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SUPREME COURT CRIM. NO. _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

S189317

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. BRANDON ALEXANDER FAVOR, Defendant and Appellant.	Court of Appeal No. B215387 Superior Court No. BA285265

APPEAL FROM THE LOS ANGELES COUNTY SUPERIOR COURT
HONORABLE MICHAEL E. PASTOR, JUDGE PRESIDING

PETITION OF APPELLANT BRANDON ALEXANDER FAVOR FOR REVIEW FROM THE PUBLISHED AFFIRMANCE OF HIS CONVICTION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION FOUR

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TO THE HONORABLE RONALD GEORGE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Appellant Brandon Alexander Favor respectfully requests this court grant review following the affirmance by the Court of Appeal, Second

Appellate District, Division Four, of his conviction and sentence for first degree murder, attempted premeditated and deliberated murder, and second degree robbery.

A copy of the December 2, 2010, published[1] opinion is attached to this petition.

ISSUES PRESENTED FOR REVIEW[2]

(1) When the prosecution proceeds on a natural and probable consequences theory as to attempted premeditated murder, must the jury be instructed that it must find attempted premeditated murder is a natural and probable consequence of the underlying felony or will an instruction linked only to simple attempted murder suffice?[3]

(2) Under what circumstances is there insufficient evidence to support a murder special circumstance alleging reckless indifference to human life?

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[1] Only the portion of the opinion relating to the first issue presented and Argument I herein was ordered published by the Court of Appeal. (Cal. Rules of Court, rules 8.1100 and 8.1110.)

[2] Four arguments are presented below. Arguments III and IV present no grounds for review under California Rules of Court, rule 8.500(b), and are presented solely to exhaust state remedies for federal habeas corpus purposes. (Cal. Rules of Court, rule 8.508(b)(3)(A).)

[3] Compare *People v. Hart* (2009) 176 Cal.App.4th 662, holding the instructions given failed to inform the jury that in order to find the accomplice guilty of attempted premeditated murder, it was necessary to find that the attempted premeditated murder, not just attempted murder, was a natural and probable consequence of the attempted robbery, with the opinion herein reaching an oppositive result on indistinguishable facts.

NECESSITY FOR REVIEW

Review by this court is necessary to secure uniformity of decision and to settle important questions of law. As to the first issue presented, there is a conflict between a published decision of the Court of Appeal, Third Appellate District and the unpublished decision herein of the Court of Appeal, Second Appellate District, Division Four. (Cal. Rules of Court, rule 8.500(b)(1).)

STATEMENT OF THE CASE AND STATEMENT OF FACTS

For purposes of this petition, the first four pages of the opinion provide a sufficient overview of the procedural and factual background of this case.

ARGUMENT

I.

REVIEW SHOULD BE GRANTED BECAUSE THERE IS A CONFLICT IN THE DECISIONS OF THE COURTS OF APPEAL AS TO WHETHER A JURY MUST BE INSTRUCTED ON THE NATURAL AND PROBABLE CONSEQUENCES DOCTRINE AS TO ATTEMPTED PREMEDITATED MURDER, RESULTING IN A VIOLATION OF A DEFENDANT'S SIXTH AMENDMENT RIGHT TO A JURY TRIAL AND FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS

A. Introduction and Background

Appellant was convicted of attempted first-degree murder in counts 2 and 3. The jury was instructed that it could find appellant guilty of "attempted murder" as a natural probable consequence if it found he aided and abetted robbery. However, the instructions did not inform the jury that in order to find the premeditation allegation true it had to decide that attempted *premeditated* murder was also a natural probable consequence of the robberies that appellant aided and abetted. (2CT 414; 5RT 1273-1275.)

The opinion of the Court of Appeal herein recognizes that it is in conflict and can not be harmonized with a recent published case, *People v. Hart* (2009) 176 Cal.App.4th 662, wherein the Court of Appeal for the Third Appellate District unanimously reversed a conviction for attempted

premeditated and deliberated murder because the jury was instructed on the "natural and probable consequences" theory only as to simple attempted murder, and not as to premeditated and deliberated attempted murder. (Opn. 10-11.) Since what took place in this case is exactly what happened in *Hart*, *supra*, this court should grant review to resolve this conflict in the law. Review should be granted, and appellant's convictions in counts 2 and 3 must be reversed.

B. Discussion

In *Hart*, co-defendants Hart and Rayford entered a liquor store intending to rob the husband and wife working there. Hart exhibited a gun and demanded money. He saw there was a gun in an open drawer under the cash register. At that point, he fired on the husband, hitting him in the abdomen. (*Id.* at p. 665.) Rayford was convicted of attempted robbery, assault with a firearm, and attempted premeditated and deliberated murder. (*Id.* at pp. 666-667.)

The *Hart* court concluded:

> Under the instructions as given, the jury may have convicted Rayford of attempted premeditated murder as an aider and abettor under the natural and probable consequences doctrine. The instructions on natural and probable consequences, however, referred to "attempted murder" without noting that, in order to convict Rayford of attempted premeditated murder under the natural and probable consequences doctrine, the jury would have to find that attempted premeditated murder was a natural and probable consequence of the attempted robbery. We

> therefore conclude that Rayford's conviction for attempted premeditated murder must be reversed and remanded.

(*People v. Hart, supra*, 176 Cal.App.4th at p. 665.)

In *Hart*, "[o]ne of the prosecution's theories of guilt as to Rayford was that he aided and abetted Hart in the attempted robbery . . . and that the attempted murder . . . .was a natural and probable consequence of the attempted robbery." (*Id.* at p. 668.) The Court of Appeal agreed that "the trial court did not sufficiently instruct the jury concerning the relationship between the natural and probable consequences doctrine and the premeditation and deliberation element of attempted premeditated murder." (*Ibid.*)

The *Hart* court observed that the natural and probable consequences doctrine, recognized at common law, was "based on the recognition that 'aiders and abettors should be responsible for the criminal harms they have naturally, probably and foreseeably put in motion." (*Id.* at p. 668, quoting *People v. Prettyman* (1996) 14 Cal.4th 248, 260.) Whether a given act is a "natural and probable consequence of another criminal act aided and abetted by a defendant" is a question of fact for the jury, under a reasonable person standard. (*Ibid.*, internal quotation marks omitted, quoting *People v. Nguyen* (1993) 21 Cal.App.4th 518, 531.)

In *Hart*, the trial court instructed the jury concerning the natural and probable consequences doctrine with CALCRIM 402. It inserted "attempted

robbery" for the target crime and "attempted murder or assault with a firearm" for the nontarget crime, and did not mention the charged premeditation element of attempted premeditated murder.

The court also instructed the jury on the elements of attempted murder. It also instructed that, if the jury found the defendant guilty of attempted murder, it must "decide whether the People have proved the additional allegation that the attempted murder was done willfully, and with deliberation and premeditation." (*People v. Hart, supra*, 176 Cal.App.4th at p. 670.) "The court did not relate the instruction concerning premeditation and deliberation to the natural and probable consequences instruction." (*Ibid.*) In *Hart*, with respect to the natural and probable consequences doctrine, the jury was asked only whether under all of the circumstances, a reasonable person in the defendant's position would have known that the commission of the attempted murder or assault with a firearm was a natural and probable consequence of the commission of the attempted robbery. (*Ibid.*) That is exactly what happened in appellant's case.

Here, the trial court instructed the jury with CALCRIM 402, inserting "Robbery" for the target offense, and "Attempted Murder" for the non-target crime, in part, as follows:

> The defendant is charged in counts 4-5 with robbery and in Counts 2-3 with attempted murder.

> You must first decide whether the defendant is guilty of robbery. If you find the defendant is guilty of this crime, then you must decide whether he is guilty of attempted murder.
>
> Under certain circumstances, a person who is guilty of one crime also may be guilty of the crimes that were committed at the same time.
>
> To prove 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 robbery.

