IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **BRANDON ALEXANDER FAVOR,** Defendant and Appellant.	No. S189317

Court of Appeal, Second Appellate District, Division Four No. B215387
Los Angeles County Superior Court No. BA285265
The Honorable Michael E. Pastor, Judge

RESPONDENT'S BRIEF ON THE MERITS

SUPREME COURT
FILED

NOV 01 2011

Frederick K. Ohlrich Clerk

Deputy

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
LAWRENCE M. DANIELS
Supervising Deputy Attorney General
LINDA C. JOHNSON
Supervising Deputy Attorney General
GARY A. LIEBERMAN
Deputy Attorney General
State Bar No. 150876
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-6863
Fax: (213) 897-6496
E-mail: DocketingLAAWT@doj.ca.gov
Attorneys for Respondent

TABLE OF CONTENTS

Page

Issue presented 1
Introduction 1
Statement of the case 2
Summary of argument 5
Argument 6
I. The Court of Appeal correctly determined that in order for appellant to be convicted of attempted premeditated murder, it was sufficient that the jury found that attempted murder was a reasonably foreseeable consequence of the robbery he aided and abetted, and that the attempted murder itself was premeditated 6
A. The relevant instructions below 6
B. Applicable law 7
C. Appellant's jury was properly instructed only that it had to determine whether attempted murder was a natural and probable consequence of the robbery, because the statute requires only that the attempted murder itself be premeditated 11
II. The alleged instructional error was harmless in any event 14
Conclusion 15

TABLE OF AUTHORITIES

Page

CASES

Apprendi v. New Jersey
(2000) 30 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435] 9

Blakely v. Washington
(2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403] 9

People v. Canizalez
(2011) 197 Cal.App.4th 832 13

People v. Cole
(2004) 33 Cal.4th 1158 14

People v. Cummins
(2005) 127 Cal.App.4th 667 .... 5, 9, 10

People v. Curry
(2007) 158 Cal.App.4th 766 10

People v. Flood
(1998) 18 Cal.4th 470 14

People v. Garrison
(1989) 47 Cal.3d 746 13

People v. Hart
(2009) 176 Cal.App.4th 662 .... 5, 10, 11, 12

People v. Lee
(2003) 31 Cal.4th 613 .... passim

People v. Medina
(2009) 46 Cal.4th 913 14

People v. Meloney
(2003) 30 Cal.4th 1145 12

People v. Nguyen
(1993) 21 Cal.App.4th 518 14

People v. Woods
(1992) 8 Cal.App.4th 1570 (conc. & dis. opn. of Sparks, J.) 10

STATUTES

Pen. Code, § 187, subd. (a) 4

Pen. Code, § 211 4

Pen. Code, § 654 4

Pen. Code, § 664 12

Pen. Code, § 664, subd. (a) .... passim

OTHER AUTHORITIES

CALCRIM No. 402 .... 7, 11

CALCRIM No. 601 .... 7, 15

CALCRIM No. 703 13

ISSUE PRESENTED

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

INTRODUCTION

During a takeover robbery of a liquor store, a store employee was shot and killed. The store owner was also shot, but he survived. Another employee was shot at, the bullet just missing his head. Appellant, a participant in the crimes, was tried and convicted as an aider and abettor.

As to the surviving store owner and employee, appellant was convicted of attempted willful, deliberate, and premeditated murder. The jury was instructed on the natural and probable consequences doctrine that the People must prove attempted murder was a natural and probable consequence of the robbery.

On appeal, appellant argued that the premeditation findings on the two attempted murder counts must be reversed because the jury was not instructed that to find appellant guilty, it must also determine that it was a natural and probable consequence that the attempted murder be willful, deliberate, and premeditated. The Court of Appeal disagreed, finding that the instructions were sufficient. Applying *People v. Lee* (2003) 31 Cal.4th 613, the court reasoned that it was enough that the jury determined that the attempted murder was premeditated and reasonably foreseeable. It was not required for the jury to also decide that premeditation was reasonably foreseeable because, under *Lee*, premeditation was not a required state of mind for aider and abettor liability.

