natural progression of accomplice liability in New Mexico toward a more simplified approach for juries in assessing the requisite *mens rea* of those who assist in the commission of crimes. This will, in turn, place New Mexico behind the times and out of sync with much of the nation.<sup>101</sup> Furthermore, the law of accomplice liability employed in New Mexico before *Carrasco* was not necessarily mutually exclusive with the natural and probable consequences doctrine, but provided for a basis upon which juries may infer the culpability of an accomplice.<sup>102</sup>

As a result of the *Carrasco* decision, criminal liability for complicity will be more difficult to prove as the trier of fact must now search to find the accomplice's intent for each element of the crime committed by the principal. Conversely, if the trier was permitted to utilize the natural and probable consequences test, it could infer the accomplice's intent to commit the principal offense so long as it was convinced beyond a reasonable doubt that the defendant intentionally aided in commission of the crime. Abolition of the natural and probable consequences doctrine also creates added barriers for prosecutors to overcome in applying certain sentence enhancements (i.e. "the old age" enhancement<sup>103</sup>), as well as in convicting for misdemeanor-manslaughter in New Mexico.

Applying the principles governing accomplice liability under the *Carrasco* court's preferred intent analysis reveals that the same result would have occurred if the court had applied the natural and probable consequences doctrine. Specifically, the court could have inferred from the lower court's factual findings that the defendant, in proceeding with his two friends to the Allsup's where he had previously worked during the night shift, and in waiting in the car with the engine running, knew he was taking a substantial and unjustifiable risk that a crime would be committed. In fact, the court found sufficient information existed to reasonably conclude the defendant was guilty as an accessory to the crimes charged.<sup>104</sup> Thus, the *Carrasco* court seemed to indirectly acknowledge that the defendant was criminally liable for those crimes that were the natural and probable consequences

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101. See, e.g., CAL. PENAL CODE §§ 31, 971 (West 1988); D.C. CODE ANN. § 22-105 (1981); GA. CODE ANN. § 16-2-5 (1996); IOWA CODE ANN. § 703.2 (West 1993); KAN. STAT. ANN. § 21-3205(2) (1995); WIS. STAT. ANN. § 939.05 (West 1996).

102. See N.M. STAT. ANN. § 30-1-13 (Repl. Pamp. 1994), which reads as follows:

A person may be charged with and convicted of the crime as an accessory if he procures, counsels, aids or abets in its commission and although he did not directly commit the crime and although the principal who directly committed such crime has not been prosecuted or convicted, or has been convicted of a different crime or degree of crime, or has been acquitted, or is a child under the Children's Code.

103. See *id.* § 31-18-16.1.

104. See *State v. Carrasco*, 124 N.M. 64, 69-71 946 P.2d 1075, 1080-82 (1997).

of his actions of aiding and abetting the principal perpetrators—that is, the injury to the store clerk.

In rejecting the use of the doctrine in New Mexico, the *Carrasco* court has essentially halted the natural progression of accomplice liability. This will force inferior courts to disregard the settled principles of complicity established in New Mexico and cloud the issue of intent for the jury. Specifically, courts will now need to instruct the jury that before it can convict an accomplice, it must not only be convinced that the defendant indeed aided the principal perpetrator, but the State must also establish beyond a reasonable doubt that the defendant possessed the same *mens rea* for each element of the crime for which the principal was charged. This is an inappropriate determination for juries in light of fact that juries have been entitled to infer guilt of an accomplice where sufficient evidence existed to believe that the defendant intended to aid and abet the principal.<sup>105</sup> This rationale is similar to that underlying the natural and probable consequences doctrine because a jury may convict a defendant for the foreseeable results that occurred after the commission of a crime in which he assisted, thus inferring that the defendant shared the principal's *mens rea*.