(2CT 414; 5RT 1273-1274.)

Also, just like in the *Hart* case, the trial court here instructed the jury on the elements of attempted murder. (2CT 415-416; 5RT 1280-1282.) It also instructed that, if the jury found the defendant guilty of attempted murder, it must determine whether the prosecution had proved the additional allegation that the attempted murder was done willfully, and with deliberation and premeditation. (2CT 416; 5RT 1281-1283.) Here, as in *Hart*, the trial court did not relate the instruction concerning premeditation and deliberation to the natural and probable consequences instruction.

C. The Error

The instructions here did not require the jury to determine that premeditated and deliberated attempted murder was a natural and probable consequence of the robberies appellant aided and abetted. Jury instructions relieving the prosecution of the burden of proving beyond a reasonable doubt each element of the charged offense violate the Sixth Amendment right to a jury trial, as well as the due process clause. (*Sullivan v. Louisiana* (1993) 508 U.S. 275 [113 S.Ct. 2078, 124 L.Ed.2d 182]; *United States v. Gaudin* (1995) 515 U.S. 506, 510 [115 S.Ct. 2310, 132 L.Ed.2d 444]; *People v. Flood* (1998) 18 Cal.4th 470.)

The *Hart* court realized that based on the facts presented there, "a reasonable jury could have concluded that the actual perpetrator (*Hart*) was guilty of attempted premeditated murder but that the aider and abettor (Rayford) was guilty of no more than attempted unpremeditated murder." (*People v. Hart*, *supra*, 176 Cal.App.4th at p. 672.) Even though Hart and Rayford planned the robbery, and Hart brought a gun to the robbery, a "reasonable person in Rayford's position may not have concluded that attempted premeditated murder would be a natural and probable result of the planned robbery." (*Ibid.*) A jury could conclude otherwise too, but "the facts do not lead ineluctably to that conclusion." (*Ibid.*)

The *Hart* court concluded that:

> (1) the jury, under the facts of this 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.)

The instructions in *Hart* were inadequate to guide the jury in that fact-finding task. Attempted murder and premeditation and deliberation, were adequately defined; however, the natural and probable consequences instruction did not mention the premeditation and deliberation element of attempted premeditated murder. (*Id.* at p. 668.) It was necessary to tell the jurors they had to "find that attempted premeditated murder, not just attempted murder, was a natural and probable consequence of the [target offense]." (*Id.* at p. 673.)

The Court of Appeal herein believed *Hart* was wrongly decided and that this court's decision in *People v. Lee* (2003) 31 Cal.4th 613 dictates a different result. (Opn. 9-11.) Here, as in *Hart*, "[t]he jury was left to its own devices without proper guidance concerning the law." (*People v. Hart, supra*, 176 Cal.App.4th at p. 674.) Under the instructions given, the jury may have found appellant guilty of attempted murder by using the natural and probable consequences doctrine, an objective test, and then found the premeditation and deliberation element true using the only instruction given as to that element,

which is described a subjective test. (*Ibid.*; 2CT 416.) Review by this court is necessary to resolve this conflict among the Courts of Appeal. After a grant of review, this court should reverse the premeditated and deliberated findings in counts 2 and 3 due to the instructional error mentioned herein. (*People v. Hart, supra*, 176 Cal.App.4th at p. 675.)

II.

REVIEW SHOULD BE GRANTED BECAUSE APPELLANT'S DUE PROCESS AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE MURDER SPECIAL CIRCUMSTANCE FINDING IN COUNT 1, AS THERE WAS NOT SUBSTANTIAL EVIDENCE THAT APPELLANT ACTED WITH RECKLESS INDIFFERENCE TO HUMAN LIFE

A. Introduction

The jury found the robbery-murder special circumstance (§ 190.2, subd. (a)(17)(A)) in count 1 true. (2CT 421.) Since appellant was not the actual killer, the prosecution had to prove that appellant either had the intent to kill or that he was a major participant acting with reckless indifference to human life. (§ 190.2, subds. (c) & (d).) The prosecution herein did not argue that appellant had an actual intent to kill and only proceeded under the major participant with reckless indifference to human life theory. (See 5RT 1529-1530.) As will be shown, under the facts of this case, there was not substantial evidence to support a finding beyond a reasonable doubt that appellant acted with reckless indifference to human life. As such, there was insufficient evidence to uphold the true finding on the special circumstance allegation, and it must be stricken. (*Enmund v. Florida* (1982) 458 U.S. 782, 798-799 [102 S.Ct. 3368, 73 L.Ed.2d 1140]; *Tison v. Arizona* (1987) 481 U.S. 137, 146-158

[95 L.Ed.2d 127, 107 S.Ct. 1676].)

B. Standard Of Review

The federal standard for sufficiency of evidence is set out in *Jackson v. Virginia* (1979) 443 U.S. 307, 319:

> [T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution.

The standard set out in *Jackson* is applicable to California cases. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) In *Johnson*, this court refined the standard:

> In determining whether a reasonable trier of fact could have found defendant guilty beyond a reasonable doubt, the appellate court 'must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence.' [Citations.] The court does not, however, limit its review to the evidence favorable to the respondent. As *People v. Bassett* (1968) 69 Cal.2d 122, explained, 'our task . . . is twofold. First, we must resolve the issue in the light of the whole record -- i.e., the entire picture of the defendant put before the jury -- and may not limit our appraisal to isolated bits of evidence selected by the respondent. Second, we must judge whether the evidence of each of the essential elements . . . is substantial; it is not enough for the respondent simply to point

> to 'some' evidence supporting the finding, for 'Not every surface conflict of evidence remains substantial in the light of other facts.'

(*Id.* at pp. 576-577.)

"Evidence, to be 'substantial' must be 'of ponderable legal significance . . . reasonable in nature, credible, and of solid value.'" (*Id.* at p. 576.)

Moreover, a state-court conviction that is not supported by sufficient evidence violates the due process clause of the Fourteenth Amendment and is invalid for that reason. (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 319.) A California conviction without adequate support separately and independently offends, and falls under, the due process clause of article I, section 15. (*People v. Johnson*, *supra*, 26 Cal.3d at pp. 575-578; *People v. Thomas* (1992) 2 Cal.4th 489, 544 (conc. & dis. opn. of Mosk, J.).)

The federal and California rules for determining sufficiency of evidence are equally applicable to challenges aimed at special circumstance findings. (*People v. Thompson* (1980) 27 Cal.3d 303, 323, fn. 25.)

C. Discussion

In order to find the robbery-murder special circumstance to be true, the jury was required to find that "[t]he murder was committed while the defendant was engaged in, or was an accomplice in, the commission of, attempted commission of, or the immediate flight after committing, or attempting to commit, . . . [r]obbery, in violation of Section 211 or 212.5." (§

190.2, subd. (a)(17)(A).) In addition, when the defendant is not the actual killer, as in this case, there is one additional decision the jury must make when the underlying killing was a felony-murder before finding the special circumstance to be true; either the defendant harbored an intent to kill or acted "with reckless indifference to human life and as a major participant." (§ 190.2, subds. (c) & (d).)

The specific question to be resolved here is whether there was evidence that appellant was a major participant in the robbery, acting with a reckless indifference to human life that was "reasonable in nature, credible, and of solid value" -- in other words, sufficient to uphold the findings of the trial court in view of the totality of the evidence. Appellant asserts that it was not.

For purposes of this argument, it is conceded here as it was by trial counsel, that appellant was a major participant in the robbery. (2CT 438.) However, there is insufficient evidence that appellant acted with reckless indifference to human life.