STATEMENT OF THE CASE

On November 8, 2004, Pablo Castaneda, Paul Lee, and Jose Huerta were working at A & J Liquor, which was located in Los Angeles near USC. Lee was the store's owner. (3RT 649-651, 653, 667, 670-672, 692, 699-700.) In addition to being a liquor store, the store did check cashing, many times totaling over $40,000 a day. (3RT 651-652, 672-673, 695-697.)

As Huerta and Lee were standing behind the counter, two or three people entered A & J Liquor and locked the door. (3RT 653-656, 660-661, 673-674.) Castaneda was in the back of the store. (3RT 661.) When the people entered, the first thing Huerta heard was a gunshot being fired near his head. The shot burned the side of his head and Huerta fell to the floor. (3RT 655-659, 675-676.)

Huerta heard a total of four gunshots. One of the shots sounded like it came from the warehouse at the rear of the store. (3RT 660, 663, 675-677.) He also heard a cash register being opened. (3RT 667-668.) One of the men demanded Huerta's own money, and Huerta gave it to him. (3RT 661-662, 668-669, 678-682, 684.) After the robbery, Huerta found Castaneda on the ground in the warehouse, and Lee "[i]n the position where he changes checks." Both had been shot. (3RT 662-663, 665, 667, 683, 766.)

Castaneda suffered a fatal gunshot wound to the head. (3RT 665, 4RT 905-907, 916-917, 948-949.) Lee suffered two bullet wounds, one to the neck and one to the chest, but he survived. (3RT 746-749.) It was estimated that the store lost between $50,000 and $70,000 in cash in the robbery. (3RT 743-744.)

Several months later, appellant was arrested. (3RT 751-752, 757-759; 4RT 954.) Appellant waived his constitutional rights, and detectives conducted a tape-recorded interview of him. (4RT 903-904, 922-923, 925-

926, 954; 2CT 304-305.) After initially claiming he had "no part" in the robbery (2CT 306, 310), appellant indicated the following:

On the day of the robbery, appellant encountered the man who "set [the robbery] all up." The man was an ex-gang member, nicknamed "Trouble." (2CT 316, 318-320, 322, 324-325, 346-347.) Appellant and Trouble walked to A & J Liquor. They entered the store and saw that it was not very secure. Trouble said he was "gonna have [his] partner come over here." (2CT 316, 326-327.) Appellant knew what was about to take place. (2CT 323-324, 351.)

Appellant and Trouble took a bus to a location where they met Trouble's "partners." (2CT 326-328.) Appellant knew one of them from the streets as an active gang member. (2CT 335-336, 349, 357.) Appellant was pretty sure he had gone to high school with the other man, who was the shooter. Appellant could tell that this man was a "shady character" who was "not one to be trusted." (2CT 338-340, 353-354.)

Appellant and the others returned to A & J Liquor. (2CT 326-327, 329-330, 346.) Appellant entered the store and saw that there was nobody inside. He then exited the store, and the other two men entered and closed the door. (2CT 329-331, 364.)

Appellant heard gunshots. (2CT 330-331, 334.) He knocked on the door to find out "what's up." One of the men opened the door, and appellant entered the store. (2CT 330-334.) Appellant saw that several people had been shot. (2CT 333-334, 358.) The shooter told appellant to "get the money." (2CT 331-332, 358.) So appellant opened the cash register and "took everything up." (2CT 332.)

A video compiled from A & J Liquor's security system showed the following: At 10:37 a.m., appellant and another man entered the store. Appellant was the "lead male." (4RT 937, 939-941, 945-946.) At 4:26 p.m., appellant and two other men entered the store. Appellant entered

first, a man wearing a security jacket entered second, and the shooter entered third. (4RT 942, 945-946.) At 4:32 p.m., the robbery had started. (4RT 944-946.)