As a result of the *Carrasco* opinion, prosecutors will effectively be prevented from applying certain sentencing enhancements, and even obtaining convictions for those who aid and abet in committing crimes. This will have the residual effect of decreasing the deterrence factor which is crucial to promoting a crime-free society. This is because the natural and probable consequences doctrine helps to ensure that defendants who intentionally facilitate the commission of a crime are put on notice that they will be held to be as guilty as the principal offender.<sup>106</sup>

Moreover, unless the legislature clarifies its position on the *mens rea* required for aiding and abetting, conviction under the misdemeanor-manslaughter statute could also be severely hindered. The misdemeanor-manslaughter rule permits conviction for a homicide that occurs during an execution of a dangerous misdemeanor, without the requirement of a showing that the defendant intentionally, knowingly, recklessly, or even negligently caused the death.<sup>107</sup> While New Mexico recognizes both felony-murder<sup>108</sup> and misdemeanor-manslaughter,<sup>109</sup> local courts have expressed distaste for the felony-murder doctrine and have essentially limited its application in *State v. Ortega*.<sup>110</sup> Most felony-murder statutes require only that the intent of the aider and abettor is that required for the underlying felony, not that the aider and abettor intend the murder be committed.<sup>111</sup> *Ortega* held that New Mexico will interpret the felony-murder provision to require

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105. See *State v. O'Dell*, 85 N.M. 536, 537, 514 P.2d 55, 56 (Ct. App. 1973).

106. See *State v. Wall*, 94 N.M. 169, 171-72, 608 P.2d 145, 147-48 (1980).

107. See LAFAYE & SCOTT, *supra* note 68, § 65, at 517.

108. See N.M. STAT. ANN. § 30-2-1(A)(2) (Repl. Pamp. 1994) (defining felony-murder as “[m]urder in the first degree is the killing of one human being by another . . . in the commission of or attempt to commit any felony . . .”).

109. See *id.* § 30-2-3(B) (defining misdemeanor-manslaughter as “the unlawful killing of a human being . . . in the commission of an unlawful act not amounting to felony, or in the commission of a lawful act which might produce death in an unlawful manner or without due caution and circumspection”).

110. 112 N.M. 554, 817 P.2d 1196 (1991).

111. See generally RICHARD G. SINGER & MARTIN R. GARDNER, *CRIMES AND PUNISHMENT: CASES, MATERIALS, AND READINGS IN CRIMINAL LAW*, § 5.03, at 385-87 (1989).

proof of intent to kill instead of maintaining the rule as a strict liability crime to preserve the statute's constitutionality.<sup>112</sup> However, New Mexico courts have not expressed the same distaste for misdemeanor-manslaughter, which rests upon the same *mens rea* principles as felony-murder. This exemplifies the state of disarray of accomplice liability in New Mexico, and reveals the need for legislative reform that defines the exact parameters for determining the intent required to convict for felony-murder, misdemeanor-manslaughter and aiding and abetting.

The court's opinion in *Carrasco* essentially bars the use of the natural and probable consequences doctrine in any accessorial criminal intent analysis, without excepting the misdemeanor-manslaughter rule, which is integrally associated with complicity. The legislature will have to overcome this burden by clarifying that a misdemeanor-manslaughter crime may still invoke a foreseeability analysis when the accomplice intentionally aids in an inherently dangerous misdemeanor that results in manslaughter.

## VII. CONCLUSION

The court in *Carrasco* has essentially, but perhaps unintentionally, impeded the natural progression of accomplice liability in New Mexico towards a more simplified and rationally based approach. Arguments that the natural and probable consequences doctrine threatens to vitiate the structure and purpose of the culpability standards which define modern criminal law are laudable. However, because an accomplice's subjective mental state is even more difficult to determine than that of the principal, and New Mexico has abolished the distinction between the principal and accessory in *Nance*, it is logical to require that an accomplice should be held equally as culpable as the principal. Instead, the *Carrasco* court has foisted the additional burden upon prosecutors to prove that the *mens rea* element, defined by the statute for the primary offense, exists for the aider and abettor as well. The natural and probable consequences doctrine was a natural result for New Mexico, but unfortunately the potential benefits of it will not be recognized, unless the legislature elects to reconstruct the law.

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112. See *Ortega*, 112 N.M. at 562, 817 P.2d at 1204.