The only evidence in this case as to what appellant knew comes from his own taped statement. While appellant initially denied being involved in the robbery, he quickly became cooperative with the detectives and admitted his involvement. However, appellant always maintained that he had no prior knowledge that the shooter was armed, and throughout his statement appellant repeated his regret that someone had been shot. It is undisputed that appellant

was outside the liquor store when the shots were fired. The prosecutor admitted as much in discussing what jury instructions would be appropriate, stating,

> the evidence does not in any way suggest that the defendant before the robbery occurred knew that the shooter had a gun, that he knew that the other gentleman had a gun at any time, [or] saw the gun before entering the store.

(5RT 1234.) There is simply no substantial evidence here to support a finding that appellant acted with a reckless indifference towards human life, and a judgment arising from insufficient admissible evidence to support the jury's verdict violates the due process clause of the Fourteenth Amendment.

The phrase "reckless indifference to human life" conveys the notion of a subjective appreciation or knowledge by the defendant of a grave risk of death. (*Tison*, *supra*, 481 U.S. at pp. 149; *People v. Estrada* (1995) 11 Cal.4th 568, 578.)

A discussion of cases addressing the sufficiency of the "reckless indifference to human life" element is instructive. In *People v. Bustos* (1994) 23 Cal.App.4th 1747, the Court of Appeal found the evidence sufficient to establish reckless indifference to human life. In that case, two defendants, Bustos and Loretto, were convicted, among other things, of first degree murder and a robbery special circumstance. (*Id.* at p. 1750.) The convictions stemmed from an incident in which the defendants decided to rob a woman

who was tanning herself on a beach. When the woman went into a restroom, Loretto also entered to rob her. She resisted and screamed, and Loretto struck her about the head and face, knocking her down. Bustos entered the restroom with a knife and fatally stabbed her. (*Id.* at p. 1751.) The evidence at trial included a confession by Loretto. (*Id.* at p. 1752.)

On appeal, Loretto argued the evidence was insufficient to support a finding that he acted with reckless indifference to human life. (*Id.* at p. 1753-1754.) The Court of Appeal rejected the contention, noting, among other things, that Loretto did not claim he was surprised that Bustos had a knife or stabbed the victim, and Loretto did not say he tried to prevent Bustos from stabbing the victim. Also, Loretto left with the robbery loot, leaving the victim to die. (*Id.* at pp. 1754-1755.)

Appellant's case is also distinguishable from *Bustos* because the evidence at trial supported the conclusion that he did not know the other perpetrators were armed before shots were fired.

In *People v. Proby* (1998) 60 Cal.App.4th 922, the defendant and Sean Vines worked at a McDonald's. Vines robbed the McDonald's late one night, using a sawed-off rifle, attempting to conceal himself with a hood and scarf, and locking the employees in a walk-in freezer. (*Id.* at p. 925.) Eleven days later, the defendant and Vines robbed another McDonald's where Vines had worked several months earlier. This time, the defendant had the sawed-off

rifle, while Vines had a handgun. During the robbery, an employee was killed by a gunshot wound to the head. (*Id.* at pp. 925-926.) The defendant admitted in a pretrial statement that he helped plan the first robbery, that Vines participated in the second robbery, and that Vines killed the victim because the victim recognized him. (*Id.* at p. 926.)

The Court of Appeal in *Proby*, *supra*, found that the evidence supported the reckless indifference element because (1) the defendant provided Vines with the gun used to kill the victim, (2) the defendant saw the victim oozing puss out of his head but made no attempt to assist him and instead went to the safe, took money, and left, (3) the defendant participated with Vines in an earlier robbery in which employees were left in a walk-in freezer for five hours until the manager arrived the next morning, showing knowledge of Vines' willingness to do violence, and (4) the defendant knew Vines had worked at the second McDonald's and thus was aware of the chance Vines would be recognized and aware there might be violence to evade apprehension. (*Id.* at pp. 929-930.)

In the instant case, unlike the defendant in *Proby*, appellant did not make any pretrial statements admitting his prior involvement in armed robberies with either of the other perpetrators. In fact, appellant maintained that, while he was acquainted with both men from the streets, he did not know them well, and there was no evidence he had ever committed any other crime

with either of them.

The Court of Appeal herein found there were reasonable inferences to be drawn from the evidence that appellant subjectively knew that there was a grave risk to human life created by the robbery. (Opn. 6-7.) Appellant disagrees. Appellant submits that the evidence cited in the opinion can lead to no more than speculation regarding appellant's subjective awareness of a grave risk to human life.

A few out-of-state cases are also instructive in evaluating the reckless indifference special circumstance element in this case. In *Jackson v. State* (Fla. 1991) 575 So.2d 181, the evidence showed that the defendant was a major participant in the robbery of a store during which the victim was killed. (*Id.* at p. 192.) The Florida Supreme Court held, however, that the evidence did not support a finding of reckless indifference to human life. (*Id.* at pp. 192-193.) In *Jackson*, the codefendant was armed with a gun, but no evidence was presented showing that the defendant was. Also, just as in the case at bar, there was no evidence that the defendant intended to harm anybody or that he expected violence to erupt. In addition, there was no real opportunity for the defendant to prevent the murder since the murder took only seconds to occur and resulted from a single gunshot which was a quick reflexive reaction to the victim's resistance. (*Ibid.*)

The *Jackson* court noted that to find reckless indifference in the case

before it would qualify every defendant convicted of felony-murder for such a finding -- a result that would be contrary to *Tison's* attempt to limit application of the finding. (*Id.* at p. 193; accord, *Benedith v. State* (Fla. 1998) 717 So.2d 472, 477 [defendant was not recklessly indifferent within the meaning of *Tison* since the evidence did not show that the defendant was the actual shooter, that he or his coparticipant used the firearm in a prior robbery, or that the defendant could have prevented the use of the firearm while the robbery was being committed].)

In *State v. Lacy* (Ariz. 1996) 929 P.2d 1288, the Arizona Supreme Court found that the evidence did not support a finding of reckless indifference to life because, while there was evidence showing the defendant's presence in their residence during the homicides of two victims, there was virtually no evidence indicating what the defendant may have seen, known or done. (*Id.* 929 P.2d at p. 1299.) The court rejected the state's contention that the defendant's taking of property and his failure to help the victims or to summon aid constituted reckless indifference to life. The court observed that in almost every felony-murder case there is a failure to summon help or render aid. (*Ibid.*)

The *Lacy* court further stated that while this failure, coupled with the stealing of property after the murder, demonstrated callousness and a shocking lack of moral fiber, it did not rise to the level of reckless indifference. (*Id.* at

p. 1300.) The court also noted that it was uncertain that the defendant should have anticipated violence and that it was not enough that the risk of bloodshed exists in the commission of any felony. (*Ibid.*)

Finally, another illustrative case arising from the State of Delaware is *State v. Rodriguez* (Del. 1993) 656 A.2d 262. That case involved a robbery of a liquor store during which the victim was shot six times with bullets fired from the same gun. (*Id.* at p. 263.) The court found that the defendant was a major participant in the robbery who was physically present when the crime occurred and was seen running from the liquor store with what appeared to be a gun in his hand. (*Id.* at p. 280.) The court ruled, however, that the evidence did not establish reckless indifference to life since there was no evidence of a conscious purpose to kill, or that the defendant expected violence to erupt, or that the defendant had a real opportunity to prevent the homicide since it occurred suddenly, apparently because the victim resisted. (*Id.* at pp. 280-281.)