During closing argument, the prosecutor further described the contents of the video, without objection: "The video shows [appellant] going in, shows him taking thin[g]s. The video shows him spending a lot of time outside with the shooter and security" (i.e., the man wearing the security jacket). (6RT 1513.) "You will see the video where [appellant] actually goes inside, gets security to come back outside. . . . Then they are all walking down the street together right before the robbery." (6RT 1513-1514.) "You see [appellant] walk right up to the counter. Mr. Huerta is on the ground there . . . . Mr. Lee is right there on the ground . . . . [¶] There is not even hesitation in [appellant's] step . . . ." (6RT 1528-1529.)[1]

The jury found appellant guilty of first-degree felony murder, two counts of attempted murder, and two counts of second-degree robbery. The robbery-murder special circumstance was found true. The jury also found that the attempted murders were committed willfully, deliberately, and with premeditation, and that a principal was armed with a firearm. (2CT 421-425.) The trial court sentenced appellant to state prison on the murder count for life without the possibility of parole, plus one year. On the attempted murder counts, appellant was sentenced to consecutive life terms with the possibility of parole, plus one year. The sentences on the robbery counts were stayed under Penal Code section 654. (2CT 467-473; 8RT 3615-3617.)

On appeal, appellant claimed that his convictions for premeditated attempted murder must be reversed because the jury was only instructed on the natural and probable consequences theory as to "simple" attempted

---

[1] Appellant rested on the state of the evidence. (4RT 979.)

murder, not as to premeditated attempted murder. (Opn. 8.) The Court of Appeal disagreed, primarily relying on the reasoning in this Court's decision in *People v. Lee, supra,* 31 Cal.4th 613 (*Lee*), where this Court held that Penal Code section 664, subdivision (a) (section 664(a)) "must be interpreted to require only that the murder attempted was willful, deliberate, and premeditated, but not to require that an attempted murderer personally acted willfully and with deliberation and premeditation, even if he or she is guilty as an aider and abettor." (Opn. 9-10.)

The Court of Appeal also followed *People v. Cummins* (2005) 127 Cal.App.4th 667 (*Cummins*), which specifically applied *Lee* to the natural and probable consequences doctrine. (Opn. 10-11.) The Court of Appeal recognized that another panel had reached a different conclusion in *People v. Hart* (2009) 176 Cal.App.4th 662 (*Hart*) (Opn. 10), but noted that "*Hart* [did] not address *Lee*, nor the application of its reasoning in . . . *Cummins*" (Opn. 11, fn. 2). The Court of Appeal concluded that "[i]n this case, as in *Cummins*, the jury was properly instructed on the elements of attempted murder based on natural and probable consequences, and on the requisite findings for willful, premeditated and deliberate attempted murder. Nothing more was required." (Opn. 11.)

SUMMARY OF ARGUMENT

In *Lee*, this Court stated unequivocally that section 664(a) "does *not* require that an attempted murderer [who is guilty as an aider and abettor] personally act with willfulness, deliberation, and premeditation. It requires only that the attempted murder itself was willful, deliberate, and premeditated." (*Lee*, *supra*, 31 Cal.4th at p. 626, emphasis in original.) This Court also indicated – notwithstanding the possibility that an attempted murderer who is guilty as an aider and abettor under the natural and probable consequences doctrine may be less blameworthy – that the Legislature had declined to limit section 664(a) only to attempted

murderers who personally premeditated. (*Id.* at pp. 624-625.) This Court also recognized that a person guilty of attempted murder under the natural and probable consequences doctrine may be sufficiently blameworthy to warrant a life sentence. (See *id.* at p. 627.)

Lee therefore stands for the proposition that under section 664(a), the premeditation element of attempted premeditated murder attaches only to the perpetrator's act of attempted murder and not to the aider and abettor's mens rea. It follows that under the natural and probable consequences doctrine, an aider and abettor need not foresee that a *premeditated* attempted murder was a natural and probable consequence of the target offense. It is simply required that (1) attempted murder was a reasonably foreseeable consequence of the crime aided and abetted, and (2) the attempted murder itself was premeditated. Appellant's jury was therefore properly instructed.