Based on the above authorities, appellant submits the facts of his case do not show that he acted with a reckless indifference to human life. The jury was instructed that, in order to find the special circumstance true, it had to find beyond a reasonable doubt that appellant knew that his participation in the robbery "involved a grave risk of death." (CALCRIM 703, 2CT 416-417.) There is not substantial evidence to support this finding. Appellant had no

knowledge anyone was armed, was not personally armed, and he did not use force. There is no evidence that appellant was directly involved in injuring or attempting to injure anyone during the robbery. There was no evidence indicating there was a plan or expectation on appellant's part that death might occur. There was no evidence indicating that appellant was aware that either of the other perpetrators had used deadly force at any other time.

Appellant's case does not contain evidence of reckless indifference of the sort found in prior California cases that upheld such a finding. Appellant did not leave the victim alone in an isolated place to die as in *People v. Bustos*, *supra*, 23 Cal.App.4th 1747. Nor does appellant's case involve facts of reckless indifference similar to those in *People v. Proby*, *supra*, 60 Cal.App.4th at pp. 925-926, 929-930, namely an earlier incident in which the codefendant displayed a willingness to engage in violence or the chance of violence because the victims knew the codefendant.

On the other hand, appellant's case is similar in a number of respects to the cases in which the evidence was found insufficient to support a finding of reckless indifference to human life. As in *Jackson v. State*, *supra*, 575 So.2d at pp. 192-193, there was no evidence suggesting appellant intended to harm anybody or expected violence to erupt.

It appears that the Court of Appeal's opinion relies in large part on appellant's reaction to the gunshots and that his failure to assist the victim or

summon help somehow showed reckless indifference. (See Opn. 6-7.) However, *State v. Lacy*, *supra*, 929 P.2d at p. 1300, persuasively rejects this position as a matter of law. As the Arizona Supreme Court there pointed out:

> In almost every felony-murder case . . . there is a failure by the defendant to stop and render aid or call for help. There must be something more if the concept of reckless indifference is to provide any meaningful guidance for determining which defendants should suffer the ultimate penalty.

(*Ibid.*)

Appellant's case also is very similar to *State v. Rodriguez*, *supra*, 656 A.2d at pp. 280-281. In both cases, the evidence indicates that the defendant was present at the robbery site (although here appellant was not armed, while the defendant in *Rodriguez* was), and there was no evidence establishing the defendant had a conscious purpose to kill, expected violence to erupt, or had a real opportunity to prevent the homicide since it occurred suddenly.

In addition, upholding the special circumstance in appellant's case would ignore the rule which requires that a factor which makes a defendant potentially eligible for capital punishment must "provide a meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not." (*Godfrey v. Georgia* (1980) 446 U.S. 420, 427 [64 L.Ed.2d 398, 100 S.Ct. 1759].) If appellant falls within the major participation/reckless indifference standard, then virtually every aider and abettor of felony-murder will qualify.

The basic premise of the special circumstance is that it applies to a small number of aiders and abettors of the underlying felony whose personal conduct is so egregious and outside the norm, even for those guilty of murder, so as to warrant eligibility for a sentence of death or life without the possibility of parole. The nature of appellant's conduct in comparison to what is typical for a robbery which rises to felony murder places him outside that small group as a matter of law. No substantial evidence in this case makes appellant more culpable than any non-shooter who is found guilty of murder stemming from an armed robbery under the felony-murder rule. Review should be granted, and the true finding on the robbery special circumstance should be reversed.

III.

APPELLANT'S DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT WERE VIOLATED IN COUNTS 2 AND 3 AS THERE WAS INSUFFICIENT EVIDENCE THAT THE ATTEMPTED MURDERS WERE WILLFUL, DELIBERATE AND PREMEDITATED

This argument is presented solely to exhaust state remedies for federal habeas corpus purposes. (Cal. Rules of Court, rule 8.508(b)(3)(A).)

The due process clause of the Fourteenth Amendment to the United States Constitution and the article I, section 15 of the California Constitution permit a defendant to be convicted of a crime only on presentation of sufficient evidence that he committed that crime. (*Jackson v. Virginia* (1979) 443 U.S. 307, 316; *People v. Osband* (1996) 13 Cal.4th 622, 690; *People v. Johnson* (1980) 26 Cal.3d 557, 578.) The requirement of substantial evidence is "not merely an appellate incantation designed to conjure up an affirmance. To the contrary, it is essential to the integrity of the judicial process that a judgment be supported by evidence that is at least substantial." (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 652.)

The constitutional prohibition against convicting a person of a crime without sufficient evidence implicates the core values of the due process clause. The state, before it brands a person a criminal and locks him up, must present to a jury, not merely some evidence, but substantial evidence the

person is actually guilty of the crimes charged. Freedom from wholly arbitrary deprivation of liberty is the most elemental of the due process rights. (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 314.)

Insistence that a criminal conviction be supported by substantial evidence, and the concomitant refusal to permit conviction on a mere modicum of evidence, is not merely a matter of convenience, but rather essential to preservation of the fundamental protection that is afforded to all of us by the due process clause. (*Id.* at pp. 319-320.)

Faced with a challenge to the sufficiency of the evidence, the reviewing court must decide whether, viewing the evidence and inferences therefrom in a light favorable to the prosecution, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Barnes* (1986) 42 Cal.3d 284, 303.) The evidence relied upon to meet this standard must be "reasonable in nature, credible and of solid value." (*People v. Trevino* (1985) 39 Cal.3d 667, 695, disapproved on other grounds in *People v. Johnson* (1989) 47 Cal.3d 1194, 1221.)

Following a jury trial, appellant was found guilty as charged of attempted murder in violation of Penal Code sections 664/187, subdivision (a) in counts 2 and 3. (2CT 422-23.) The jury also made a finding that the attempted murders were committed "willfully, deliberately, and with premeditation . . . " (*Ibid.*) The evidence at appellant's trial was insufficient

to support the jury's findings of premeditation and deliberation in counts 2 and 3.

In the present case, the evidence simply did not support the jury's findings that the attempted murders were "willful, deliberate and premeditated." First of all, it is undisputed that appellant was not the shooter. At the time of trial the identity of the shooter was not known. There was no evidence of any statements made by the shooter before or after the crime, and any conclusion as to when he chose to shoot and when he formed an intent to kill are based on circumstantial evidence. Taken in the light most favorable to the verdict, the shooter came into the store and fired several shots. There was simply no evidence to indicate whether he chose to fire before he entered the store, or if his decision to fire came as a reaction to what he observed upon entering the store.

In the present case, the evidence presented did not consist of "planning" activity as to the two counts of attempted murder. Appellant does not dispute that the murder in count 1 is elevated to first-degree because of the felony-murder rule. However, there was not substantial evidence to elevate the attempted murders in counts 2 and 3 to attempted premeditated and deliberated murder. There was no substantial evidence of a calculated plan to shoot or kill anyone, and the equivocal evidence as to the shooter's intent just as easily supports a conclusion that he fired as a result of panicking once he entered the

store and saw there were multiple employees who might prevent the robbery.

The evidence was insufficient to support an inference "that the [attempted] killing was the result of 'a pre-existing reflection' and 'careful thought and weighing of considerations' rather than a 'mere unconsidered or rash impulse hastily executed.'" (*People v. Anderson* (1968) 70 Cal.2d 15.)

The Court of Appeal herein believed there was "very strong evidence of planning." (Opn. 7.) However, while there may have been a plan to rob, there was no evidence of a plan to kill. The Court of Appeal's reliance on gunshots being a "signal to enter" the store is no more than speculation. There was no evidence that there was any plan to kill or that the firing of shots was pre-determined. Similarly, the Court of Appeal's finding that the shots being fired immediately upon entry into the store showed evidence of planning is just as speculative as finding that shots fired after a certain period of time or after some other aspect of the robbery had taken place would have been evidence of some sort of plan. Appellant's recorded statement was damning, and the prosecution proceeded as if it was appellant's honest admission of his role in the robbery and its planning. Appellant never stated that there was a discussion of any intended shooting whatsoever. In fact, he stated he did not know anyone was armed. Thus, whatever planning occurred could not have involved a plan to shoot anyone. In discussing what jury instructions would be appropriate, the prosecutor stated,

> the evidence does not in any way suggest that the defendant before the robbery occurred knew that the shooter had a gun, that he knew that the other gentleman had a gun at any time, [or] saw the gun before entering the store.

(5RT 1234.) This undermines any argument that the attempted murders here were part of a pre-existing plan.

There was also no substantial evidence presented pertaining to the "manner" in which the attempted murder occurred which would support a finding of premeditation and deliberation. While the shooter fired several rounds, it was all within a brief period of time, and occurred quickly after he entered the store.

There was simply no evidence here as to any extent of the reflection by the shooter herein. The evidence regarding the two counts of attempted murder was insufficient in the case at hand in for a rational trier of fact to be persuaded beyond a reasonable doubt that appellant or the shooter premeditated the attempted murders. (*Jackson v. Virginia*, *supra*, 443 U.S. 307 and *People v. Barnes*, *supra*, 42 Cal.3d at p. 303.)

In reviewing the sufficiency of the evidence to support appellant's convictions for the attempted murders, the standard is "whether any rational trier of fact could have been persuaded beyond a reasonable doubt that defendant [or shooter herein] premeditated the [attempted] murder[s]. [Citations.]" (*People v. Perez* (1992) 2 Cal.4th 1117, 1127.) Appellant

submits this standard cannot be met.

In carefully considering the factors applied by this court in *People v. Anderson*, *supra*, 70 Cal.2d 15, 26-27, and *People v. Perez*, *supra*, 2 Cal.4th at pp. 1124-1129, the record does not contain sufficient evidence to support the findings of the jury that the shootings herein were committed with premeditation and deliberation. Even when the evidence is viewed in a light most favorable to the prosecution, any rational tier of fact could not find appellant guilty beyond a reasonable doubt because there was no substantial evidence that he or the shooter acted with the requisite premeditation and deliberation.

Review should be granted, and since the evidence to support appellant's conviction for attempted willful, deliberate and premeditated murders in count 2 and 3 were insufficient as a matter of law, reversal of the first-degree findings is required and further proceedings barred by the double jeopardy clause. (U.S. Const., 5th Amend.; *Burks v. United States* (1978) 437 U.S. 1, 10-11 [57 L.Ed.2d 1, 9, 98 S.Ct. 2141]; *People v. Anderson*, *supra*, 70 Cal.2d at p. 36.)

IV.

THE CALIFORNIA DEATH PENALTY LAW VIOLATES THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION BECAUSE THE PROLIFERATION OF SPECIAL CIRCUMSTANCES HAS UNDERMINED THE NARROWING FUNCTION REQUIRED OF CALIFORNIA LAW

This argument is presented solely to exhaust state remedies for federal habeas corpus purposes. (Cal. Rules of Court, rule 8.508(b)(3)(A).)

Appellant was found guilty of the first degree murder of Pablo Castenda. Appellant was not the shooter, but he was convicted under the felony murder rule, having been found to have aided and abetted a robbery that resulted in the shooting death of Casteneda. The special circumstance alleging that the murder in count 1 was committed while appellant was engaged in the commission of a robbery within the meaning of section 190.2, subd. (a)(17) was found true. (2CT 421.) The jury was only required to find that appellant was a "major participant" in the robbery, and that he acted with reckless disregard for human life in order to find this special circumstance true. Had the prosecution elected to so proceed, appellant would have been eligible for the death penalty.

Pursuant to Penal Code section 190.2, subdivision (a), appellant was sentenced to life without the possibility of parole, and the prosecution never

sought to have appellant be subject to a sentence of death. Nevertheless, because appellant's sentence has been enhanced by a special circumstance finding, he is permitted to argue as a matter of statutory construction that the special circumstance would violate the Eighth Amendment if applied in a death penalty case, since the construction of the special circumstance in his case must be consistent with its construction in a capital case. (*People v. Anderson* (1987) 43 Cal.3d 1104, 1139-1146; *Owen v. Superior Court* (1979) 88 Cal.App.3d 757, 759-760.)

As this court has observed, Eighth Amendment standards apply to all allegations of special circumstances, regardless of whether the People seek and exact the death penalty or a sentence of life without parole. (*People v. Estrada* (1995) 11 Cal.4th 568, 575-576.)

Under the black letter principles of the Eighth Amendment, the legislative definitions of offenders eligible for the death penalty must circumscribe the class in a sufficiently objective manner to distinguish it from the remainder for whom death is inappropriate. (*People v. Crittenden* (1994) 9 Cal.4th 83, 154.)

The Eighth Amendment imposes on the State of California

> a constitutional responsibility to tailor and apply its [death penalty] law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a State's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates 'standardless [sentencing]

> discretion.' [Citations omitted] It must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.' . . . a death penalty 'system could have standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing . . . ."

(*Godfrey v. Georgia* (1980) 446 U.S. 420, 428 [100 S.Ct. 1759, 64 L.Ed.2d 398], citations & footnotes omitted.)

The primary requirement of any state's death penalty law is to: "provide a meaningful basis for distinguishing the few cases in which [the penalty] is imposed from many cases in which it is not." (*Godfrey v. Georgia*, *supra*, 446 U.S. at p. 427, internal quotation marks and citation omitted.)

Under California law, the factors which distinguish murder cases that are eligible for capital punishment from those that are not, and therefore which are subject to the above rule, are the special circumstances listed in Penal Code section 190.2, subdivision (a). (*Tuilaepa v. California* (1994) 512 U.S. 967, 971-972, 975 [114 S.Ct. 2630, 129 L.Ed.2d 750].) Or, as this court succinctly put it: "The narrowing role of distinguishing a death-worthy case from one that is not is fulfilled by special circumstances." (*People v. Mendoza* (2000) 24 Cal.4th 130, 192.)

Appellant contends that the death penalty law is unconstitutional under the United States and California Constitutions because it fails to narrow the

class of death-eligible murderers and thus renders the overwhelming majority of first degree murderers death eligible.

Claims have been made that the proliferation of special circumstances has undermined the narrowing function of California law. If the special circumstances effectively apply to all first degree murders, then the entire death penalty process is defective. Appellant recognizes that this claim has consistently been rejected by California courts (see, e.g., *People v. Sanchez* (1995) 12 Cal.4th 1, 60), but submits that because appellant was not the shooter, and because his conduct can not be distinguished from that of any of the many participants in robberies which lead to a shooting and death, the argument should be reopened and reversal of the special circumstance is warranted.

In 1994, California's death penalty scheme received attention for the sheer number of special circumstances it contained and for the percentage of first degree murderers it made death eligible. "By creating nearly 20 such special circumstances, California creates an extraordinarily large death pool." (*Tuilaepa v. California, supra*, 512 U.S. at p. 994 (dis. opn. of Blackman, J.).) However, in *Tuilaepa*, the defendant did not challenge any of the special circumstances and instead challenged on the ground of vagueness three of the factors related to the determination of whether to impose a sentence of life without parole rather than death. (*Id.* at pp. 969-970.)

And despite Justice Blackman's observation about California's large death pool, the California Supreme Court has chosen to uphold this state's death penalty law by relying on earlier case law which predates four recent expansion of the special circumstances: (1) to add in 1990 those who, like appellant, with reckless indifference to life aid and abet in one of the felony special circumstances (Pen. Code, § 190.2, subd. (d)); (2) to add in 1996 a special circumstance applicable to the killing of a juror (Pen. Code, § 190.2, subd. (a)(20)); (3) to add in 1996 the drive-by special circumstance (Pen. Code, § 190.2, subd. (a)(21)); and to add in 2000 the street gang special circumstance (Pen. Code, § 190.2, subd. (a)(22)). (See, e.g., *People v. Sanchez, supra*, 12 Cal.4th 60-61, declining to reconsider the point and noting that the Court has repeatedly rejected the claim since *People v. Rodriguez* (1986) 42 Cal.3d 730, 770-779.)