ARGUMENT

I. THE COURT OF APPEAL CORRECTLY DETERMINED THAT IN ORDER FOR APPELLANT TO BE CONVICTED OF ATTEMPTED PREMEDITATED MURDER, IT WAS SUFFICIENT THAT THE JURY FOUND THAT ATTEMPTED MURDER WAS A REASONABLY FORESEEABLE CONSEQUENCE OF THE ROBBERY HE AIDED AND ABETTED, AND THAT THE ATTEMPTED MURDER ITSELF WAS PREMEDITATED

A. The Relevant Instructions Below

The trial court instructed appellant's jury regarding the natural and probable consequences doctrine:

> To prove that the defendant is guilty of attempted murder, the People must prove that: [¶] 1. The defendant is guilty of robbery; [¶] 2. During the commission of robbery, a coparticipant in that robbery committed the crime of attempted murder; [¶] AND [¶] 3. Under all of the circumstances, a reasonable person in the defendant's position would have known

> that the commission of attempted murder was a natural and probable consequence of the commission of the robbery.

(2CT 414; CALCRIM No. 402.)

The jury was also instructed regarding attempted willful, deliberate, and premeditated murder:

> If you find the defendant guilty of attempted murder . . . , then you must decide whether the People have proved the additional allegation that the attempted murder was done willfully and with deliberation and premeditation . . . .
>
> . . . .
>
> The attempted murder was done willfully and with deliberation and premeditation if either the defendant or a principal or both of them acted with [the requisite] state of mind.

(2CT 416; CALCRIM No. 601.)[2]

B. Applicable Law

Section 664(a) "provides that . . . a person guilty of attempted murder must be punished by imprisonment for five, seven, or nine years. It goes on to provide, however, that, 'if the [murder] attempted is willful, deliberate, and premeditated . . . , the person guilty of that attempt shall be punished by imprisonment . . . for life.'" (*Lee*, *supra*, 31 Cal.4th at p. 616.)

In *Lee*, this Court concluded that the trial court "did not err by failing to instruct the jury to determine personal willfulness, deliberation, and premeditation in the case of an aider and abettor." (*Lee*, *supra*, 31 Cal.4th at p. 628.) This Court held that "section 664(a) properly must be interpreted to require only that the murder attempted was willful, deliberate, and premeditated, but not to require that an attempted murderer personally

[2] In closing argument, the prosecutor argued that appellant was guilty of the attempted murders under the natural and probable consequences doctrine (6RT 1518-1520, 1529, 1572), and that the attempted murders were done with premeditation (6RT 1520-1521).

acted willfully and with deliberation and premeditation, even if he or she is guilty as an aider and abettor." (*Id.* at p. 616.) In other words, "section 664(a) does *not* require that an attempted murderer personally act with willfulness, deliberation, and premeditation. It requires only that the attempted murder itself was willful, deliberate, and premeditated." (*Id.* at p. 626, emphasis in original.)

This Court observed in *Lee* that "a person may be guilty of attempted murder . . . on varying bases and with varying mental states," but section 664(a), "[r]eferring three times broadly and generally to 'the person guilty' of attempted murder, . . . not once distinguishes between an attempted murderer who is guilty as a direct perpetrator and an attempted murderer who is guilty as an aider and abettor[.]" (*Lee*, *supra*, 31 Cal.4th at p. 622.) This Court also found that "the Legislature reasonably could have determined that an attempted murderer who is guilty as an aider and abettor, but who did not personally act with willfulness, deliberation, and premeditation, is sufficiently blameworthy to be punished with life imprisonment." (*Id.* at p. 624.) Where, as was the situation in *Lee*, "the natural-and-probable-consequences doctrine does not apply, such an attempted murderer necessarily acts . . . with intent to kill. . . . [H]e or she also necessarily acts with a mental state at least approaching deliberation and premeditation[.]" (*Ibid.*)

In making this determination, this Court deferred to the Legislature's decision not to require personal premeditation for an aider and abettor despite an arguably lesser culpability under the natural and probable consequences doctrine:

> Of course, where the natural-and-probable-consequences doctrine does apply, an attempted murderer who is guilty as an aider and abettor may be less blameworthy. In light of such a possibility, it would not have been irrational for the Legislature to limit section 664(a) only to those attempted murderers who

> personally acted willfully and with deliberation and premeditation. But the Legislature has declined to do so.

(*Lee*, *supra*, 31 Cal.4th at pp. 624-625.)