As appellant has noted, things have changed since the decision in *People v. Rodriguez, supra*, in 1986. The findings and declarations contained in section 2 of Proposition 21 made clear that gang related homicides have increased at an exponential rate over the past two decades and are expected to continue to do so into the future. As a result, gang related homicides -- those subject to the new special circumstance -- make up a highly disproportionate percentage of first degree murders statewide. And, these crimes were not subject to other special circumstances, for that was the purpose behind this

portion of Proposition 21, as stated in Penal Code section 2:

> (h) Gang-related crimes pose a unique threat to the public because of gang members' organization and solidarity. Gang-related felonies should result in severe penalties. Life without the possibility of parole or death should be available for murderers who kill as part of any gang-related activity.

With this new addition, bringing gang related murders into the already large class of cases that are death-eligible, almost every first degree murderer is death eligible based on the charging decision of the prosecutor. Most importantly, if the prosecutors of the State of California choose not to exercise discretion, almost every first degree murderer faces a true finding on a special circumstance allegation at this time.

While not susceptible of "mathematical precision" (*People v. Sanchez*, *supra*, 12 Cal.4th at p. 61), California's death penalty law no longer narrows the class of death eligible persons. Indeed, it is now hard to find any first degree murder which does not fall under at least one of the special circumstances listed in Penal Code section 190.2. California law no longer "provide[s] a meaningful basis for distinguishing the few cases in which [the penalty] is imposed from many cases in which it is not." (*Godfrey v. Georgia*, *supra*, 446 U.S. at p. 427, internal quotation marks and citation omitted.) Instead, California law allows for a penalty of death, or the alternative penalty of life without parole, in the vast majority of first degree murder cases. Accordingly, California law runs afoul of the Eighth Amendment.

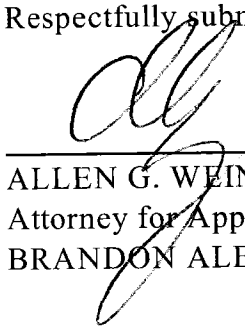
The special circumstance finding must be vacated because there is no basis for a harmless error analysis.

CONCLUSION

For the reasons stated above, review should be granted.

DATED: December 16, 2010

Respectfully submitted,



ALLEN G. WEINBERG
Attorney for Appellant
BRANDON ALEXANDER FAVOR

CERTIFICATE OF APPELLATE COUNSEL PURSUANT TO CALIFORNIA RULES OF COURT, COURT, RULE 8.504(d)

I, Allen G. Weinberg, appointed counsel for appellant Brandon Alexander Favor, hereby certify, pursuant to rule 8.504(d) of the California Rules of Court, that I prepared the foregoing petition for review on behalf of my client, and that the word count for this petition is 8021 words, which does not include the cover, tables, or attached opinion. This petition therefore complies with the rule, which limits a petition for review to 8,400 words. I certify that I prepared this document in Corel WordPerfect, and that this is the word count WordPerfect generated for this document.

Dated: December 16, 2010

ALLEN G. WEINBERG
Attorney for Appellant
BRANDON ALEXANDER FAVOR

ATTACHMENT

Filed 12/2/10

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. BRANDON ALEXANDER FAVOR, Defendant and Appellant.	B215387 (Los Angeles County Super. Ct. No. BA285265)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael E. Pastor, Judge. Modified and affirmed.

Allen G. Weinberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Linda C. Johnson and Gary A. Lieberman, Deputy Attorneys General, for Plaintiff and Respondent.

*Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of parts I, II, IV, V, and VI.

Brandon Favor appeals from his conviction on one count of first degree murder, two counts of attempted murder, and two counts of second degree robbery. He claims there was insufficient evidence to support the true finding on the robbery-murder special circumstance or the findings that the attempted murders were willful, deliberate and premeditated. He also claims the court erred by instructing the jury on the natural and probable consequences doctrine as to the nontarget offense of attempted murder, but not as to the nontarget offense of attempted willful, deliberate and premeditated murder. Appellant challenges the California death penalty law, claiming the proliferation of special circumstances has undermined the narrowing function required of California law, and claims his life without parole sentence constitutes cruel and/or unusual punishment. Appellant and respondent ask that an error in the abstract of judgment be corrected, and we so order.

In the published portion of this opinion, we conclude the instructions were sufficient with respect to the natural and probable consequences doctrine as applied to attempted willful, deliberated and premeditated murder. In the nonpublished portion of this opinion, we find no error other than that contained in the abstract of judgment, and we affirm the judgment as modified.

FACTUAL AND PROCEDURAL SUMMARY

Jose Huerta was the manager of A & J Liquor Store on Hill Street in Los Angeles. In addition to selling alcohol and food, the store had a Lotto machine and did a large check cashing business, handling as much as $40,000 a day. On November 8, 2004, Huerta was behind the counter talking with Paul Lee, the store owner, when two or three individuals entered the store and locked the door. Huerta had his back turned when they entered. The first thing he heard was a gunshot being fired near his head, burning the side of his head. He fell to the floor and stayed there. After the shot near his head, he heard a shot that sounded like it came from inside the warehouse at the rear of the store, and two more near him. He also heard one of the cash registers being opened.

One of the intruders said, "Get the telephone, get the cameras, and I'll find you. You already know where." A second person asked, "Where are the cameras?" Huerta lifted his head and answered that the cameras were in back. One of the men demanded his money. Huerta, who had just been paid, removed $525 from his pocket and handed it to the man. Huerta then walked to the office in the back of the store, where the security videos were located. The man followed him, looked around inside the room, then exited the store.

After the intruders left the store, Huerta locked the door. He found store employee Pablo Castaneda on the ground in front of the warehouse. He had been shot once in the head and was dead. Store owner Paul Lee was lying on the ground near the check cashing register. He had been shot twice and suffered grave injury. According to Lee's son, between $50,000 and $70,000 was missing from the check cashing portion of the business, and approximately $1,000 was missing from the grocery portion of the business. A mobile phone and some prepaid phone calling cards also were taken.

A flier offering a $75,000 reward was distributed in connection with the crime. The flier contained still photographs from the store security video. Appellant was depicted as one of the three suspects.

Appellant was arrested in June 2005. After waiving his rights, he was interviewed by Los Angeles Police Department detectives. He was shown a videotape of the robbery, and initially denied any part in the robbery. He later admitted that he went to the liquor store with the two other men in the video.

In his recorded interview, which was played at trial, appellant stated that on the day of the robbery, he went to a county building on Adams and Grand to take care of some paperwork. With him was an ex-gang member known as "Trouble" or "Troub." The two men then walked over to A & J Liquor, went inside, and saw that the store was not very secure. Trouble said he would tell his partners about it. He and appellant got on a bus to Crenshaw and King, where they met up with Trouble's partners. Appellant knew one of the men from the streets. He was pretty sure he had gone to high school with the

other man, who was the shooter. He described the shooter as a "shady character" who was not to be trusted.

Trouble told these two men about the liquor store. Appellant and the two men took a bus back to the store, and appellant was told to go in to see how many people were in the store. Appellant went in, saw there was nobody inside, cashed a check, and walked out. The two men then entered the store and closed the door. Appellant heard gunshots, and knocked on the door to find out what happened. The shooter, who still had a gun in his hand, opened the door and told appellant to "get the money." Appellant opened the cash register and "took everything up." He also grabbed a phone and gave it to the shooter. As soon as appellant walked into the store, he saw someone lying on the ground who had just been shot. He also heard another shot fired in the back of the store. The shooter took the video from the rear of the store.