At the same time, this Court also acknowledged that a person guilty of attempted murder under the natural and probable consequences doctrine may in fact be sufficiently blameworthy to warrant a life sentence. (See *Lee*, *supra*, 31 Cal.4th at p. 627 ["Although defendants . . . argue that an attempted murderer who is guilty as an aider and abettor . . . is insufficiently blameworthy to be punished with life imprisonment, their argument . . . ignores the very substantial blameworthiness of even this sort of attempted murderer – necessarily so in the general case, and possibly so even under the natural-and-probable-consequences doctrine"].) "More fundamentally," this Court explained, punishment need not be exactly proportionate to the criminal's mens rea and can take into account other valid penological considerations:

> [A]n assumption that punishment must be finely calibrated to a criminal's mental state[] . . . is unsound. Punishment takes account not only of the criminal's mental state, but also of his or her conduct, the consequences of such conduct, and the surrounding circumstances. [Citations.] Such circumstances may include the fact that the murder attempted was willful, deliberate, and premeditated.

(*Ibid.*)

Later, in *Cummins*, *supra*, 127 Cal.App.4th 667, the Court of Appeal applied *Lee* to the natural and probable consequences doctrine. There, the trial court did not instruct the jury that it had to find a premeditated attempted murder was a natural and probable consequence of the target crimes of robbery and carjacking. Citing *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403], and *Apprendi v. New Jersey* (2000) 30 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], the defendant claimed that such a failure denied him his constitutional right to have the

jury determine any fact used to enhance his sentence. (*Cummins*, at p. 680.)

The Court of Appeal observed that the question whether a jury must find a premeditated attempted murder to be a natural and probable consequence of a target crime appeared to be one of first impression. (*Cummins, supra*, 127 Cal.App.4th at p. 680.) The Court of Appeal then found "no reason, under the facts of [that] case, to depart from the reasoning of the *Lee* court in a situation that applies the natural and probable consequences doctrine." (*Ibid.*) It noted:

> Kelly was a willing and active participant in all the steps that led to the attempt on [the victim's] life. Although the evidence did not conclusively determine which defendant had physical contact with the victim when he was pushed, certainly Kelly's conduct makes him no less blameworthy than Cummins. The jury here was properly instructed on the elements of attempted premeditated murder and, based on the evidence, found the attempt on [the victim's] life was willful, deliberate, and premeditated. Nothing more was required.

(*Id.* at pp. 680-681; see also *People v. Curry* (2007) 158 Cal.App.4th 766, 792 [agreeing "that *Lee* should apply in a case involving the natural and probable consequences doctrine"]; *People v. Woods* (1992) 8 Cal.App.4th 1570, 1603 (conc. & dis. opn. of Sparks, J.) ["[I]t is enough that an unlawful killing was a likely consequence of the target crime. . . . [I]t is not necessary that the aider and abettor precisely foresee that the killing might be a premeditated one"].)

After the trial in the instant case, another Court of Appeal reached a contrary conclusion in *Hart, supra*, 176 Cal.App.4th 662. There, defendants Hart and Rayford entered a liquor store, intending to rob the husband and wife working there. Hart exhibited a gun and demanded money. When Hart saw a gun in an open drawer below the cash register, he shot the husband. (*Id.* at p. 665.) Rayford was convicted of, inter alia,

attempted premeditated murder. One of the theories of guilt was that Rayford had aided and abetted Hart in the attempted robbery, and that attempted murder was a natural and probable consequence thereof. (*Id.* at p. 668.) The trial court instructed the jury with CALCRIM No. 402, regarding the natural and probable consequences doctrine, and inserted "attempted robbery" for the target crime and "attempted murder or assault with a firearm" for the nontarget crimes. The instruction did not refer to the premeditation element of attempted premeditated murder. (*Id.* at p. 669.)

Concluding that the instructions were prejudicially deficient, the Court of Appeal reversed the finding that Rayford had premeditated. (*Hart*, *supra*, 176 Cal.App.4th at pp. 674-675.) The court found that: "(1) the jury, under the facts of [that] case, could have concluded that attempted unpremeditated murder was a natural and probable consequence of the attempted robbery and that attempted premeditated murder was not a natural and probable consequence and (2) the instructions were insufficient to inform the jury concerning its duty in this regard." (*Id.* at p. 670; see also *id.* at p. 673 ["The instructions did not fully inform the jury that, in order to find Rayford 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"].)