After the robbery, appellant and the two men met up to watch the video. They discarded it because it did not show anything. Appellant said he probably went in and out of the liquor store five times, twice by himself while the others were outside.

Appellant was charged by information with one count of first degree murder, two counts of attempted murder, and two counts of second degree robbery. It was alleged that the murder was committed while appellant was engaged in the commission of a robbery, that the attempted murders were committed willfully, deliberately and with premeditation, and that as to each count, a principal was armed with a firearm. He was convicted as charged, and the allegations were found true. This is a timely appeal from the judgment of conviction.

DISCUSSION

I

Appellant claims there was insufficient evidence to support the true finding on the robbery-murder special circumstance. "In order to support a finding of special circumstances murder, based on murder committed in the course of robbery, against an

aider and abettor who is not the actual killer, the prosecution must show that the aider and abettor had intent to kill or acted with reckless indifference to human life while acting as a major participant in the underlying felony." (*People v. Proby* (1998) 60 Cal.App.4th 922, 927; Pen. Code, § 190.2, subds. (c), (d); all statutory references are to the Penal Code.) The phrase "'reckless indifference to human life'" means "subjective awareness of the grave risk to human life created by his or her participation in the underlying felony." (*People v. Estrada* (1995) 11 Cal.4th 568, 578.)

Appellant concedes for purposes of this argument that he was a major participant in the robbery. His claim is that there was no substantial evidence that he acted with reckless indifference to human life. He relies on a statement by the prosecutor during the discussion of jury instructions. Defense counsel was arguing that there was sufficient evidence to support an instruction on duress: "I am asking for the instruction of duress so that the jury will have some guidance of why Mr. Favor, when he was outside of the store and he heard the gunshots, entered the store and at that moment continued with . . . committing the crime of robbery because it can be argued that the man who had the weapon who we've identified as the shooter went in there and shot about five times. Mr. Favor said during his interview, when he walked through the door, he actually observed the shooter fire the last shot at Mr. Castaneda. And in the defendant's mind, he went forward with committing the robbery because one could infer from all the evidence everything that we know about the shooter that Mr. Favor was in sustained fear and concern that if he did not continue through with his role in committing the robbery that his life or the life of his family would be in danger."

The prosecutor opposed the duress instruction, arguing: "Your honor, the evidence does not in any way suggest that the defendant before the robbery occurred knew that the shooter had a gun, that he knew that the other gentleman had a gun at any time, saw the gun before entering the store." This was not a concession that appellant had no subjective awareness that the robbery created a grave risk to human life; it was an argument that appellant's participation in the robbery did not result from being threatened

with a gun before the other two perpetrators entered the store.

But as the prosecutor pointed out in closing argument, in addition to the grocery business, this store included a check cashing business, which typically had large sums of money. "You don't think a place like this . . . might carry a gun? . . . It's possible, probable, foreseeable to a reasonable person that a place like that might have a firearm. The reason why that's relevant is because what do we know that the defendant knew for sure? He knew that there were employees in there because he had been there. He knew Mr. Huerta worked there, Mr. Castaneda worked there, and Mr. Lee worked there. And he also knows how busy it is. Just how did he think shooter and security[1] were going to secure the store? There is no way he thought they were going to walk in and say 'Please give us all your money.' That is not realistic. If you want to wait outside while two guys go and do a strong armed front take over, how else are they going to do that? At least one of them has a gun. And even then is that really enough because chances of a place having a gun are at the very least probable, the very least. So if you know they may have a gun and you have got to go and take it over, what are your options?"

These are reasonable inferences to be drawn from the evidence—that appellant subjectively knew that there was a grave risk to human life created by the robbery he assisted. Appellant went into the store to see what was going on inside, and came back out. The other two perpetrators then went in, locked the door, sent the two customers to the back of the store, and fired a gun past Mr. Huerta, striking Mr. Lee. As soon as appellant heard the gunshots, he knocked on the door and the perpetrator in the security jacket let him in. According to appellant, he was in the store when the shot that killed Mr. Castaneda was fired. On the video, there is no reaction from appellant; he is seen taking the prepaid telephone cards from in front of the counter, then immediately going behind the counter to the cash registers. He appears oblivious to the men who have been shot; he is "on task" to retrieve the money and phone cards, and then he leaves. The entire incident, completed in approximately three minutes, yielded a large amount of

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1 The second perpetrator was wearing a jacket marked "Security."

money and phone cards and resulted in one dead victim, one gravely injured victim, and a slightly wounded third victim. Appellant's participation in the planning of this incident, his response to the gunshots as if they were a signal for him to enter the store, and his conduct once he entered the store all support the inference that he was aware that the robbery, as planned and as executed, presented a grave risk to human life. Viewing the record in the light most favorable to the judgment (*People v. Lewis* (2001) 25 Cal.4th 610, 642), we conclude there was substantial evidence to support the jury's finding that appellant acted with reckless indifference to human life as a major participant in the underlying felony.

II

Appellant next claims there was insufficient evidence that the attempted murders were willful, deliberate and premeditated. He argues there was no evidence indicating whether the shooter decided to fire before he entered the store or whether he shot as a reaction to what he observed when he entered the store.

"Three categories of evidence are helpful to sustain a finding of premeditation and deliberation in a murder case: (1) planning activity; (2) motive; and (3) manner of killing. (*People v. Anderson* (1968) 70 Cal.2d 15, 26-27; see also *People v. Welch* (1999) 20 Cal.4th 701, 758.)" (*People v. San Nicolas* (2004) 34 Cal.4th 614, 658.) These factors need not be present in any particular combination, and when the record includes evidence in all three categories, the verdict generally will be sustained. (*People v. Stitely* (2005) 35 Cal.4th 514, 543.)

In this case, there is very strong evidence of planning. Appellant and Trouble "cased" the store, then met with the other two perpetrators. After that meeting, appellant and the two perpetrators returned to the location, appellant again went into the store to see how many people were inside. When he came out, the two men entered, locked the door, and immediately shot at the store owner and manager. As soon as appellant heard the shots, he knocked at the door and was admitted without delay; according to appellant, the final shot was fired after he entered. He proceeded to take prepaid telephone cards

from the counter and then removed money from the cash register. The three men then left the store. The events within the store took less than three minutes. There is no dispute that the robbery itself was planned. The shooting occurred almost immediately after the two men entered the store, before there was an opportunity for the store employees to resist. And appellant responded to the gunshots as a signal to enter the premises. These facts provide substantial evidence that the shooting was planned.

There also is evidence of motive. As the prosecutor argued at trial, it would not be unusual for the proprietor of a liquor store with a check cashing business to be armed. It may be inferred from the speed of the shooting, before there was any opportunity for the store employees to react, that the motive for the shooting was to overtake the store employees before they could offer any resistance.

Finally, the manner of shooting suggests reflection. The shots were fired immediately upon entry to the store. The first shot was fired near enough to Huerta's head to leave a burn. Lee was shot in the neck and chest, and Castaneda was then shot in the head. The immediacy, the sequence, and the aim of these gunshots support the conclusion that the perpetrators shot with the purpose of preventing any of the employees from resisting or surviving the robbery. We find substantial evidence of premeditation and deliberation.

III

Appellant claims his conviction on counts two and three of attempted premeditated and deliberate murder must be reversed because the jury was only instructed on the natural and probable consequences theory as to "simple" attempted murder, not as to premeditated and deliberate attempted murder.