C. Appellant's Jury Was Properly Instructed Only That It Had To Determine Whether Attempted Murder Was A Natural And Probable Consequence Of The Robbery, Because The Statute Requires Only That The Attempted Murder Itself Be Premeditated

Based on the reasoning in *Hart*, appellant argues that the trial court improperly failed to instruct the jury to determine whether premeditated attempted murder was a natural and probable consequence of the robberies he aided and abetted. (Appellant's Opening Brief on the Merits ("AOBM")

11, 15-17.) He contends that this Court's decision in *Lee* is "inapplicable" because *Lee* did not involve the natural and probable consequences doctrine, and the *Lee* court recognized that "'where the natural-and-probable-consequences doctrine does apply, an attempted murderer who is guilty as an aider and abettor may be less blameworthy.'" (AOBM 16-17, quoting *Lee, supra*, 31 Cal.4th at p. 624.) Respondent disagrees, and submits that *Hart* was contrary to this Court's determinations in *Lee* that for premeditated attempted murder, (1) only the attempted murder itself must be premeditated, and (2) premeditation is not a required component of the aider and abettor's mental state.

As it did in *Lee*, this Court should "decline [appellant's] invitation to *insert* a personal-mental-state requirement not imposed by section 664(a)." (*Lee, supra,* 31 Cal.4th at p. 626, emphasis in original.) This Court stated unequivocally that section 664(a) "requires *only that the attempted murder itself* was willful, deliberate, and premeditated." (*Ibid.*, emphasis added.) It also indicated – notwithstanding the possibility that an attempted murderer who is guilty as an aider and abettor under the natural and probable consequences doctrine may be less blameworthy – the Legislature had declined to limit section 664(a) only to attempted murderers who personally premeditated. (*Id.* at pp. 624-625.)

Furthermore, in the years following *Lee*, the Legislature has not modified section 664(a) in any way, although it has modified other subdivisions of section 664. (See *People v. Meloney* (2003) 30 Cal.4th 1145, 1161 ["[W]hen as here '"a statute has been construed by judicial decision, and that construction is not altered by subsequent legislation, it must be presumed that the Legislature is aware of the judicial construction and approves of it." [Citations.] "There is a strong presumption that when the Legislature reenacts a statute which has been judicially construed it adopts the construction placed on the statute by the courts."'"].)

This Court also specifically recognized in *Lee* that a person guilty of attempted murder under the natural and probable consequences doctrine may be sufficiently blameworthy to warrant a life sentence. (See *Lee*, *supra*, 31 Cal.4th at p. 627.) Such is certainly the case here. In finding the special circumstance to be true (2CT 421), the jury found that appellant had been a major participant in the robbery, and that he had acted with a reckless indifference to human life (see 2CT 416-417; CALCRIM No. 703). Moreover, as one Court of Appeal recently acknowledged, the culpability of the person liable under the natural-and-probable-consequences doctrine is legally equivalent to the culpability of "the direct perpetrator of an unintended crime that is the natural and probable consequence of the intended crime." (See *People v. Canizalez* (2011) 197 Cal.App.4th 832, 852 [the natural-and-probable-consequences doctrine "imposes vicarious liability for any offense committed by the direct perpetrator that is a natural and probable consequence of the target offense" and "[b]ecause the nontarget offense is unintended, the mens rea of the aider and abettor with respect to that offense is irrelevant," citing *People v. Garrison* (1989) 47 Cal.3d 746, 778].)

As this Court determined in *Lee*, to be liable for premeditated attempted murder, the attempted murder itself must be premeditated, but the aider and abettor's mental state need not be. It follows that under the natural-and-probable-consequences doctrine, an aider and abettor need not foresee that a premeditated attempted murder was a natural and probable consequence of the target offense. It is sufficient that (1) attempted murder was a reasonably foreseeable consequence of the crime aided and abetted, and (2) the attempted murder itself was committed willfully, deliberately, and with premeditation. Consequently, the Court of Appeal correctly decided that the trial court's instructions were proper.

II. THE ALLEGED INSTRUCTIONAL ERROR WAS HARMLESS IN ANY EVENT

Appellant also argues that the alleged instructional error was prejudicial. (AOBM 17-20.) Respondent disagrees.[3]

Where a jury instruction omits an element of a criminal offense, the federal constitutional standard of harmless error is implicated. (*People v. Flood* (1998) 18 Cal.4th 470, 503.) Accordingly, a trial court's failure to instruct on an element of a crime is federal constitutional error that requires reversal of the conviction unless it can be shown beyond a reasonable doubt that the error did not contribute to the jury's verdict. (*People v. Cole* (2004) 33 Cal.4th 1158, 1208-1209.)

"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, quoting *People v. Nguyen* (1993) 21 Cal.App.4th 518, 535.) "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. . . ." [Citation.]'" (*Ibid.*)

Here, appellant knowingly committed a takeover robbery with a "shady character" who was "not one to be trusted" (2CT 338-340), and with an active gang member (2CT 335, 357). Furthermore, appellant presumably knew that the robbery was to be accomplished by means of a firearm as he was apprised of the plan by the gang member who "set [the robbery] all up." (See 2CT 316, 318-320, 322, 324-328, 330, 346-347.)

---

[3] Having found no instructional error, the Court of Appeal did not address respondent's harmless-error argument below. (See RB 18.)

Appellant also admitted that he knew beforehand what was about to take place. (2CT 323-324, 351.) Under these circumstances, the jury would have found that it was reasonably foreseeable that a possible consequence of such an endeavor was that one of these potentially dangerous individuals might make "a cold, calculated decision to kill" with a gun. (See CALCRIM No. 601; 2CT 416.)

Consequently, if instructional error is found, this Court should find that beyond a reasonable doubt it did not contribute to the jury's verdict. Alternatively, the matter should be remanded to the Court of Appeal to determine prejudice in the first instance.

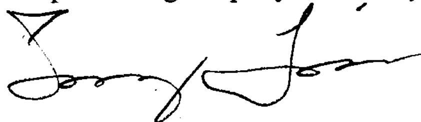
CONCLUSION

For the foregoing reasons, respondent respectfully requests that the decision of the Court of Appeal be affirmed.

Dated: October 31, 2011

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
LAWRENCE M. DANIELS
Supervising Deputy Attorney General
LINDA C. JOHNSON
Supervising Deputy Attorney General



GARY A. LIEBERMAN
Deputy Attorney General
Attorneys for Respondent

LA2011501234
50994074.doc

CERTIFICATE OF COMPLIANCE

I certify that the attached Respondent's Brief on the Merits uses a 13-point Times New Roman font, and contains 4,264 words.

Dated: October 31, 2011

KAMALA D. HARRIS
Attorney General of California

GARY A. LIEBERMAN
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***The People of the State of California v. Brandon Alexander Favor***
No.: **S189317**

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 October 31, 2011, I served the attached **RESPONDENT'S 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 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

Allen G. Weinberg
Attorney at Law
Law Offices of Allen G. Weinberg
9454 Wilshire Boulevard, Suite 600
Beverly Hills, CA 90212
(Served 2 copies)

Marcus Musante
Deputy District Attorney
L.A. County District Attorney's Office
6230 Sylmar Avenue
Room 201
Van Nuys, California 91401

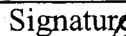
Clerk of Court
Second Appellate District
Court of Appeal
Division Four
300 South Spring Street
Los Angeles, CA 90013

The Honorable Michael E. Pastor
Judge
L.A. County Superior Court
Central District
Clara Shortridge Foltz Criminal Justice Center
210 West Temple St., Dept. 133
Los Angeles, CA 90012

The one copy for the California Appellate Project was placed in the box for the daily messenger run system established between this Office and California Appellate Project (CAP) in Los Angeles for same day, personal delivery.

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 October 31, 2011, at Los Angeles, California.

C. Esparza
Declarant


Signature

LA2011501234
51011506.doc