Pursuant to CALCRIM No. 402, the court instructed the jury as follows: "The defendant is charged in counts 4 through 5 with robbery and in counts 2 through 3 with attempted murder. You first must decide whether the defendant is guilty of robbery. If you find the defendant is guilty of this crime, then you must decide whether he is guilty of attempted murder. Under certain circumstances, a person who is guilty of one crime

also may be guilty of other crimes that were committed at the same time. 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 co-participant 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." These instructions were correct with respect to attempted murder as a natural and probable consequence of robbery.

The jury also was instructed on willful, deliberate and premeditated attempted murder pursuant to the pattern CALCRIM instruction: "If you find the defendant guilty of attempted murder in count 2 and/or count 3, then you must decide whether the People have proved the additional allegation that the attempted murder was done willfully and with deliberation and premeditation, within the meaning of Penal Code section 664 (A). The defendant and/or a principal acted willfully if he intended to kill when he acted. The defendant and/or a principal deliberated if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. The defendant and/or a principal premeditated if he decided to kill before acting. The attempted murder was done willfully and with deliberation and premeditation if either the defendant or a principal or both of them acted with that state of mind."

Appellant argues these instructions failed to relate the instruction concerning premeditation and deliberation to the natural and probable consequences instruction. We conclude no such instruction was required.

In *People v. Lee* (2003) 31 Cal.4th 613, the Supreme Court examined the necessary showing for an aider and abettor to be found guilty of attempted willful, deliberate and premeditated murder under section 664, subdivision (a). The court concluded the law required only that the *murder* attempted was willful, deliberate, and premeditated, not that the *attempted murderer* personally acted willfully and with deliberation and premeditation, even if he or she is guilty as an aider and abettor. (*Id.* at

p. 616.) The court noted 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. . . . Punishing such an attempted murderer with life imprisonment would not run counter to section 664(a)'s purpose of making the punishment proportionate to the crime." (*Id.* at p. 624.) The natural and probable consequences theory of liability was not present in *Lee*, but the court observed 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. 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." (*Id.* at pp. 624-625.)

In *People v. Cummins* (2005) 127 Cal.App.4th 667, 680, the court rejected the claim that the court should have instructed the jury that it had to find that a premeditated attempted murder was a natural and probable consequence of the target crimes of robbery and carjacking. Applying the reasoning of *Lee* to the natural and probable consequences theory of attempted murder, the court held it was sufficient that the jury was instructed on the elements of attempted premeditated murder and on the natural and probable consequences doctrine. "Nothing more was required." (*Id.* at p. 681; see also *People v. Curry* (2007) 158 Cal.App.4th 766, 791-792.)

People v. Hart (2009) 176 Cal.App.4th 662, reached a different conclusion. The case is factually similar to this one; the defendant was convicted of premeditated attempted murder when his codefendant shot the owner of a liquor store during a robbery. The jury was instructed that it could find the defendant guilty of attempted murder if it found that it was a natural and probable consequence of the attempted robbery. The court held the instructions failed to inform the jury that in order to find the accomplice guilty of attempted *premeditated* murder, "it was necessary to find that attempted premeditated murder, not just attempted murder, was a natural and probable consequence

of the attempted robbery." (Id. at p. 673.)

But as the Supreme Court observed in *Lee*, the Legislature declined to make a distinction in the findings necessary for perpetrators or for aiders and abettors in section 664, subdivision (a). (31 Cal.4th at pp. 624-625.)[2] In 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.

IV

Appellant argues that as a matter of statutory construction, the felony-murder special circumstance that was used to enhance his sentence is unconstitutional under the state and federal constitutions "because it fails to narrow the class of death-eligible murderers and thus renders the overwhelming majority of first degree murderers death eligible." This claim has been repeatedly rejected by the Supreme Court, and we do so here. (See *People v. Martinez* (2010) 47 Cal.4th 911, 967; *People v. Gamache* (2010) 48 Cal.4th 347, 406 ["the felony-murder special circumstance (§ 190.2, subd. (a)(17)) is not overbroad and adequately narrows the pool of those eligible for death"].)

V

Appellant also argues his sentence of life without the possibility of parole constitutes cruel and unusual punishment. "'Cruel and unusual punishment is prohibited by the Eighth Amendment of the United States Constitution and article I, section 17 of the California Constitution. Punishment is cruel and unusual if it is so disproportionate to the crime committed that it shocks the conscience and offends fundamental notions of human dignity.' (*People v. Mantanez* (2002) 98 Cal.App.4th 354, 358, fns. omitted.)" (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 568-569.) The Supreme Court has identified three techniques for determining whether a penalty offends this prohibition: Examining the nature of the offense and the offender, comparing the punishment with the

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2 *Hart* does not address *Lee*, nor the application of its reasoning in *People v. Cummins*.

penalty for more serious crimes in the same jurisdiction, and comparing the punishment with the penalty for the same offense in other jurisdictions. (*In re Lynch* (1972) 8 Cal.3d 410, 425-427.)

Appellant relies on *People v. Dillon* (1983) 34 Cal.3d 441, 479, where the Supreme Court emphasized the need for individual consideration of the nature of the offense and of the offender. The court recognized that in the abstract, robbery-murder presents a very high level of danger to society, but instructed that the court also must consider "the totality of the circumstances surrounding the commission of the offense in the case at bar, including such factors as its motive, the way it was committed, the extent of the defendant's involvement, and the consequences of his acts." (*Ibid.*) As to the nature of the offender, the inquiry "focuses on the particular person before the court, and asks whether the punishment is grossly disproportionate to the defendant's individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind." (*Ibid.*)

Appellant was a major participant in the robbery, actively participating from the time of the original planning all the way through to the conclusion. The crime resulted in the death of one employee and grave permanent physical harm to the store owner. As we discussed in section I, there is sufficient evidence that appellant acted with reckless indifference to human life throughout. There is nothing disproportionate between the punishment and the nature of the offense.

As to the nature of the offender, appellant asserts he had no prior felony convictions, just a lengthy misdemeanor record involving summary probation and traffic offenses. At the time of the incident, appellant was 23 years old. In the 10 years from his first sustained juvenile petition at age 13 to the commission of these crimes, his criminality had increased from traffic offenses to carrying a loaded firearm, and infliction of corporal injury on a spouse. There was no evidence that appellant resisted participation in the robbery. More importantly, it is apparent from the security video of this incident that appellant was neither fearful nor panicked as he participated in the

robbery, even after the shooting. Unlike the 17-year-old defendant in *People v. Dillon*, *supra*, 34 Cal. 3d at page 486, who had no prior criminal activity and acted out of fear, appellant showed increasing involvement in criminal activity including ongoing active participation in the preparation and commission of this robbery. There is nothing disproportionate between the nature of the offender and the sentence of life without the possibility of parole.

VI

Respondent asks that we order the abstract of judgment be amended to correctly reflect that appellant was convicted of second degree robbery in counts four and five. We shall direct the superior court to make that correction.

DISPOSITION

The abstract of judgment is amended to show that in counts four and five, appellant was convicted of second degree robbery. In all other respects, the judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION.

EPSTEIN, P. J.

We concur:

WILLHITE, J.

SUZUKAWA, J.

PROOF OF SERVICE BY MAIL

I, the undersigned, declare as follows: I am over eighteen (18) years of age and not a party to the within action. My business address is 9454 Wilshire Boulevard, Suite 600, Beverly Hills, California 90212.

On the date indicated below, I served the within

PETITION FOR REVIEW

on each of the following, by placing a true copy thereof in a sealed envelope with postage fully prepaid, in the United States Mail at Beverly Hills, California addressed as follows:

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Attn: Michael E. Pastor, Dept. 107

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Clerk, Court of Appeal
Second Appellate District, Div. 4
300 S. Spring Street, Suite 2217
Los Angeles, CA 90013

I declare under the penalty of perjury that the foregoing is true and correct. Executed this 16th day of December, 2010, at Beverly Hills, California.

ALLEN G. WEINBERG